

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
MARCH 7 11 50 AM
2003

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

Case No. 1:96CV01285
(Judge Lamberth)

**INTERIOR DEFENDANTS' REPLY MEMORANDUM IN
FURTHER SUPPORT OF THEIR MOTION TO DEFER RULING ON
PLAINTIFFS' APPLICATION FOR FEES AND EXPENSES FILED APRIL 4, 2003**

Interior Defendants submit this reply memorandum in further support of their motion to defer ruling on Plaintiffs Application For Fees And Expenses Related To Defendants' Rejected Motion For Protective Order Re Powers Of The Special Master-Monitor Pursuant To Court Order Issued March 5, 2003 ("Plaintiffs' Fee Application").

DISCUSSION

By this motion, Interior Defendants have requested that the Court defer ruling upon the Plaintiffs' Fee Application, which was filed pursuant to the Court's March 5, 2003 Memorandum and Order ("Memorandum and Order"). In that Memorandum and Order, the Court denied Interior Defendants' motion for a protective order as to discovery propounded by the Special Master-Monitor, and also with respect to the stated intention of the Special Master-Monitor to assume the authority to make substantive rulings on contested legal matters arising during the course of depositions. See Interior Defendants' Motion For A Protective Order As To Discovery By The Special Master-Monitor

And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning and accompanying Memorandum Of Points And Authorities (Jan. 23, 2003) (collectively "Protective Order Motion"). The Court further ordered Interior Defendants and their counsel to pay Plaintiffs the reasonable fees and expenses they incurred in opposing the motion. Memorandum and Order at 29.

The grounds underlying the motion that is presently before the Court are plain. First, Interior Defendants have filed a motion for reconsideration of the Memorandum and Order (to the extent that sanctions were imposed) and that motion has not yet been decided. See Interior Defendants' Motion For Reconsideration Of The Court's March 5, 2003 Memorandum And Order Insofar As It Imposed Sanctions On Interior Defendants And Their Counsel (March 18, 2003) ("Reconsideration Motion"). Second, the Court of Appeals has ordered a stay, pending further order, of "all orders of the district court, including but not limited to the orders dated April 16, 2001, April 15, 2002, and September 17, 2002, insofar as they authorize Joseph S. Kieffer III to act as Court Monitor, Special Master-Monitor or in any other capacity in this case." See Order (April 24, 2003). Because the disposition of Plaintiffs' Fee Application may be affected by both the Court's adjudication of the pending Reconsideration Motion and matters currently before the Court of Appeals, it would be appropriate for this Court to defer ruling on the fee application pending resolution of those matters.

Despite the straightforward bases upon which the instant motion rests, Plaintiffs misconstrue them entirely. Plaintiffs erroneously characterize the motion as one challenging the Court's power to enforce a prior order. See Plaintiffs' Opposition To Defendants' Motion To Defer Ruling On Plaintiffs' Application For Fees And Expenses Filed April 4, 2003 (filed May 15, 2003) ("Plaintiffs' Opposition Brief") at 2 ("[D]efendants implicitly suggest that this Court has lost its power enforce [sic] its sanction

order merely because defendants appealed a different order.") (emphasis in original). Based on that erroneous reading, Plaintiffs devote their entire brief to the contention that the Court has the power to enforce a prior order notwithstanding a pending appeal. Plaintiffs' Opposition Brief at 2 ("This Court's Power to Enforce Its Sanction Orders Are Unaffected by the Pending Appeal . . ."); *id.* ("[I]t is clear that this Court continues to have the power to enforce its earlier sanctions orders."); *id.* at 3 ("[E]ven had defendants appealed the same order . . . that would not have altered the power and right of this Court to continue to enforce its orders while on appeal.") (emphasis in original); *id.* at 3-4 (citing cases for the proposition that Court's authority to impose sanctions is not altered by subsequent finding that Court lacked subject matter jurisdiction). Yet, the Court's authority to enforce a prior order is not an issue that was even presented by Interior Defendants in this motion.

