

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., )  
 )  
 Plaintiffs, )  
 )  
 v. ) Case No. 1:96CV01285 (RCL)  
 )  
 GALE A. NORTON, Secretary of the Interior, ) (Special Master Alan L. Balaran)  
 et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**INTERIOR DEFENDANTS' MOTION FOR PROTECTIVE ORDER  
AND MOTION TO QUASH PLAINTIFFS' NOTICE OF DEPOSITION  
AND REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED  
TO NON-PARTY MICHAEL CARR AND DEFENDANTS**

Pursuant to Fed. R. Civ. P. 26(c) and (d), the Secretary of the Interior and the Acting Assistant Secretary of the Interior – Indian Affairs ("Interior Defendants") hereby move for a protective order and an order quashing the plaintiffs' notice of deposition directed to former Interior attorney Michael Carr and the accompanying document production request directed to Mr. Carr and defendants. The improper discovery requests are Exhibit 1 to the accompanying memorandum of points and authorities.

As explained in further detail in the accompanying memorandum of points and authorities, the deposition notice and document request are unauthorized and, indeed, in direct contravention of the Special Master's scheduling orders. Further, the deposition notice and document request are intended to elicit discovery in connection with plaintiffs' allegations of criminal and civil contempt against Mr. Carr and potentially other individuals named in plaintiffs' October 19, 2001 *Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court in Connection with Trial One* (the "October 19, 2001 motion"). The

Court of Appeals' recent decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), makes clear that the discovery plaintiffs seek from Mr. Carr and the defendants is impermissible because of the potential criminal ramifications of plaintiffs' allegations.

Counsel for Interior Defendants have attempted in good faith to resolve this discovery matter prior to filing this motion. Plaintiffs' counsel, however, have refused to withdraw the notice and document request, and therefore this motion is necessary. *See* Exhibit 2 to accompanying memorandum of points and authorities (certificate of counsel). A proposed report and recommendation is attached.

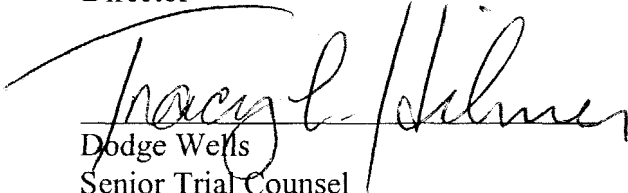
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DATED: September 11, 2003

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	
Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285 (RCL)
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GALE A. NORTON, Secretary of the Interior,	)	(Special Master Alan L. Balaran)
<u>et al.</u> ,	)	
	)	
Defendants.	)	
	)	

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
INTERIOR DEFENDANTS' MOTION FOR PROTECTIVE ORDER  
AND MOTION TO QUASH PLAINTIFFS' NOTICE OF DEPOSITION  
AND REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED  
TO NON-PARTY MICHAEL CARR AND DEFENDANTS**

Pursuant to Fed. R. Civ. P. 26(c) and (d), the Secretary of the Interior and the Acting Assistant Secretary of the Interior – Indian Affairs ("Interior Defendants") hereby move for a protective order and an order quashing the plaintiffs' unauthorized and otherwise improper attempt to take discovery in the contempt proceedings currently before the Special Master. On August 21, 2003, plaintiffs served a notice of deposition directed to former Interior attorney Michael Carr accompanied by a document production request directed to Mr. Carr and defendants. Exhibit 1. The deposition notice and document request are unauthorized and, indeed, in direct contravention of the Special Master's scheduling orders. Further, the deposition notice and document request are intended to elicit discovery in connection with plaintiffs' allegations of criminal and civil contempt against Mr. Carr and potentially other individuals named in plaintiffs' October 19, 2001 *Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court in Connection with Trial One* (the "October 19, 2001 motion").

The Court of Appeals' recent decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), makes clear that the discovery plaintiffs seek from Mr. Carr and the defendants is impermissible because of the potential criminal ramifications of their allegations.

Counsel for Interior Defendants have attempted in good faith to resolve this matter prior to filing this motion. Plaintiffs' counsel, however, have refused to withdraw the notice and document request, and therefore this motion is necessary. *See* Exhibit 2 (certificate of counsel).

### **Background**

On October 19, 2001, plaintiffs filed the show cause motion that is the subject of the Carr deposition notice and accompanying document request. On November 28, 2001, the Court entered an Order to Show Cause granting plaintiffs' motion "as to the Interior defendants in their official capacities." The Order directed defendants Norton and McCaleb to "show cause why they should not be held in civil contempt of court in their official capacities" upon four specifications:

1. That defendants had failed to comply with the Court's Order of December 21, 1999 to initiate a Historical Accounting Project.
2. That defendants committed a fraud on the Court by concealing the Department's true actions regarding the Historical Accounting Project during the period from March 2000 until January 2001.
3. That defendants committed a fraud on the Court by failing to disclose the true status of the TAAMS project between September 1999 and December 21, 1999.
4. That defendants committed a fraud on the Court by filing false and misleading quarterly reports starting in March 2000, regarding TAAMS and BIA Data Clean-Up.

