

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA  
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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 (RCL)  
(Judge Larnberth)

**INTERIOR DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION  
OF INTERIOR'S MOTION TO DISQUALIFY SPECIAL MASTER BALARAN**

Interior Defendants respectfully move for expedited consideration of Interior's Motion to Disqualify Special Master Balaran, filed on May 29, 2003.<sup>1</sup> Expedited consideration is needed to ensure that Interior Defendants receive an impartial disposition of the many matters now pending or undertaken by the Special Master since the Motion to Disqualify was filed. In the Motion to Disqualify, Interior Defendants have raised serious questions about the ability of Mr. Balaran to serve as a special master in this litigation. These questions require prompt resolution.

Mr. Balaran has recently announced his intention to begin a new investigation under the aegis of his authority to oversee records retention matters (See Letter of June 5, 2003 from Alan Balaran to Amalia Kessler (attached as Exhibit A)), baselessly accused Interior's counsel of failing to conduct the appropriate Rule 11 due diligence before signing a letter to the Special Master in connection with his authority to oversee IT matters (see Letter of June 19, 2003 from Alan Balaran to Sandra Spooner and Letter of June 20, 2003 from Sandra Spooner to Alan

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<sup>1</sup> In accordance with Local Civil Rule 7.1(m), counsel for Interior Defendants conferred with Plaintiffs' counsel regarding this motion. Counsel for Plaintiffs stated that Plaintiffs oppose this motion.

Balaran (attached as Exhibit B)), and has renewed his request for documents related to his NAID investigation (see Letter of June 23, 2003 from Alan Balaran to Phil Seligman (attached as Exhibit C)). It was, of course, Mr. Balaran's improper conduct during the NAID investigation which prompted the Motion to Disqualify.

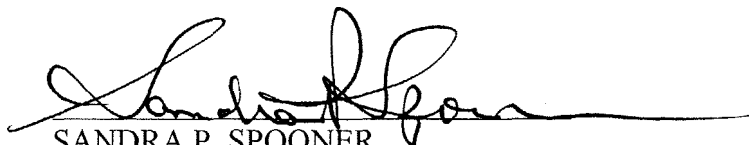
Plaintiffs will not suffer any prejudice from expedited consideration. On June 12, 2003 Plaintiffs moved for an enlargement of time to oppose the Motion to Disqualify, claiming that their limited resources were devoted to prosecution of trial 1.5. On June 20, 2003, Plaintiffs filed a Motion for an Order to Show Cause why Interior Defendants should not be held in contempt for actions related to Mr. Balaran's IT investigations. Apparently Plaintiffs' counsel have now acquired the necessary resources for non-trial related briefing.

For these reasons, Interior Defendants respectfully request that the Court enter the attached order granting expedited consideration of the Motion to Disqualify. Under the proposed order, Plaintiffs would file, and serve upon Interior Defendants, any opposition to the Motion to Disqualify by June 27, 2003, and Interior Defendants would file any reply by June 30, 2003.

Dated: June 24, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.  
Assistant Attorney General  
STUART E. SCHLFFER  
Deputy Assistant Attorney General  
J. CHRISTOPHER KOHN  
Director

  
SANDRA P. SPOONER  
Deputy Director  
D.C. Bar No. 261495  
JOHN T. STEMPLEWICZ

Senior Trial Attorney  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

Case No. 1:96CV01285  
(Judge Lamberth)

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**ORDER**

This matter comes before the Court on Interior Defendants’ Motion for Expedited Consideration of Interior’s Motion to Disqualify Special Master Balaran. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants’ Motion for Expedited Consideration is GRANTED;  
it is further

ORDERED that Plaintiffs file, and serve upon Interior Defendants, any opposition to Interior Defendants’ Motion to Disqualify Special Master Balaran, by June 27, 2003;

ORDERED that Interior Defendants file any reply by June 30, 2003.

SO ORDERED.

