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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.	)	Case No. 1:96CV01285
	)	
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION IN LIMINE TO PRECLUDE THE TESTIMONY OF GENERAL COUNSEL AUFHAUSER AND FISCAL ASSISTANT SECRETARY HAMMOND AT THE PHASE 1.5 TRIAL

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Civil Rule 7.1, Defendants respectfully move this Court for an order in limine barring Plaintiffs from calling Mr. David Aufhauser and Mr. Donald Hammond as witnesses at the Phase 1.5 trial.[1] Mr. Aufhauser is General Counsel for the Department of the Treasury, and Mr. Hammond is the Fiscal Assistant Secretary for the Department of the Treasury. Because the Phase 1.5 trial concerns the January 6, 2003 plans proposed by the Department of the Interior ("Interior") and by Plaintiffs, any testimony elicited from these Department of the Treasury ("Treasury") witnesses would be of doubtful relevance to the Phase 1.5 trial. Moreover, because Mr. Aufhauser and Mr. Hammond are high-level officials, they may only be called to testify under extraordinary circumstances, which do not exist here. Therefore, the Court should

[1] Counsel for Defendants has consulted with Plaintiffs' counsel, who opposes this motion.

enter an order in limine prohibiting Plaintiffs from calling Mr. Aufhauser or Mr. Hammond as witnesses at the Phase 1.5 trial.

I. Treasury Witness Testimony is Tangential to the Phase 1.5 Trial

In its 1999 opinion, this Court found that Treasury's sole breach of its fiduciary duty was destruction of trust-related documents and having no remedial plan to address that breach. Cobell v. Babbitt, 91 F. Supp. 2d 1, 49-51 (D.D.C. 1999). In that opinion, the Court referenced its August 12, 1999 Order approving Treasury's record retention plan,[2] adding: "It may very well be that the agreement reached in that instance would satisfactorily discharge Treasury's duty to retain these documents beyond this litigation." Id. at 51. Because the Phase 1.5 trial does not relate to Treasury's record retention policies, which are continuously monitored by the Special Master, there is no basis for Plaintiffs to call any Treasury officials as witnesses at trial, let alone high-ranking Treasury officials.

In its September 17, 2002 opinion, this Court granted "leave to the Treasury defendant to make a pertinent submission [regarding plans for administering IIM trust accounts] . . . . " Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002). Unlike the Court's directive to Interior Defendants to submit a plan, the Court specifically did not require Treasury to submit a similar plan. Consistent with this guidance from the Court, Treasury filed a Memorandum and Statement but did not file a separate "plan" on January 6, 2003, "since the role played by Treasury is a supporting one in assistance and furtherance of Interior's primary role in IIM trust

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[2] The Court entered the August 12, 1999 Order upon the recommendation of the Special Master, Order Regarding Treasury Department IIM Records Retention (Aug. 12, 1999) and with the consent of Plaintiffs. Cobell v. Babbitt, 91 F. Supp. 2d at 50 ("Treasury has agreed, to plaintiffs' satisfaction, to preserve certain enumerated categories of IIM-related trust documents.")

and IIM trust-related matters." Notice of Filing (Treasury Defendant), Jan. 6, 2003. Because the Phase 1.5 trial concerns the trust reform plans filed by Interior and Plaintiffs on January 6, 2003, and because Treasury did not file such a trust reform plan, Plaintiffs have no reason for seeking the testimony of Treasury witnesses.[3]

II. Plaintiffs Cannot Demonstrate Any Basis For Senior Treasury Officials To Testify

A. High-Ranking Government Officials Cannot Be Called to Testify Absent Extraordinary Circumstances

Even apart from the objections discussed above, Plaintiffs have made no showing that Mr. Aufhauser and Mr. Hammond, as high-ranking government officials, should be required to testify. As the D.C. Circuit has made clear, "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)); accord In re United States, 197 F.3d 310, 313-14 (8th Cir. 1999) (citations omitted); In re United States, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (citations omitted) ("the practice of calling high officials as witnesses should be discouraged"); In re Office of Inspector Gen., 933 F.2d 276, 278 (5th Cir. 1991) (citations

[3]In fact, Plaintiffs acknowledged that Treasury's role in this trial is tangential. In response to questions related to a discovery dispute, Mr. Brown stated: "Well, we think that there's a big difference between Treasury and Interior, and Trial 1.5 is geared primarily to Interior, although Treasury may participate, and that Treasury has been - - has not been found in contempt of court most recently and we frankly have found much more obstruction on the part of Interior." Telephone Conference with Special Master-Monitor (Jan. 14, 2003) at 7, lines 19-25 (attached hereto as Exhibit 1).

omited) ("exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted"). [4]

