IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285

INTERIOR DEFENDANTS' RESPONSE AND OBJECTIONS TO REPORT AND RECOMMENDATION OF THE SPECIAL MASTER-MONITOR ON DEFENDANTS' DELIBERATIVE PROCESS PRIVILEGE CLAIMS OVER PHASE 1.5 TRIAL DEPOSITION TESTIMONY

The Report and Recommendation of the Special Master-Monitor on Defendants' Deliberative Process Privilege Claims over Phase 1.5 Trial Deposition Testimony (dated March 24, 2003) ("R&R") correctly found that Interior Defendants' witnesses actually answered twenty-six of the forty-one questions set forth in Plaintiffs' Unanswered Deposition Questions Pursuant to District Court's Memorandum and Order Dated February 5, 2003 (Feb. 14, 2003) ("Unanswered Questions").[1] For

[1] The R&R specifically addresses thirty-nine questions. Plaintiffs' Unanswered Questions submission appears to indicate 41 questions, though the questions are not numbered. The R&R does not address (1) a question to Deputy Secretary J. Steven Griles concerning discussions about Associate Deputy Secretary James E. Cason's role in trust reform, Unanswered Questions at 5, and (2) a question to the Acting Special Trustee for American Indians, Donna Erwin, concerning a meeting she had with the Office of Management and Budget, id. at 15-16. Interior Defendants' declarations addressed both questions. See Declaration of J. Steven Griles In Support of Interior Defendants' Assertion of Deliberative Process Privilege in Response to Deposition Questions at 10-11 (Feb. 26, 2003) ("Question 5"); Declaration of Donna Erwin in Response to Plaintiffs' Statement of Need Pursuant to Memorandum and Order Dated February 5, 2003 at 23-24 (Feb. 26, 2003) ("Erwin Declaration") ("Question 9").

most of the remaining questions, the R&R, although incorrectly relying on Plaintiffs' inadequate Statement of Need, correctly recommends that Interior Defendants' objections be upheld. However, the R&R incorrectly found that the answer to one question – concerning the Department of the Interior's strategic plan – is not protected by the deliberative process privilege.

I. Interior Defendants Answered Most of Plaintiffs' "Unanswered Questions."

As confirmed by the R&R, at the depositions the deponents answered most of the questions that Plaintiffs' Statement of Need Pursuant to Memorandum and Order Dated February 5, 2003 (Feb. 14, 2003) ("Statement of Need") claimed went unanswered. The R&R found that: (1) the deponents answered twenty-six of the cited questions, R&R at 6-17 (questions: 1(b), (c), (f); 2(a), (b), (c), (e), (g); 3(a); 4(a), (d), (f), (g), (h); 5(a), (b), (d), (e), (f), (i), (j); 6(a), (c), (e), (f), (g)); (2) Plaintiffs' counsel rephrased one question, which was then answered, R&R at 11-12 (question 4(e) rephrased as 4(f)); (3) one question was objected to only on the basis of the bank examination privilege, R&R at 13; and (4) one question – objected to only on the basis of the attorney-client privilege – had already been decided by the Court on December 23, 2002, R&R at 6 and n.5 (question 1(a)) (noting Interior Defendants' noticing of appeal). With regard to question 1(a), Interior Defendants agree with the R&R that "this Court's order directing response to question 1(a) should be stayed pending the Circuit Court decisions [sic] on defendants' appeal." R&R at 17-18. In sum, twenty-nine of the questions presented to the Special Master-Monitor ("Monitor") – over seventy percent – were either answered or did not involve a deliberative process objection. As a result of Plaintiffs' apparent lack of diligence in reviewing the transcripts to determine whether their questions had been answered, Plaintiffs wasted the time and

resources of the Monitor, Interior Defendants' counsel and support staff, five high-ranking Department of the Interior officials, and Solicitor's Office attorneys.

II. Plaintiffs' Statement of Need Did Not Adequately Address the "Unanswered Questions" and Should Not Have Required a Response from Interior Defendants.

Interior Defendants object to the R&R's consideration of Plaintiffs' Statement of Need, which failed to establish any basis for Interior Defendants to answer Plaintiffs' Unanswered Questions. Plaintiffs were required to submit "a detailed statement setting out the reasons why they require answers to these questions." Memorandum Opinion at 14 (Feb. 5, 2003). Plaintiffs' Statement of Need: (1) made virtually no specific arguments about their need for answers to the questions they claim went unanswered; (2) failed to "establish that [their] need for the information outweighs the interest of the government in preventing disclosure of the information," Memorandum Opinion at 5; (3) failed to cite or reference the "unanswered questions" in all but four instances[2]; and (4) failed to address the five factors required by this Court to carry their burden. See Memorandum Opinion at 5 (Feb. 5, 2003) ("once the elements of the privilege have been met, the burden shifts to the party opposing the privilege").

