IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,	
Plaintiffs,	No. 1:96CV01285
v.	(Joseph S. Kieffer, III Special Master-Monitor)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

INTERIOR DEFENDANTS' STATUS REPORT ON DISCOVERY RELATING TO TRIAL PHASE 1.5

To aid the Special Master-Monitor in facilitating discovery for phase 1.5, working with the parties to reach agreement where possible, and identifying issues that require resolution, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Defendants") submit this Status Report On Discovery Relating to Trial Phase 1.5. In his letter to all counsel, dated October 14, 2002, the Special Master-Monitor asked the parties to attend a discovery conference on October 18, 2002; this submission is also intended to assist the progress of that conference.

A. Current Discovery Developments Following The Last Conference

Counsel for the parties met for a full day of consultations with the Special Master-Monitor on October 3, 2002. During the conference, Defendants and Plaintiffs proposed and discussed the dates with the Special Master-Monitor for the conduct of discovery, given the Court's imposed deadlines of January 6, 2003, for filing of any plans; January 31, 2003, for moving for summary judgment; and May 1, 2003, for trial of phase 1.5.

Several other discovery topics were addressed at the October 3 conference as well, such as Defendants' affirmative discovery, see Hearing Transcript of October 3, 2002 at 110-34

[hereinafter cited as "Tr."], disputed discovery requests served previously by Plaintiffs, Tr. at 206-10, depositions each side plans to take, Tr. 200-01, and how discovery disputes might be addressed during this phase, Tr. at 158-59, 163-64. The Special Master-Monitor took these issues under advisement. He asked for further information in some cases and indicated that he would draft a proposed discovery schedule and ex parte proposal reflecting the parties' comments and concerns.

On October 4, 2002, the Special Master-Monitor declined to entertain Plaintiffs' requests concerning their previous, disputed discovery requests and referred Plaintiffs to Special Master Balaran. The Special Master-Monitor also filed a Report and Recommendation addressing Plaintiffs' Motion to Unseal Document Filed Under Seal by Court Monitor. On October 7, 2002, the Special Master-Monitor faxed the parties a letter, asking the parties to confer on an attached draft discovery schedule and submit comments on the schedule by October 9, 2002. The Special Master-Monitor solicited comments on draft guidelines he circulated concerning ex parte contacts.

Per the Special Master-Monitor's request, Defendants' counsel called Plaintiffs' counsel and consulted with them on October 9, 2002.[1] Defendants' counsel discussed at length with Mr. Brown, for Plaintiffs, the advantages to all concerned of stipulating to a scheduling order setting out deadlines for discovery, while the parties continued to work on specific language, satisfactory to both sides, to govern the process by which any discovery will be expedited or extended and the means by which discovery disputes might be resolved.

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[1]Four attorneys from Justice, including Mr. Petrie, Mr. Stemplewicz, Mr. Quinn and Phil Seligman, made themselves available to discuss the discovery schedule with Plaintiffs' counsel. We attempted to reach Keith Harper by telephone and then spoke with Mr. Brown when Mr. Harper could not be reached.

As Defendants explained to Mr. Brown, this procedure made sense for two reasons. *First,* the parties were in complete agreement on the dates for the discovery milestones. *Second,* both sides recognized that the draft proposed order did not fully address the discovery ground rules for phase 1.5 that may deviate from the Federal Rules of Civil Procedure.

Toward the end of the conference call, Mr. Brown inquired whether Defendants' counsel would be ready to discuss specific language later in the day. Contrary to assertions by Mr. Brown in his letter to the Special Master-Monitor, dated October 10, 2002 (at paragraph 2), Defendants' counsel told Mr. Brown they were not sure whether they could be ready to discuss specific wording later that day. On Defendants' behalf, Mr. Quinn telephoned Mr. Brown again about 3:45 p.m. that same day and reached an agreement to confer on these issues again the next day at 11:00 a.m. Defendants also agreed to consider whatever discovery terms Plaintiffs indicated they would propose in their October 9 letter to the Special Master-Monitor about the discovery schedule.