Order to Show Cause, November 28, 2001 at 1-2. The order stated that the "Court defers ruling at this time on plaintiffs' motion to order non-party employees and counsel to show cause." *Id.* at

1. On December 6, 2001, the Court entered a Supplemental Order to Show Cause, adding a fifth

specification that defendants committed a fraud on the Court by making false and misleading representations starting in March 2000, regarding computer security of IIM trust data. Plaintiffs' October 19, 2001 motion did not address the IIM computer security issue which was the subject of the Supplemental Order to Show Cause, and plaintiffs did not amend their motion to include that specification.

The five issues identified in the Orders to Show Cause were tried as to the named Interior Defendants in their official capacity, following which the Court issued its September 17, 2002 order. *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002). As part of the September 17, 2002 order, the Court "deferred ruling on the plaintiffs' motion filed on October 19, 2001, as it related to 37 non-party employees and counsel." 226 F. Supp. 2d at 155. The Court explained this deferment: "Upon consideration of the memoranda filed in support of and in opposition to the plaintiffs' motion, the record in this case, and the applicable law, the Court finds that it is not appropriate to order these individuals to show cause at this time why they should not be held in contempt of court." *Id.* Instead, the Court referred the matter "to Special Master Balaran so that he may develop a complete record with respect to these 37 non-party individuals." *Id.*; *see also id.* at 162 ("It is further ORDERED that the plaintiffs' motion for order to show cause, filed October 19, 2001, shall be REFERRED to Special Master Balaran. Special Master Balaran shall issue a report and recommendation with respect to each of the 37 non-party individuals named in the plaintiffs' motion.").

On October 7, 2002, the Special Master issued a proposed protocol and schedule for addressing the two show cause orders that had been referred to him by the Court. The proposal included a discovery period before any determination of the legal sufficiency of plaintiffs' allegations. Following a case management conference held on October 30, 2002, in which the

propriety of discovery was among several topics addressed by the Special Master, counsel for the parties and counsel for the Named Individuals in their personal capacities, the Special Master issued a memorandum setting forth *Revised Procedures and Schedule for Investigation Into Plaintiffs' Motion for Orders to Show Cause* (dated Nov. 4, 2002) ("Revised Procedures Memorandum"). In the Revised Procedures Memorandum, the Special Master provided that he would "preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery." Revised Procedures Memorandum at 2. The Revised Procedures Memorandum also set forth a schedule for the plaintiffs to file "bills of particulars" setting forth the specific instances of contempt of which they accused each Named Individual and the evidence supporting such allegations. Plaintiffs' bills regarding the October 19, 2001 motion were to be filed by May 1, 2003. Thereafter, the Named Individuals – in both their official and personal capacities – were permitted to file briefs challenging the legal sufficiency of plaintiffs' allegations. Briefing on those challenges was completed on August 18, 2003, and the Special Master has not yet issued any report and recommendation concerning those challenges. Likewise, the Master has never authorized the initiation of discovery in connection with the show cause motions over which he is currently presiding.

By a letter to the Special Master dated December 4, 2002, plaintiffs' counsel proposed the initiation of discovery in these proceedings. Exhibit 3. The Special Master wrote back to plaintiffs' counsel the same day, reiterating his directive that discovery would not take place "[u]ntil the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals. . . ." Exhibit 4.

On August 21, 2003, plaintiffs served upon government counsel a notice of deposition for Mr. Carr accompanied by a request for production of documents directed to Mr. Carr and

defendants. Exhibit 1. The request for production states that it seeks "documents related to the subject matter of the motions for order to show cause, bills of particular, Interior Office of Inspector General investigations and draft, interim and final reports, and the preliminary contempt proceedings . . . before Special Master Alan Balaran that are relevant to Named Individual Carr." *Id.* at 2. Thus, it is clear that plaintiffs are seeking discovery in furtherance of their October 19, 2001 show cause motion and the bills of particulars filed in supplementation of that motion. The deposition notice and document request are in direct contravention of the Special Master's determination that no discovery will be permitted in these proceedings before the issuance of the Master's report and recommendation on the legal sufficiency of plaintiffs' claims against the Named Individuals. The plaintiffs' discovery requests are, therefore, unauthorized and should be quashed. Further, plaintiffs have indicated an intention to issue additional unauthorized discovery requests in these proceedings. Accordingly, it is appropriate for the Master to recommend that the Court enter a protective order precluding such discovery.<sup>1</sup>

### Argument

#### **A. Plaintiffs' Attempted Discovery is Unauthorized.**

Under Fed. R. Civ. P. 26(d), a party "may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." No Rule 26(f) conference has taken place. Although plaintiffs sought leave of the Master to undertake discovery, the Master declined to

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<sup>1</sup>Government counsel wrote to the Special Master on August 28, 2003, requesting that the Master affirm, as he had in his December 4, 2002 letter to plaintiffs' counsel, that the government and the Named Individuals need not respond to any discovery in this matter at this time. That letter was also served upon plaintiffs' counsel. Exhibit 5 (attachments omitted). Private counsel for Mr. Carr likewise wrote to plaintiffs' counsel, with a copy to the Special Master, seeking the withdrawal of the improper notice. Exhibit 6. Nevertheless, plaintiffs have not withdrawn their improper discovery requests.

permit discovery at this time. Thus, plaintiffs have no right to take discovery of Interior Defendants or any Named Individual in these proceedings at this time. Nonetheless, plaintiffs have stated on their website that the Carr notice is "the first in a series" of depositions they intend to notice. *See* Exhibit 7. Therefore, the Special Master should recommend that the Court enter a protective order confirming that the Named Individuals and the defendants need not respond to any discovery requests in connection with the proceedings concerning the two show cause motions that are currently before the Special Master.