Plaintiffs have made no showing that the testimony of these high-ranking officials is necessary to their presentation of any issue related to the Phase 1.5 trial. The description of expected testimony found in Plaintiffs' Witness List merely reads: "Matters concerning defendants' failure and inability to bring themselves into compliance with their trust duties." Plaintiffs' Pretrial Statement, Witness List (Apr. 22, 2003) at 1. Such a generic description of Mr. Aufhauser's and Mr. Hammond's expected testimony is a far cry from demonstrating that these witnesses "possess information essential to [Plaintiffs'] case which is not obtainable from another source." In re United States, 197 F.3d at 314; see also Alexander v. FBI, 1999 WL 270022, at *2 (D.D.C. Apr. 21, 1999) (citations omitted) ("Litigants should ordinarily be required to depose those individuals with the most knowledge of the relevant facts before taking the depositions of high-ranking government officials.") The information plaintiffs seek from Mr. Aufhauser and Mr. Hammond is barely related to the Phase 1.5 trial, let alone "essential" to it.[5]

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[4] The restriction on compelling testimony of senior government officials applies not only to Cabinet officers, but to other officials as well. See, e.g., Simplex, 766 F.2d at 586 (precluding testimony of Solicitor of Labor, Secretary of Labor's Chief of Staff, OSHA's Regional Administrator and OSHA's Area Director); In re United States, 197 F.3d at 314 (issuing writ of mandamus to prevent compelled testimony of Attorney General and Deputy Attorney General). It clearly encompasses the officials called to testify here.

[5] In preparation for the Phase 1.5 trial, Plaintiffs made no attempt to depose Mr. Aufhauser, Mr. Hammond, or any other Treasury witness. In fact, neither Mr. Aufhauser nor Mr. Hammond participated actively in the development of Interior's Phase 1.5 plans. See Declaration of Donald Hammond at ¶ 5 (attached hereto as Exhibit 2); Declaration of David D. Aufhauser at ¶ 15 (attached hereto as Exhibit 3).

The Court should contrast Plaintiffs' lack of need for Mr. Aufhauser's and Mr. Hammond's testimony with Treasury's need for these two individuals to attend to their other pressing duties, which include developing the financial infrastructure for appropriate use of the vested Iraqi assets and other financial operations in Iraq as well as developing and implementing United States strategies to combat terrorist financing domestically and internationally. See Declaration of Donald Hammond at ¶ 6 (attached hereto as Exhibit 2); Declaration of David D. Aufhauser at ¶¶ 7 - 9 (attached hereto as Exhibit 3).

B. Attorney Testimony is Highly Disfavored.

Not only is Mr. Aufhauser a high-ranking official, but also he is an attorney. Plaintiffs' attempt to call a high-ranking government attorney – the General Counsel of the Department of the Treasury – fails for the additional reason that attorney testimony is strongly disfavored. Indeed, "the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c) . . . protective order unless the party seeking the deposition can show both the propriety and need for the deposition." N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987) (citations omitted); see also Dunkin' Donuts, Inc. v. Mandorico, Inc., 181 F.R.D. 208, 210 (D.P.R. 1998) (citations omitted); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 125 F.R.D. 578, 594 (N.D.N.Y. 1989) (citations omitted).

As the Eighth Circuit has explained, "the increasing practice of taking opposing counsel's deposition [is] a negative development in the area of litigation, and one that should be employed only in limited circumstances." Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); see also Theriot v. Parish of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999) (citation omitted) ("Generally, federal courts have disfavored the practice of taking the deposition of a

party's attorney; instead, the practice should be employed only in limited circumstances."); Rainbow Investors Group, Inc. v. Fuji Trucolor Mo., Inc., 168 F.R.D. 34, 36 (W.D. La. 1996) (citations omitted) ("deposition of opposing counsel is a practice that has long been discouraged as disruptive of the adversarial system"). Accordingly, the party seeking to depose another party's attorney has the burden of establishing that: "(1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Shelton, 805 F.2d at 1327 (citation omitted); see also Boughton v. Cotter Corp., 65 F.3d 823, 829 (10th Cir. 1995); Jennings v. Family Mgmt., 201 F.R.D. 272, 277 (D.D.C. 2001); West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302-303 (S.D. Fla. 1990) (citations omitted).[6] These principles apply with equal force to trial testimony. In stating generically that they expect Mr. Aufhauser to testify regarding "matters concerning defendants' failure and inability to bring themselves into compliance with their trust duties," Plaintiffs have failed to satisfy any of those three elements.

Conclusion

Because the Phase 1.5 trial concerns the January 6, 2003 plans proposed by the Department of the Interior and by Plaintiffs, any testimony elicited from General Counsel

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[6]In United States v. Philip Morris Inc., 209 F.R.D. 13, 17 (D.D.C. 2002), the court discussed Pamida, Inc. v. E.S. Originals, Inc., 281 F.3d 726 (8th Cir. 2002), and found the Pamida decision "makes clear that the three Shelton criteria apply to limit deposition questions of attorneys in only two instances: (1) when trial and/or litigation counsel are being deposed, and (2) when such questioning would expose litigation strategy in the pending case." Although Mr. Aufhauser is not involved in the details of the Cobell litigation, he nonetheless supervises the litigation in his capacity as General Counsel and is being called to testify about it under oath, albeit at trial rather than at a deposition. Therefore, concerns enunciated in Shelton and Pamida are still applicable.

