IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285
	(Special Master-Monitor
GALE A. NORTON, Secretary of the Interior, et al.,	Joseph S. Kieffer, III)
Defendants.	

DEFENDANTS' MOTION FOR PROTECTIVE ORDER

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), pursuant to Fed.R.Civ. P. 26(c), hereby move that a protective order be entered to prevent the depositions of certain government officials, namely Donna Erwin and Bert Edwards. Donna Erwin is the Acting Special Trustee and Bert Edwards is the Director of the Office of Historical Trust Accounting. Pursuant to the Court's September 17, 2002 order which appointed the Special Master-Monitor, this motion is submitted to Mr. Kieffer for his report and recommendation regarding this discovery dispute. See Order dated September 17, 2002 at paragraph numbered 8. In support, Interior Defendants state:

On September 17, 2002, the Court directed Interior Defendants to file two plans on January 6, 2003. See Order filed September 17, 2002 at III, ¶¶ 2 and 3. The Court also authorized discovery by Plaintiffs provided that it shall "not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court." Id. at ¶ 16. On December 9, 2002, Plaintiffs served notices for the depositions of Ms. Erwin and Mr. Edwards.

As discussed in the supporting memorandum filed with this motion, Ms. Erwin and Mr.

Edwards are key participants, with important central roles and responsibilities, in Interior's efforts to formulate and provide the plans due to the Court on January 6, 2003. Through great effort, Interior has accomplished much work on the plans yet still has a significant amount remaining. To require Interior to be without their services for the time necessary for them to be deposed (including the time necessary to prepare) unreasonably interferes with and unfairly prejudices Interior's ability to provide the plans on January 6, 2003.

Counsel for Interior Defendants conferred with counsel for Plaintiffs, Keith Harper, about this motion, and Mr. Harper stated that Plaintiffs oppose this motion.

Dated: December 11, 2002

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
Trial Attorney
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IN THE UNITED STATES DISTRICT COURT
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ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285
	)	(Special Master-Monitor
GALE A. NORTON, Secretary of the Interior, et al.,	)	Joseph S. Kieffer, III)
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Plaintiffs seek to depose Bert Edwards, the Director of the Office of Historical Trust Accounting, on December 16, 2002, and Donna Erwin, Acting Special Trustee, on December 20, 2002. Both are Department of Interior employees who are critical to Interior Defendants' ability to file timely two court-ordered plans on January 6, 2003. For good cause, as explained below, Plaintiffs should be precluded from deposing Mr. Edwards and Ms. Erwin until after January 6, 2003.

Background

On September 17, 2002, the Court directed Interior Defendants to file two plans on January 6, 2003. See Order filed September 17, 2002 at III, ¶¶ 2 and 3. One plan was to describe how the Department plans to conduct a historical accounting of the IIM trust accounts. Id. at III, ¶ 2. The second plan was to describe how the Department plans to bring itself into compliance with the fiduciary obligations that they owe to the IIM beneficiaries. Id. at III, ¶ 3. Further, the Court specified that the second plan shall describe, in detail, the standards by which the

Department intends to administer the IIM trust accounts, and how the proposed actions would bring the Department into compliance with those standards. Id.

Also on September 17, 2002, the Court authorized discovery by Plaintiffs provided that it shall "not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court." Id. at III, ¶ 16.

The Department of Interior has summoned and expended an extraordinary amount of effort, and has undertaken much of the work necessary to provide the plans ordered by the Court. Declaration by J. Steven Griles, Ex. 1 at ¶¶ 6-7. However, much work remains to be accomplished before January 6, 2003. Id. at ¶ 7. Mr. Edwards, the Director of the Office of Historical Trust Accounting, and Ms. Erwin, the Acting Special Trustee, are critical, key participants in Interior's efforts to provide the plans on time. Id. at ¶ 6. Both play central roles with important responsibilities in the formulation of the plans. Id. at ¶¶ 6-7. Each also possesses important knowledge and experience necessary to Interior's formulation of these plans. Id. at ¶¶ 6-7.