**B. Plaintiffs Cannot Take Discovery of the Named Individuals Because of the Potential Criminal Ramifications of the Proceeding.**

In seeking to depose Mr. Carr and to require him and Interior Defendants to produce documents relating to their October 19, 2001 motion, plaintiffs have entirely ignored the Court of Appeals' July 18, 2003 decision. The Court of Appeals held that the District Court's contempt citations on all four specifications arising from plaintiffs' October 19, 2001 show cause motion were "criminal in nature." *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003). The Court of Appeals also made clear that anyone accused of criminal contempt – as Mr. Carr and other Named Individuals here have been accused – is entitled to the full measure of due process rights afforded in any criminal proceeding. *Id.* at 1147. As we and private counsel for the Named Individuals have noted repeatedly, the Federal Rules of Criminal Procedure do not permit the sort of wide-ranging discovery that plaintiffs are again attempting to undertake with this notice of deposition and request for production of documents. *See, e.g., Government's Response to Special Master's Proposed Protocol for Proceedings Regarding Plaintiffs' March 20, 2002 Motion for Order to Show Cause* (filed Oct. 15, 2002) at 2 & note 2; *Memorandum of Points and Authorities in Opposition to Plaintiffs' Bills of Particulars in Support of Motion for Order to Show Cause*



*Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and Defrauding this Court in Connection with Trial One (Filed October 19, 2001)* (filed June 2, 2003) at 18-19; *United States' Reply to Plaintiffs' Opposition to Named Individuals' Responses to Bills of Particulars Relating to Plaintiffs' October 19, 2001 Motion for Order to Show Cause* (filed Aug. 18, 2003) at 1-3. Accordingly, it would constitute a serious violation of Mr. Carr's due process rights to permit the discovery to proceed on allegations that the Court of Appeals has already declared to be criminal in nature.

Further, since the plaintiffs' allegations are clearly criminal in nature, plaintiffs' counsel are not permitted to have any role in conducting an investigation of those allegations. *See Landmark Legal Found. v. EPA*, 2003 WL 21715678 at \*4 (D.D.C. July 25, 2003), citing *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987).

**C. The Notice Is Also Defective Because Interior Defendants Cannot Produce Mr. Carr or Any Items in His Personal Possession.**

Mr. Carr is no longer employed by the federal government. Accordingly, Interior Defendants cannot produce him or anything in his personal possession. For this reason, too, the notice of deposition and document requests are defective and should be quashed.

**Conclusion**

For all the foregoing reasons, Interior Defendants request that the Special Master issue a report and recommendation that plaintiffs' August 21, 2003 Notice of Deposition and Request for Production of Documents directed to Mr. Carr and defendants be quashed and that a protective order be entered prohibiting discovery in connection with the show cause proceedings before the Special Master until further order of the Court.

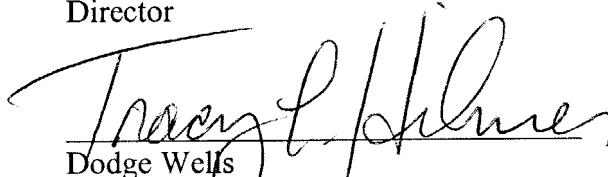
Respectfully submitted,

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DATED: September 11, 2003

IN THE UNITED STATES DISTRICT COURT  
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ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
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Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285 (RCL)
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GALE A. NORTON, Secretary of the Interior,	)	(Special Master Alan L. Balaran)
<u>et al.</u> ,	)	
	)	
Defendants.	)	
_____	)	

**REPORT AND RECOMMENDATION OF SPECIAL MASTER  
CONCERNING INTERIOR DEFENDANTS' MOTION FOR  
PROTECTIVE ORDER AND MOTION TO QUASH  
PLAINTIFFS' NOTICE OF DEPOSITION AND  
REQUEST FOR PRODUCTION OF DOCUMENTS DIRECTED  
TO NON-PARTY MICHAEL CARR AND DEFENDANTS**

On September 17, 2002, the Court referred to the Special Master (1) plaintiffs' *Motion for Order to Show Cause Why Interior Defendants and their Counsel Should Not be Held in Contempt for Destroying E-mail* (filed March 20, 2002) (the "March 20, 2002 motion") and (2) plaintiffs' *Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court in Connection with Trial One* (filed Oct. 19, 2001) as it pertained to the 37 non-party individuals named in plaintiffs' motion (the "October 19, 2001 motion"). Pursuant to the Court's referral of the March 20, 2003 and October 19, 2001 motions, the Special Master issued a memorandum setting forth the *Revised Procedures and Schedule for Investigation Into Plaintiffs' Motion for Orders to Show Cause* (dated Nov. 4, 2002). Therein, the Master determined to "preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery." *Id.* at 2.