Aufhauser and Fiscal Assistant Secretary Hammond would be tangential to the trial. Moreover, because Mr. Aufhauser and Mr. Hammond are high-level officials, they may be called to testify only under extraordinary circumstances, which do not exist here. Therefore, the Court should enter an order in limine prohibiting Plaintiffs from calling Mr. Aufhauser or Mr. Hammond as witnesses at the Phase 1.5 trial.

Respectfully submitted,

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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
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION IN LIMINE TO PRECLUDE THE TESTIMONY OF GENERAL COUNSEL AUFHAUSER AND FISCAL ASSISTANT SECRETARY HAMMOND AT THE PHASE 1.5 TRIAL

This matter coming before the Court on Defendants' Motion In Limine to Preclude the Testimony of General Counsel Aufhauser and Fiscal Assistant Secretary Hammond at the Phase 1.5 Trial, and having considered any responses thereto as well as the record, the Court finds that the motion shall be GRANTED.

IT IS THEREFORE ORDERED THAT Plaintiffs are precluded from calling General Counsel Aufhauser and Fiscal Assistant Secretary Hammond to testify at the Phase 1.5 trial.

SO ORDERED this ____ day of _____, 2003

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA
3 - - - - - - - - - - - - - - - x
4 ELOUISE PEPION COBELL, :
5 et al., : Case No.
6 Plaintiffs, : 1:96CV01285
7 v. : (Judge Lamberth)
8 GALE NORTON, Secretary of :
9 the Interior, et al., :
10 Defendants. :
11 - - - - - - - - - - - - - - - x
12
13 TELEPHONE CONFERENCE WITH
14 SPECIAL MASTER MONITOR
15
16 Tuesday, January 14, 2003
17 The above-entitled matter commenced at 5:55
18 p.m. and the proceedings were reported telephonically
19 and taken down by Stenomask by MARK T. EGAN, CVR-CM,
20 and transcribed under his direction.
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Defendants' Motion *in Limine* to Preclude Testimony of Genl. Counsel Aufhauser and Asst. Secretary Hammond

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1 P R O C E E D I N G S
2 MR. PETRIE: Let me just take a quick roll
3 call. Mark Brown?
4 MR. BROWN: Yes, sir.
5 MR. PETRIE: Keith Harper.
6 MR. HARPER: Yes, I'm here.
7 MR. PETRIE: Mark Egan, the Court Reporter.
8 THE REPORTER: Yes.
9 MR. PETRIE: Okay, great, so we're all
10 aboard.
11 MR. KIEFFER: And you've got Seligman
12 and - -
13 MR. PETRIE: I've got Michael Quinn, Phil
14 Seligman, and John Siemietkowski.
15 MR. KIEFFER: Siemietkowski, okay.
16 All right, Mr. Petrie; since you sent me
17 the first letter, why don't you start and tell me just
18 what's occurred since we talked yesterday on the
19 conference call.
20 MR. PETRIE: Yes, sir. Sir, we at that
21 time, Mr. Quinn and myself and Mr. Siemietkowski,
22 took your advice, your recommendation, to call Mr.
23 Balloran and we contacted Mr. Balloran, related to him
24 the events of the call with you and that you had
25 recommended that we call you -- call him.

1 We did so, and he said that he was going to
2 consider the matter and asked if I would have a phone
3 number here among the three of us that he could reach
4 later that night, last night, if he wanted to address
5 the matter further.
6 Later that night, I'm just estimating 20,
7 30 minutes later, came back to my office a voicemail
8 message for me from Mr. Balloran to call him. I did
9 so.
10 Mr. Balloran at that point asked me if the
11 government would find five days acceptable. I asked,
12 or took the position that we asked for eight because
13 that's what we had needed; we were not engaging in
14 sometimes a technique that is used in asking for much
15 more time than one would desire and then be content to
16 come up with something less than that.
17 Mr. Balloran at that point placed me on
18 hold and came back a short while later and indicated
19 that the eight days was acceptable and that was
20 approved.
21 MR. KIEFFER: Acceptable to him?
22 MR. PETRIE: My understanding was that he
23 was tieing that to the Plaintiffs and that he was
24 going to approve the motion as a result of that.
25 MR. KIEFFER: I thought you were all going

1 to have a conference call with Mr. Balloran.
2 Mr. Brown or Mr. Harper, did you have any
3 contact with Mr. Balloran?
4 MR. BROWN: I did not.
5 MR. HARPER: No, but I understand that Mr.
6 Gingold on our side did have contact with Mr. Balloran
7 and did consent to an extension for the limited
8 purpose of the Department of Treasury, which we
9 believe is under a -- in a different position than the
10 Interior Department both as a matter of record in this
11 case and vis a vis the need for any enlargement.
12 MR. KIEFFER: Did Mr. Balloran say anything
13 to you, Mr. Petrie, about that issue, or was he just
14 saying, I've gotten consent for the eight days for
15 Treasury, and left it at that?
16 MR. PETRIE: He -- when he indicated that,
17 sir, he did not tie it to the motion specifically in
18 front of him, in the sense that he did not expressly
19 say that it was eight days for the motion that was
20 solely in front of him.
21 I was remiss. There was one last exchange
22 in that call, the second call with Mr. Balloran, and
23 what it was was that he suggested that I then send a
24 letter to the parties advising them, confirming the
25 essence of the decision that had been made.