Date: \_\_\_\_\_

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ROYCE C. LAMBERTH  
United States District Judge

cc:

Sandra P. Spooner  
John T. Stemplewicz  
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LAW OFFICE

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June 5, 2003

**VIA FACSIMILE**Amalia Kessler  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division  
Commercial Litigation Branch  
P. O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: **Cobell v. Norton Civil Action No. 96-1285**  
**Audit of the Minerals Management Service Audit**  
**Offices (No. 2003-I-0023) March 2003**

Dear Ms. Kessler:

In March 2003, the Department of the Interior Office of the Inspector General ("OIG") issued its Audit of the Minerals Management Service Audit Offices ("MMS Audit Report"). (An electronic copy of the MMS Audit Report will be transmitted for your review.) The stated objective of that report "was to determine whether MMS' internal quality control system provides reasonable assurance that MMS audits are performed in accordance with established policies, procedures, and the Government Auditing Standards (Standards)." See Memorandum from Anne Richards, Regional Audit Manager, Central Region to the Assistant Secretary for Land and Minerals Management.

Since MMS is responsible for the annual collection of \$6 billion in royalties and fees for minerals produced from federal, tribal and allotted lands, I became concerned upon reading a section of the MMS Audit entitled "Professionalism," where the OIG reported ~~that~~ it selected for review an audit involving Navajo Indian leases. According to the MMS Audit Report,

[w]hen MMS officials could not locate this audit file, instead of informing [the OIG] of that fact, they recreated and backdated the working papers. The recreated papers were dated to when MMS believed the work had been done rather than when the replacement working papers were actually created.

MMS Audit Report at 8. The OIG also reported that MMS "then granted a cash award, citing 'creativity,' to the auditor who reconstructed the working papers." *Id.* At 8.

The MMS Audit Report mentions two other instances of missing files pertaining to Indian leases; a statistical possibility that working papers for **as many as 62** audits are missing; the existence of "incomplete files" for the audits performed by the same employees responsible for recreating and backdating the Navajo leases file; and 30 "incomplete *sets*" of files (lacking working papers or master indices). Id. at 9.<sup>1</sup>

**Aside** from the violation of Court orders implicated by the loss of Navajo leasing files containing trust information, MMS failed to inform the Court, the plaintiffs (or, I suspect, the Navajo allottees) that trust documentation was missing and/or that files containing IM information were "incomplete."<sup>2</sup> **Instead**, MMS auditors "recreated" and "backdated" the records in an attempt to deceive the OIG. **And** one was awarded a cash bonus for his duplicity. Beyond this, trust information missing from these incomplete files and work papers are germane to the underlying litigation and thus discoverable by plaintiffs. Given the findings of the OIG, plaintiffs can not determine whether documents produced by the agency are "originals" or "recreations" generated by "creative" employees awaiting cash bonuses.

I am confident that had the OIG nor uncovered this problem in the course of performing its audit, the loss of the Navajo trust information would not have come to light. I am therefore informing you of my intention to investigate MMS' leasing files to determine whether individual Indian trust information is properly maintained and safeguarded.

Thank you.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

Electronic attachment

cc: Dennis Gingold, Esq (w/attachment)

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<sup>1</sup> These figures were based on statistical and judgment samples and not an exhaustive review of each file. Id. at 8-9.

<sup>2</sup> As the MMS Audit Report is dated March 2003, I suspect that the agency was aware that trust documentation was missing at the time the audit was undertaken in 2001.

