

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA  
2003 SEP 23 PM 5:03

ELOUISE PEPION COBELL, et al., )  
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 Plaintiffs, )  
 )  
 v. )  
 )  
 GALE A. NORTON, Secretary of the Interior, )  
 et al., )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

HANCOCK M.  
MAYER-WHITTINGTON  
CLERK

Case No. 1:96CV01285  
(Judge Lamberth)

**INTERIOR DEFENDANTS' MOTION TO STRIKE  
NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT  
OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW DATED AUGUST 4, 2003 and IN SUPPORT  
OF PLAINTIFFS' PLAN FOR DETERMINING ACCURATE BALANCES  
IN THE INDIVIDUAL INDIAN TRUST, DATED JANUARY 6, 2003**

Pursuant to Federal Rule of Civil Procedure 12(f), Interior Defendants respectfully move to strike Plaintiffs' Notice of Supplemental Authority in Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law dated August 4, 2003 and In Support of Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust, dated January 6, 2003 (September 3, 2003) ("Notice of Supplemental Authority" or "Notice").<sup>1</sup> The supplemental "authority" submitted by Plaintiffs is the Site Visit Report of the Special Master to the Office of Appraisal Services in Gallup, New Mexico and the Bureau of Indian Affairs Navajo Realty Office in Window Rock, Arizona ("Site Visit Report"), filed on August 20, 2003. Because the Site Visit Report is not authority, and because Plaintiffs' Notice is an

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<sup>1</sup> Counsel for Interior Defendants has consulted with counsel for Plaintiffs, who stated that Plaintiffs will oppose this motion.

illegitimate effort to place evidence before the Court after the record of the Phase 1.5 trial has been closed, Plaintiffs' Notice of Supplemental Authority should be stricken.

**The Court Should Strike Plaintiffs' Notice of Supplemental Authority**

Plaintiffs mischaracterize the Special Master's Site Visit Report as "supplemental authority" to provide support for pleadings filed in conjunction with the recently completed Phase 1.5 trial. The Site Visit Report contains the Special Master's opinions and conclusions about Interior's appraisal practices. Plaintiffs' Notice should be stricken because it is fatally defective for three independent reasons: (1) Plaintiffs are improperly attempting to supplement the record of the Phase 1.5 trial; (2) the Site Visit Report is merely advisory; and (3) the Site Visit Report is not "authority." Any one of these defects calls for Plaintiffs' Notice to be stricken.

**A. Plaintiffs' Notice Is An Impermissible Attempt To Supplement the Phase 1.5 Trial Record**

The record of the Phase 1.5 trial, which concluded on July 8, 2003, is now closed. No more evidence may be introduced. Nonetheless, Plaintiffs improperly attempt to supplement the record by characterizing evidence as "supplemental authority." Plaintiffs specifically state:

[Special Master] findings further confirm findings of this Court that an accounting is impossible, the Trial 1.5 testimony of plaintiffs' experts, and the validity of plaintiffs' plan to utilize the most accurate and reliable data and other information to restate the individual Indian trust balances.<sup>2</sup>

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<sup>2</sup> This statement is a misrepresentation of fact. This Court has already ruled that appraisals "are important for evaluating whether the trustee is managing the underlying assets prudently," but "asset management is not part of this lawsuit." Cobell v. Babbitt, 91 F. Supp. 2d 1, 18 (D.D.C. 1999).

Plaintiffs thus mischaracterize the facts and disregard the law of the case by contending that the

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Accordingly, plaintiffs submit the Navajo Report as supplemental authority for the adoption of Plaintiffs' Proposed Findings of Fact and Conclusions of Law with respect to: the inadequacy of defendants' proposed "accounting" plan; the adoption of Plaintiffs' Plan on Determining Accurate Balances for the Individual Indian Trust as a reasonable methodology for calculating and determining accurate balances in the Individual Indian Trust; and, the setting of a date certain for Trial 2 without further delay.

Plaintiffs' Notice at 2 (footnote omitted).

Plaintiffs cite no authority for their naked attempt to supplement the closed record of the Phase 1.5 trial. Such an effort must be preceded by a motion that demonstrates good cause to reopen or supplement a trial record. See, e.g., In Re Weiner, 161 F.3d 1216 (9th Cir. 1998) (bankruptcy court's decision on motion to reopen or to supplement trial record is reviewed for abuse of discretion); S.E.C. v. Rogers, 790 F.2d 1450 (9th Cir. 1986) (court of appeals reviews district court's denial of motion to reopen or supplement trial record for abuse of discretion); Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla.1992) (unopposed Motion to Supplement Trial Record with additional exhibits granted); Pathman Const. Co. v. United States, 10 Cl. Ct. 142 (1986) (Plaintiff's motion to supplement the record granted); Good v. Weinberger, 389 F. Supp. 350 (W.D. Pa.1975) (Secretary of Department of Defense filed a motion to reopen the trial record); see also Fed. R. Civ. P. 59(a) (motion for new trial may permit the taking of additional testimony); Fed. R. Civ. P. 60(b)(2) (motion for relief based on newly discovered evidence). As demonstrated above, no good cause exists for such a motion.

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<sup>2</sup>(...continued)

appraisals discussed in the Special Master's report have some relevance to the accounting issues now before the Court when they are plainly inapposite.

**B. The Special Master's Site Visit Report Is Advisory**

Plaintiffs' Notice is defective for a second reason. Special master reports are advisory until they are acted upon by a court. United States v. Raddatz, 447 U.S. 667, 683 n.11 (1980); Basey v. Gallagher, 87 U.S. 670, 680 (1874); United States v. Microsoft Corp., 147 F.3d 935, 955 (D.C. Cir. 1998) ("a special master's findings and conclusions are always advisory") (emphasis in original). Thus, the Special Master's Site Visit Report is not a judicial opinion, memorandum, or order, and it is not proper to cite it in a notice of supplemental authority. Plaintiffs are attempting to have the Court attach weight to a report that, under the law, is of no effect. D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1947) ("The report of the master is advisory only and is without effect until confirmed by the court.").

