

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2003 OCT 14 PM 12: 28

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

Case No. 1:96CV01285
(Judge Lamberth)

NANCY M.
MAYER-WHITTINGTON
CLERK

**INTERIOR DEFENDANTS' OPPOSITION TO
PLAINTIFFS' CONSOLIDATED MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Interior Defendants respectfully submit this opposition to Plaintiffs' Consolidated Motion for Temporary Restraining Order And Motion For Preliminary Injunction ("Plaintiffs' Motion"). Plaintiffs' Motion derives solely from Interior Defendants' insistence that the Special Master provide advance notice to counsel of proposed site visits so that counsel has an opportunity to accompany him on such visits. The order governing the Special Master's authority does not provide him with the power to conduct site visits outside the presence of counsel, and no evidence exists that counsel has ever obstructed the Special Master in his work when accompanying him on site visits. The notion put forth by Plaintiffs that the mere presence of Interior Defendants' counsel at site visits has placed individual Indian trust records "at risk of imminent loss and destruction" is absurd. Weighed against the high threshold that Plaintiffs must meet to obtain the extraordinary relief they seek, Plaintiffs' motion is patently deficient and should be denied.

PERTINENT BACKGROUND

On August 12, 1999, with consent of the parties, the Court adopted two orders relating to the retention of individual Indian trust records by the Department of the Interior (“Interior”) and the Department of the Treasury (“Treasury”). Order (Aug. 12, 1999) (adopting Order Regarding Interior Department IIM Records Retention (“Interior Order”) and Order Regarding Treasury Department IIM Records Retention (“Treasury Order”)). These orders provided, inter alia, “that Alan L. Balaran, Special Master (‘Special Master’), is hereby authorized to oversee the Interior [Treasury] Department’s retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are maintained.” Interior Order at 2; Treasury Order at 2. They further required Interior and Treasury to distribute attached memoranda relating to trust document and data retention to “each employee with custody of IIM Records” and to other entities. Interior Order at 1; Treasury Order at 1. The memorandum to be distributed to employees by Interior and Treasury included the following information:

Moreover, preservation of records identified in Attachment A is a responsibility that can be enforced by the Court presiding over the Cobell litigation. As the Order of July __, 1999, directs, the Special Master appointed by the Court, Alan Balaran, is authorized to oversee and independently verify our compliance with our document retention responsibilities. Mr. Balaran may exercise his responsibilities by visiting any location where IIM records are maintained and inspecting the IIM records at that location. These inspections may occur with no advance notice. Please provide full cooperation should Mr. Balaran visit your office.

Interior Order, Memorandum Attachment at 2; Treasury Order, Memorandum Attachment at 2. Thus, the memorandum informed Interior and Treasury employees that a site visit by the

Special Master may occur without them receiving advance notice of the visit.

The August 12, 1999 Order includes no provision authorizing the Special Master to conduct site visits outside the presence of counsel, *i.e.*, ex parte. Although reports issued by the Special Master indicate that, after the Order was entered, he conducted some site visits outside the presence of counsel, he assured Interior Defendants' counsel in a meeting held on October 28, 2002 that he would no longer do so. Letter from Sandra P. Spooner, Department of Justice, to Alan L. Balaran, Special Master (Oct. 28, 2002) ("At our meeting this morning on records-management, we agreed that you would make your visits to Interior offices after notice to counsel so that they would have an opportunity to accompany you and assist, as necessary, in obtaining access to Interior facilities.") (copy attached to Exhibit 1 of Plaintiffs' Motion).¹ To Interior Defendants' knowledge, the practice of the Special Master subsequent to that meeting generally has been to notify counsel of an intended visit, and for Interior Defendants' counsel to accompany the Special Master on the visit.