Plaintiffs' counsel then abandoned this arrangement the very next day. On October 9, Defendants submitted and served their letter to the Special Master-Monitor, but received no letter from Plaintiffs concerning the discovery schedule.[2] The first letter Defendants' counsel received on these topics was Mr. Brown's October 10 letter to the Special Master-Monitor, which cancelled the telephone conference planned for October 10 and made a rash of false and totally unfounded representations to the Special Master-Monitor. Consequently, the parties did not confer about

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[2]Defendants were unaware of Mr. Brown's October 9 letter until Mr. Quinn called Mr. Brown concerning his letter of October 10. Mr. Brown stated that he had faxed his October 9 letter to Mr. Petrie and that he had a confirmation of the transmission. Mr. Brown then faxed a courtesy copy of the October 9 letter but did not send the confirmation sheet.

what specific discovery ground rules beyond the Federal Rules of Civil Procedure should be adopted for this phase.

Subsequently, the Special Master-Monitor submitted a Report and Recommendation, dated October 14, 2002, supporting the discovery schedule stipulated to by both sides. By letter to the parties, dated October 14, 2002, the Special Master-Monitor also asked the parties to meet in conference with him on Friday, October 18, 2002, to address remaining discovery issues.

B. Discovery Matters Addressed in the Special Master-Monitor's Letter Of October 14

To facilitate discussion during the conference on October 18 and to forestall any confusion as to Defendants' position, Defendants submit this summary of their understanding of the matters enumerated as "agreements" in the Special Master-Monitor's letter to counsel, dated October 14, 2002, at 3-5. The Special Master-Monitor expressly noted that "[i]f this list missed recognizing any agreement between the parties made at the October 3, 2002 discovery conference or [if] a party objects to the interpretation of an agreement, these issues can be raised at the status conference to be held this Friday, October 18, 2002." Id. at 5, note 6.

Defendants' position regarding the enumerated items can be summarized as follows:

1. Defendants' Discovery. The Discovery Period opened on October 7 by stipulation. As the Special Master-Monitor has noted, the Federal Rules of Civil Procedure govern the process unless the parties agree to specific departures from the Rules. Those Rules provide for discovery by *both* parties. See, e.g., Fed. R. Civ. P. 26(b)(1)("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ."). Defendants' ability to conduct discovery has not been limited by Court order. Although the

Special Master-Monitor has inquired whether Defendants should be so entitled, Defendants have briefed the issue[3] and addressed it in conference on October 3. It is Defendants' position that they are entitled to proceed with discovery unless ordered otherwise.

No agreement was reached concerning whether Defendants are required to "clear" discovery requests with the Special Master before propounding them. To the contrary, Plaintiffs proposed a procedure requiring Defendants to submit their discovery requests to the Special Master-Monitor for approval, but the Special Master-Monitor did not adopt such an arrangement. See Tr. at 141-43. Defendants' entitlement to discovery must be as broad as Plaintiffs' right in order to ensure due process.[4]

Plaintiffs, moreover, are amply protected under the Rules from undue burdens or harassment. The Rules specifically permit any party to seek a protective order against discovery requests that either present a special hardship or seek to impose discovery obligations that are broader than what Rule 26 allows. Thus, even without any further agreement by the parties, either side remains entitled during this phase to petition the Special Master-Monitor for relief. Moreover, as Defendants suggest further below (Part C, Section 3), there may be a better approach to addressing these issues without adopting a blanket restriction.

Finally, Defendants cannot overemphasize the fundamental importance of affording discovery to *both* sides in an even-handed manner. The guaranteed access to discovery in preparing for trial is inherent in, and a principal basis for, the Federal Rules of Civil Procedure,

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[3]See Interior Defendants Statement Regarding Discovery, filed October 1, 2002.

[4]If the Special Master-Monitor anticipates filing a recommendation to the Court that Defendants' discovery right should be limited, Defendants respectfully urge the Special Master-Monitor to file his submission without delay, so that Defendants are not prejudiced by a delay in resolving this issue.

and Defendants have approached this entire process with the expectation that they will receive due process and not be subjected to unfair surprise. Defendants noted this expectation and set it forth explicitly as a condition on their agreement to the discovery schedule that has since been recommended to the Court. Indeed, if denied this fundamental, inherent right to discovery, the entire process is subject to objection. That does not mean that Defendants will not comply with the orders of the Court or duties imposed upon them in discovery, but to preserve their objections, Defendants cannot to stipulate to discovery arrangements if, in fact, discovery is to be denied them.

