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DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**

The Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Secretary of the Treasury (collectively, "Defendants") file this opposition to the Motion of the National Congress of American Indians for Leave to File *Amicus Curiae* Brief ("NCAI's Amicus Request" and "NCAI's Amicus Brief"). NCAI's Amicus Brief does not meet the standard for being helpful to the Court because this is an IIM, not a tribal case, because NCAI's concerns are more appropriately directed to Congress and to the Department of the Interior, because it would focus on NCAI's narrow interests, and because the parties already address NCAI's concerns that are relevant to this lawsuit. Moreover, adding NCAI's brief to the record would burden the Court and the parties, and potentially encourage other interested tribes or associations to file similar amicus requests, thus further burdening the Court and the parties.

No statute or rule exists delineating the standard for assessing an amicus request at the District Court level.

> This court is not aware of any rule or statute that prescribes the procedure for obtaining leave to file an *amicus* brief in the district court nor is this court aware of any rule or statute which furnishes standards to guide the court in determining whether leave to file an *amicus* brief should be granted.

United States v. Gotti, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991). However, such guidance does exist in the Rules of the Supreme Court, and in the Federal Rules of Appellate Procedure. SUP. CT. R. 37 1 states:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

Federal Rule of Appellate Procedure 29 provides mostly procedural guidance to those wishing to file an amicus brief, but also states, "Any other amicus curiae [other than a government entity] may file a brief only by leave of court or if the brief states that all parties have consented to its filing." FED. R. APP. P. 29(a).

Case law also provides some guidance as to when a court should permit the filing of an amicus brief. "Other functions served by *amicus curiae* are to provide supplementary assistance to existing counsel and insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." Gotti, 755 F. Supp. at 1158. In most cases, "'new issues raised by an *amicus* are not properly before the court in the absence of exceptional circumstances.'" Verizon Internet Servs., Inc. v. Recording Indus. Ass'n of Am., No. 02-MS-0323, 2003 WL 141147, at *15 (D.C. Cir. Jan. 21, 2003) (quoting General Eng'g. Corp. v. Virgin Islands Water & Power Auth., 805 F.2d 88, 92 (3d Cir. 1986).[1] Courts may be less likely to

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[1] See also, Verizon Internet Servs., Inc. v. Recording Indus. Ass'n of Am., No. 02-MS-0323, 2003 WL 141147, at *5 (D.C. Cir. Jan. 21, 2003) (quoting Universal City Studios, Inc. v. (continued...)

permit the filing of amicus briefs in cases that have developed an extensive record. See New York v. Microsoft Corp., No. 98-1233, 2002 WL 31628215, at *1 (D.D.C. Nov. 14, 2002) ("Given the extensive record created during over 32 trial days of testimony and argument, the presentation of additional information which the parties did not themselves present would serve little purpose.") Ultimately, the Court enjoys wide discretion in deciding whether to accept an amicus brief. Id. ("Since an *amicus curiae* does not represent the parties but participates only for the benefit of the Court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus.")

NCAI's amicus brief would not meet these standards, and thus would not be helpful to the Court. This is an IIM case, not a tribal case. Tribal-specific concerns like those of NCAI do not belong in this IIM litigation.[2] The Court should therefore not permit NCAI to import its tribal-specific issues into this IIM lawsuit.

Much of what NCAI attempts to present through its proposed amicus brief is more appropriately addressed directly to the Department of the Interior or to Congress. NCAI's Amicus Brief presents "some critiques of the Department of the Interior's proposed plan of reform, and concerns about some aspects of the Cobell plaintiffs' plan . . . . " NCAI's Amicus

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[1](...continued)
Corley, 273 F.3d 429, 445 (2nd Cir. 2001)) ("'Although an *amicus* brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues . . . , at least in cases where the parties are competently represented by counsel.'")

[2] At this time, the Department of Justice is litigating numerous cases brought by Indian tribes in various courts around the country. See e.g., Assiniboine & Sioux Tribes of Fort Peck Reservation v. Norton, No. 90-2-4-10540 (D.D.C. filed Jan. 7, 2002) (One of the Court's decisions in Assiniboine is reported at 211 F. Supp. 2d 157 (D.D.C. 2002) (case not referred to Calendar Committee for random assignment because of relation to Cobell v. Norton)).

Brief at 2. Its brief also concludes "with a set of proposed actions for the Court to consider what [sic] we believe will ensure that the Government complies with its trust responsibilities." Id. at 3. Such critiques, concerns, and proposed actions are more properly before Interior and Congress rather than before the Court. NCAI tacitly acknowledges this to an extent by claiming, "It is for Congress, not the DOI, to decide whether adequate funding will be provided." NCAI's Amicus Brief at 17. NCAI also acknowledges the propriety of addressing concerns directly to Congress and Interior by stating, "*Amicus* NCAI has been engaged in pressing for amendments to the Indian Land Consolidation Act to address this problem and is providing funding for a pilot program." Id. at 26 n.13. If NCAI addresses these concerns to Congress and Interior, it should also present its amicus concerns in these fora, rather than through this litigation.