¹ Plaintiffs' counsel complains at length, in a letter submitted to the Court with Plaintiffs' Motion, that they were not informed of the meeting with the Special Master. See Letter from Dennis Gingold to Sandra P. Spooner, Department of Justice (Oct. 1, 2003) at 3 (copy attached as Exhibit 2 to Plaintiffs' Motion) ("Why did you fail to inform plaintiffs' counsel of this meeting? Why did you conduct this so-called negotiation in the absence of plaintiffs' counsel? Who participated in this *ex parte* negotiation? Why have you failed to provide to plaintiffs' counsel a copy of any written agreement executed by the Interior defendants and the Master? Under what authority do you claim such agreement may be executed absent plaintiffs' participation and consent? . . ."). Plaintiffs' counsel is wrong. Plaintiffs' counsel was provided with notice of the meeting (along with an agenda of the matters to be discussed, which included, inter alia, "Site Visits"), as well as notice of the Special Master's agreement at that meeting to advise counsel prior to conducting a site visit. See Letter from Alan Balaran, Special Master, to Sandra Spooner, Department of Justice, copy to Dennis Gingold (Oct. 28, 2002) (copy attached hereto as Exhibit 1); Letter from Sandra P. Spooner, Department of Justice, to Alan L. Balaran, Special Master, copies to Dennis Gingold and Keith Harper (Oct. 28, 2002) (attached to Exhibit 1 to Plaintiffs' Motion).

Notwithstanding the foregoing, the Special Master visited a Minerals Management Service facility in Dallas on September 26, 2003, without first informing Interior Defendants' counsel and allowing counsel an opportunity to accompany him. Upon learning that the Special Master was conducting an ex parte visit, Interior Defendants' counsel attempted to contact the Special Master on his cellular telephone. When those efforts were unsuccessful, counsel left the Special Master a voicemail message respectfully requesting that he cease any ex parte proceedings. The Special Master subsequently issued a report with respect to the site visit. See Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (undated).²

ARGUMENT

Plaintiffs must satisfy a significant burden to prevail on their motion. The Court must examine whether (1) Plaintiffs have demonstrated a substantial likelihood of success on the merits; (2) Plaintiffs have demonstrated that they will suffer irreparable injury if the relief they seek is denied; (3) the granting of injunctive relief would substantially injure the other party; and (4) the public interest would be served by the granting of the relief. E.g., Davenport v. Int'l Bhd. of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citation omitted). The Supreme Court has observed that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972

² Interior Defendants reserve their right to submit objections to the Special Master's report pursuant to Federal Rule of Civil Procedure 53.

(1997) (emphasis in original; citation omitted). Plaintiffs' motion fails even to approach this high standard.

I. Plaintiffs Have Failed To Demonstrate A Substantial Likelihood Of Success On The Merits Or Irreparable Harm

Plaintiffs have made no showing that they can succeed on their claim that the presence of Interior Defendants' counsel during site visits by the Special Master places individual Indian trust records "at risk of imminent loss and destruction," and such a claim has no support. Nothing Interior Defendants have done restricts the Special Master from conducting site visits in accordance with the August 12, 1999 Order. Indeed, Interior Defendants have acknowledged that he has such authority. See, e.g. Letter from Sandra P. Spooner, Department of Justice, to Alan L. Balaran, Special Master (Sept. 30, 2003) at 1 (attached as Exhibit 1 to Plaintiffs' Motion).

The August 12, 1999 Order, however, does not provide the Special Master with the authority to conduct ex parte site visits. Although the memoranda distributed to Interior and Treasury employees by those agencies pursuant to the Order informs them that they may have no advance notice of visits by the Special Master, nothing in the Order authorizes the Special Master to conduct such visits outside the presence of counsel. The assurance he provided Interior Defendants' counsel during the October 28, 2002 meeting that he would not conduct site visits without first notifying them, and his subsequent practice of providing such notice and being accompanied by Department of Justice counsel on those visits, is consistent with this fundamental notion.

