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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

2003 AUG 15 PM 3: 55

NANCY M.
MAYER-WHITTINGTON
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ELOUISE PEPION COBELL, et al.,)
)
Plaintiffs,)
)
v.)
)
GALE A. NORTON, Secretary of the Interior,)
et al.,)
)
Defendants.)
_____)

Case No. 1:96CV01285
(Judge Lamberth)

**DEFENDANTS' OPPOSITION TO
NATIONAL CONGRESS OF AMERICAN INDIANS
MOTION TO FILE AMICUS BRIEF**

Defendants file this opposition to the Motion of the National Congress of American Indians ["NCAI"] for Leave to File *Amicus Curiae* Brief ("NCAI's Second Amicus Request" accompanied by "NCAI's Second Amicus Brief"). NCAI's Second Amicus Brief does not meet the standard for being helpful to the Court for all the reasons stated in Defendants' Opposition to National Congress of American Indians Motion to file Amicus Brief, filed February 11, 2003, incorporated here by reference. Moreover, much of the argument in NCAI's Second Amicus Brief is redundant, as it restates the arguments NCAI made in its first amicus brief, filed on January 28, 2003. Finally, NCAI's Second Amicus Brief improperly comments on Phase 1.5 trial testimony and should not be considered by the Court.

On January 28, 2003, NCAI filed its Motion of the National Congress of American Indians for Leave to File *Amicus Curiae* Brief ("NCAI's First Amicus Request" accompanied by "NCAI's First Amicus Brief"). The Court granted NCAI's First Amicus Request on March 3,

2003. NCAI filed its Second Amicus Request and Second Amicus Brief on August 4, 2003. For all the reasons stated in Defendants' Opposition to National Congress of American Indians Motion to file Amicus Brief, filed February 11, 2003, NCAI's Amicus Brief does not meet the standard for being helpful to the Court and the Court therefore should not consider it.¹

More specifically, however, the Court should deny NCAI's Second Amicus Request because many of the arguments in NCAI's Second Amicus Brief repeat the arguments in NCAI's First Amicus Brief. For example, NCAI's Second Amicus Brief addresses "NCAI's Concerns with the Parties' Compliance Plans." NCAI's Second Amicus Brief at 4-11. Yet NCAI's First Amicus Request specifically sought permission to address these same concerns: "[NCAI] respectfully moves for leave to file a brief *Amicus Curiae* in reference to the plans for complying with the fiduciary obligations of the . . . (IIM) trust accounts" NCAI's First Amicus Request at 2. NCAI's First Amicus Brief addressed NCAI's concerns with the compliance plans: "We also present some critiques of the Department of the Interior's proposed plan of reform, and concerns about some aspects of the Cobell plaintiffs' plan, from the perspective of Indian tribes." NCAI's First Amicus Brief at 2; see also, id. at 21-40. NCAI also argues against the "BIA Reorganization" in its 2nd Amicus Brief, see NCAI's Second Amicus Brief at 11-17, just as it criticized the reorganization plan in its First Amicus Brief, see NCAI's First Amicus Brief at 31-35. NCAI's conclusion in its Second Amicus Brief, see NCAI's Second Amicus Brief at 22,

¹ As stated in Defendants' Opposition to National Congress of American Indians Motion to file Amicus Brief, filed February 11, 2003, NCAI's amicus filings are not helpful to the Court because this is an IIM, not a tribal case, because NCAI's concerns are more properly directed to Congress and to the Department of the Interior, and because the parties already address NCAI's concerns relevant to this lawsuit. In addition, adding yet another NCAI brief to the record would further burden the Court and the parties. Id. at 1.

closely mirrors its conclusion in its First Amicus Brief, see NCAI's First Amicus Brief at 43. In addition, NCAI uses the same "Attachment A" for its Second Amicus Brief that it used for its First Amicus Brief. Therefore, the Court should not consider this latest NCAI amicus brief because it is largely redundant.