The Court should also deny NCAI's Amicus Request because the group's amicus brief impermissibly injects new issues into the case. In its amicus request, NCAI focuses on the particularized interests of its member tribes.

> The main parties (Cobell and the Government) are primarily concerned about the managing of individual IIM accounts held in trust by the Government for the individual beneficiaries. However, tribes too have IIM accounts as well as other accounts held in trust by the Government.

NCAI's Amicus Request at 2-3.

> In the interest of justice and judicial efficiency, this Court should have before it all pertinent arguments and concerns of tribal governmental entities so as to give full consideration to the impacts that this decision will have on Indian tribes, as well as on individual Indians.

Id. at 3. One such particularized tribal concern is "an express right of compensation for trust mismanagement . . . . " Id., describing the first of five "fundamental trust principles." Although the "concerns of tribal governmental entities" are undoubtedly important to the overall issue of

trust reform, see e.g., Department of the Interior Fiduciary Obligations Compliance Plan, Jan. 6, 2003, at 13, those specific tribal concerns raised by NAIC nonetheless present new issues to this particular litigation. The issue of "an express right of compensation for trust mismanagement" is an especially new issue for this particular litigation, as such relief is beyond the Court's jurisdiction, and is relief that Plaintiffs do not seek. See Cobell V. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998) (considering "the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, . . . the plaintiffs do not seek money damages.") The Court should not consider such new issues or perspectives in the absence of exceptional circumstances. Verizon, 2003 WL 141147, at *15 (quoting Virgin Islands Water & Power Auth., 805 F.2d at 92). Because no such exceptional circumstances exist in this litigation (and NCAI points to none in its request), the Court should deny NCAI's Amicus Request because its amicus brief injects new issues into this case. See id. (quoting Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2nd Cir. 2001)).

In the same vein, the Court should deny NCAI's Amicus Request because the issues the association seeks to brief are too narrow. Three of NCAI's five "fundamental trust principles" focus on tribes rather than on individual Indians. NCAI's Amicus Request at 3. NCAI's second fundamental trust principle states "that a primary trust responsibility of the United States is to protect the governing authority of Indian tribes . . . . " Id. "For the benefit of the Court," NCAI offers to "evaluate the fiduciary compliance plans submitted by the [parties] to ensure that implementation of trust reform adequately protects the interests of NCAI's member tribes." Id. at 4 (emphasis added). "We also present some critiques . . . from the perspective of Indian tribes." NCAI's Amicus Brief at 2. These quotes indicate that NCAI has focused its amicus brief on its

own insular interests rather than on the issues already before the Court and affecting the parties to the litigation. While protecting the governing authority and overall interests of NCAI's member tribes is an essential component of overall trust reform, see e.g., Department of the Interior Fiduciary Obligations Compliance Plan, Jan. 6, 2003, at 37, this particular litigation is about individual Indians, not tribes. The Court should therefore not permit the filing of an amicus brief addressing such narrow and insular issues. See Microsoft, 2002 WL 31628215, at *1 ("Court failed to see a need for the presentation of additional material, some of which appears to be concerned with rather narrow and parochial matters.") The Court should also be wary of considering such narrow matters where, as in this case, the parties themselves have already developed such an extensive record. See id. ("Given the extensive record created during over 32 trial days of testimony and argument, the presentation of additional information which the parties did not themselves present would serve little purpose.")

Additionally, the Court should look askance at NCAI's Amicus Request because its amicus brief presents a voluminous amount of opinion analysis without the benefit of questioning by the Court or either party. This is especially true of Paul Gillis' 13-page criticism of Interior Defendants' compliance plans. Although in the form of a declaration, Mr. Gillis' criticisms are not subject to cross-examination by the parties, particularly Interior Defendants. Such opinion evidence is also apparent on pages 2-3 of NCAI's amicus brief. In the last paragraph on page 2, continuing onto page 3, NCAI summarizes its brief using such phrases as "we agree," "but believe that," "we do not believe," "we are concerned," and "we recommend." More generally, NCAI's 80 pages (including introductory matters, the brief itself, and attachments) of amicus matter attempt to inject opinion into the record outside of the normal

testimonial fora. The Court should frown on such "'unsworn expert testimony.'" Microsoft, 2002 WL 31628215, at *1. In this particular case, such "unsworn expert testimony" would constitute untested and unsupported evidence from NCAI. More specifically, the Court should reject NCAI's Amicus Request and brief to the extent they address the substantive issue of remedy, particularly their "fundamental trust principle" alleging "an express right of compensation for trust mismanagement."