Upon consideration of *Interior Defendants' Motion for Protective Order and Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-Party Michael Carr and Defendants* (filed Sept. 11, 2003), and the record before the Special Master concerning the Court's referral of plaintiffs' March 20, 2002 and October 19, 2001 motions, the Special Master recommends that the Court:

1. Enter an order prohibiting discovery in connection with the plaintiffs' March 20, 2002 motion or October 19, 2001 motion until further order of the Court; and
2. Enter an order quashing the Notice of Deposition and Request for Production of Documents, dated August 21, 2003, directed by plaintiffs to Michael Carr and defendants.

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Alan L. Balaran  
Special Master

Dated: \_\_\_\_\_

IT IS SO ORDERED.

---

Hon. Royce C. Lamberth  
UNITED STATES DISTRICT JUDGE

DATED: \_\_\_\_\_.

CC:

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Case No.1:96CV01285 (RCL)  
Special Master Balaran

NOTICE OF DEPOSITION and REQUEST FOR PRODUCTION OF DOCUMENTS

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Attorneys for Defendants

PLEASE TAKE NOTICE that on **September 24, 2003**, at plaintiffs' counsel's offices, 607 14<sup>th</sup> Street, 9<sup>th</sup> floor, Washington D.C. 20005, plaintiffs will take the deposition of **Michael Carr** and

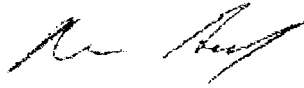
This deposition will commence at **10:00 a.m.** and will continue from day to day until completed. Testimony will be recorded by stenographic means.

PLEASE TAKE FURTHER NOTICE – Request is hereby made that defendants and the deponent produce on or before September 22, 2003 the following documents related to the subject matter of the motions for order to show cause, bills of particular, Interior Office of Inspector General investigations and draft, interim and final reports, and the preliminary contempt proceedings (individually and collectively the “Subject Matters”) before Special Master Alan Balaran that are relevant to Named Individual Carr:

1. All documents, including memoranda, handwritten notes and marginalia, calendars, diaries (including Mr. Carr’s “green books” if he used them), appointment books, schedulers, planners, Day-Timers, voice mail, email, telephone records and the like, including without limitation all hard copy documents, and electronic documents housed in, or created on, computers or personal digital assistants, whether the computers are owned or leased by the government, its agents, employees, or Named Individual Carr, and any drafts thereof, which documents show in whole or in part matters that relate to, refer to, or embody the Subject Matters, whether any such references are direct or indirect and general or specific with respect to Named Individual Carr.
2. All phone logs (both incoming and outgoing), phone message books, voice mail, and telephone message slips, including without limitation all individual phone memoranda slips together with the duplicate carbon or carbonless originals contained in the phone message books themselves (typically spiral bound), and all notes of telephone conversations maintained in such logs, which documents relate to, refer to or embody the Subject Matter, whether any such references to the Subject Matters are direct, indirect, general or specific, and whether such reference telephone calls, whether completed or not, placed to or made by Mr. Carr at any time relevant to the Subject Matters.
3. All documents, whether in hard copy or electronic format – including all memoranda, voice mail, email, handwritten notes and marginalia – that relate to, refer to, or embody, directly or indirectly, generally or specifically, and informal or formal, disciplinary action,

threatened disciplinary action, investigations, examinations, assessments or adverse or critical performance reviews (“Professional Evaluations”) concerning Named Individual Carr and his conduct with respect to the Subject Matters, including without limitation the Office of Inspector General, Office of the Solicitor, Department of Justice, and all disciplinary action taken with respect thereto.

4. All documents, whether in hard copy or electronic format, that relate to, refer to, or embody the time and charges of all personal counsel for Named Individual Carr, including all hourly rates, actual time billed and paid, all expenses related thereto, the dates such bills were submitted for payment, the dates payments were made, and the realization percentage for all time submitted and tendered for payment, and explanations, if any, for the government’s deferment of fees or failure to pay 100% of time and charges submitted for payment to the defendants or the Department of Justice. However, this request does not include the detailed description of specific professional services provided by personal counsel to Named Individual Carr in support of each such statement of time and charges.

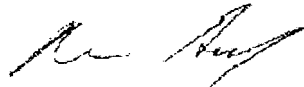


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Attorneys for Plaintiffs

August 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS was served on the following by US Mail or facsimile, pursuant to agreement, on this day, August 21, 2003.

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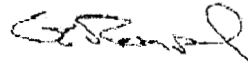
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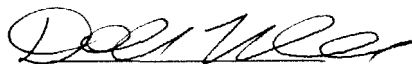
Geoffrey M. Rempel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
	)	
v.	)	
	)	
GALE A. NORTON, et al.,	)	(Special Master Alan L. Balaran)
	)	
Defendants.	)	
_____	)	

**CERTIFICATE OF COMPLIANCE WITH  
FEDERAL RULE OF CIVIL PROCEDURE 26(c)**

Dodge Wells, one of the attorneys for the Interior defendants, hereby certifies that he conferred with Dennis Gingold, counsel for plaintiffs, by telephone on September 9, 2003 in a good-faith effort to resolve the issues raised by the foregoing motion for a protective order concerning the notice for the depositions of Michael Carr, and the he and Mr. Gingold have been unable to resolve the dispute.