1 Then at that point Mr. Quinn and myself --
2 Mr. Siemietkowski was not a party to the second.
3 Other than the first conversation with Mr. Balloran,
4 Mr. Siemietkowski wasn't a party to the later
5 conversations with Mr. Balloran. At that point, after
6 we hung up with Mr. Balloran after he asked that we
7 send a letter, I and Mr. Quinn called Mr. Harper to
8 see if -- to confirm our understanding. And that then
9 led to my call with Mr. Harper this morning to discuss
10 this further, at which time it became clear that the
11 consent by the Plaintiffs was to the effect that Mr.
12 Harper described a moment ago.
13 MR. KIEFFER: Okay. Well, why don't we go
14 over to the Plaintiffs here and hear what their
15 opposition is or what the difference, what the
16 distinction is here between Treasury and Interior.
17 Mr. Harper or Mr. Brown?
18
19 MR. BROWN: Well, we think that there's a
20 big difference between Treasury and Interior, and
21 Trial 1.5 is geared primarily to Interior, although
22 Treasury may participate, and that Treasury has been -
23 - has not been found in contempt of court most
24 recently and we frankly have found much more
25 obstruction on the part of Interior.

1 MR. KIEFFER: Well, wait a minute. The
2 issue here is they need time to produce their answer
3 and produce documents or whatever else. The whole
4 emphasis here, the emphasis is on the size of the
5 production that they've got to make and what they've
6 got to do to find answers to your questions and so on.
7 It's not about -- and if Treasury's only tertiarily
8 involved in this thing, it must be easier for Treasury
9 to come up with whatever they've been asked to produce
10 than it will be for Interior.
11 My interest is in why Mr. Balloran
12 apparently ended up mediating and encouraging an
13 agreement on this extension.
14 MR. HARPER: Let me clarify the point a
15 little bit, Mr. Kieffer, if I could. I think that the
16 issue here is that the Defendants are not saying they
17 need the enlargement to produce. They're saying they
18 need the enlargement and they might produce, and
19 they've already listed a series of objections. Our
20 view is, hey, let them get those objections out on the
21 table.
22 MR. KIEFFER: Okay, let's not go into the
23 objections now. I went through that yesterday. I
24 misspoke. I didn't mean just produce. I mean answer
25 your interrogatories and respond to your production

1 request however they're going to respond. I've read
2 the production request and the interrogatories.
3 They're very extensive for Interior. I haven't seen
4 the Treasury ones.
5 MR. BROWN: They're all the same ones.
6 MR. HARPER: But our point is they need no
7 more time to come forward with their specifics on what
8 they are and are not going to produce and on what
9 ground they're not going to produce those. In our
10 view, the difference and the important difference and
11 why we have focused on this issue, this distinction
12 between Treasury and Interior, is that the Interior
13 has a longer demonstration, a more long-term
14 consistent demonstration of bad faith, and if you give
15 them more time they will once again, as they have time
16 and time again, abuse that, abuse that discretion and
17 have us in a situation where we're further
18 disadvantaged than we already are because of their
19 resistance to the discovery in so many different ways.
20 So we think, look, they need to come up
21 with how, what they're going to produce and what
22 they're not going to produce, so to the extent that we
23 believe it is necessary for us to file the appropriate
24 motions that we can do so in short order. If at the
25 time what they're saying is they're responding in the

1 original time frame but the actual production effort
2 they want a few days extension, that may be a
3 different issue. But that's not what we understand
4 their request involves.
5 MR. KIEFFER: Mr. Petrie, what's your
6 response to that?
7 MR. PETRIE: Mr. Kieffer, you know, frankly
8 their agreement on the motion before Mr. Balloran
9 simply ends the story. Conspicuously silent from Mr.
10 Brown's letter that he sent today, misdirected to my
11 personal dial number instead of the office fax number,
12 a fax number that Plaintiffs have used repeatedly, and
13 we only got his letter by checking the Plaintiffs' web
14 site, but conspicuously silent from that letter is not
15 even a single syllable, much less a sentence, that
16 acknowledges the truth that Plaintiffs have consented
17 to the eight days requested in an identical motion for
18 an enlargement for Mr. Balloran on the same two sets
19 of discovery.
20 All of the same -- and frankly, they are -
21 - baseless arguments that Mr. Brown has posited in his
22 letter, as well as those that Mr. Harper has now
23 offered here, could have been lodged in an opposition
24 to the motion before Mr. Balloran. Tellingly, they
25 did not.