Rather than apply the five factors, Plaintiffs primarily argued that the resignation of former Special Trustee for American Indians Thomas N. Slonaker and "countless other decisions made by the

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[2] The four references to the deposition transcripts: (1) complained about a question, Statement of Need at 5 n.6, that Special Trustee Donna Erwin answered, R&R at 13 (question 5(f)); (2) cited testimony of the Executive Director of the Department of the Interior's Office of Historical Trust Accounting, Bert T. Edwards, that did not appear in Plaintiffs' Unanswered Questions, Statement of Need at 5 n.7; (3) cited Mr. Edwards' testimony, id. at 6 n.8, which included one question he answered and another question that the R&R found was moot, R&R at 10-11 (questions 4(c) and 4(d)); and (4) complained that "[Associate Deputy Secretary James E.] Cason refused to answer all questions" related to "management and administration of the Individual Indian Trust," Statement of Need at 7 n.9, although the R&R found that the only "unanswered" question contained in that portion of Mr. Cason's deposition transcript had in fact been answered, R&R at 6-7 (question 1(b)).

defendants during the [sic] this litigation relates directly to the credibility of the Secretary and her senior managers and counsel." Statement of Need at 6. Phase 1.5 discovery concerns Interior's plan for an accounting of Individual Indian Money ("IIM") trust funds and for IIM trust management. Those plans are extant and will stand or fall on their merit, not on the opinions of Interior officials relating to Mr. Slonaker's tenure or drafts of a quarterly report to this Court.

Plaintiffs further argued broadly that "to the extent such information is deliberative, the needs of plaintiffs and this court clearly outweigh the interest of defendants and their counsel to conceal more fraud, more retaliation and more deception." Statement of Need at 7. Plaintiffs' repeated and continuing allegations of "fraud, more retaliation, and more deception" have already chilled Interior's deliberative process. Their stated goal is to use the predecisional opinions, advice and recommendations of Interior officials to attack the "credibility of the Secretary and her senior managers and counsel." Statement of Need at 6-7. Yet such discourse is and should remain protected to encourage government officials to take positions that may be at odds with their superiors, peers and subordinates without fear of scrutiny and the resultant allegations that an agency is at odds with itself or had serious questions about decisions and policies.

The Interior Defendants should not have been compelled to submit declarations in the face of such a clearly inadequate statement of need and such a grossly inaccurate representation of what deposition questions were "unanswered." See Letter of Sandra P. Spooner to Joseph S. Kieffer, III, Special Master-Monitor (Feb. 26, 2003) (Exhibit "A" attached (enclosures omitted)). Nevertheless, rather than jeopardize Interior Defendants' ability to prevent disclosure of privileged information, Interior Defendants submitted five declarations supporting their privilege claims and explaining how most questions had been answered, and prepared a detailed summary of their responses to each

question set forth by Plaintiffs, in accordance with the Court's February 5, 2003 Order. See id. Those responses were submitted to the Monitor and filed under seal. Id.

III. Interior Defendants Properly Asserted the Deliberative Process Privilege with Regard to the Purpose of the Department of the Interior's Strategic Plan.

At the deposition of James G. Pauli of Electronic Data Systems Corp. ("EDS"), Interior Defendants' counsel properly objected to the question: "What is the purpose of [the Department of the Interior's] strategic plan?" Deposition Transcript of James G. Pauli at 50:17-54:4 (Dec. 19, 2002) ("Pauli Deposition"), quoted in Declaration of Ross O. Swimmer in Support of Interior Defendants' Assertion of Deliberative Process Privilege at 9-11 (Feb. 26, 2003) ("Swimmer Declaration"). Mr. Pauli testified that the plan was not "in effect." Pauli Deposition at 53:10-11. The R&R then correctly found that the "question addressed was a plan under development within the Department of the Interior on which EDS was providing advice to defendants." R&R at 15. With no further analysis, the R&R incorrectly concluded that "review of the sealed detailed summary regarding this response indicates that the complete response . . . would not have been subject to the deliberative process privilege . . . ." Id. This conclusion must be rejected.

"[A] master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned whenever they are believed to be erroneous." Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO v. NLRB, 547 F.2d 575, 580 (D.C. Cir. 1976) (citing Case v. Morrisette, 475 F.2d 1300, 1308 (D.C. Cir. 1973)). Absent "careful review by the trial judge, judicial authority" would otherwise be "effectively delegated to an official who has not been appointed pursuant to [A]rticle III of the Constitution." Meeropol v. Meese, 790 F.2d 942, 961 (D.C. Cir. 1986). Thus, with or without objections to the R&R, its conclusions of law must be reviewed de novo and are not

binding until the Court has adopted them. The Court "shall accept the master's findings of fact unless clearly erroneous." Fed. R. Civ. P. 53(e)(2).