2. Party Depositions. Defendants have proposed to Plaintiffs, at the Special Master-Monitors' direction, deposition dates for three Department of the Interior witnesses, James Cason, Ross Swimmer, and Stephen Griles. Plaintiffs expressed a desire to conduct all three depositions during one three-week window, October 21, through November 12, 2002, which happens to coincide with a tribal conference and preparation of the next Quarterly Report to the Court, due November 1. In light of the witnesses' busy schedules and Plaintiffs' preferred window, Defendants proposed November 5, 6 and 7 for each witness. Defendants have also provided some alternative dates for witnesses where dates were available. The alternative dates include November 4 for Mr. Cason and November 12, 13 and 14 for Mr. Griles. As of this writing, Plaintiffs have not responded to the proposed dates.

In light of the Special Master-Monitor's Report and Recommendation regarding the deposition of these three officials of the Department of the Interior, Defendants will produce these witnesses for deposition. For the record, however, Defendants continue to object to discovery in general and reserve the right to object to the continuation of any deposition if it becomes

repetitive, harassing or a waste of time.

Defendants do consent to holding more than one day of deposition for these witnesses, so long as the arrangement is mutual. A multiple day deposition, extending beyond one seven hour session, is a departure from the Federal Rules, see Fed. R. Civ. P. 30(d)(2) ("Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours."), and so fairness dictates that any agreement extending or broadening one party's discovery obligations must be reciprocal.

Plaintiffs have demanded that these three witnesses appear for up to 21 hours of deposition apiece (3 days of 7 hour sessions) and that they be produced again after January 6, as needed, for further depositions of undetermined length. Defendants continue to question whether Plaintiffs require more than 21 hours of any witness in total, and Plaintiffs have made no showing to demonstrate their need for such prolonged oral discovery of these witnesses. See Tr. at 197. Defendants would prefer to agree on an overall time limit, rather than leave the matter open-ended and subject to a future motion for protective order. Defendants propose that these witnesses appear for no more than a total of 21 hours of deposition each, with time divided between pre-January 6 and post January 6, as Plaintiffs determine. Permitting Plaintiffs to take depositions without a set time limit is an invitation to frolic and detour that is wasteful of the limited time available in this phase. Defendants, therefore, respectfully again urge the Special Master-Monitor to recommend a maximum time limit on depositions and otherwise reserve their right to move for a protective order in the event a deposition becomes harassing or manifestly unproductive.

Finally, Plaintiffs stated they desired to "sequester" the witnesses, Messrs. Griles, Cason

and Swimmer, which Defendants understood to be some arrangement wherein none of these witnesses could review or discuss their deposition testimony with the other witnesses until the depositions were all completed. Tr. at 229. Defendants agreed only to consider such a proposal and the Special Master-Monitor directed Plaintiffs to submit a proposed form of sequestration. Tr. at 230. Plaintiffs proposed some language in their letter (at page 4-5), dated October 9, to the Special Master-Monitor. Plaintiffs are concerned that the language proposed is overly broad and problematic. Plaintiffs proposed the following operative limitation: "The contents of the depositions, including without limitation the questions asked and the answers given, shall not, in form or substance, be discussed with or revealed to any persons or entities . . . ." Defendants propose using language such as the following: "The contents of a witness' testimony shall not, in form or substance, be discussed with or revealed to any persons or entities other than counsel." Defendants' alternative is closer to that employed by Special Master Balaran as part of the IT Security investigation, and Defendants plan to propose a specific form of order at the conference.

3. Existing Discovery Requests of Plaintiffs. For the record, it is Defendants' understanding that the Special Master-Monitor declined Plaintiffs' entreaty to consider discovery issues as they concern Treasury or Paragraph 19 matters at the October 3 conference. Subsequently, by letter dated October 4, 2002, the Special Master-Monitor declined to consider issues concerning Plaintiffs' existing and previously served discovery requests and advised Plaintiffs to bring those matters to the attention of Special Master Balaran, who had previously dealt with issues relating to these requests.

4. Location for Production of Documents. At the October 3 conference, Plaintiffs advocated that all documents must be produced to them at their offices in Washington.