On November 22, 2002, at the initiative of the Defendants, Plaintiffs were asked to provide the names of those individuals they would desire to depose before January 6, 2003. Letter dated November 22, 2002 from Terry M. Petrie to Keith M. Harper, Ex. 2. Plaintiffs were specifically advised that if they did not provide by November 27, 2002, the names of those they wanted to depose before the plans were submitted to the Court, that it would be understood "to mean that [Plaintiffs] do not desire to depose any other[1] government witnesses until after January

[1] By this time, Plaintiffs had already deposed Messrs. J. Steven Griles, James Cason, and Ross Swimmer.

6, 2003." Id. Despite Defendants' specific request, Plaintiffs provided no names by November 27, 2002.

On December 3, 2002, at the instigation of the Special Master-Monitor, Plaintiffs were again asked to provide the names of those individuals they wished to depose prior to January 6, 2003. See Letter dated December 4, 2002 from Keith M. Harper to Sandra Spooner, Ex. 3. The next day, December 4, and two weeks after they were requested to provide the same information by Defendants, the Plaintiffs indicated that they wished to depose Ms. Erwin and Mr. Edwards, as well as a Rule 30(b)(6) corporate deposition of Electronic Data Systems ("EDS"), before January 6. Ex. 3. In short, even though authorized as of September 17, 2002, Plaintiffs inexplicably waited until December 4, approximately 22 working days before the plans are to be submitted to the Court, to advise Defendants that they intended to depose two key Department of Interior employees before January 6, 2003

On December 6, 2002, in response to Plaintiffs' December 4 letter, Defendants advised Plaintiffs that "the duties of Ms. Erwin and Mr. Edwards with respect to the plans will prevent them from being available for deposition until after January 6, 2003." Letter dated December 6, 2002 from Terry M. Petrie to Keith M. Harper, Ex. 4 at page 2. Plaintiffs were further informed that:

> These witnesses have significant involvement in the preparation of the two plans. To require them to be deposed now, before January 6, will unfairly and directly prejudice Interior's ability to develop and complete the plans with the full complement of abilities and knowledge these witnesses possess.

Id.

Notwithstanding, on December 9, 2002, Plaintiffs served notices for the depositions of Ms. Erwin and Mr. Edwards, as well as the Rule 30(b)(6) corporate deposition of EDS. Letter

dated December 9, 2002 from Keith M. Harper to Terry M. Petrie and Michael J. Quinn, Ex. 5.

In response to the notices of Ms. Erwin and Mr. Edwards, we have filed this motion for a protective order precluding Plaintiffs from deposing either one of them until after January 6, 2003.[2]

Argument

Defendants have amply demonstrated good cause for why Ms. Erwin and Mr. Edwards should not be deposed until after January 6, 2003. See Fed.R.Civ.P. 26(c). Both individuals are crucial participants in Interior's efforts to comply with the Court's September 17, 2002 order and file important plans with the Court on January 6, 2003. Each possesses important knowledge and experience that needs to be employed in the formulation and coordination of the plans. And each has critical responsibilities in that effort. In short, as recognized by the Special Master-Monitor, both are "key" Interior employees with respect to the preparation of the January 6 plans. Letter dated December 9, 2002 from Special Master-Monitor Joseph S. Kieffer, III to the parties, Ex. 6 at page 2. Plaintiffs cannot reasonably dispute this fact.

The Court has explicitly recognized the importance of the January 6 plans and the need for Interior to bring its full efforts to bear in preparing those plans. In its September 17, 2002 order, the Court expressly stated that discovery taken by Plaintiffs shall "not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court." Id. at

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[2] At this time, we are checking with EDS about its ability to produce a witness in response to the Rule 30(b)(6) notice served by Plaintiffs. We agree with the Special Master-Monitor that it would be preferable to come to an agreement on these depositions without the need to involve the Court (see Special Master-Monitor letter dated December 9, 2002 to the parties, Ex. 6 at page 2 fn. 3), however Plaintiffs insist on taking now the depositions of Interior employees critical to the Defendants' ongoing ability to provide timely plans on January 6, 2003.