Interior Defendants stand on their arguments made during the deposition colloquy concerning this question and stated in the Swimmer Declaration. Because the plan was not in effect, discussion of the plan, including its purpose, was deliberative and predecisional. See Swimmer Declaration ¶ 11 at 11. "The purpose of the plan includes the scope of the plan, which had not yet been decided. The purpose of a strategic plan is a fundamental underpinning of the plan and to hinder open and creative debate of the stated purpose of the plan would harm the process of developing the plan and potentially its effectiveness as well, to the plaintiffs' ultimate detriment." Id. A draft plan, like other drafts, is protected by the deliberative process privilege. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980), cited in Memorandum Opinion at 7; see also R&R at 16 (recommending that the Court uphold objection to revealing list of standards being considered for January 6, 2003 trust reform plan). The answer to this question should, therefore, remain protected by the deliberative process privilege.

IV. The R&R Contains an Improper and Incorrect Advisory Opinion that Implies a Fiduciary Exception to the Deliberative Process Privilege.

Bert T. Edwards, Executive Director of the Department of the Interior's Office of Historical Trust Accounting ("OHTA"), was asked during his deposition to "detail [] adaptive strategies" suggested by Department officials in discussing the July 2, 2002 Report to Congress on an historical accounting plan; Interior Defendants objected on the basis of the deliberative process privilege. Deposition Transcript of Bert T. Edwards at 134:7-135:10 (Dec. 18, 2002) ("Edwards Deposition"), quoted in Declaration of Bert T. Edwards In Support of Interior Defendants' Assertion of Deliberative

Process Privilege in Response to Deposition Questions at 6 (Feb. 27, 2003) ("Edwards Declaration"). In support of Interior Defendants' objection, Mr. Edwards stated:

> This type of private, undisclosed interaction between myself as Executive Director of OHTA and other Interior officials and employees is essential to making important decisions such as this decision over the scope of the historical accounting. The decision itself may be analyzed and criticized by Plaintiffs or others, but the decision stands on its merits, not on who recommended what to whom. Permitting Plaintiffs to obtain information to attack officials and employees for their predecisional opinions will stifle debate and prevent alternative viewpoints from being heard. Those views may ultimately be rejected, but they assist my ability to be confident that my decisions as Executive Director of OHTA are sound.

Edwards Declaration ¶ 11 at 7-8. Plaintiffs' Statement of Need did not address the potential chilling effect of disclosure of otherwise privileged information.

Disregarding the record evidence, the R&R opines that "[r]elease of their discussions will not place other government officials in fear of release of their candid expression of opinions unless they also owe a fiduciary trust duty to their beneficiaries to apprise them of the management decisions made regarding administration of their trust." R&R at 11. The R&R thus essentially invokes a fiduciary exception to the deliberative process privilege without any citation to law or fact. Interior Defendants are still unaware of any case, statute or regulation that supports such a position. See Memorandum Opinion at 2-7. In effect, the R&R does not weigh the chilling effect on decisionmaking, but rejects it out of hand despite the R&R's unequivocal conclusion that Interior Defendants properly asserted and supported their assertion of the deliberative process privilege concerning this question. R&R at 10 ("process engaged in to come to the decision . . .was clearly deliberative and pre-decisional"). In addition, Plaintiffs did not carry their burden because they failed to show their need for the information and failed to address the five factors. See Statement of Need at 4-6.

Nevertheless, the R&R concluded that the "questions whether the assertion of the privilege over this line of questioning at the time was proper, which it was, or should be rejected in light of the plaintiffs' countervailing interests and need for the information, which may have been the case, are moot." R&R at11. Although the R&R's ultimate finding that the question need not be answered was correct, the R&R's mootness determination makes its discussion of the five factors – and particularly the effect on future decision-making – advisory.

V. Interior Defendants Properly Invoked the Bank Examination Privilege to Protect Unpublished Information from Bank Examination Reports.

At the deposition of the Department of the Interior's Acting Special Trustee for American Indians, Donna Erwin, Interior Defendants objected on the basis of the bank examination privilege to a question seeking information contained in confidential government banking reports. Deposition Transcript of Donna Erwin at 75:18-76:21 (Dec. 20, 2002) ("Erwin Deposition"), quoted in Erwin Declaration at 6-7. Although, as the R&R states, Ms. Erwin agreed that "ratings [of banks] are published," Erwin Deposition at 78:5-7, she did not state that the reports themselves were published and Plaintiffs have made no such showing. Plaintiffs' counsel asked whether "any . . . reports [were] critical to [sic] the performance of the trust partner." Id. at 76:8-9. Without developing further evidence, the R&R is incorrect to conclude that publication of bank "ratings" equates with publication of bank examination "reports." R&R at 13.