1 Frankly, one would almost want to laugh at
2 Mr. Brown's unfounded and unreasoned speculation on
3 the second page of his letter that somehow the
4 Defendants have disrespected you in this matter, when
5 the truth of the matter is: one, we have not; and
6 two, the ugly fact of the matter is that it is the
7 Plaintiffs who have disrespected you, first by their
8 effort to play gamesmanship. In consenting to one
9 motion before Special Master Balloran and objecting to
10 the identical motion before you, they are manipulating
11 the process.
12 Second, and this is an example, and it's
13 prompted by Mr. Brown's remarks yesterday about judge-
14 shopping. Plaintiffs know full well that they are not
15 able to obtain discovery right now and may not, if
16 ever, on the contempt matter involving the named
17 individuals before Mr. Balloran. Yet what signal are
18 they sending when they attempt to do an end run around
19 that prohibition and ask for discovery on the contempt
20 matters in this set of discovery before you.
21 One wants to laugh but cannot, because
22 Plaintiffs apparently tender this disrespect argument,
23 caked with mud, with apparently a straight face.
24 There is no merit to Mr. Brown's letter. There is no
25 merit to these arguments that Mr. Harper has offered

1 here.
2 You went to the heart of the matter, Mr.
3 Kieffer, and stated and recognized that there is a
4 disparate difference in the burdens associated with
5 the discovery requests that the Plaintiffs have
6 propounded here, and they readily, in whatever manner,
7 elected to consent to that motion before Mr. Balloran
8 and now, on the same two sets of discovery, they for
9 whatever reason choose to oppose the motion before you
10 as it relates to Interior.
11 Instead of addressing that fact, they
12 simply choose to throw mud and not address the fact
13 that they have agreed to that extension in the
14 Balloran motion.
15 MR. KIEFFER: Okay, now I have one question
16 for you before we go back and let the Plaintiffs have
17 the final word here.
18 MR. PETRIE: Yes, sir.
19 MR. KIEFFER: That goes to, not disrespect,
20 but to your position about my authority.
21 MR. PETRIE: Yes, sir.
22 MR. KIEFFER: And I've spoken to this
23 before.
24 MR. PETRIE: Yes, sir.
25 MR. KIEFFER: What you're asking me to do

1 right now is to say, is to authorize you eight
2 additional business days. There's no time to go to
3 the Judge and write a report and recommendation, and I
4 doubt the Judge in the last three days' worth of his
5 time in town before he goes on vacation is going to
6 have the chance to even look at this.
7 So unless I can, and I have the authority
8 to say to you, as Mr. Balloran has apparently done,
9 yes, you can have those days, you're up a creek here,
10 Mr. Petrie.
11 So I'm going to ask you again: What do you
12 think my authority is on this matter, as opposed to
13 depositions, as opposed to harassing questions?
14 MR. PETRIE: I think that our position
15 remains the same as it has been before and that what
16 we envision is that by force of your position to be
17 able to see if the parties can agree. Mr. Balloran
18 apparently was able to strike that balance with the
19 Plaintiffs as it regards the motion before him and as
20 it relates to Treasury, and we envision the same sort
21 of role here, that you by force of the position that
22 you play, the role that you play, are in a position to
23 indicate to Plaintiffs in these facts, under these
24 circumstances, that the appropriate course of action
25 is to see if they would be willing to consent to that

1 request.
2 It's their choice ultimately and we would
3 hate to see this thing go the R and R route, but at
4 this juncture that's going to be a product solely and
5 simply ultimately as to what decision they make here
6 regarding our motion.
7 MR. KIEFFER: Let me say one thing here,
8 because I did, to add full disclosure here, I did call
9 Mr. Balloran today when I got your letter Mr. Petrie,
10 because no one had called me to tell me about what had
11 happened over with Balloran. So I called him to find
12 out on what basis he basically made the decision, if
13 he made the decision other than the consent, and there
14 wasn't a consent initially, as Mr. Harper and Mr.
15 Brown have stated.
16 His position basically was -- and I don't
17 know if he described it to each of you -- that this
18 eight business days isn't something out of the
19 ordinary here -- I frankly agree with that -- and that
20 there didn't seem to be any games being played from
21 what he could tell from talking to the parties
22 individually ex parte, I might note.
23 In any event, I agree with him. I also
24 said to you all yesterday that I wasn't going to have
25 inconsistent decisions here and that's why I wanted to

1 coordinate with him and that's why I ended up calling
2 him. And I'm of a mind that that eight-day extension
3 should be given. I think that, having read the
4 discovery and knowing what the Department of Interior
5 has, that they have to go through and the people they
6 have to talk to to answer it, it's a monumental job.
7 I'm surprised you're only asking for eight days, but
8 I'll hold you to that.
9 But I'll grant that eight days. But before
10 I even say that, I want to go back to the Plaintiffs
11 for their final position on this and where they stand
12 on what my authority is. Mr. Harper?
13 MR. HARPER: Well, our view is that you
14 have the authority to regulate discovery as per the
15 court's September 17th order, and we have not changed.
16 Our position has not been modified from that, and we
17 will abide by your ruling on these discovery matters.
18 We do object and we will not consent to an
19 enlargement of time for the Department of Interior,
20 who has a demonstrated track record of acting in bad
21 faith. Mr. Petrie's arguments that we are somehow
22 disrespectful when they have treated you I think what
23 has been rightly denoted as a potted plant, is
24 laughable. I think that the record is pretty clear on
25 that issue without going through all the various

