IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285 (RCL)
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,)		
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' OBJECTIONS TO AND MOTION TO QUASH PLAINTIFFS' SUBPOENA OF MAY 1, 2003

Pursuant to Federal Rule of Civil Procedure 45, Interior Defendants object to and move to quash Plaintiffs' subpoena duces tecum served on May 1, 2003 ("Plaintiffs' Subpoena") (Exhibit A), the first day of the Phase 1.5 trial. Counsel for Interior Defendants conferred with Plaintiffs' counsel who stated that Plaintiffs oppose this motion. Plaintiffs' Subpoena is objectionable and should be quashed because:

(1) the subpoena constitutes a discovery request, which is improper against a party after the discovery cutoff;

(2) the subpoena seeks thousands of documents requested by now-stayed Special Master-Monitor Kieffer in his trust reform monitor role and by Special Master Balaran in his investigative role, which were neither discovery requests nor necessarily relevant to the Phase 1.5 trial;

(3) the subpoena requests tens of thousands of documents that Plaintiffs could have requested before the discovery cutoff for Phase 1.5, including those generally described

by the "Joe Christie Inventory" as well as those requested by the Special Master and Special Master-Monitor;

(4) the subpoena fails to provide a reasonable time for response and is unduly burdensome in seeking tens of thousands of documents during trial; and

(5) the subpoena seeks privileged documents not subject to any exception or waiver.

I. PLAINTIFFS IMPROPERLY ATTEMPT TO DISGUISE A BROAD RULE 34 DISCOVERY REQUEST AS A RULE 45 TRIAL SUBPOENA.

A. Plaintiffs' Subpoena Is a Discovery Request Improperly Served After the Close of Discovery.

Courts have ruled that a Rule 45 subpoena is never proper against a party for any reason. E.g., Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 (D. Mass. 1996); Alper v. United States, 190 F.R.D. 281, 283 (D. Mass. 2000); see also Wright & Miller, 9A Federal Practice & Procedure § 2452 at n.1 (2d ed. 1995 & Supp. 2002). Other courts have determined that Rule 45 does not wholly preclude its use against a party. Such uses are very limited, however, such as obtaining original documents for use at trial where the subpoenaed party has already produced a copy of the document. See e.g., Mortgage Info. Servs. Inc. v. Kitchens, 210 F.R.D. 562, 567 (W.D.N.C. 2002); Rice v. United States, 164 F.R.D. 556, 558 n.1 (N.D. Okla. 1995). Thus, Plaintiffs' Subpoena is defective because its purpose is facially inconsistent with the limited uses of a Rule 45 subpoena on a party.

The subpoena is also defective because it is being used to circumvent the requirements of Rule 34 and the Court's scheduling order, which established a fact discovery cut-off date of March 24, 2003. Phase 1.5 Trial Discovery Schedule Order (Oct. 17, 2002). Plaintiffs' Subpoena seeks a voluminous number of documents. It requests that Secretary Norton "produce at trial the following

documents **pursuant to a definition of terms** that is set forth following these **document categories**." Plaintiffs' Subpoena at 3 (emphasis added). The Subpoena baldly seeks discovery, not specific documents for use at trial. Plaintiffs' designation of the courtroom for the ongoing Phase 1.5 trial as the "place" to produce the requested documents does not convert the Subpoena into a "trial subpoena."

Fundamentally, Rule 45 and the other discovery rules in the Federal Rules of Civil Procedure must be read as a unified whole. See Hickman v. Taylor, 329 U.S. 495, 505 (1947); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C. Cir. 1960); Linder v. Calero-Portocarrero, 183 F.R.D. 314 (D.D.C. 1998); Mortgage Info. Servs., 210 F.R.D. at 566-67. "Allowing a party to use Rule 45 to circumvent the requirements of a court-mandated discovery deadline would clearly be contrary to this approach." Id.; see also 7 Moore's Federal Practice 5 34.03[2][a] (3d ed. 1997) (Rule 45 "should not be used to obtain pretrial production of documents . . . from a party in circumvention of discovery rules or orders"). Importantly, although the Mortgage Info. Servs. court recognized that the text of Rule 45 did not preclude limited use of a subpoena against a party where needed to obtain original documents for trial, it held that broad categories of document requests constituted discovery. Id. at 567. It therefore quashed the subpoena. Id.; see also Ghandi v. Police Dept. of City of Detroit, 747 F.2d 338, 354-55 (6th Cir. 1984) (affirming quashing of subpoena issued on the eve of trial seeking documents available during discovery); Buhrmaster v. Overnite Trans. Co., 61 F.3d 461 (6th Cir. 1995) (affirming quashing of subpoena of material that could have been produced through normal discovery where plaintiff used subpoena to circumvent discovery deadline).[1]

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[1] Even if Plaintiffs were to argue that some of the documents listed on the subpoena were subject to prior discovery requests, the proper vehicle to obtain such documents is a motion to compel production.