III, ¶ 16.

To allow the depositions to go forward as noticed unreasonably interferes with Interior's ability to develop and complete the plans. Without any explanation, and while authorized since September 17, 2002, Plaintiffs have elected to wait and now want to depose Mr. Edwards and Ms. Erwin on dates when there will be approximately 13 and 9 working days left, respectively before the plans are due to the Court on January 6, 2003. Plaintiffs are too late.

Mr. Griles, the Deputy Secretary of Interior, who has overall authority and responsibility within the Department for Indian trust reform, has assessed and determined that (a) there is much work remaining to be accomplished on the plans, (b) both Ms. Erwin and Mr. Edwards are indispensable to the remaining effort by virtue of the roles and the responsibilities they have in the creation of these plans and the knowledge and experience they possess, and (c) it is imperative to the Department's abilities to fully and successfully complete the plans on time that Mr. Edwards and Ms. Erwin not have their efforts distracted by the necessary time it would take to prepare them for depositions as well as the time spent in deposition. Ex. 1 at ¶ 7.

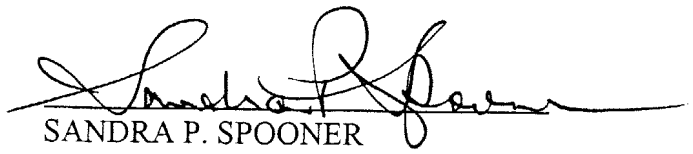
Conclusion

For the foregoing reasons, Defendants respectfully request that the Court enter an order precluding Plaintiffs from deposing Mr. Edwards and Ms. Erwin until after January 6, 2003.

Dated: December 11, 2002

Respectfully submitted,

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



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IN THE UNITED STATES DISTRICT COURT
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ELOUISE PEPION COBELL, et al.,	)	
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Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter coming before the Court on Defendants' Motion for Protective Order, any responses thereto, and the record in this case, the Court finds that the motion should be granted.

IT IS THEREFORE ORDERED that the Plaintiffs are precluded from deposing Department of Interior employees Donna Erwin and Bert Edwards until after January 6, 2003.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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John T. Stemplewicz
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Special Master-Monitor
GALE A. NORTON, Secretary of the Interior, et al.,	)	Joseph S. Kieffer, III)
	)	
Defendants.	)	
	)	

DECLARATION OF J. STEVEN GRILES

1. I am J. Steven Griles, the Deputy Secretary, United States Department of the Interior. In that capacity, I serve as the Chief Operating Officer of the Department.

2. As part of my official duties and responsibilities, I have overall authority and responsibility within the Department for Indian trust reform.

3. On September 17, 2002, the Court directed Interior Defendants to file two plans on January 6, 2003. One plan was to describe how the Department plans to conduct a historical accounting of the IIM trust accounts. The second plan was to describe how the Department plans to bring itself into compliance with the fiduciary obligations that they owe to the IIM beneficiaries. Further, the Court specified that the second plan shall describe, in detail, the standards by which the Department intends to administer the IIM trust accounts, and how the proposed actions would bring the Department into compliance with those standards.

EXHIBIT 1
Defs' Memorandum in Support of
Motion for Protective Order

4. Bert Edwards is the Director of the Department's Office of Historical Trust Accounting. As such, he has been working on the first plan; that is, how the Department plans to conduct a historical accounting of the IIM trust accounts. I have been informed that Plaintiffs have noticed a deposition for Mr. Edwards to begin on December 16, 2002, and to continue day-to-day until completed.

5. Donna Erwin is the Acting Special Trustee. As such, she has been working on the second plan and is involved in a review of the historical accounting plan that the Court has ordered to be filed on January 6, 2003. I have been informed that Plaintiffs have noticed a deposition for Ms. Erwin to begin on December 20, 2002, and to continue day-to-day until completed.