Defendants opposed this as a blanket rule, urging that some productions because of their size, breadth or the condition of documents themselves could make production in Washington wasteful, overly burdensome and/or time consuming. Tr. at 216, 221-22. The Special Master-Monitor then appeared to suggest a case by case review of document production requests, whereby the producing party would notify the Special Master-Monitor of an anticipated difficulty with relevant requested documents, followed by some kind of mutual effort to determine the best course for completing the production in an efficient manner. Tr. at 219-20, 222. Defendants understood this would involve a cooperative effort but not an agreement to undertake a burden on Defendants to produce every document requested in Washington, D.C. absent a protective order. While Defendants remain amenable to a cooperative effort on documents, no specific language has as yet been proposed.

5. Nonparty Discovery. Defendants did agree to seek voluntary cooperation in discovery of nonparties that Defendants "control" within the meaning of the Rules. Defendants also noted, however, that many nonparties may still require service of a subpoena, in which case, Defendants will notify Plaintiffs. Likewise, many other (i.e., "nonparty") federal departments and agencies have specific regulations requiring service of a subpoena, which neither Defendants nor their counsel have the authority to waive.

In addition, it is not within the power of this Court to mandate that a deposition of nonparty witnesses occur in Washington, D.C. if that witness resides more than 100 miles outside the District of Columbia. Fed. R. Civ. P. 45(b)(2)("a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of deposition . . . [or] production"). Thus, the parties must recognize that some

nonparty depositions may occur at locations outside Washington, where the witness is found, as is the ordinary course in any national litigation.

6. Ernst & Young Depositions. At the October 3 conference, Tr. at 212, the parties did briefly discuss the possibility of a deposition of someone from Ernst & Young, but the date, location, duration and other aspects of such a deposition were not even considered. These remain open issues that need to be addressed by the parties.

7. Extensions of Discovery and "Surprise" Witnesses. During the October 3 conference, when discussing the usefulness of having each side exchange a list of potential witnesses during discovery, the issue arose of avoiding "surprise" witnesses showing up on one side's trial witness list that the opposing side had not had an opportunity to depose previously. The Special Master-Monitor suggested that he would favor allowing a deposition to be held "out of time" in order to prevent unfair surprise. Defendants submit that this understanding be entered as a formal agreement for this phase of the case.[5]

8. APA Objections & Discovery. Defendants desire to clarify their continuing, consistent position concerning their objections based upon the Administrative Procedure Act and the discovery to be undertaken in preparation for the phase 1.5 trial. The APA issue has been briefed and discussed at length, but there still appears to be a misconception about how that objection will impact this phase of the proceedings. See Letter of Joseph S. Kieffer to the parties, dated October 14, 2002, at 3, note 3 and accompanying text. Although Defendants continue to assert their objections based upon the APA and to reserve them for appeal, this objection has not

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[5]Again, inherent in all of Defendants' positions on discovery is the well-founded expectation that Defendants will be able to conduct their own discovery.

interfered in any way with phase 1.5 discovery and should not "continue to interfere with. . .this discovery" as the Special Master-Monitor, with all due respect, has asserted. Id. at 2-3.

In short, the United States is immune from suit unless it waives that immunity. The APA is admittedly the only basis on which Plaintiffs may maintain an action against the United States. If the APA is the basis for suit, then the action must proceed according to the dictates of the APA, which does not permit discovery in the manner directed by the Court here. Notwithstanding this limitation, the Court has ordered that discovery occur, and Defendants will comply with that order. Defendants, however, intend fully to reserve the issue for appeal and so will continue, where appropriate, to note their continuing objections to the proceedings based on the APA. As Mr. Stemplewicz expressly stated at the October 3, 2002 hearing, these objections will not be used as a basis for refusing to provide discovery, Tr. at 125-26, absent a superceding court order.

C. Additional Discovery Issues That Need To Be Addressed

1. Deposition Dates for the Five Named Plaintiffs. Defendants have previously noticed Eloise Cobell for deposition. Defendants propose that all five named Plaintiffs appear for deposition for at least one day initially, beginning with Ms. Cobell. Given Plaintiffs' desire to hold all depositions in Washington, all these depositions will be held in D.C. Defendants request that Plaintiffs consult with their clients and propose dates for these depositions during the period, November 12 through November 26, 2002, within the next week.

2. Responses to Defendants' Outstanding Discovery Requests. Defendants have previously served Plaintiffs with discovery requests that are directly relevant to phase 1.5. These include one very limited document request, which contains a mere five requests. This was served on June 5, 2002, so Plaintiffs have had already had time to review these requests for production

with their clients. Plaintiffs have pending a motion for a protective order asserting a blanket challenge that Defendants should not receive discovery because of alleged failures in Defendants' own production. Given the Court's intervening orders, Defendants believe the asserted basis for the protective order is rendered moot, and Plaintiffs should produce these documents forthwith. In any event, Defendants require this production in advance of the depositions of the individual Plaintiffs.