Were the Court to permit Plaintiffs to take discovery beyond the March 24 cutoff, Rule 34 entitles a responding party to 30 days from service of a request for production to serve a response to the requests, including any objections the party may have, unless the court orders a shorter time. Fed. R. Civ. P. 34(b). The Subpoena bears a return date of May 5, 2003. The subpoena affords Interior Defendants' only two business days to respond. Serving a Rule 45 subpoena instead of a Rule 34 request for production does not negate Plaintiffs' obligation to afford a 30-day response period.

Because the subpoena does not comply with Rule 34's response period and a 30-day period would violate the Court's Scheduling Order, the subpoena is defective and unenforceable. See Mortgage Information Services, 210 F.R.D. at 567; McLean v. Prudential S.S. Co., 36 F.R.D. 421, 425 (E.D. Va. 1965) (holding that a party may not use Rule 45 to circumvent a requirement of Rule 34, and concluding that "[i]t is unthinkable that the effect of Rule 34 can be emasculated by the use of Rule 45"); see also Rule 45 Advisory Committee Notes to subdivision (c) of the 1991 amendments (Rule 45(c) "is not intended to diminish rights conferred by Rules 26-37 or any other authority").

B. Plaintiffs' Subpoena Requests Tens of Thousands of Documents That Plaintiffs Could Have Requested Before the Discovery Cutoff for Trial Phase 1.5.

Virtually all of the documents requested in the Subpoena are ones that could have been requested on December 16, 2002, as part of the 224 categories of documents that were the subject of Plaintiffs' Eighth Request for Production of Documents, or at any time since September 17, 2002, when the Court lifted the restrictions on Plaintiffs' discovery. Instead, Plaintiffs waited until the day trial commenced to attempt to obtain these documents. Even the so-called "Joe Christie Inventory" list of documents that Plaintiffs now seek was apparently in Plaintiffs' hands no later than February 21, 2003, see Plaintiffs' Subpoena at 8, 10 (showing date received), in time for Plaintiffs to have included it in a

discovery request to meet the discovery cut-off of March 24, 2003. The EDS "As-Is Study," see Plaintiffs' Subpoena at 3, Request No. 2, was known to Plaintiffs no later than the December 19, 2002 deposition of EDS employee James Pauli. James Pauli Deposition Transcript at 71, 84 (Dec. 19, 2002). The requests of the Special Master-Monitor and Special Master, see Plaintiffs' Subpoena at 3, Request Nos. 3-4, could have been made by Plaintiffs themselves at any time during discovery (to the extent relevant to Phase 1.5).[2] The final request category seeks a broad range of documents related to documents transmitted to the Special Master on June 8, 2001, which Plaintiffs apparently knew about no later than on or about June 15, 2001. See Plaintiffs' Subpoena at 4, Request 6 & n.4.

II. PLAINTIFFS' SUBPOENA IS OBJECTIONABLE BECAUSE IT IS UNDULY BURDENSOME AND PROVIDES INSUFFICIENT TIME FOR DEFENDANTS TO RESPOND.

The prejudice Defendants would suffer if required to respond to such an untimely request is self-evident. Given that the subpoena is defective and unenforceable in its entirety for the reasons stated above, Defendants have no obligation to enumerate the numerous other objections they have to the contents and scope of the requests. Many requests appear to be overly broad and would likely be unduly burdensome to fulfill. Some also appear to call for privileged documents. Defendants, therefore, expressly and fully reserve all objections to content and scope, including all claims of privilege, that may exist. Should it be subsequently determined that Plaintiffs can somehow overcome the defects in the subpoena and its service, Defendants will provide a full response to the document

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[2] To the extent Plaintiffs are now adopting the Special Master-Monitor's requests as Plaintiffs' own discovery requests and merely incorporating them by reference in their subpoena, these requests cannot carry the imprimatur of requests of the Court. Interior Defendants have not been afforded the protections available in pre-trial discovery from a party. Rather, Plaintiffs' incorporation of these requests are nothing more than two overly-broad requests among others in this late-served document demand improperly disguised as a trial subpoena.

requests, including an identification and specification of all such objections.