Interior Defendants note that, nonetheless, the R&R determined that "the information sought is so tangential to the Phase 1.5 trial . . . that it is not necessary for this Court to ponder the question further or direct further response."

CONCLUSION

For the reasons stated above, the Court should: (1) accept the R&R's findings that deponents answered twenty-six of the questions Plaintiffs designated as unanswered; (2) accept the R&R's recommendation that the answer to question "1(a)" concerning attorney-client communications about trust reform be stayed pending appeal; (3) reject the R&R's recommendation that Interior Defendants be required to answer question "6(b)" concerning the purpose of the Department of the Interior's strategic plan; (4) reject the R&R's advisory opinion that implies a fiduciary exception to the deliberative process privilege; and (5) reject the R&R's finding that information protected by the bank examination privilege had already been disclosed.

April 7, 2003

Respectfully submitted,

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February 26, 2003

BY FACSIMILE

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, NW, #705
Washington, DC 20004

Re: Cobell v. Norton, (D.D.C. Case No. 1:96CV01285 (RCL)

Dear Mr. Kieffer:

In accordance with the Court's order dated February 5, 2003, we submit with this letter, for review in camera, detailed summaries of the responses that would have been given by witnesses whose privileged testimony is sought by the plaintiffs. Although these are being provided to you on the date they are due, Interior defendants have sought a one-day extension of time to file them with the Court because they could not be completed prior to 4:00, when the clerk's office closed.

As you know, plaintiffs were required to submit "a detailed statement setting out the reasons why they require answers to these questions." Memorandum Opinion at 14; Order at 2-3. Plaintiffs' Statement of Need made virtually no specific arguments about their need for answers to any of the questions they claim are unanswered. Furthermore, as the transcripts clearly reveal, many of the questions Plaintiffs claim are unanswered were, in fact, answered.

Plaintiffs primarily argue that the resignation of former Special Trustee Tom Slonaker and "countless other decisions made by the defendants during the [sic] this litigation relates directly to the credibility of the Secretary and her senior managers and counsel." Plaintiffs' Statement of Need at 6. Plaintiffs further assert -- incorrectly -- that "to the extent such information is deliberative, the needs of plaintiffs and this court clearly outweigh the interest of defendants and their counsel to conceal more fraud, more retaliation and more deception." Statement of Need at 7. Phase 1.5 discovery concerns Interior's plan for an accounting of Individual Indian Money ("IIM") trust funds and for IIM trust management. Those plans are extant and will stand or fall on their merit, not on the opinions of Interior officials relating to Mr. Slonaker's tenure or drafts of a quarterly report to this Court. Protecting Interior's deliberative processes in this matter is far more

important than in a normal case. Plaintiffs' repeated and continuing allegations of "fraud, retaliation and more deception," Statement of Need at 6, have already chilled the deliberative process. Their stated goal is to use the predecisional opinions, advice and recommendations of Interior officials to attack the "credibility of the Secretary and her senior managers and counsel." Statement of Need at 6.

Yet such discourse is and should remain protected to encourage government officials to take positions that may be at odds with their superiors, peers and subordinates without fear of scrutiny and the resultant allegations that an agency is at odds with itself or had serious questions about decisions and policies. Plaintiffs will make even more unwarranted and unsupported attacks on Interior if they are given access to opinions and recommendations that are inconsistent with final decisions on Indian trust issues. Plaintiffs will undoubtedly attack those officials they disagree with for coming down on the "wrong" side of an issue. If Plaintiffs are given this information, Interior officials will be forced to avoid controversy and debate about important decisions affecting all Americans. This chilling effect already has occurred in this litigation but can get much worse. Officials and employees, many already afraid or reluctant to air their views due to this litigation, will become more reluctant. Hence, the Department's ability to make good decisions will be further hampered.

The Interior Defendants should not be compelled to submit declarations in the face of such a clearly inadequate statement of need. Nevertheless, rather than jeopardize Interior Defendants' ability to prevent disclosure of privileged information, Interior Defendants are responding to each question set forth by plaintiffs. Those responses are enclosed and will be filed under seal tomorrow.

Sincerely,

Sandra P. Spooner

cc by FAX w/o enclosures: Mr. Dennis Gingold
Mr. Keith Harper

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 7, 2003 I served the Foregoing *Interior Defendants' Response and Objections to Report and Recommendation of the Special Master-Monitor on Defendants' Deliberative Process Privilege Claims over Phase 1.5 Trial Desposition Testimony* by facsimile in accordance with their written request of October 31, 2001 upon:

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