3. Communications Between The Parties. Clear communications between the parties and among the parties and the Special Master-Monitor remain a major concern. Defendants believe the Special Master-Monitor's decision to avoid any ex parte communications is the only approach that will minimize the potential for miscommunication that can result from such contacts.

Defendants remain concerned that communication between the parties will also be more likely to be misinterpreted and misconstrued unless those consultations are recorded by stenography. The parties' consultations concerning comments on the Special Master-Monitor's draft proposed discovery schedule underscores the difficulty of maintaining clear communications in this case. Defendants' counsel called Mr. Brown on October 9, 2002 to discuss at length the parties' respective views and concerns about the draft proposed discovery order that the Special Master-Monitor had circulated for comment. Mr. Brown's letter of October 10, 2002, to the Special Master-Monitor, however, mischaracterized Defendants' objections to the draft schedule and was wholly at odds with the extended discussion the parties had on October 9. Contrary to Mr. Brown's statement, Defendants' objections are not "a direct challenge" to the "jurisdiction and authority" of the Special Master-Monitor. Defendants' counsel plainly told Mr. Brown on

October 9 that the language concerning discovery procedures was inadequate and incomplete. Mr. Brown agreed that they were incomplete. Defendants stated their desire to agree on the schedule, advise the Special Master-Monitor of the parties' agreement on the dates, and then consult further to develop language for discovery guidelines.[6] It was flatly wrong for Plaintiffs to pretend that our objection to the *wording* was a rejection of the concept.

It was particularly outrageous for Plaintiffs -- having had the benefit of a full explanation of our position and knowing Defendants' express willingness to work on wording for discovery guidelines -- to claim that Defendants' reservation of rights by way of objection somehow "manifests bad faith and an apparent intention to obstruct the judicial process." They are patently wrong.[7]

Given this experience, Defendants recommend that the parties meet for regular, perhaps biweekly, conferences before the Special Master-Monitor to address pending discovery on an ongoing basis. Such conferences, on the record, will afford a forum for each side to disclose problems in responding to discovery requests and other problems as they become evident.

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[6]For example, at the October 3 conference, the parties discussed the concept of flagging any discovery problems early and not waiting until the response deadline to identify them. The draft discovery order mentioned a document production deadline but offered no mechanism for addressing and resolving discovery problems early. Although Plaintiffs characterize the draft order's partial treatment as "innocuous," Defendants considered it dangerous to address only half an issue at a time.

[7]Defendants also note their vigorous disagreement with the denouncement in Mr. Browns' letter of the Special Master-Monitor's discovery conference on October 3 and the subsequent party consultations as a "colossal waste of . . .time." Letter of Mark Kester Brown, dated October 11, 2002, to Joseph S. Kieffer, III at 1. That is a label better reserved for the diatribe and false accusations made in Plaintiffs' own letter. The parties had come to agreement on all pre-trial dates. We had agreed to consult further on language for specific phase 1.5 discovery guidelines, and that dialog only ended because Plaintiffs' counsel unilaterally decided not to participate in a telephone conference slated for October 10. It is time to stop histrionics and aspersions and get on with the huge task ahead. Defendants remain prepared and committed to plan, conduct and complete discovery in an orderly, fair and efficient manner.

Defendants submit that this approach is superior to the "early protective order" approach suggested by Plaintiffs. See Letter from Mark Kester Brown, dated October 9, 2002, to Joseph S. Kieffer, III, at 2. Regular conferences will force the parties to focus on the discovery matters at hand and will keep the Special Master-Monitor apprised of the course of discovery. It also would permit the Special Master-Monitor an opportunity to work out a resolution with the parties, as problems arise.

Finally, Defendants also request an opportunity to clarify with the Special Master-Monitor his list of procedures for addressing discovery issues that is set out in his letter to counsel, dated October 14, 2002.

Dated: October 18, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 17, 2002 I served the foregoing *Interior Defendants' Status Report on Discovery Relating to Trial Phase 1.5* by facsimile, in accordance with their written request of October 31, 2001 upon:

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