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

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June 19, 2003

**VIA FACSIMILE****Sandra Spooner, Esq.****UNITED STATES DEPARTMENT OF JUSTICE**

Civil Division - Commercial Litigation Branch

P.O. Box 875

Ben Franklin Station

Washington, DC 20044-0875

**RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285  
OSM Server Outage**

Dear Ms. Spooner:

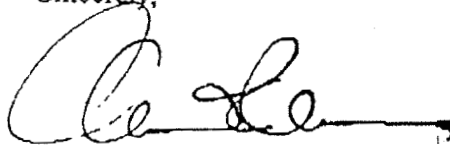
Thank you for your letter dated June 18, 2003 (sent and received this date), wherein you state that “[n]o attorney in the Department of Justice can **make** ‘a personal certification that the representations reflected in [DOJ Attorney Glenn Gillett’s June 11, 2003 letter] are accurate’ because no attorney has direct knowledge that a LAN cable **was** loose or that reseating the LAN cable cured the **problem** noticed by an Interior employee.” I respectfully disagree. While Mr. Gillett may not have direct knowledge of the Office of Surface Mining “cable failure,” by presenting me with **an** explanation, he was personally “certifying that to the best of [his] knowledge, information, **and** belief, formed after an inquiry reasonable under the circumstances. . . **the** allegations **and** other factual contentions” set out in **his** June 11, 2003 letter had “evidentiary support” Fed.R.Civ.Pro. 11(b)(3). This requirement, as you know, extends to all “pleading[s], written motion[s], or other paper[s].” Id. (Emphasis added.)

Beyond the requirements of Rule 11, the need for personal certification in this instance is particularly acute, given Mr. Gillett’s reliance on “privileged” “draft correspondence between the Department of the Interior **and** the Department of Justice.” Since it appears, by your correspondence, that Mr. Gillett **did** not perform the requisite due diligence before signing the June 11, 2003 letter, I assume that I am to accept explanations extracted from “draft” documents of unknown authorship that I am unable to examine. **Again**, I disagree, and will not recommence the reconnection process until I have reviewed all relevant documentation explaining the events that led to the **April 23, 2003 OSM** server outage, **and** am satisfied that the explanation rings true.

**Exhibit B**Defendants’ Motion for Expedited  
Consideration to Disqualify S. M. Balaran



Sincerely,

A handwritten signature in black ink, appearing to read 'Alan L. Balaran', with a long horizontal flourish extending to the right.

Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.



United States Department of Justice  
Civil Division  
Commercial Litigation Branch

Sandra P. Spooner  
Deputy Director

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June 20, 2003

**By Facsimile**

Mr. Alan Balaran  
1717 Pennsylvania Avenue, N.W.  
Thirtieth Floor  
Washington, D.C. 20006

Re: **Cobell v. Norton - OSM Server Outage on April 23, 2003**

Dear Mr. Balaran:

We received your June 19, 2003 letter concerning the **OSM** server outage incident.

Through the misstatements, omissions, and unsupported allegations in your letter, you have attempted to create an ethical issue where none exists. I have been involved in *the* drafting of our letters on this subject, and have no doubt that the inquiry conducted before Mr. Gillett's June 11, 2003 letter to you was signed was more than adequate under the circumstances and that **the** evidence to support the statements in Mr. Gillett's letter is strong and consistent.

Your June 19 letter states that "it appears, by [Department of Justice] correspondence, **that** Mr. Gillett did not perform the requisite due diligence before signing the June 11, 2003 letter." Your allegation is unfounded. My letters to you cannot reasonably be interpreted to suggest that Mr. Gillett did not meet all of his obligations, including Rule 11 to the extent it is applicable.

Before you wrote your June 19 letter, you were aware that the June 5, 2003 sworn testimony of Associate Deputy Secretary **of** the Interior James Cason in the Phase 1.5 trial proceeding was consistent with the facts set forth in Mr. Gillett's June 11 letter. Indeed, I provided you with the relevant testimony in my June 19, 2003 letter (incorrectly dated June 18, 2003). **Mr.** Gillett was familiar with this testimony before he signed the June 11, **2003** letter. In addition, before Mr. Gillett sent *his* letter, **he** received information concerning the server outage from both Mr. Roy Morrison and the service technician who received the report of the outage from the user and remedied the problem. The factual assertions in Mr. Gillett's letter were also

reviewed carefully by Mr. Cason before the letter was sent. The inquiry made by Mr. Gillett **was** more than reasonable under the circumstances; **indeed**, the sworn testimony of Mr. Cason by itself satisfies the requirement that a factual assertion "have evidentiary support." Fed. R. Civ. P. 11(b)(3).