The Court should also deny NCAI's Second Amicus Request because the only section of NCAI's Second Amicus Brief that does not repeat arguments made in NCAI's First Amicus Brief improperly comments on Phase 1.5 trial testimony. Specifically, NCAI criticizes the trial testimony of the Special Trustee, questioning his "credibility" and "candor." NCAI's Second Amicus Brief at 17, 20. There is no provision in the law for a non-party to comment on trial testimony to the fact finder while that fact finder is deliberating. NCAI's amicus attack on the Special Trustee's trial testimony is tantamount to a third party's interference with jury deliberations. While this is not a jury trial, there is nonetheless no provision in law permitting an amicus to comment on trial testimony to the fact finder while that fact finder is deliberating. The Court should not permit such improper commentary to enter the record.

CONCLUSION

NCAI's Second Amicus Brief does not meet the standard for being helpful to the Court for all the reasons stated in Defendants' Opposition to National Congress of American Indians Motion to file Amicus Brief, filed February 11, 2003, fully incorporated here by reference. Moreover, much of the argument in NCAI's Second Amicus Brief repeats the argument in NCAI's First Amicus Brief, filed on January 28, 2003. Finally, NCAI's Second Amicus Brief improperly comments on Phase 1.5 trial testimony. For these reasons, the Court should deny NCAI's Second Amicus Request.

Dated: August 15, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Associate Attorney General

PETER D. KEISLER

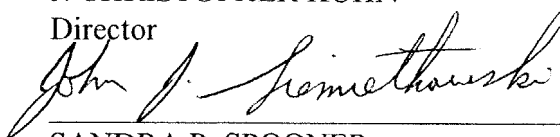
Assistant Attorney General

STUART E. SCHIFFER

Deputy Assistant Attorney General

J. CHRISTOPHER KOHN

Director

A handwritten signature in cursive script, appearing to read "John J. Siemietkowski", is written over a horizontal line.

SANDRA P. SPOONER

D.C. Bar No. 261495

Deputy Director

JOHN T. STEMPLEWICZ

Senior Trial Attorney

JOHN J. SIEMIETKOWSKI

Trial Attorney

Commercial Litigation Branch

Civil Division

P.O. Box 875

Ben Franklin Station

Washington, D.C. 20044-0875

(202) 514-3368

(202) 514-9163 (fax)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Having considered the National Congress of American Indians Motion for Leave to File *Amicus Curiae* Brief, filed August 4, 2003, and having considered the parties' responses to said Motion, it is hereby **Ordered that**:

The National Congress of American Indians Motion is **DENIED**. The National Congress of American Indians *amicus curiae* brief, dated August 4, 2003, shall not be filed.

Dated: _____

Hon. Royce C. Lamberth
United States District Judge

cc:

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

Dennis M Gingold, Esquire
Mark Kester Brown, Esquire
607 14th St., N.W., Box 6
Washington, D.C. 20005
Fax (202) 318-2372

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

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

Alan L. Balaran
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

Charles A. Hobbs, Esquire
Geoffrey D. Strommer, Esquire
Attorneys for National Congress of American Indians
2120 L St., N.W., Suite 700
Washington, D.C. 20037
Telefax: 202-296-8834

John Dossett, Esquire
General Counsel, National Congress of American Indians
1301 Connecticut Ave., N.W., Suite 200
Washington, D.C. 20009
Telefax: 202-466-7797

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 15, 2003 I served the foregoing *Defendants' Opposition to National Congress of American Indians' Motion to File Amicus Brief* 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

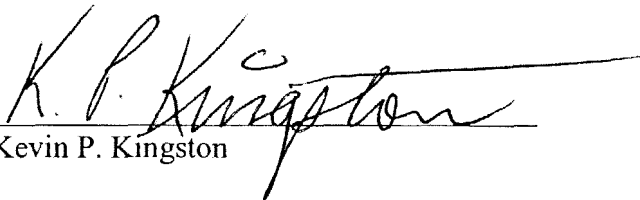
Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW
Box 6
Washington, D.C. 20005
(202) 318-2372

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

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