1 nuances of this.
2 We will say, though, that we do oppose
3 their -- we strongly oppose their seeking enlargement,
4 because each and every time they've done so they've
5 abused any allowance that's made to the parties or a
6 judicial officer has granted them.
7 So we do oppose. We think that what will
8 be clearly demonstrated here is that once again they
9 will abuse it. They won't turn over documents,
10 they'll insert frivolous objections, and this will
11 just require additional work on our part to fetter out
12 all the litigation misconduct.
13 MR. KIEFFER: All right. Well, I
14 appreciate your position, Mr. Harper.
15 MR. BROWN: By the way, Your Honor, they
16 still haven't answered your question as to what their
17 position is on your authority.
18 MR. PETRIE: We did.
19 MR. KIEFFER: Yes, he did. He said it was
20 the same. They're not changing that.
21 And that, Mr. Petrie, gives me a lot of
22 problem here, because I've said in a recent letter
23 your position -- you know, Mr. Harper and Mr. Brown
24 and Mr. Gingold follow what I tell them to do. And
25 that's based on your position which you have taken,

1 and I'm not going to go through the history here. But
2 it really gives me pain. I try to be fair and
3 evenhanded and I think I have been.
4 But I think that in some manner I'm harming
5 or could harm the Plaintiffs here by doing what is
6 fair, based on your position on what my authority is.
7 And now you come to me and you want me to get you out
8 of a tight spot here. And I'm going to, because
9 mainly I believe that it's the fair thing to do and
10 Mr. Balloran's already done it or at least gotten
11 consent from the Plaintiffs to do it.
12 I'm going to give you the eight days and I
13 hope that you will respond fully to the discovery
14 request.
15 MR. PETRIE: I appreciate that, Mr.
16 Kieffer. I would simply note -- and this is not to
17 get into a protracted dialogue -- but the same sort of
18 dilemma exists for the Plaintiffs in the sense that,
19 given your take on the legitimacy of the request for
20 an enlargement, if they are to abide by their view of
21 your authority, that is that in this instance what you
22 would determine is appropriate is something that they
23 are to be bound by, then in this instance they would
24 respect that fact and accept the fact that we've got
25 the eight-day enlargement.

1 MR. KIEFFER: Well, they've said they
2 would.
3 MR. PETRIE: I understand that. I just
4 wanted to point that out.
5 MR. KIEFFER: They've done that in every
6 deposition, every discovery proceeding that I have
7 been involved in, and they continue to do that. And
8 if it turns out that they're right and it's going to
9 harm them, we'll be back here in some manner. And I
10 hope it won't, Mr. Petrie.
11 MR. HARPER: Mr. Kieffer, if I could, I
12 think I need to respond to that, because I think that
13 there's not a matter of if it will or whether it will.
14 It has already harmed us. We have been blocked at
15 each deposition from being able to acquire information
16 that I think we have report right to because of
17 frivolous objections despite your rulings.
18 There was even an objection, when you
19 clearly indicated that there was no harassment of a
20 witness, there was an objection and a direction not to
21 answer a question based on harassment of a witness.
22 That's the kind of thing that we're talking about
23 which creates a very one-sided street here, where
24 they're having full ability to depose our witnesses,
25 including with documents that they may or may not have

1 produced to us, and we are limited based on frivolous
2 objections.
3 MR. KIEFFER: Okay.
4 MR. HARPER: And at the same time, there's
5 no -- we're not even sure how we're going to get to a
6 point where these types of clearly, patently unethical
7 conduct is going to be something that is reprimanded
8 in any serious way.
9 MR. KIEFFER: Well, there's two ways you're
10 going to do it. You've got a motion before the court
11 right now to redepose Erwin and to hold Ms. Spooner in
12 contempt for what she did -- or not in contempt; to
13 make her pay for the legal fees or whatever.
14 Also, if you didn't -- if that ruling comes
15 out, comes in your favor, you would be able to go back
16 and ask those questions that you couldn't ask, if you
17 were going to take depositions. But I get a letter
18 from you yesterday saying you're not going to take any
19 more depositions. So there is little I can do to
20 augment or to bring you whole again in these
21 depositions, depending on what the Judge does, if
22 you're not going to take any more depositions.
23 MR. HARPER: Well, I think the issue there
24 was that we weren't going to take the depositions
25 until these issues are resolved, because there's no

1 use in us going into a deposition and each and every
2 time we get to the critical question the Defendants
3 raise frivolous objections and we're prevented from
4 getting the most critical of information. And that's
5 where it's been at each and every one of these.
6 MR. KIEFFER: Well, I'm not going to go,
7 I'm not going to characterize your depositions or how
8 much you've been able to do as opposed to what you
9 haven't been able to do here. And that's what Mr.
10 Petrie was afraid if he mentioned something we were
11 going to get into, and I don't want to get into that.
12 But there were possibilities, which may be excluded
13 now because you're not going to take any more
14 depositions.
15 But in any event, that's my ruling,
16 gentlemen, and I hope that we see in eight business
17 days a good production here.
18 Anything else?
19 MR. PETRIE: That's it from the government,
20 sir.
21 MR. KIEFFER: All right. Well, thank you
22 both.
23 MR. PETRIE: Thank you for your time.
24 MR. HARPER: Thank you.
25 MR. KIEFFER: Bye-bye.