Plaintiffs have not even attempted to support the underlying contention of their motion, that the presence of Interior Defendants' counsel during site visits could somehow cause them irreparable harm. Indeed, there has been no evidence that, on site visits on which he has been accompanied by Department of Justice counsel, the Special Master has been obstructed in any way. Plaintiffs' failure to even address this threshold issue is fatal to their motion. Their reliance, instead, on the general allegation that trust records are now "at risk of imminent loss and destruction" -- without any explanation as to how the presence of Interior Defendants' counsel at site visits could possibly result in such harm -- falls woefully short of establishing a substantial likelihood on the merits and irreparable harm.

II. The Granting of the Relief Would Substantially Harm Interior and Not Serve the Public Interest

The effect of the TRO sought by Plaintiffs is clear: to deprive Interior Defendants' counsel of the opportunity to be notified in advance of site visits and to accompany the Special Master on such visits. Whereas the August 12, 1999 Order authorizes the Special Master "to oversee the Interior Department's retention and protection from destruction of IIM records through, among other things, on-site visits to any location where IIM Records are maintained," Interior Order at 2, Plaintiffs' proposed TRO would alter that authority to "unrestricted access to any Interior Department facility and all areas within any such facility, that houses [sic] Trust Records without advance notice to Interior Defendants or their counsel." Plaintiffs' Motion, Proposed Temporary Restraining [sic] Order (emphasis added). Such an order would strip Interior Defendants' counsel of any ability to ascertain whether the Special Master's conduct is in conformity with this Court's reference order and within the

limits on authority established in this case by the Court of Appeals. The potential for harm in this respect is greatly exacerbated in light of the concerns raised in Interior Defendants' pending motion to conform the Special Master's conduct to the limits established by the Court of Appeals³ and in their pending motion to disqualify the Special Master.⁴

Nor would the public interest be served by granting the relief Plaintiffs seek. There has been no indication that the Special Master has been obstructed in his site visits when accompanied by counsel for Interior Defendants, and no benefit would inure to the public by precluding counsel from being present at the site visits. To the contrary, it would disserve the public interest to deny the United States the ability to ascertain how the Special Master is exercising his authority.

³ Interior Defendants' Motion For An Order Directing The Special Master To Conform His Conduct To Limits Stated By The Court Of Appeals; To Vacate Or Clarify Existing Orders As Appropriate; And To Act On This Motion On An Expedited Basis (Sept. 24, 2003). As discussed in that motion, the Special Master has used site visits as a means to investigate issues that are beyond his authority to oversee the retention and protection of trust documents. See id. at 2-3, 6-7 (Special Master's August 20, 2003 report, detailing site visits to Office of Appraisal Services in Gallup, New Mexico, and a Bureau of Indian Affairs office in Window Rock, Arizona, included examination of issues and findings relating to appraisal practices for rights of way over the allotments of Indian beneficiaries).

⁴ Interior Defendants' Motion to Disqualify Special Master Balaran (May 29, 2003) (Special Master's conduct demonstrates actual bias and mandates disqualification); see also Cobell v. Norton, 334 F.3d at 1139 ("When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable.").

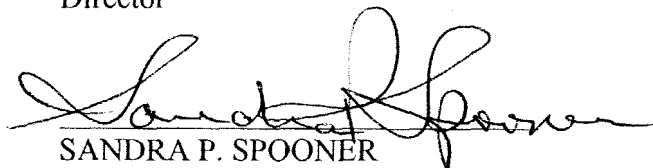
CONCLUSION

For all of the foregoing reasons, Interior Defendants respectfully request that
Plaintiffs' Motion be denied.

Dated: October 14, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
GINO D. VISSICCHIO
TIMOTHY E. CURLEY
Trial Attorneys
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| _____ |) | |
| ELOUISE PEPION COBELL, <u>et al.</u> , |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | Case No. 1:96CV01285 |
| |) | (Judge Lamberth) |
| GALE NORTON, Secretary of the Interior, <u>et al.</u> , |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

ORDER

This matter comes before the Court on Plaintiffs' *Plaintiffs' Consolidated Motion for Temporary Restraining Order and Motion for Preliminary Injunction*. [Dkt. #2319] Upon consideration of the Plaintiffs' Motion, Interior Defendants' Opposition, and any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is, DENIED.