At best, Plaintiffs' filing is premature and relies upon a defective and deficient report. As noted in Defendants' response to the Special Master's Site Visit Report,<sup>3</sup> which asks the Court to reject the report in toto and which is incorporated herein by reference, the report in question contains findings that are based on an incomplete record, relies upon extra record documents, was issued without affording Interior Defendants any hearing or other hint of the requisite procedural protections, and principally involved other matters (i.e., appraisal valuations and alleged underpriced right-of-way leases) that are

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<sup>3</sup> The full title of Interior Defendants' response, filed September 4, 2003, is "Interior Defendants' (1) Response and Objections to Special Master's Site Visit Report to the Office of Appraisal Services in Gallup, New Mexico and the Bureau of Indian Affairs Navajo Realty Office in Window Rock, Arizona ('Site Visit Report') and (2) Opposition to Plaintiffs' Motion to Adopt Site Visit Report."

plainly beyond this Court's subject matter jurisdiction. Last but not least, the author of this report, Special Master Balaran, is demonstrably biased and is the subject of a motion for disqualification filed over three months ago, on May 29, 2003.

**C. Plaintiffs' Notice Is Not "Supplemental Authority"**

Notices of supplemental authority are routinely used to advise or inform courts of judicial opinions or orders, or other authorities such as statutes or regulations, believed to be relevant to a proceeding in litigation. The use of a notice of supplemental authorities is prescribed in Federal Rule of Appellate Procedure 28(j):

Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision--a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Although it applies to filings in appellate proceedings, the rule's language is nonetheless instructive because it reflects and corroborates the plain meaning of the word "authority" in the context of legal proceedings.<sup>4</sup> Notices of supplemental authorities in this Court generally follow suit and have informed

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<sup>4</sup> Reinforcing this common sense interpretation is Black's Law Dictionary definition of the word "authorities":

Citations to statutes, precedents, judicial decisions, and text-books of the law, made on the argument of questions of law or the trial of causes before a court, in support of the legal positions contended for, or

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the Court of a judicial ruling and its relevance to pending proceedings. See, e.g., Lynom v. Widall, 222 F. Supp. 2d 1, 3-4 (D.D.C. 2002) (citation to recently issued Supreme Court decision on issue regarding application for fees); American Min. Congress v. U.S. Army Corps of Engineers, 120 F. Supp. 2d 23, 28 n.7 (D.D.C. 2000) (citation to Fourth Circuit decision in support of argument to deny motion to compel compliance with injunction); American Chiropractic Ass'n v. Shalala, 108 F. Supp. 2d 1, 10 n.7 (D.D.C. 2000) (citation to recently issued Supreme Court decision to support motion to dismiss); Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co., 842 F. Supp. 575, 582 (D.D.C. 1994) (citation to Eighth Circuit opinion on pending joint motion for summary judgment); Beverly Hosp. v. Bowen, No. 86-3079, 1987 WL 19217 (D.D.C. Oct. 20, 1987) (citation to an opinion issued in the district court of the Western District of Wisconsin and its effect on agency's interpretation of a regulation which was challenged in motion for summary judgment); Stormont-Vail Reg'l Medical Ctr. v. Bowen, 645 F. Supp. 1182, 1190 (D.D.C. 1986) (citation to recently issued D.C. Circuit opinion in opposition to motion for summary judgment). But see Cobell v. Norton, 213 F.R.D. 33, 36 (D.D.C. 2003) (notice of supplemental authority cited Department of the Interior press statement).

The term "authorities," however, does not include the misuse of the "notice" filing to provide a court additional incomplete and incompetent evidence on a matter under consideration following trial.

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<sup>4</sup>(...continued)

adduced to fortify the opinion of a court or of a text writer upon any question. Authorities may be either primary (e.g., statutes, court decisions, regulations), or secondary (e.g., Restatements, treatises).

Black's Law Dictionary, 121 (5<sup>th</sup> Ed. 1979).

that each side's proposed findings of fact and conclusions of law would not be subjected to responsive pleadings. Thus, Plaintiffs have absolutely no basis for this new "supplemental" pleading.

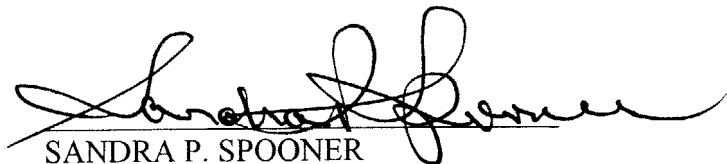
**CONCLUSION**

Plaintiffs' Notice of Supplemental Authority should be stricken as an improper attempt to supplement the Phase 1.5 trial record because the trial is complete and because the Special Master's Site Visit Report is not "authority."

Dated: September 23, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 23, 2003 I served the foregoing *Interior Defendants' Motion to Strike Notice of Supplemental Authority in Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law Dated August 4, 2003 and in Support of Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust, Dated January 6, 2003* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.  
Native American Rights Fund  
1712 N Street, N.W.  
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By Facsimile and U.S. Mail upon:

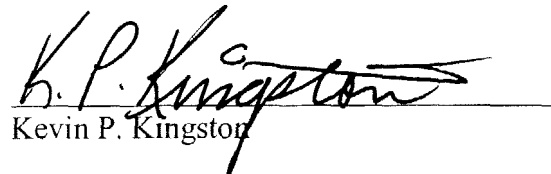
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Per the Court's Order of April 17, 2003,  
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