

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**REPLY TO PLAINTIFFS' OPPOSITION TO
INTERIOR DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF
UNOPPOSED MOTION FOR ORDER ADOPTING
SPECIAL MASTER-MONITOR'S RECOMMENDATION REGARDING
PLAINTIFFS' PRODUCTION OF DOCUMENTS, AND ORDERING
PLAINTIFFS' IMMEDIATE PRODUCTION OF DOCUMENTS**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), submit the following Reply to Plaintiffs' November 25, 2002 Opposition to Interior Defendants' Motion for Expedited Consideration of Unopposed Motion for Order Adopting Special Master-Monitor's Recommendation Regarding Plaintiffs' Production of Documents, and Ordering Plaintiffs' Immediate Production of Documents ("Opposition").¹

Plaintiffs oppose expedited consideration of the Unopposed Motion for two reasons, neither of which makes sense. Plaintiffs do not challenge the production request, they simply do not want it to occur before the deposition of Plaintiff Elouise Cobell, which Plaintiffs agreed to begin on December 4, 2002. Interior's ability to take a full deposition is frustrated when Ms.

¹ Interior's "Unopposed Motion for Order Adopting Special Master-Monitor's Recommendation Regarding Plaintiffs' Production of Documents, and Ordering Plaintiffs' Immediate Production of Documents" ("Unopposed Motion") was filed on November 20, 2002, as was its Motion for Expedited Consideration ("Expedited Motion") of the same.

Cobell has not produced requested documents.

Plaintiffs first argue that this Court should not consider Interior's Unopposed Motion until it rules on the Special Master-Monitor's Report and Recommendation ("R&R")² regarding the scope of his authority. Opposition at 1. Plaintiffs offer no reason other than that the Special Master-Monitor's authority is an important matter. Id. The merits of that R&R, however, have no bearing at all on the production of documents or Ms. Cobell's testimony under oath. Interior's Unopposed Motion rests upon a Report and Recommendation³ that is already before the Court without Plaintiffs having timely filed any objections pursuant to Rule 53(e)(2). Thus, regardless of the merits of the other R&R, it is no justification for delaying the grant of an unopposed motion.

Simply put, no nexus exists between Interior's Unopposed Motion and the Special Master's Report and Recommendation relating to his authority. Plaintiffs do not even pretend there is any relationship between the two.

² See "Report and Recommendation of the Special Master-Monitor on the Extent of the Authority of the Special Master-Monitor to Regulate All Phase 1.5 Trial Discovery Proceedings and the Need for Clarification of the September 17, 2002 Order Appointing of the Special Master-Monitor," filed November 18, 2002.

³ See Report and Recommendation of the Special Master-Monitor on Plaintiffs' "Motion for Protective Order Seeking: (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees (Served June 28, 2002):" and Defendants' Motion to Compel Discovery" and "Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition" and "Defendants; Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold," filed October 18, 2002. The Plaintiffs refer to this Report and Recommendation as the "Trifold Protective Order Report and Recommendation." See Opposition at 1. For the convenience of the Court, we will refer to it by the same name.

Expedited consideration of Interior's Unopposed Motion facilitates discovery. It does not impede discovery; nor does it impede the Court's timely consideration of the Special Master-Monitor's authority.

Plaintiffs also oppose expedited consideration of Interior's Unopposed Motion out of feigned concern that the Court not "rush its decision and analysis" on the merits of the Special Master-Monitor's "Trifold Protective Order Report and Recommendation" by ruling on a "piecemeal basis." Opposition at 1. Plaintiffs' own failure to object pursuant to Rule 53(e)(2) belies concern that any complicated analysis is even required to rule on the "Trifold Protective Order Report and Recommendation."⁴ Indeed, the Court has already addressed a portion of the Special Master's "Trifold Protective Order Report and Recommendation." Specifically, the Court on November 12, 2002, issued an order that denied "Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold," and denied "Plaintiffs' Motion for a Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees (Served June 28, 2002)," as moot.

Plaintiffs' opposition to expedited consideration here is a patent maneuver to delay Interior's effort to examine Ms. Cobell fully and thoroughly. The Court should not countenance such a maneuver.

⁴ Plaintiffs apparently intend to assert belatedly that, even if the Court were to adopt the Special Master-Monitor's "Trifold Protective Order Report and Recommendation" in full, they have "preserved the right to respond to the Request for Production of Documents and assert further specific objections if warranted" by filing a motion for a protective order. Opposition at 2 n. 5. Apparently, Plaintiffs believe and anticipate that they can comply with a Court order adopting the Special Master-Monitor's "Trifold Protective Order Report and Recommendation" by asserting still other objections in a piecemeal fashion. Plaintiffs' tactic fails to address the merits of Interior's motion for expedited consideration. Indeed, and without conceding the merits of their outlandish position, Plaintiffs' tactic only militates in favor, not against, expedited treatment.

CONCLUSION

For the foregoing additional reasons, Interior respectfully requests the Court provide expedited consideration to Interior's Unopposed Motion.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



SANDRA P. SPOONER
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
TERRY M. PETRIE
D.C. Bar Number 454795
Trial Attorney
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: November 29, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 29, 2002, I served the foregoing *Reply to Plaintiffs' Opposition to Interior Defendants' Motion for Expedited Consideration of Unopposed Motion for Order Adopting Special Master-Monitor's Recommendation Regarding Plaintiffs' Production of Documents, and Ordering Plaintiffs' Immediate Production of Documents* by facsimile, in accordance with their written request of October 31, 2001 upon:

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

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, NW
Ninth Floor
Washington, DC 20004
202-318-2372


and by U.S. Mail upon:

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

and by U.S. Mail and by facsimile upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., NW
12th Floor
Washington, DC 20006
202-986-8477

Joseph S. Kieffer, III, Esq.
Special Master-Monitor
420 7th Street, NW
Apt 705
Washington, DC 20004
202-478-1958


Sean P. Schmergel