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

Sandra P. Spooner, Esq
John T. Stemplewicz, Esq
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
607 14th Street, NW, Box 6
Washington, D.C. 20005
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006
(202) 986-8477

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

LAW OFFICE

ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.
TWELFTH FLOOR
WASHINGTON, D.C. 20006
TELEPHONE (202) 466-5010
FAX (202) 986-8477
E-MAIL: abalaran@erols.com

October 28, 2002

VIA FACSIMILE

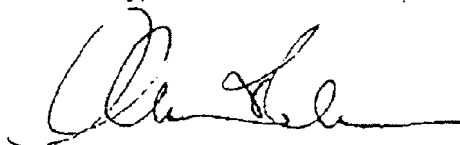
Sandra Spooner
UNITED STATES DEPARTMENT OF JUSTICE
Civil Division - Commercial Litigation Branch
P.O. Box 875
Ben Franklin Station
Washington, DC 20044-0875

RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285
Agenda for Meeting October 28, 2002

I am enclosing a copy of a proposed agenda for today's meeting. As you will note, the focus will be on Trust Records.

Thank you.

Sincerely,



Alan Balaran
SPECIAL MASTER

cc: Dennis Gingold, Esq.
Enclosure

PROPOSED AGENDA FOR MEETING TUESDAY, OCTOBER 28, 2002**I. Definition of Trust Data**

Projected Date for Completion

II. Trust Records

1. Records Updates - 16 BIAM
2. Staffing
3. Site Visits
4. Trust-related Training for Field Personnel
5. Letter Allowing Special Master/agents Access to Field Sites
6. Labatt Contract
7. Findings Following MMS Survey/interviews of OTR Employees
8. Findings Following Survey Conducted by Michelle Chavez Filling of Vacancies
9. Role for 14 Additional Records Management Specialists Identified in '03 Budget
10. Filling of OTR Directorship
11. Proposed Protocol for Transferring Boxes
12. Any Reports of Missing Boxes - What about 35 Missing Winnebago Boxes and 1 Arapaho Box
13. Protocol for Monitoring Boxes Given to Contractors
14. Status of Action Plans
15. Training for Haspell, E. Abeita and Alan Balaran in Records Management - (Mark Ferguson (Denver) Denver National Archives)

MODE = MEMORY TRANSMISSION

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 Civil Division, Commercial Litigation Branch
 Corporate Financial Section
 P.O. Box 875, Ben Franklin Station
 Washington, DC 20044

Fax No.: 202 514-9163 Voice No.: 202 514-7194
 Email: sandra.spooner@usdoj.gov

SENT BY: Sandra P. Spooner

TO: Alan L. Balaran, Esq. **FAX No.:** 202 986-8477
 Dennis M. Gingold, Esq. 202 318-2372
 Keith Harper, Esq. 202-822-0068

DATE: October 3, 2003

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 4

SPECIAL INSTRUCTIONS:

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 14, 2003 I served the foregoing *Interior Defendants' Reply Memorandum in Further Support of Their Motion for Leave to Supplement Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar as it Imposed Sanctions on Interior Defendants and Their Counsel* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Richard A. Guest, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(202) 318-2372

By Facsimile and U.S. Mail upon:

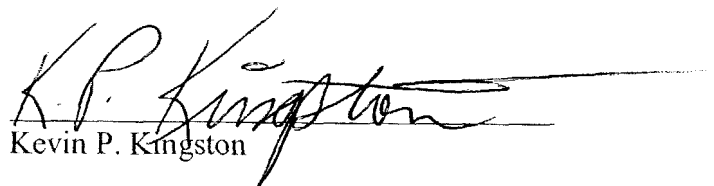
Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W., 13th Floor
Washington, D.C. 20006
(202) 986-8477

Per the Court's Order of April 17, 2003,
by Facsimile and by U.S. Mail upon:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

By U.S. Mail upon:

Elliott Levitas, Esq
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530


Kevin P. Kingston