At a minium, Interior Defendants should be afforded the full 30-day period specified in Rule 34 to respond to Plaintiffs' untimely discovery requests. And in the event this Court determines that Interior Defendants must produce documents protected by the attorney-client and work product privileges, Defendants request that the Court allow sufficient time for the government to consider seeking appropriate relief in light of the attorney-client and work product privilege appeals now pending in the D.C. Circuit (Nos. 03-5063, 03-5084, 03-5097). See Notice of Appeal (Feb. 21, 2003); Notice of Appeal (April 4, 2003); Amended Notice of Appeal (April 7, 2003).

If the Court were to determine that Plaintiffs' Subpoena was properly served after the close of discovery, it should nevertheless still be quashed based on the various grounds set forth in Rule 45(c)(3)(A). On its face, Plaintiffs' Subpoena clearly "fails to allow reasonable time for compliance." Fed. R. Civ. Proc. 45(c)(3)(A)(i). Plaintiffs' Subpoena only allows two business days for compliance, yet propounds broad requests that would require production of tens of thousands of pages of documents.[3] Even assuming the documents could be easily identified (which they cannot based on the over-breadth and vagueness of the requests), two days is not even sufficient time to deliver that many documents, let alone enough time to search for them throughout the Department of the Interior, collect, process, scan and label them, and then review and analyze them for responsiveness and privilege, generate a privilege log and copy them.[4]

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[3] When Plaintiffs served this subpoena on May 1, they had not yet provided Defendants with a complete set of the 240 trial exhibits identified in their Pretrial Statement on April 22, yet demanded that Interior produce tens of thousands of documents in two-business-days.

[4] The first numbered request in the subpoena is the only one that identifies a single document. Yet, as with all of the documents requested in this subpoena, Plaintiffs' Request for the "Krulitz

Plaintiffs' Subpoena also improperly "requires disclosure of privileged or other protected matter." Fed. R. Civ. Proc. 45(c)(3)(A)(iii). Requests 2, 3, and 6 seek categories of documents that include privileged documents and in that respect are improper. Interior Defendants do not read Plaintiffs' requests for Special Master and Special Master-Monitor documents as requiring the disclosure of privileged documents since neither of those officials required disclosure of privileged documents to Plaintiffs.

Most egregiously, Plaintiffs' Subpoena "subjects [Interior Defendants] to undue burden." Fed. R. Civ. Proc. 45(c)(3)(A)(iv). Served at the start of trial, it requests tens of thousands of pages of documents, without regard to whether they are relevant to the trial. For example, requests 4 and 5 incorporate by reference "all" Special Master-Monitor and Special Master requests, without regard to whether they are necessary or even relevant to the Phase 1.5 trial. Such requests are overly broad and unduly burdensome on their face, particularly at this stage of the proceedings.

A further example of burden is request 2, which requests "ALL DOCUMENTS that discuss, concern, reflect or constitute a COMMUNICATION" with regard to the "As-Is Study." The As-Is Report and related documentation total almost 25,000 pages and were included in the exhibits Defendants provided to Plaintiffs. Producing all communications and documents related to that document, particularly during trial, is obviously unduly burdensome. Plaintiffs make no attempt to

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Opinion" also constitutes a misuse of a trial subpoena. Moreover, Plaintiffs have clearly already had this document for years, as they have filed it with the Court before. See e.g., Plaintiffs' Response To 'Defendants' Motion For Partial Summary Judgment On Plaintiffs' Claims For An Accounting Of IIM Accounts' And Plaintiffs' Motion For Oral Argument," filed with the Court July 7, 2000 and attaching the Krulitz Opinion. However, as a show of good faith, Interior Defendants are providing Plaintiffs with another copy of the document (Exhibit B). Finally, the Krulitz Opinion does not reference any attachments and we are not aware of any.

confine their request to communications as to particular sections of that voluminous document, but instead attempt to burden Interior Defendants with collecting "ALL" documents and communication.[5] Such over-breadth is clearly burdensome, violates Rule 45, and should be rejected out of hand.