> None of the proposed amici address themselves to issues of law, but instead offer factual information, whether technical or economic, which appears to concern the substantive issue of remedy. Viewed in this light, it is apparent that consideration of the materials submitted by these proposed amici is likely improper.

Id.

NCAI's Amicus Request is also not helpful to the Court because the accompanying amicus brief presents a one-sided view favoring Plaintiffs' plans rather than providing the Court an objective, dispassionate, and neutral discussion of relevant issues. NCAI's Amicus Brief spends 15 pages (pages 21-36) criticizing Interior's plans, while spending less than four pages praising Plaintiffs ("Plaintiffs cite authoritative sources . . . . " NCAI's Amicus Brief at 37) and offering mild suggestions that Plaintiffs clarify their proposals. Mr. Gillis' declaration is an even more thinly veiled attempt to provide the Court with a biased discussion of relevant issues. Not one of Mr. Gillis' eight points reference Plaintiffs' plans, much less criticize them. Rather, Mr. Gillis states that "3. The Government's own submissions to this Court testify to its inability to readily carry out its trust obligations" and "4. The Government continues to disclaim direct responsibility for its trust obligations, and it has acted in a manner raising serious questions whether it has any intention of fully carrying out those obligations." Gillis Declaration at 3 and 7. When it comes to analyzing Plaintiffs' plans, all that Mr. Gillis can muster is, "The Plaintiffs'

filings have made an able presentation of position, and I find no reason to attempt to add to their position." Gillis Declaration at 13. In effect, Mr. Gillis appears to speak as nothing more than the Plaintiffs' parrot.[3] Such a one-sided presentation has no place in an amicus brief.

> Rather than seeking to come as a "friend of the court" and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the [putative amicus] has come as an advocate for one side, having only the facts of one side at the time. In doing so, it does the court, itself and fundamental notions of fairness a disservice.

Gotti, 755 F. Supp. at 1159. See also, Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 556 (E.D. Pa. 1999)

> (While it is acknowledged that partiality of amici is not dispositive, it is "a factor to consider in deciding whether to allow participation." It is apparent to this Court that the petitioner is better characterized as "amicus reus," or friend of the defendant, than amicus curiae. (citations omitted)).

Under Federal Rule of Appellate Procedure 29(a), an amicus curiae "may file a brief only by leave of court or if the brief states that all parties have consented to its filing." In this instance, Defendants oppose NCAI's Amicus Request.[4] Although the Court retains great discretion in ruling on NCAI's request, the Court should carefully examine the request in the absence of consent from Defendants. Gotti, 755 F. Supp. at 1158 (Amicus request denied where the brief was "not accompanied by the written consent of either party . . . .")

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[3] In their Opposition to Quapaw Tribe's Motion to File a Brief *Amicus Curiae* (filed Feb. 10, 2003), Plaintiffs state, "The *Cobell* plaintiffs see no reason why defendants should be permitted to use the Quapaw to get another bite at the apple through a proxy brief filed by a government-*amicus*-tribe." Id. at 5 (footnote omitted). If Plaintiffs are consistent in their logic, then the Court should similarly reject NCAI's Amicus Brief because it is nothing more than a proxy brief filed by a Plaintiffs-amicus-interest group.

[4] Plaintiffs do not oppose NCAI's Amicus Request, though they do oppose the Quapaw Tribe's similar request.

The Court should also reject NCAI's Amicus Request because the accompanying amicus brief asks the Court to order Interior to take certain steps which are beyond the Court's authority to order. For example, NCAI's Amicus Brief asks the Court to order "that the reorganization be suspended pending consultation with tribes . . . . " NCAI's Amicus Brief at 42. As NCAI acknowledges, however, Interior retains the discretion to determine how best to carry out its trust duties: "While Congress left the DOI with the discretion to determine what specific policies and procedures it would implement to effectively carry out its trust responsibility, the statute requires that DOI actually implement them." Id. at 12. In other words, while the Court may monitor Interior in fulfilling its statutory duties, it likely may not specify how Interior should do so.

> It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction.

Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001). This is because "[w]hile there is a specific duty to provide a complete accounting, there is no specific duty to, for example, implement particular policies . . . . " Id. at 1105. If the Court lacks authority, therefore, to order Interior to "implement particular policies," then it follows that NCAI's suggestions to the Court (such as ordering a suspension of reorganization activities) regarding the implementation of particular policies are improper in an amicus brief.