Your disagreement **with** my assertion that "no attorney in the Department **of** Justice can make a personal certification that the representations **reflected** in said document are accurate" (emphasis in original) exhibits a lack of understanding of the difference between a certification that **particular** facts are accurate (the standard you create) and the Rule 11 certification that "**to the best of the person's knowledge, information and belief, formed after reasonable inquiry under the circumstances . . . the allegations or other factual contentions have evidentiary support . . .**" *Id.* The difference **is** not semantic.

Further, your June 15, 2003 letter purported to require Mr. Gillett **to** certify that the representations *in a document from the Department of the Interior* are accurate, not that Mr. Gillett's June 11, 2003 letter was accurate, as you incorrectly state in your June 19, 2003 letter. Your letter of June 15, 2003 **discussed** "an unattributed **and** unattached correspondence or memorandum" and demanded that Mr. Gillett provide a "personal certification that the representations in said document are accurate." **Your** letter of June 19, 2003 substitutes "[DOJ Attorney Glenn Gillett's June 11, 2003 letter]" for "said document," incorrectly implying that the certification you demanded applies to Mr. Gillett's letter rather than the document from the Department **of** the Interior that contained the information used in the June 11 letter.

Finally, if you are correct that the signature of our attorney was a certification under Rule 11, then you should **have** accepted the June 11, 2003 letter as having been certified. This **is** especially true here, where, notwithstanding your accusations, you have not suggested that there is even a shred of evidence that runs counter to the information provided to you by Mr. Gillette. We are confident that the inquiry made prior to the signing of the letter passes muster under Rule 11 standards and you have never given us any basis to question the results of our inquiry.

Inasmuch as your June **19** letter gratuitously defames Mr. Gillett's reputation and professionalism without the slightest basis to support your allegations, the letter should be retracted. **As** you know, until very recently, you have consistently commended to me the conduct of and assistance provided to you by Mr. Gillett – even to the point of asking that I assign him to various matters **instead of** other attorneys in my office. Your recent accusations are so ill-founded and disproportionate as to defy legitimate explanation, absent a fundamental misunderstanding. Under the circumstances, your accusations should be withdrawn immediately.

Sincerely,



Sandra P. Spooner

cc: Dennis Gingold, Esq. (by facsimile)  
Keith Harper, Esq. (by facsimile)

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

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June 23, 2003

**VIA FACSIMILE**

Phillip Seligman, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division - Commercial Litigation Branch  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

RE: **Cobell et al. v. Norton et al., Civil Action No. 96-1285**  
**Wewoka/Chickasaw Agency Investigation**

Dear Mr. Seligman:

I have been advised that Ms. McGarity Clark will no longer be handling matters related to the December 12, 2002 site visit by the Special Master team to the Wewoka and Chickasaw Agencies and that you will be assuming responsibility for that investigation. Please advise me, before close of business today, when I can expect the final production of documents responsive to my letter dated May 13, 2003.

Please also advise me, within the same time frame, when I can finally expect to receive documents responsive to my repeated requests concerning the NAID investigation.

Thank you.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on June 24, 2003 I served the foregoing *Interior Defendants' Motion for Expedited Consideration of Interior's Motion to Disqualify Special Master Balaran* 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:

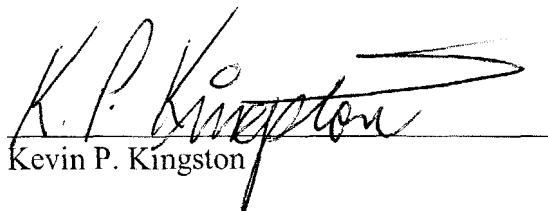
Earl Old Person (*Prose*)  
Blackfeet Tribe  
P.O. Box 850  
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By U.S. Mail upon:

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By facsimile and U.S. Mail:

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Kevin P. Kingston