6. I am personally familiar with the Department's efforts to provide the plans ordered by the Court on September 17, 2002. I am also personally familiar with the efforts by Mr. Edwards and Ms. Erwin to assist the Department in providing those plans. The efforts to provide these plans, in the time permitted, has been extraordinary, requiring great amounts of time and effort by many people. Mr. Edwards and Ms. Erwin are critical, key participants and play a central role in our ability to fully and completely meet our obligation by January 6, 2003.

7. The Department has not completed either plan at this time. Through great effort much work has been undertaken, however, much remains to be accomplished in the time remaining between now and January 6. Mr. Edwards and Ms. Erwin are indispensable to the remaining effort by virtue of the roles and the responsibilities they have in the creation of these plans and the knowledge and experience they

possess. It is imperative to the Department's abilities to fully and successfully complete the plans on time that Mr. Edwards and Ms. Erwin not have their efforts distracted by the necessary time it would take to prepare them for depositions as well as the time spent in deposition.

I declare under penalty of perjury that the foregoing is true and correct.

Date: Dec. 11, 2002

J. Steven Griles

U.S. Department of Justice
Civil Division

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Terry M. Petrie - Trial Attorney

Phone (202)307-0267 Fax:(202) 305-4933

November 22, 2002

BY FACSIMILE

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell v. Norton

Dear Mr. Harper:

I would like to address the scheduling of depositions.

At Mr. Swimmer's deposition this past Wednesday, November 20, you represented that you would provide us today the dates other named plaintiffs (besides Ms. Cobell whose deposition begins on December 4) are available to be deposed. Upon receipt, we will advise you as soon as possible of the acceptability of those dates.

As you are aware, we are now less than 45 days from the deadline the Court imposed for the Interior Defendants to file their Plans as part of the Phase 1.5 proceeding. The Thanksgiving holiday is next Thursday, the Christmas holiday less than a month later, and followed the next week by New Year's. Given the time commitments required to complete a timely plan and the usual scheduling conflicts posed by the holiday season, I also would like to confirm with you what depositions you desire to take before January 6, 2003.

Depending on the witnesses and their schedule, and subject to the scheduling of other depositions in the case, we will attempt to accommodate you so long as the discovery does not interfere with the work on the plan. Nevertheless, these should be completed between December 9 and December 20, the last really open weeks prior to the holidays and the approaching plan deadline. Consequently, we request that you advise us by next Wednesday, November 27, of what additional testimony you desire to take of government witnesses before January 6, 2003. If we do not receive a list by that date, we will understand that to mean that you do not desire to

EXHIBIT 2
Defs' Memorandum in Support of
Motion for Protective Order

depose any other government witnesses until after January 6, 2003.

Sincerely,

Terry M. Petrie

Terry M. Petrie
Trial Attorney

cc: Special Master-Monitor Joseph S. Kieffer
Mark Kester Brown, Esq.

ATTORNEYS
Keith Harper
Tracy Labin

Native American Rights Fund
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December 4, 2002

BY FAX

Sandra Spooner
U.S. Department of Justice
Civil Division
Commercial Litigation Branch
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20004

Re: *Cobell v. Norton*, Civ. No. 96-1285

Dear Ms. Spooner:

Yesterday, at the request of the Special Master Monitor, I committed to listing the names of individuals who plaintiffs will depose prior to submission of our plans on January 6, 2003 as ordered by the Court. We have selected three depositions and proposed dates as follows:

1. Donna Erwin, Acting Special Trustee for American Indians
(Suggested date: December 12-13, 2002)

2. Bert T. Edwards, Director of Office of Historical Trust Accounting
(Suggested date: December 17-18, 2002)

3. Pursuant to Rule 30(b)(6), a person or persons from Electronic Data Systems (EDS) who is able to testify on the following matters:

   a. "As-Is" Project

   b. "To-Be" Project

   c. The nature and scope of Electronic Data Systems' involvement in trust reform activities by the Department of Interior

(Suggested date: December 19-20, 2002)

As discussed with defendants' counsel today, the dates above are proposed and we are willing to discuss alternatives. Also we note, since – as we understand it – defendants are making public today a plan that may very well reveal names of individuals or subject areas that will require additional pre-January 6, 2003, depositions, the list above may not be dispositive.