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DATED: September 9, 2003

*Demis M. Gingold*  
*P.O. Box 14464*  
*Washington, D.C. 20044-4464*

**BY FACSIMILE**

December 4, 2002

Hon. Alan Balaran  
1717 Pennsylvania Ave., N.W.  
Twelfth Floor  
Washington, D.C. 20006

Re: *Cobell v. Norton*, Civ. Action No. 1285 (RCL). Procedures and Schedule for Investigation Into Putative Contemnors' Misconduct.

Dear Mr. Balaran:

By this letter, plaintiffs respectfully bring to your attention two matters regarding your investigation into the culpability of more than 39 putative contemnors. First, inasmuch as plaintiffs have completed the initial series of "Bills of Particulars"<sup>1</sup> in accordance with your November 4, 2002 Memorandum setting forth the revised schedule,<sup>2</sup> it is now appropriate for plaintiffs to commence discovery to the extent their burden under Fed.R.Civ.P. 12(b)(6) has been met.<sup>3</sup> Accordingly, plaintiffs propose the submission of a preliminary "list of potential witnesses for the Special Master's review along with a brief statement explaining why each witness should be deposed,"<sup>4</sup> as well as appropriate discovery requests critical to your complete and thorough investigation.<sup>5</sup>

---

<sup>1</sup>These "Bills of Particulars" were prepared in support *Plaintiffs' Motion For Order to Show Cause Why Interior Defendants, And Their Counsel, Should Not Be Held in Civil And Criminal Contempt For Destroying E-mail* (3/20/02) and detail each putative contemnor's role in the destruction of federal records at the Office of the Solicitor.

<sup>2</sup>Plaintiffs respectfully note that the Special Master's November 4, 2002 Memorandum revised the schedule for the upcoming proceedings, it did not revise the "Rules Governing the Investigative Process." See October 7, 2002 Memorandum at 4-6.

<sup>3</sup>*Id.* at 4 ("The Special Master will initially review plaintiff's bill of particulars and determine if the investigation should proceed with regard to a particular Named Individual and evaluate whether plaintiffs have stated a claim and whether the allegations, construed in a light most favorable to plaintiffs, constitute fraud on the court.") (footnotes omitted).

<sup>4</sup>*Id.* at 5.

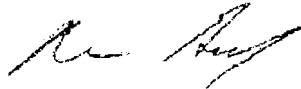
<sup>5</sup>*Id.* Plaintiffs reserve the right to supplement their request for discovery to the extent that



Second, plaintiffs note that you have scheduled May 1, 2003 as the deadline for plaintiffs' second series of "Bills of Particulars;" the same day that this Court has scheduled the opening of Trial 1.5. To be absolutely clear: it is impossible for plaintiffs to produce the requested "Bills of Particulars" and prepare concurrently for a major trial covering *both* retrospective and prospective aspects of this action. Moreover, this first series of "Bills of Particulars" has demonstrated that issues are capable of being segregated; indeed, the massive nature of these frauds militate strongly for partitioning the issues into manageable segments and proceeding seriatim. Plaintiffs suggest that proceeding along the same lines as the Court in the second Contempt Trial is appropriate.

For these reasons, plaintiffs respectfully request that the Special Master permit the submission of "Bills of Particulars" with respect to Count 5, starting August 4, 2003.<sup>6</sup>

Very truly yours,



Dennis M. Gingold

cc: Hon. Joseph Kieffer, III, Special Master-Monitor (via facsimile)  
All Counsel identified in Attachment A (via facsimile)

---

<sup>6</sup>Plaintiffs propose that scheduling future counts may be best accomplished after the Master has made his reports and recommendations regarding the destruction of electronic records and any future proceedings before the Court are known.

## ATTACHMENT A

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CHRISTOPHER KOHN	JUSTICE DEPARTMENT
MARK NAGLE	JUSTICE DEPARTMENT
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December 4, 2002

## VIA FACSIMILE

Dennis M. Gingold, Esq.  
1275 Pennsylvania Ave., N.W.  
Ninth Floor  
Washington, DC 20004RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285  
Procedures and Schedule for Investigation Into Plaintiffs'  
Motions for Orders to Show Cause

Dear Mr. Gingold:

This letter responds to your correspondence of this date regarding the procedures that will govern the investigation into the conduct of the 39 Named Individuals<sup>1</sup>:

1. Until the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals, no discovery will commence.
2. Any requests for additional time to file the second set of Bills of Particulars or to segregate the issues therein will require the consent of counsel for the Named Individuals or the intervention of the Court.

Sincerely,

Alan L. Balaran  
SPECIAL MASTERcc: Sandra Spooner, Esq.  
Attached Distribution List

---

I will assume, for the last time, that my direction concerning the manner in which these individuals are to be addressed was not clear and that your referral to them as "putative contemnors" was an oversight.