1 (Whereupon, at 6:17 p.m., the conference
2 was adjourned.)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285 RCL
Plaintiffs,	)	
	)	
v.	)	
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF DONALD HAMMOND

I, Donald Hammond, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently employed by the Department of the Treasury, as Fiscal Assistant Secretary. I have been employed in different capacities at Treasury for a total of almost 20 years and have been acting in my current position since January 1998. I report to the Under Secretary for Domestic Finance. As Fiscal Assistant Secretary, I lead the Fiscal Service and my responsibilities include two Treasury Bureaus: The Financial Management Service (FMS) and the Bureau of the Public Debt (BPD).

2. The Fiscal Service's mission is to develop policy for and operate the financial infrastructure of the Federal government, including payments, collections, cash management, financing, central accounting, and delinquent debt collection.

3. My office provides policy oversight of the Fiscal Service bureaus and develops policy on payments, collections, debt financing operations, electronic commerce, government wide accounting, government investment fund management, and other issues. The office also performs two critical functions for the Department: It manages the daily cash position of the government and it produces the cash and debt forecasts used to determine the size and

Defendants' Motion *in Limine* to
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Counsel Aufhauser and Asst.
Secretary Hammond

EXHIBIT 2

timing of the government's financing operations.

4. In addition, the office represents the Secretary on the Federal Accounting Standards Advisory Board, Joint Financial Management Improvement Program, and the Library of Congress and National Archives Trust Fund Boards, is a statutory member of the government wide Chief Financial Officers Council, and serves as liaison to the Federal Reserve system in its capacity as Treasury's fiscal agent.

5. While I have had a significant management role with regard to Treasury's efforts to bring its operations into compliance with the Court's orders in the Cobell litigation, I was not an active participant in the development of the plans submitted by Interior to the Court on January 6, 2003.

6. Moreover, since early March and for the near future, I have been spending a preponderance of my time developing the financial infrastructure for appropriate use of the vested Iraqi assets and other financial operations in Iraq. Considering that I did not participate in the drafting of Interior's plans, and considering the importance and urgency of my work with regard to Iraq, I believe my services are more usefully spent on issues pertaining to Iraq at this time.

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

Executed this 25th day of April, 2003.

DONALD HAMMOND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285 RCL
Plaintiffs,	)	
	)	
v.	)	
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF DAVID D. AUFHAUSER

I, David D. Aufhauser, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the General Counsel of the Department of the Treasury and have held this position since June 1, 2001. I was nominated by the President on February 28, 2001 and confirmed by the Senate on May 26, 2001 to serve as General Counsel of the Department of the Treasury.
2. By statute, the General Counsel is the chief law officer of the Department and, together with Assistant General Counsels, carries out the duties and powers prescribed by the Secretary of the Treasury. 31 U.S.C. § 301(f)(1).
3. Under Departmental regulations, the General Counsel has final authority over legal matters within the Department and, as such, has the authority to participate in and decide any legal matter within the Department. Treasury Order 107-04, 54 Fed. Reg. 32155-03 (1989).
4. I am formerly of the law firm of Williams & Connolly in Washington, D.C., and have been a member of the bar of this Court since 1978.

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Secretary Hammond
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5. I am responsible for the supervision of more than 1200 lawyers within the Department of the Treasury, including the legal staff in Treasury offices and bureaus.

6. As General Counsel and the chief legal officer for the Department, I also am responsible for litigation oversight at Treasury. This includes ensuring that the Department complies with all court orders and that the Department exercises appropriate due diligence regarding the retention and production of records that relate to litigation.

7. Since the terrorist attacks on September 11, 2001, I have taken a leading role both within the Department of the Treasury and in the Executive branch regarding the fight against terrorism, focusing in particular on the disrupting and dismantling of terrorist financing. I chair a National Security Council (NSC) sponsored inter-agency policy coordinating committee (PCC) on terrorist finance that includes representatives from the Treasury Department, the NSC, the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, the Department of Defense, the Department of Homeland Security, the Department of Justice, and the Department of State. This group meets formally at least every two weeks and is charged with marshaling and deploying the assets of the U.S. government to fight global terrorist financing. In addition, I have daily meetings devoted to accomplishing the goals of the PCC, including overseeing Treasury's implementation of the decisions made by the PCC. I travel regularly both within the U.S. and abroad and meet with representatives of foreign governments to share information and enlist their aid in the fight against terrorist financing.