III. PLAINTIFFS' SUBPOENA IMPROPERLY INTERJECTS SPECIAL MASTER-MONITOR AND SPECIAL MASTER ACTIVITIES INTO THE PHASE 1.5 TRIAL.

Plaintiffs' requests incorporate by reference "all documents" requested at any time by the Special Master and Special Master-Monitor, without regard to whether their requests are relevant to the Phase 1.5 trial or even the litigation.[6] Plaintiffs' Subpoena at 3, Requests 4, 5. This attempt by Plaintiffs to step into the shoes of these two court officials unnecessarily sidetracks this phase of the proceedings. Such requests attempt an end-run around the stay by the Court of Appeals with regard to the Special Master-Monitor's authority as well as this Court's preliminary statements as to the proper scope of the trial.

As the Court is aware, the propriety of the Special Master-Monitor's appointment, and his authority thereunder, is currently being reviewed by the Court of Appeals for the District of Columbia Circuit. On April 24, 2003, pending that review, the Court of Appeals, on its own motion, issued a stay of the Special Master-Monitor's authority. See Order, Cobell v. Norton, No. 02-5374 (D.C. Cir. April 24, 2003). In addition, during the very first moments of the pretrial conference for the Phase 1.5 trial, this Court stated:

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[5] Interior Defendants would also have to review any documents collected for privilege.

[6] As per this Court's March 5, 2003 Memorandum and Order, Interior Defendants were not permitted to treat special master document requests as discovery and thus have not had the opportunity to make objections to these requests pursuant to the Federal Rules governing discovery. Therefore, the scope of documents requested by these court officials may very well be beyond what the Federal Rules would require Interior Defendants to produce for this Phase 1.5 trial.

> I don't propose to deal with any special master or special master monitor issues in this trial and to keep those divorced from this trial because it should be unnecessary, but one consequence of my decision in that regard is I am striking Mr. Christie as a witness. I simply don't see any reason to get into any of those issues in this trial and to, depending on the outcome of this trial, have another appellate issue on special master or special master monitor, communications with them or any of those issues come back. This is going to be a clean trial on the plan, the adequacy of the plan, the plaintiffs' plan, and we're not going to worry about special master, special master monitor or whatever happens in that regard. That's just going to be left out of this trial because it's irrelevant as far as I can see.

Pretrial Hearing Tr. at 4-5. Nevertheless, Plaintiffs served their subpoena only a week after Mr. Kieffer's appointment was stayed, and only two days after this Court made the above statements. The Court should not permit Plaintiffs to interject into this trial what it has expressly said it would not allow or, with regard to Special Master-Monitor requests, to circumvent the Court of Appeals' stay.

Regarding Plaintiffs' request for Special Master-Monitor documents, Plaintiffs already received copies of all non-privileged documents produced to the Special Master-Monitor. In light of the stay, Interior Defendants are not required to continue producing documents pursuant to these requests unless and until the stay is lifted. In the interim, Plaintiffs have no right to enforce those requests and should not expect this Court to order that production to go forward while the Court of Appeals considers the very lawfulness of the appointment from which such requests were generated.

CONCLUSION

For the foregoing reasons, Plaintiffs' Subpoena should be quashed.

Respectfully submitted,
ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Attorney
JOHN R. KRESSE
Trial Attorney
D.C. Bar No. 430094
TIMOTHY E. CURLEY
Trial Attorney
D.C. Bar No. 470450
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 307-0183

Dated: May 2, 2003

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	)	(Judge Lamberth)
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ORDER

This matter comes before the Court on "Interior Defendants' Objections To and Motion To Quash Plaintiffs' Subpoena Of May 1, 2003." Upon consideration of this Motion and Plaintiffs' responses thereto, it is HEREBY:

ORDERED that Interior Defendants' Motion To Quash Plaintiffs' Subpoena Of May 1, 2003 is Granted.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

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

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

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 1, 2003 I served the foregoing *Interior Defendants' Objections to and Motion to Quash Plaintiffs' Subpoena of May 1, 2003* by Hand upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Dennis M Gingold, Esq.
Mark Kester Brown, Esq
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004

By U.S. Mail upon:

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

By Facsimile and U.S. Mail Hand upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006

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

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

K.P. Kingston

Kevin P. Kingston