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August 28, 2003

**By Facsimile (202)986-8477**

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Special Master  
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Washington, DC 20006

**Re: *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL) (D.D.C.) –  
Referral of Plaintiffs' October 19, 2001 and March 20, 2002  
Show Cause Motions**

Dear Mr. Balaran:

On August 21, 2003, we received the attached notice of deposition from plaintiffs' counsel purporting to require former Interior attorney Michael Carr to appear for deposition and further purporting to require defendants and Mr. Carr to produce certain documents. *See Attachment 1*. As you know, Mr. Carr is one of the individuals named by plaintiffs in their October 19, 2001 show cause motion, which the Court referred to you on September 17, 2002. The request for production states that it seeks "documents related to the subject matter of the motions for order to show cause, bills of particular, Interior Office of Inspector General investigations and draft, interim and final reports, and the preliminary contempt proceedings . . . before Special Master Alan Balaran that are relevant to Named Individual Carr." Attachment 1 at 2. Thus, it is clear that plaintiffs are seeking discovery in furtherance of their October 19, 2001 show cause motion and the bills of particulars filed in supplementation of that motion.

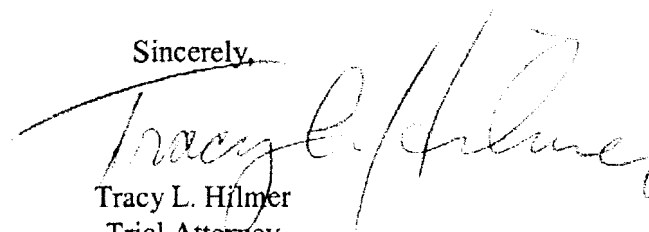
Plaintiffs' attempt to obtain discovery on this matter is unauthorized. Indeed, it is in direct contravention of your determination that discovery would not take place "[u]ntil the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals. . . ." Dec. 4, 2002 letter from Alan L. Balaran, Special Master, to Dennis M. Gingold, counsel for plaintiffs (Attachment 2). We are also attaching for your convenience Mr. Gingold's December 4, 2002 letter to you in which he proposed initiating discovery, to which your letter of the same date replied. *See Attachment 3*. Besides your own determination that discovery would not commence in this matter before the issuance of your report and recommendation on the legal sufficiency of plaintiffs' allegations, the Court of Appeals' July 18, 2003 decision makes clear that there are potential criminal ramifications in this proceeding. *See Cobell v. Norton*, 334 F.3d 1128,

1146 (D.C. Cir. 2003) (treating District Court's contempt citations on all specifications arising from plaintiffs' October 19, 2001 show cause motion as "criminal in nature"). The Court of Appeals also made clear that anyone accused of criminal contempt – as the Named Individuals here have been accused – is entitled to the full measure of due process rights afforded in any criminal proceeding. *Id.* at 1147. As we and private counsel for the Named Individuals have noted repeatedly, the Federal Rules of Criminal Procedure do not permit the sort of wide-ranging discovery that plaintiffs are again attempting to undertake with this notice of deposition and request for production of documents.

The government hereby requests that you direct plaintiffs to withdraw the unauthorized request for production and notice of deposition to Mr. Carr. Moreover, plaintiffs' website states that the Carr notice is the "first in a series." See Attachment 4. To avoid wasting further time responding to any additional unauthorized deposition notices or document production requests directed to Named Individuals, we ask you to affirm that the government and the Named Individuals need not respond to any discovery in this matter at this time.

Thank you for your attention to this matter.

Sincerely,



Tracy L. Hilmer  
Trial Attorney  
Commercial Litigation Branch

Attachments

cc: Attached service list

cc:

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**DATE:** August 28, 2003

**TO:** Allan Balaran Keith Harper Dennis M. Gingold  
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**NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 27**

*Hilmer 08-28-03 to Balaran re Plifs 08-21-03 Notice of Carr Depo*

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Re: *Cobell v. Norton*, Case No. 96-CV-1285

Dear Messrs. Harper and Gingold:

On August 21, 2003 you posted to the Internet a "Notice of Deposition and Request for Production of Documents" addressed to my client, Michael Carr. I have not yet received a service copy of this document.

I attach to this letter the December 4, 2002 letter of Special Master Alan L. Balaran to you in which the Special Master advises you: "Until the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals [including Mr. Carr], no discovery will commence."

Accordingly, I demand that you withdraw the purported notice of deposition and request for production of documents against Mr. Carr. I further demand that you remove that document from the Internet. Please advise me immediately whether you will comply with these demands. If you do not withdraw this discovery, please explain why your actions do not violate the Special Master's December 4, 2003 instructions to you.

Very truly yours,



R. Christopher Cook

cc: Counsel of Record  
 Special Master Alan L. Balaran

Dec-04-02 02:47

From THE LAW OFFICE OF ALAN BALARAN

2029868477

T-278 P 02/00 F-343

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December 4, 2002

VIA FACSIMILE  
Dennis M. Gingold, Esq.  
1275 Pennsylvania Ave., N.W.  
Ninth Floor  
Washington, DC 20004

RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285  
Procedures and Schedule for Investigation Into Plaintiffs'  
Motions for Orders to Show Cause.

Dear Mr. Gingold:

This letter responds to your correspondence of this date regarding the procedures that will govern the investigation into the conduct of the 59 Named Individuals<sup>1</sup>:

1. Until the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals, no discovery will commence.
2. Any requests for additional time to file the second set of Bills of Particulars or to segregate the issues therein will require the consent of counsel for the Named Individuals or the intervention of the Court.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

cc: Sandra Spooner, Esq.  
Attached Distribution List

I will assume, for the last time, that my direction concerning the manner in which these individuals are to be addressed was not clear and that your referral to them as "putative contemnors" was an oversight.