In responding solely to a contention that is not presented by this motion, Plaintiffs avoid the issue that is actually before the Court. The manner in which the Special Master-Monitor purported to carry out his responsibilities is an issue that is directly at play in both the Reconsideration Motion before this Court and the proceedings before the Court of Appeals. Given that such matters were at the core of the Protective Order Motion and the Memorandum and Order pursuant to which Plaintiffs' Fee Application was submitted, the Court should have the opportunity to fully consider and rule on the matters raised in the Reconsideration Motion, and also have the benefit of the Court of Appeals' analysis and decision, prior to addressing the reasonableness of the specific fees and expenses that are claimed by Plaintiffs. Plaintiffs have made no claim that this sensible approach will result in any prejudice to them, nor have they put forth any argument as to why an immediate decision on their fee application is warranted.

Insofar as Plaintiffs suggest that the matters presently before the Court of Appeals do not relate to the issues raised in the Protective Order Motion, they are wrong. See Plaintiffs' Opposition Brief at 2 ("[T]he frivolousness of defendants' motion for protective order would remain regardless whether [sic] they prevail on their interlocutory [sic] appeal with respect to this Court's order appointing Mr. Kieffer a special master"). In their Protective Order Motion, Interior Defendants sought relief because the way in which the Special Master-Monitor carried out his role was improper. For instance, in that motion, Interior Defendants complained that, inter alia, the Special Master-Monitor was propounding his own discovery requests and effectively depriving Interior Defendants, under threat of disciplinary action, of a fair opportunity to object to those requests. See Protective Order Motion at 16-19. These and related issues are now directly before the Court of Appeals:

The fact that the Special Master-Monitor shall 'oversee the discovery process and administer document production' further underscores the problem. Discovery and document production issues, including issues of privilege, have been contentious. In his role as monitor, Mr. Kieffer has issued his own discovery requests. Mr. Kieffer cannot now be made an impartial judicial officer responsible for ruling on these issues subject only to clear-error review by the district judge. . . . [H]e has threatened Interior officials with adverse consequences if they refuse to go along with his view of the issues, and has repeatedly and harshly castigated the Secretary and other Interior officials in his reports to the court. This course of conduct is inconsistent with a neutral, judicial role.

Brief for the Appellants, Cobell v. Norton, No. 02-5374 (Ct. App. D.C. Cir.) (filed Dec. 6, 2002) at 56-57. Thus, the question of whether the Special Master-Monitor acted improperly in carrying out his role is a matter that was at the heart of the Protective Order Motion, and that now looms large in the appellate proceedings. Accordingly, the Court should await decision by the Court of Appeals, and its

own resolution of the Reconsideration Motion, prior to ruling on Plaintiffs' Fee Application.¹

CONCLUSION

For the reasons stated above and in Interior Defendants' Motion To Defer Ruling On Plaintiffs' Application For Fees And Expenses Filed April 4, 2003, Interior Defendants respectfully request that their motion be granted.

Dated: May 27, 2003

Respectfully submitted,
ROBERT D. McCALLUM
Acting Associate Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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

¹ For the same reasons, Plaintiffs' request that the time they spent opposing this motion be added to the fee award contemplated by the Memorandum and Order, see Plaintiffs' Opposition Brief at 4, should be rejected.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 27, 2003 I served the foregoing *Interior Defendants' Reply Memorandum in Further Support of Their Motion to Defer Ruling on Plaintiffs' Application for Fees and Expenses Filed April 4, 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.
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

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

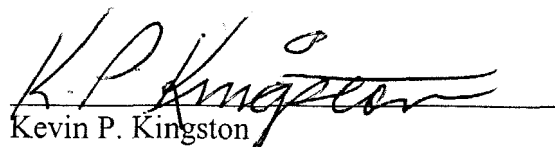
By U.S. Mail upon:

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

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

By facsimile and U.S. Mail:

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


Kevin P. Kingston