EXHIBIT 3
Defs' Memorandum in Support of
Motion for Protective Order

In addition, we would like to schedule dates for the continuation of the depositions of Messrs. Cason, Griles and Swimmer. Since defendants have represented that these individuals have limited availability, we suggest that you propose dates for these individuals as a first step to determine a mutually convenient schedule.

Finally, we note that plaintiffs, of course, will take additional depositions after January 6, 2003 and, to the extent feasible, we will notify you of those deponents in the near future.

Regards,

Keith M. Harper

cc: Special Master Monitor Joseph S. Kieffer III
Dennis M. Gingold
Terry Petrie

U.S. Department of Justice
Civil Division

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December 6, 2002

BY FACSIMILE

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell v. Norton

Dear Mr. Harper:

I am writing you once again on the subject of deposition scheduling. Just so that we are all clear, I would like to summarize our understanding of the situation, as well as report on what we currently know about those witnesses that have been identified at this time for deposition.

First, with respect to depositions we desire to take in addition to that of Elouise Cobell, we had repeatedly requested dates for the other named Plaintiffs since early October. Because we had not received proposed dates from Plaintiffs, we finally noticed dates for these additional depositions: Earl Old Person on January 8-9, James Larose on January 22-23, and Thomas Maulson on January 29, 2003. Since these dates were set by service of a Notice of Deposition on Plaintiffs under Rule 30, your witnesses are now obligated to appear on these dates without any further action by us or the court.

I understand, however, from my colleague Michael Quinn, that you called today and expressed an interest in finding alternative dates for these depositions. Based upon the deposition yesterday of Ms. Cobell, we presently think it may be possible to conduct this round of depositions of the other Plaintiffs in a shorter period of time, and so we are amenable to setting these other depositions initially for one full day.[1] If that is agreeable to you, we prefer to get these depositions completed earlier than was noticed. I propose, alternatively, December 19, 2002 for Mr. Larose, January 8, 2003 for Mr. Old Person and January 14, 2003 for Mr. Maulson. Please confirm these dates by 6:00 pm Monday, December 9, or advise what other dates prior to January 15 work for these deponents.

[1]This means that we are a afforded a full seven hours of examination time each, exclusive of any recesses. Of course, each deposition proceeds on its own course and so we cannot guarantee that only one day will be sufficient; moreover, we may need to pursue other questions at a later date. Subject to these caveats, though, we can begin with one day for each of these witnesses.

EXHIBIT 4
Defs' Memorandum in Support of
Motion for Protective Order

Second, with respect to your letter dated December 4, 2002, you indicate a desire to depose two individual Department of the Interior employees, namely Donna Erwin and Bert Edwards, as well as a Rule 30(b)(6) corporate deposition of Electronic Data Systems ("EDS"). In your letter, you also propose dates for these depositions. At this time, these are only proposed dates for our exploration since Plaintiffs have not as yet formally noticed these depositions, compelling appearance on any set date.

As you know, when the Court authorized discovery by Plaintiffs, it ordered that the discovery shall "not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court." See Order filed September 17, 2002 at ¶ 16. In that regard, I need to advise you that the duties of Ms. Erwin and Mr. Edwards with respect to the plans will prevent them from being available for deposition until after January 6, 2003. Because of the limited window of availability due to work and coordination requirements on the plans occurring in the midst of the holiday season, we specifically requested two weeks ago that you advise us of who you desired to depose before January 6. (Copy of November 22, 2002 letter to Keith M. Harper is attached.) You declined to tell us until two days ago. And even then it was only under the prodding of the Special Master-Monitor.

