IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MAYER-WHITTINGTON
CLERK

ELOUISE PEPION COBELL, et al., Plaintiffs,	Case No. 1:96CV01285 Judge Lamberth
v.	
GALE A NORTON, Defendants.	

INTERIOR DEFENDANTS' RESPONSE TO
COURT ORDER DATED APRIL 3, 2002 REGARDING COURT MONITOR

On April 16, 2001 this Court entered an order appointing a Court Monitor to review the Department of the Interior's trust reform efforts. The Court Monitor's responsibilities were enumerated in that order, which provided that his term would be "at least one year," with possible extension after comment or objection by the parties. Recently, this Court proposed an extension of the Court Monitor's term of service for "at least an additional year," and requested comments or objections from the parties on the question. See Cobell v. Norton, No. 96-1285 (D.D.C. April 4, 2002).

Defendants Gale A. Norton, Secretary of the Interior, and Neil McCaleb, Assistant Secretary for Indian Affairs, (collectively "Interior Defendants") hereby consent to the reappointment of Joseph S. Kieffer, III, to serve as Court Monitor for one additional year, so long as (1) the Court Monitor's actions and reports are given no greater deference or status that those

set out in Federal Rule of Civil Procedure 53, (2) his reports are limited to reporting on steps taken by the Department to rectify the breaches of trust declared by the Court or steps taken that "would necessarily delay rather than accelerate the ultimate provision of an adequate accounting," Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir.2001), and (3) his findings of fact submitted to the Court are based upon witness testimony from on-the-record statements given under oath with an opportunity for cross-examination by the parties. Absent these procedures to ensure fundamental fairness, the Interior Defendants are constrained to object to his reappointment. This position is informed by the Interior Defendants' view that only through reliance upon these well established jurisprudential protections for all parties is appointment of a Court Monitor consistent with fundamental constitutional and legal principles.

The procedures of Rule 53 provide due regard for the deliberative process and other important privileges. As this Court has explained, the deliberative process privilege serves three important purposes:

> First, the privilege protects candid discussions within an agency. Second, it prevents public confusion from premature disclosure of agency opinions before the agency established its final policy. Third, it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions.

Alexander v. FBI, 186 F.R.D. 154, 163 (D.D.C . 1999) (quoting Judicial Watch v. Clinton, 880 F. Supp. 1, 12 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996). The privilege is "predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl." Dow Jones & Co v. Dep't of Justice, 917 F.2d 571, 573 (D.C. Cir. 1990) (internal quotations omitted). Though government decision makers will often disagree and consider numerous options prior to rendering a final decision or policy, these "predecisional and deliberative discussions and disputes" are protected

from public disclosure by the deliberative process privilege. See Hinckley v. United States, 410 F.3d 277, 285 (D.C. Cir.1998). Cf. Morgan v. United States, 304 U.S. 1 (1938).

In the Interior Defendants' view, adherence to the procedural requirements set out above is necessary to ensure the viability of these privileges and, through them, the ability of the Interior Defendants candidly to consider and debate the proper course of future trust reform efforts. It is of particular importance now, as the Interior Department proceeds with trust reform , that it be able to have the open and frank communications that these privileges protect. Interior's commitment to trust reform can be realized only where there is ample "space" within which to make managerial and policy decisions that are uniquely within the purview of the Secretary. The established procedural framework of Rule 53, which permits a Special Master to develop a complete factual record through the traditional "on the record" process, properly balances the legitimate need of the Court and the Plaintiffs to obtain factual information against the Interior Defendants' overriding interest in a full and fair deliberative process.

Reliance upon Rule 53 and the Court of Appeals statement of the limits on judicial power affords essential regard for the constitutional separation of powers doctrine. That doctrine is inherent in our constitutional framework as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." See Buckley v. Valeo, 4224 U.S. 1, 122 (1976). Over the years, courts have enforced the doctrine vigorously, demanding that "each of the three general departments of government [remain] entirely free from the control or coercive influence, direct or indirect, of either of the others." Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935).