## Welcome

### Accounting long overdue for Indian trust funds

When I went to Washington on a hot, sultry June day in 1996 to file a lawsuit over the billions of dollars of trust funds that the government had lost, misplaced and otherwise grossly mismanaged for hundreds of thousands of American Indians, I had no idea I would still be in court seven years later.

Yet today, after three Cabinet secretaries have been held in contempt by a federal judge and after four lengthy trials and a successful defense on appeal of our claims on the merits, the federal government has failed to clean up the trust records. It cannot certify the accuracy of a single one of the estimated 500,000 current individual Indian trust accounts.

That's the sad bottom line on how the federal government has continued to treat the nation's first citizens.

All I and three other Indians are asking the government to do is account for the tens of millions of acres of land the government forced into trust and to account for and distribute -- to the proper trust beneficiaries -- the correct amount of funds it received and invested from the leases it arranged for timber sales and for oil, gas, minerals and grazing rights on Indian trust lands in the West.













I may not be a lawyer, but I was a small-town banker in Montana. I know that the most basic of duties of any trustee is to account for all trust assets, including the funds they hold for the beneficiaries.

Unfortunately, the commissioner of the Bureau of Public Debt, a senior Treasury Department official, testified in our case that the United States has used our trust funds to reduce the national debt.

But no one knows how much of our money was used to reduce the debt load of this country or how many years the U.S. government used our trust money for these and other important government purposes, such as building dams and major power projects in the West.

We hope an accounting will finally tell the true story of how the government has used Individual Indian Trust funds for more than 100 years. And, we also hope that we will learn what really happened to 40 million acres of Individual Indian

## Latest Information

- 09/04 [Plaintiffs' Opposition. Plaintiffs oppose Norton conditional motion for additional time to file opening appeals brief.](#)  244.0 KBs
- 09/04 [Plaintiffs Subpoena. Plaintiffs subpoena DOJ attorney Spooner regarding misrepresentations made to the Court with respect to the deposition of Donna Erwin.](#)  507.9 KBs
- 09/04 [Plaintiffs Subpoena. Plaintiffs subpoena DOJ attorney Quinn regarding misrepresentations made to the Court with respect to the deposition of Donna Erwin.](#)  508.0 KBs
- 09/04 [Plaintiffs Subpoena. Plaintiffs subpoena DOJ attorney Petrie regarding misrepresentations made to the Court with respect to the deposition of Donna Erwin.](#)  505.0 KBs
- 09/03 [Plaintiffs Notice. Plaintiffs provide the Court notice of the Master's Navajo Report in support of Trial 1.5 Findings and Conclusions.](#)  27.1 KBs
- 09/02 [Plaintiffs' Petition for Rehearing En Banc. Plaintiffs petition the Court of Appeals to reinstate the contempt judgment against Norton.](#)  2.3 MBs
- 08/29 [Plaintiffs' Opposition. Plaintiffs oppose Citizen Norton's motion to vacate procedural order.](#)  255.5 KBs
- 09/02 [INDIANS ASK COURT TO REINSTATE CONTEMPT FINDING AGAINST INTERIOR SECRETARY](#)
- 08/31 [A Betrayal of Trust Land-lease deal with U.S. is a trail of broken promises](#)
- 08/31 [Indian leases still a scandal](#)
- 08/31 [Attorneys are getting rich, at your expense](#)
- 09/01 [Accounting long overdue for Indian trust funds](#)
- 08/27 [Plaintiffs' Comments. Plaintiffs provide their response to Norton's information technology certifications in accordance with the Court's Preliminary Injunction.](#)  74.7 KBs
- 08/27 [The great American land row American Indians are embroiled in a \\$137bn lawsuit with the US Government over land royalties. The saga, which has been going on for seven years, rests on a judge's decision, which is expected shortly.](#)
- 08/22 [Plaintiffs' Opposition. Plaintiffs oppose Norton's motion to voluntarily dismiss her appeal.](#)  292.1 KBs
- 08/21 [Plaintiffs Notice. Plaintiffs notice former-Navajo Appraisal chief, Anson Baker, for deposition.](#)  115.8 KBs
- 08/21 [Plaintiffs' Motion. Plaintiffs move to adopt the Master's report regarding Norton's violations of law and fiduciary duty with respect to the undervaluation of Navajo ROW leases.](#)  36.5 KBs
- 08/21 [Plaintiffs Notice. Plaintiffs notice Michael Carr for deposition; first in a series of named individuals to appear in connection with plaintiffs' contempt motions charging fraud and violations of court orders.](#)  29.3 KBs
- 08/21 [Report Finds Oil Firms Paid Indians Less for Land](#)
- 08/21 [Investigation finds that Navajo landowners are underpaid for land rights](#)

Trust land that simply vanished, according to the testimony of the head of Interior's Office of Historical Accounting.

Seven years later, Interior Secretary Gale Norton, the government's trustee-delegate for the nation's first citizens, has done nothing to provide us answers to this and other important trust accounting issues.

Why the delay? Why the deception? Why the disdain for the obligations Norton owes to hundreds of thousands of Individual Indian Trust beneficiaries, many of whom live in Washington state?