These witnesses have significant involvement in the preparation of the two plans. To require them to be deposed now, before January 6, will unfairly and directly prejudice Interior's ability to develop and complete the plans with the full complement of abilities and knowledge these witnesses possess. If you require pre-January 6 dates for these witnesses and demand them by noticing earlier dates, we will move at the appropriate time for a protective order. Alternatively, we can determine their availability after January 6 and propose dates for your consideration.

However, with regard to the proposed Rule 30(b)(6) deposition, we think that can be accomplished before January 6, 2003. Your letter identifies three subject areas for this Rule 30(b)(6) deposition. As you know, under this Rule, we must designate a witness or witnesses with knowledge on the subjects you identify. Please confirm in writing by the end of the day Monday, December 9, that the topics you have identified constitute the scope of the inquiry for this Rule 30(b)(6) deposition. We will then determine with EDS the availability of persons with knowledge and promptly propose specific dates for this deposition.

Sincerely,

Terry M. Petrie

Terry M. Petrie
Trial Attorney

Enclosure

cc: Special Master-Monitor Joseph S. Kieffer
Mark Kester Brown, Esq.

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November 22, 2002

COPY

BY FACSIMILE

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell v. Norton

Dear Mr. Harper:

I would like to address the scheduling of depositions.

At Mr. Swimmer's deposition this past Wednesday, November 20, you represented that you would provide us today the dates other named plaintiffs (besides Ms. Cobell whose deposition begins on December 4) are available to be deposed. Upon receipt, we will advise you as soon as possible of the acceptability of those dates.

As you are aware, we are now less than 45 days from the deadline the Court imposed for the Interior Defendants to file their Plans as part of the Phase 1.5 proceeding. The Thanksgiving holiday is next Thursday, the Christmas holiday less than a month later, and followed the next week by New Year's. Given the time commitments required to complete a timely plan and the usual scheduling conflicts posed by the holiday season, I also would like to confirm with you what depositions you desire to take before January 6, 2003.

Depending on the witnesses and their schedule, and subject to the scheduling of other depositions in the case, we will attempt to accommodate you so long as the discovery does not interfere with the work on the plan. Nevertheless, these should be completed between December 9 and December 20, the last really open weeks prior to the holidays and the approaching plan deadline. Consequently, we request that you advise us by next Wednesday, November 27, of what additional testimony you desire to take of government witnesses before January 6, 2003. If we do not receive a list by that date, we will understand that to mean that you do not desire to

depose any other government witnesses until after January 6, 2003.

Sincerely,

Terry M. Petrie

Terry M. Petrie
Trial Attorney

cc: Special Master-Monitor Joseph S. Kieffer
Mark Kester Brown, Esq.

ATTORNEYS
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December 9, 2002

BY FAX (202) 514-9163

Terry M Petrie
Michael J. Quinn
Civil Division
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P.O. Box 875
Ben Franklin Stations
Washington, D.C. 20005

Re: *Cobell v. Norton*, Civ. No. 96-1285

Dear Mr. Petrie:

I write in response to your December 6, 2002 letter regarding depositions. I will not address the fabrications contained in your letter, but you can presume for purposes here that plaintiffs do not agree with your proposed "understanding of the situation."

As I informed your colleague Mr. Quinn, we will make available Mr. LaRose for deposition in January as defendants have requested, but not on the dates defendants have demanded, as he is otherwise engaged. Now that defendants have represented they will require one day for that deposition, we propose three alternative dates: January 6th, 20th, or 27th. Please let us know which date you prefer, or we will request that the Special Master-Monitor set the date certain for this deposition.

As I stated to you in prior correspondence, plaintiffs seek to take three additional depositions prior to January 6, 2003. Since defendants have steadfastly refused to agree to dates for these depositions prior to January 6, 2003 – contrary to the direction of the Special Master-Monitor – attached please find attached appropriate notices for these depositions.