Congress has entrusted the Secretary of the Interior with the duty to execute the laws governing Indian trust. See, e.g., 25 U.S.C. 4202(a). Through the American Indian Trust Fund

Management Reform Act of 1994 ("1994 Act"), for example, Congress provided for reform within the Department of the Interior, without shifting trust duties to another agency, much less to the courts or to any other party. See H.R. Rep. No. 1103-7789, at 8-9 (1994), reprinted in 1994 U.S.C.C.A.N. 3467-68 (explaining that the purpose of the bill was to "bring about better accountability and management of Indian trust funds by the Department of the Interior"). In contrast, it is "emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803); see also Morrison v. Olson, 487 U.S. 654, 680-81 (1988) (asserting the importance of "ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those [coordinate] branches"); U.S. Const., art. III 2, cl. 1 ("The judicial Power shall extend to all Cases. . . [and] Controversies. . ."). Only by limiting the role of the Court - and by extension the Court Monitor - to those traditional power set forth in Rule 53 is this important and delicate balance maintained.

Finally, application of the procedures the Interior Defendants believe must be applicable to the Court Monitor safeguards the vitally important due process rights of the Interior Defendants and their employees and agents. The Court Monitor's method of gathering some of the information in his reports – through *ex parte* interviews, not under oath, sometimes with unidentified individuals, and without providing a record of the communication – renders difficult an assessment of the reliability of the information that is gathered and any conclusions based on that information.[1] This, in turn, undermines the Interior Defendants' ability to challenge effectively conclusions with which they disagree, especially in the ten day time frame provided

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[1] This is in contrast to the protections afforded by Rule 53, which requires filing with a Special Master's report "a transcript of the proceedings and of the evidence and the original exhibits." Fed. R. Civ. P. 53(e)(1).

for such responses. Given the importance of the reports and the gravity of the information, conclusions, and opinions contained in them, Defendants object to the continuation of this procedure.

When the Court Monitor was appointed, the Interior Defendants did not expect that his reports would themselves be evidence, either on the merits of the case or at a contempt trial. As the Court Monitor himself explained, his conclusions "are not evidence on which the Court may act . . . as they have not been independently confirmed." See Motion for Reconsideration of November 28, 2001 Order, to the Extent that It Precludes Defendants from Challenging Factual Findings of the Court Monitor (Nov. 29, 2001), Exhibit 1, at 11. But the use of these reports at the recent contempt trial has demonstrated the vitally important need for scrupulous attention to traditional procedural requirements - most importantly the need to have the factual basis for the Court Monitor's conclusions be unambiguously and clearly identified with a full and fair opportunity for further inquiry and cross examination. Only if the parties are able to identify the source for the Court Monitor's conclusion from "on the record" statements and identified documents is it practical to respond fully and fairly to those conclusions in judicial proceedings. A requirement that the Court Monitor comply with the requirements set out above would permit the development of a complete record while at the same time safeguarding these most basic principles of due process.

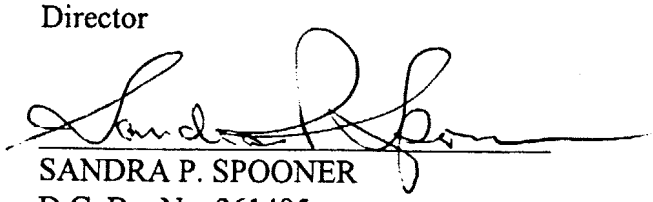
CONCLUSION

Reappointment of the Court Monitor subject to the strictures noted above allows judicial oversight of trust reform, while simultaneously safeguarding protected Executive Branch responsibilities. It can also ensure fact gathering and adjudication take place with proper regard for the due process rights of all parties. For these reasons, the Interior Defendants consent to the

Court Monitor's reappointment is these conditions are applied.

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
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

OF COUNSEL:

Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 11, 2002, I served the foregoing Interior Defendants Response to Court Order Dated April 3, 2002 Regarding Court Monitor by facsimile only, in accordance with their written request of October 31, 2001, upon:

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

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 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 fax to:

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

and by hand delivery upon:

Joseph S. Kieffer
Court Monitor
420 7th Street, NW
Apt 705
Washington, DC 20004

Sean P. Schmergel