8. In addition to these responsibilities regarding the Treasury Legal Division and the Administration's fight against terrorist financing, since March 2003 I have assumed responsibility for the Treasury Executive Office for Terrorist Financing and Financial Crimes (EOTFFC). This Office is headed by the Deputy Assistant Secretary for Terrorist Financing and Financial Crimes, to whom reports a Treasury bureau, the Financial Crimes Enforcement Network, as well as Treasury's Office of Foreign Assets Control and its Executive Office of Asset Forfeiture. The EOTFFC is charged with: developing and implementing U.S. government strategies to combat terrorist financing domestically and internationally (in concert with Treasury's International Affairs Task Force on Terrorist Financing); developing and implementing the National Money Laundering Strategy, as well as other policies and programs to fight financial crimes; participating in the Treasury's development and implementation of U.S. government policies and regulations in support of the USA PATRIOT Act, including outreach to the private sector; joining in representation of the United States at focused international bodies dedicated to fighting terrorist financing and financial crimes; and developing U.S. government policies relating to financial crimes. The EOTFFC will report to the Deputy Secretary of the Treasury in the future, but is reporting to me while there is a vacancy in the Office of the Deputy Secretary. This vacancy likely will not be filled for a number of months.
9. Until a Deputy Secretary is confirmed, I also am chairing the Treasury Department's USA PATRIOT Act Regulation Review Task Force that was established by former Deputy Secretary Dam to develop effective regulations to

crack down on terrorist financing and money laundering. The Task Force reviews the regulations during the drafting and comment stages to determine whether they accomplish stated goals but are not unnecessarily burdensome on the financial community. While a Treasury led effort, the Task Force consults with public and private experts in this area, including appropriate federal regulators such as the Securities and Exchange Commission, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Commodity Futures Trading Commission, and the Federal Reserve Board, as well as industry groups.

10. Since coming to Treasury, I have ensured that someone under my direct supervision directly oversees and manages Treasury's significant litigation, including the Cobell litigation. Specific to this litigation, Brian Ferrell, Chief Counsel, Bureau of the Public Debt (and Special Attorney for the Justice Department in the Cobell litigation) is responsible for a team of attorneys and program staff that ensure that Treasury is abiding by its trust–related obligations. Mr. Ferrell has access to the most senior people at Treasury and has access to the necessary personnel to perform this assignment. He has unlimited access to all Treasury facilities, offices, records and personnel to perform necessary audits, monitoring reviews, and investigations, as necessary. Mr. Ferrell has kept me apprised of significant events in the litigation and keeps the Court, Special Master and the plaintiffs well-informed of actions taken by Treasury that relate to this litigation.

11. Treasury continues to work with the Special Master, as it has in the past, to assist the Special Master in his assessment of Treasury's trust document retention and litigation oversight programs. This assistance will continue to include providing access to senior supervisory officials at Treasury, access to training sessions of Treasury attorneys and program staff, as well as coordinating access to any facilities, offices, and records the Special Master seeks to visit or report upon.

12. In its September 17, 2002 Opinion and Order, the District Court directed the Secretary of the Interior to file, by January 6, 2003, a plan for conducting a historical accounting of the Individual Indian Money (IIM) accounts as well as a plan for bringing the Department of the Interior (Interior) into compliance with the fiduciary obligations owed to the IIM beneficiaries.

13. In that same order, the Court granted Treasury leave so that it **might** make a "pertinent submission" akin to the plan which Interior has been ordered to file.

14. On January 6, 2003, Treasury filed its Statement Regarding the Court's September 17, 2002 Opinion and Order in Cobell, et al. v. Norton, et al.. In that submission, Treasury informed the Court that Treasury has taken extensive steps to fulfill its trust-related obligations but does not have a separate "plan" from that of Interior since the role played by Treasury is a supporting one in assistance and furtherance of Interior's primary role in IIM trust and IIM trust-related matters.

15. To the best of my recollection and belief, during 2002 I attended several high-level meetings at the Department of Justice and/or at the Department of Interior, to review the progress of trust reform and the status of the Government's efforts to comply with various Court orders in Cobell. These meetings were chaired by

either Assistant Attorney General Robert McCallum, Interior's Solicitor William Myers, or Interior's Deputy Secretary Steve Griles. I did not, however, participate in the drafting of the January 6, 2003 plan. I have delegated principal Treasury responsibility for tracking Interior's compliance plans to Mr. Ferrell.

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

Executed this 25 day of April, 2003.

DAVID D. AUFHAUSER

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 28, 2003 I served the foregoing *Defendants' Motion in Limine to Preclude the Testimony of General Counsel Aufhauser and Fiscal Assistant Secretary Hammond at the Phase 1.5 Trial* 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

Per the Court's Order of April 17, 2003
By Facsimile and U.S. Mail upon:

My Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

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.
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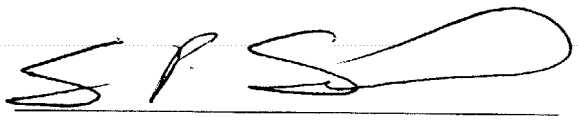

Sean P. Schmergel