As for your suggested dates for the depositions of Messrs. LaRose, Old Person and Maulson, on December 19, 2002, January 8, 2003 and January 14, 2003 respectively, we are unable to agree to these dates. Mr. LaRose's availability is as stated above and we are in the process of determining January dates for Messrs. Old Person and Maulson.

EXHIBIT 5
Defs' Memorandum in Support of
Motion for Protective Order

Since there is an obvious dispute on deposition scheduling, it would be fruitful to have these matters resolved by the Special Master-Monitor as soon as possible. Please advise as to your availability for such a conference today.

Sincerely,

Keith M. Harper

cc: Honorable Joseph S. Kieffer III

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs

v.

GALE NORTON, Secretary

Defendants.

Case No.1:96CV01285

NOTICE OF DEPOSITION

To: Mark E. Nagle
Assistant U.S. Attorney
Judiciary Center Building
555 Fourth Street, NW, Room 10-403
Washington, DC 20001

J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005

Attorneys for Defendants

PLEASE TAKE NOTICE, that on December 16, 2002, at plaintiffs counsel's offices, the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of Bert Edwards, Director, Office of Historical Trust Accounting, Department of Interior, 1849 C Street, NW, Room 7229, Washington, DC 20240.

This deposition will commence at 9:30 a.m. and will continue from day to day until completed. Testimony will be recorded by stenographic means. You are invited to attend and examine.

Respectfully submitted,

DENNIS M. GINGOLD
D.C. Bar No. 417748
MARK KESTER BROWN
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1275 Pennsylvania Ave., N.W.
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KEITH M. HARPER
D.C. Bar No. 451956
Native American Rights Fund
1712 N Street, NW
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Attorneys for Plaintiffs

OF COUNSEL:

JOHN ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

December 9, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs

v.

GALE NORTON, Secretary

Defendants.

Case No.1:96CV01285

NOTICE OF DEPOSITION

To: Mark E. Nagle
Assistant U.S. Attorney
Judiciary Center Building
555 Fourth Street, NW, Room 10-403
Washington, DC 20001

J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005

Attorneys for Defendants

PLEASE TAKE NOTICE, that on December 20, 2002, at plaintiffs counsel's offices, the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of Donna Erwin, Acting Special Trustee, U.S. Department of the Interior. 1849 C Street, NW, Room 7229, Washington, DC 20240.

This deposition will commence at 9:00 a.m. and will continue from day to day until completed. Testimony will be recorded by stenographic means. You are invited to attend and examine.

Respectfully submitted,

DENNIS M. GINGOLD
D.C. Bar No. 417748
MARK KESTER BROWN
D.C. Bar No. 470952
1275 Pennsylvania Ave., N.W.
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KEITH M. HARPER
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Attorneys for Plaintiffs

OF COUNSEL:

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Native American Rights Fund
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December 9, 2002

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Washington, DC 20005

Attorneys for Defendants

PLEASE TAKE NOTICE, that on December 19 and 20, 2002, at plaintiffs counsel's offices, the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of a witness or witnesses from Electronic Data Systems (EDS), 5400 Legacy Drive, Plano, Texas 75024-3199, designated by defendants pursuant to Fed. R. Civ. P. 30(b)(6). The subject area of this deposition are: (1) The nature and scope of EDS's involvement in trust reform activities related to the Individual Indian Money Trust, (2) the "As-Is" Project; (3) the "To-Be" Project and (4) any additional information regarding the IIM trust. This deposition will commence at 10:00 a.m. and will continue on subsequent days to the extent necessary. Testimony will be recorded by stenographic means.

You are invited to attend and examine.