Sen. John McCain, R-Ariz., and others have said it's because Indians lack political clout in the nation's capital. Any other interest group would have had this problem resolved immediately, McCain has said. There is no dispute about the evidence. Study after study has warned Congress that our trust funds were being horribly managed by the Department of Interior. Billions of dollars are missing.

In 1989, the Senate Special Committee on Investigations found that "fraud and corruption pervade" the Interior Department. The General Accounting Office warned both Republican and Democratic administrations for years that this is a very serious problem.

In 1994, Congress ordered Interior to account for the missing funds. Nothing happened.

So we Indians did what others similarly situated would have done. We turned to the courts for help to straighten out an obdurate and dishonest executive and an uninterested Congress.

Since we filed our suit, we have won several significant victories. In 1999, U.S. District Judge Royce Lamberth declared the government breached its trust responsibilities to us and ordered the interior secretary and the treasury secretary to provide us a complete accounting of all trust assets, including the revenues generated from our trust lands since the creation of the Individual Indian Trust in 1887. The U.S. Court of Appeals for the District of Columbia unanimously agreed with Lamberth and found that the interior secretary had engaged in "malfeasance" and has unduly delayed the accounting, causing irreparable harm to all of us.

The government's record as trustee for Indians is "a long and sorry story," Lamberth declared. "... It is fiscal and governmental irresponsibility in its purest form."

Tough words, to be sure -- but they are utterly meaningless unless Norton is compelled to do what she is required to do by law.

- 08/20 [COURT OFFICIAL FINDS SECRETARY NORTON IN VIOLATION OF LAW AND BREACH OF TRUST DUTIES TO NAVAJO](#)
- 08/20 [Special Master Report and Recommendation. Master finds violations of law and court orders in Navajo area appraisals.](#) PDF 84.5 KBs
- 08/20 [Court Order. Court orders Master Navajo report to be filed in the public record.](#) PDF 7.2 KBs
- 08/18 [Plaintiffs' Opposition. Plaintiffs oppose Norton's motion to disqualify the Special Master.](#) PDF 538.6 KBs
- 08/18 [Plaintiffs' Opposition. Plaintiffs oppose Norton motion to suppress information implicating White House involvement in suppressing testimony before Congress.](#) PDF 35.5 KBs

Continuing to rely on the good faith of the interior secretary is an exercise in futility.

There is enough wrongdoing, malfeasance and incompetence in the way the Department of Interior has handled our monies to fill a thousand accounting school and law school textbooks, the courts agreed.

Records have been, and continue to be, lost, systematically destroyed, corrupted and, in many cases, never kept. In short, the government has no idea what the proper balances in our trust accounts should be. It doesn't know how many trust beneficiaries there were in the first place and it doesn't know how many trust accounts it should be managing today.

It has admitted, however, that at least \$13 billion in nominal dollars has been collected from Individual Indian Trust lands. But it doesn't know what happened to this money or the compound interest this money was earning for generations.

And remember these are accounts the government created for some of the poorest Americans. We Indians had no choice in the matter. The government unilaterally decided we were incompetent to handle our own funds and created the trust in 1887.

Would anyone in his right mind voluntarily give his or her life savings to unqualified bureaucrats and political appointees in Washington, D.C? Never!

What has stunned me is the steadfast resistance and hostility of Democrats and Republicans alike, first to our lawsuit and then to the rulings, now numbering more than 50, that we have won.

As our victories in court have increased, so has the government's resistance and open hostility to a just and fair resolution. What are they afraid of? Exposure of another Teapot Dome scandal?

After concluding another trial -- 44 days -- in July on accounting and trust rehabilitation issues, we are moving closer to the long-overdue accounting, the government seems to be, pardon the cliché, circling the wagons. Every ruling reinforcing the trust obligations of the United States to us trust beneficiaries is ignored -- whether the rulings are made by the trial court, the appellate court or the U.S. Supreme Court. As Lamberth lamented, "this is not our form of government."

We can settle this case, but the government first must participate in settlement talks with integrity, something they have refused to do for the seven years this case has been litigated.

It must stop hiding behind disingenuous excuses, defending the indefensible and protecting incompetent and dishonest officials.

Any settlement must be fair and just to make  
Indians whole for monies that have been  
collected by the United States for 116 years.

It is, after all, our money. It is our property right.

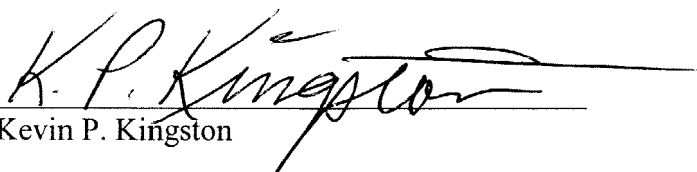
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 10, 2003, I served the foregoing *Interior Defendants' Motion for Protective Order and Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-Party Michael Carr and Defendants*; and *Defendants Memorandum of Points and Authorities in Support of Interior Defendants' Motion for Protective Order and Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed To Non-Party Michael Carr and Defendants*; and *Proposed Report and Recommendation of Special Master Concerning Interior Defendants' Motion for Protective Order and Motion to Quash Plaintiffs' Notice of Deposition and Request for Production of Documents Directed to Non-Party Michael Carr and Defendants* in the manner stated upon the persons listed on the attached service list.

  
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