Under the Supreme Court standard, an amicus brief should contain relevant information not already brought to the Court's attention by the parties. SUP. CT. R. 37 1. Given the voluminous information already presented to the Court by the parties in this litigation, it is

difficult to imagine how NCAI could present any relevant matter not already in the record. To the extent that NCAI would present new material to the Court regarding tribal interests, it would not likely be relevant to this particular IIM litigation. The presentation of such new material to the Court, whether new and immaterial to this particular litigation or old and cumulative of other matter already in the record, would burden the Court and its filing should therefore not be favored. Id.

The filing of NCAI's's amicus brief would not only burden the Court, but would also burden the parties. The parties to this suit have plenty of pleadings from their opponents to respond to, and should not have to divert their focus from the case in chief to respond to an amicus brief. In their amicus brief, NCAI cites 17 reported cases, 27 statutes, and 11 other sources. Neither the Court nor the parties should have to divert time and effort from the case in chief to read, analyze, and respond to these 55 citations, much less the voluminous brief itself. Just responding to the brief's proposal for a "team of Special Masters" (NCAI's Amicus Brief at 40) would require a tremendous amount of factual and legal research. Coordinating responses to these citations and amicus proposals would soon require the parties (and the Court) to expend valuable time and resources that should be concentrated on the case in chief.

Another potential danger to the Court and to the parties of granting NCAI's Amicus Request is that other interested tribes or associations may follow NCAI's lead and also seek to file amicus briefs.[5] If the Court grants NCAI's Amicus Request, it is possible that other groups of Indians, not represented by NCAI, will follow suit. Although NCAI represents more than 250

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[5] As of this time, the Quapaw Tribe has already filed a request with the Court to file an amicus brief.

tribes and Alaska Native villages (NCAI's Amicus Request at 2) there are perhaps other Indian tribes and associations not represented by NCAI that would feel compelled to file similar amicus requests. Indeed, perhaps even tribes and groups already represented by NCAI would feel compelled to file their own amicus requests in order to protect their particular interests. The parties would have to respond to these amicus requests and briefs, and the Court would have to address them. Such a scenario would truly burden the Court as well as the parties.

As complex as this litigation is, neither the Court nor the parties would benefit from NCAI's Amicus Brief. While Interior indeed has a "duty to consult with tribes or Indians" (NCAI's Amicus Brief at 18; see also, Department of the Interior Fiduciary Obligations Compliance Plan, Jan. 6, 2003, at 11), this duty to consult with tribes should not extend to having to respond to NCAI's amicus brief in the context of this IIM litigation. Defendants certainly have no duty to respond to one-sided criticisms that purport to be helpful. The Court and the parties should focus solely on the trust reform plans presented by the parties, rather than being distracted by NCAI's Amicus Brief.

CONCLUSION

NCAI's Amicus Brief does not meet the standard for being helpful to the Court. NCAI's brief does not belong in this IIM case. NCAI's concerns are more properly addressed to Congress and to the Department of the Interior. Moreover, NCAI's Amicus Request and accompanying brief focus on NCAI's narrow interests without addressing any relevant matters that the parties have not already brought to the Court's attention. Filing NCAI's Amicus Brief would burden the Court and the parties, and potentially set a burdensome precedent if other tribes or associations

also seek to file amicus briefs. Put more simply, the tribe's proposed amicus brief is neither necessary nor helpful to the Court or to the parties.

> [I]t "may be thought particularly questionable" for the court to accept an *amicus* when it appears that the parties are well represented and that their counsel do not need supplemental assistance and where the joint consent of the parties to the submission by the *amicus* is lacking.

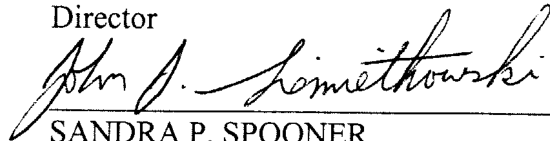
Gotti, 755 F. Supp. at 1159 (quoting Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970)).

Therefore, the Court should deny NCAI's Amicus Request.

Dated: February 11, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
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 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, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Having considered the National Congress of American Indian's Motion for Leave to File *Amicus Curiae* Brief, and having considered the parties' responses to said Motion, it is hereby

Ordered that:

The National Congress of American Indian's Motion is **DENIED.** The National Congress of American Indians may not file an amicus curiae brief.

Dated: ______________________________

____

Hon. Royce C. Lamberth
U.S. 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
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
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

Joseph S. Kieffer, III
Special Master-Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

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 February 11, 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.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

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

By facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

By facsimile upon:

Charles A. Hobbs
Geoffrey D. Strommer
F. Michael Willis
2120 L Street, Suite 700
Washington, D.C. 20037
(202)296-8834

John Dossett
1301 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202)466-7797

Sean P. Schmergel