Respectfully submitted,

DENNIS M. GINGOLD
D.C. Bar No. 417748
MARK KESTER BROWN
D.C. Bar No. 470952
1275 Pennsylvania Ave., N.W.
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Attorneys for Plaintiffs

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December 9, 2002

Joseph S. Kieffer, III.
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December 9, 2002

Terry M. Petrie, Esquire
Michael Quinn, Esquire
John Stemplewicz, Esquire
Civil Division
U.S. Department Of Justice
P. O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Keith Harper, Esquire
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285
(Judge Lamberth)

Dear Counsel:

Re: Phase 1.5 Trial Discovery Pending Depositions

In response to my letter, dated December 5, 2002, entitled as captioned above, plaintiffs' counsel, Mr. Harper, has responded to my request that the parties inform me by today as to whether there has been an agreement on the parties' proposed dates for depositions. His December 9, 2002 letter indicates that there has been no agreement reached on plaintiffs' dates for their depositions of defendants' employees and contractor prior to January 6, 2003. There is still discussion ongoing, apparently, on defendants' requested deposition dates.

Defendants have not responded to my request as of yet to provide me with their position on discovery by today. Mr. Harper, however, has requested that I schedule a discovery conference as soon as possible to address this ongoing discovery dispute. Plaintiffs' counsel have also noticed the depositions of the three deponents they plan to depose with

EXHIBIT 6
Defs' Memorandum in Support of
Motion for Protective Order

dates scheduled prior to January 6, 2002.[1]

However, Mr. Petrie had written to Mr. Harper in a December 6, 2002 letter regarding these pre-January 6, 2003 depositions that: "(i)f you require pre-January 6 dates for these witnesses and demand them by noticing earlier dates, we will move at the appropriate time for a protective order." *Id.* at 2.[2]

Mr. Petrie cited to these two key Interior employees' duties with respect to the preparation of the plans due to the Court on January 6, 2003 and to the "limited window of availability due to work and coordination requirements on the plans occurring in the midst of the holiday season" as the reasons for this refusal to allow plaintiffs' counsel to depose these two Interior employees before January 6, 2003. Mr. Petrie capped his refusal's explanation by stating that plaintiffs' counsel had failed to inform defendants until December 4, 2002 of whom they sought to depose prior to January 6, 2003.

I am perfectly willing to hold a discovery conference either in person or by phone. However, if defendants' counsel are prepared to seek a protective order from the Court to prevent the depositions of Ms. Erwin and Mr. Edwards before January 6, 2003, it would seem that there is little to gain and much time to waste by holding such a conference, confirming the discovery dispute, preparing a Report and Recommendation for the Court following receipt of the parties positions, and waiting for the parties' response to the recommendation in order for the Court to decide on the schedule for the depositions. This is a decision that defendants' counsel will certainly argue (as they have repeatedly) cannot be decided by the Special Master-Monitor. Better that the dispute be placed before the Court now to enable a decision to be made that will allow plaintiffs' counsel their opportunity to depose these witnesses before January 6, 2003 should the Court so decide.[3]

Plaintiffs' counsel have now taken the step that Mr. Petrie said would serve as the catalyst for a motion for a protective order – filing notices of deposition for Ms. Erwin and Mr. Edwards for dates prior to January 6, 2003. Nonetheless, if plaintiffs' counsel desire a discovery conference to address possible solutions to this dispute, I am available to meet or confer by phone tomorrow starting at 9:00 a.m. Please inform me of the time and method for the conference as soon as possible.

Thank you.

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[1] Bert Edwards – December 16, 2002; Donna Erwin – December 20, 2002; and an EDS witness – December 19 and 20, 2002.

[2] This position was limited to Ms. Erwin and Mr. Edwards as Mr. Petrie was willing to schedule the 30(b)(6) EDS deposition on a date prior to January 6, 2003.

[3] It would be even better to come to an agreement on these depositions without the need to involve the Court in this matter at all.

Sincerely yours,

Joseph S. Kieffer, III
Special Master – Monitor

cc: The Honorable Royce C. Lamberth
Mark Brown, Esquire
Dennis Gingold, Esquire
Elliot Levitas, Esquire

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 11, 2002 I served the foregoing *Defendants' Motion for Protective Order and Defendants' Memorandum of Points and Authorities in Support of Motion for Protective Order* 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
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(202) 478-1958

K. P. Kingston
Kevin P. Kingston