IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. DISTRICT COURT DISTRICT OF COLUMBIA
2003 APR 29 PM 7:30
NANCY M. MAYER-WHITTINGTON CLERK

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

INTERIOR DEFENDANTS' MOTION IN LIMINE TO EXCLUDE INTERIM REPORT OF THE SPECIAL MASTER REGARDING THE FILING OF INTERIOR'S EIGHTH QUARTERLY REPORT AND ALL EVIDENCE RELATED TO THE SPECIAL MASTER'S INCOMPLETE INVESTIGATION

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Rule 7.1, Interior Defendants respectfully move this Court for an Order in limine excluding the Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report (filed April 21, 2003) ("Interim Report"), and all evidence offered by Plaintiffs related to the pending investigation of the Special Master into the filing of the Eighth Quarterly Report.[1] Interior Defendants seek an order in limine for the reasons set forth below.

I. THE INTERIM REPORT IS INADMISSIBLE

By order dated November 5, 2002,[2] this Court authorized Special Master Balaran to investigate certain claims made by a former Interior contractor, Native American Industrial

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[1] On April 28, 2003, Interior Defendants' counsel conferred with Plaintiffs' counsel pursuant to Local Rule 7.1(m). Plaintiffs' counsel stated that Plaintiffs will oppose this motion.

[2] The handwritten date of the Order is December 5, 2002, but this is obviously mistaken, as the Order was filed a month earlier, on November 5.

Distributor, Inc. ("NAID"), that Interior improperly withheld information that should have been disclosed to the Court in the Eighth Quarterly Report. On April 21, 2003, the Special Master filed his Interim Report. As disclosed by the Special Master, the Interim Report is "interim" because he has not finished his investigation. Interim Report at 1 n.1.

The Interim Report is inadmissible hearsay under Fed. R. Evid. 803 and does not fall within any exception to the hearsay rule. On that ground alone it must be excluded.[3]

The Interim Report also fails on relevance grounds. The Interim Report contains the interim findings and conclusions of the Special Master related to his investigation of whether Interior improperly excluded information from the Eighth Quarterly Report, filed on January 16, 2002. The Special Master's investigation into the contents of a quarterly report filed eight months before this Court ordered the parties to file the historical accounting and trust management plans which are the subject of the Phase 1.5 trial can have no relevance to those plans. The Interim Report should be excluded as irrelevant evidence under Fed. R. Evid. 402.

Moreover, even if the Interim Report did have some tangential relevance, any probative value would be outweighed by the danger of unfair prejudice. The Interim Report is based largely upon information that the Special Master obtained "outside of normal channels and to which the parties may have no familiarity." Interim Report at 1 n.1. It would be improper to admit into evidence a report from a judicial official that is based in any way upon secretly acquired information. Some of the documents attached as exhibits to the Interim Report were obtained from unknown sources and their authenticity has not yet been verified. Furthermore,

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[3] The Interim Report is listed as Exhibit 40(a) in Plaintiffs' Exhibit List, attached as Exhibit 3 to Plaintiffs' Pretrial Statement.

many of the documents the Special Master relies upon may be privileged. The Special Master has revealed the contents of these documents without first giving Interior an opportunity to assert any privilege. Under these circumstance, the unfair prejudice of considering the Interim Report manifestly outweighs any probative value and the report should thus be excluded under Fed. R. Evid. 403.

It would also be improper to admit into evidence an interim report about an incomplete investigation. Until the Special Master has finished his investigation, nothing in the Interim Report should be considered by the Court.[4]

II. EVIDENCE RELATED TO THE SPECIAL MASTER'S INVESTIGATION IS INADMISSIBLE

For all of the reasons discussed above, it would also be improper to admit any other evidence offered by Plaintiffs which is related to the Special Master's investigation. Plaintiffs' witness list, attached as Exhibit 1 to their Pretrial Statement, contains two employees of NAID, Jerry Morgan[5] and Michael Smith. These employees of a former Interior contractor had nothing whatsoever to do with the creation of either of Interior's plans.[6] Their proposed testimony can only be related to the Special Master's incomplete investigation into the filing of the Eighth

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[4] It would also be improper to consider a master's report before Interior has had an opportunity to file its objections. Pursuant to Fed. R. Civ. P. 53(e)(2), Interior will timely file its objections to the interim findings and conclusions in the Interim Report by May 5, 2003.

[5] It is believed that Plaintiffs intended to list NAID employee, Jerry "Moran," not "Morgan."

[6] They are not listed as having any information about Plaintiffs' plans either. If they are being offered to give testimony about Plaintiffs' plans, they should be excluded because Plaintiffs have not yet answered the discovery that Interior propounded on February 21, 2003 asking who provided information related to Plaintiffs' plans.

Quarterly Report. As such, their testimony should be excluded as irrelevant to any issue properly before the Court in the Phase 1.5 trial.

Similarly, the testimony from Interior employee Chester Mills, listed as a potential witness by Plaintiffs, should be excluded. Mr. Mills was the Trust Assets and Accounting Management System Project Manager and worked closely with NAID. He is mentioned frequently in the Interim Report (see, e.g., id. at 10, 25, 26, 34, 36, 37, 39, 42). His testimony, to the extent that it relates to the Special Master's investigation or Interim Report, should be excluded as irrelevant evidence in the Phase 1.5 trial.

In short, Plaintiffs should not be permitted to transform the Phase 1.5 trial into a mini-hearing about the Special Master's preliminary and incomplete investigation into the Eighth Quarterly Report. The Interim Report and any witness testimony, or other evidence related to the investigation or the Interim Report, should be excluded.

CONCLUSION

For these reasons, Interior Defendants' Motion should be granted.

Dated: April 28, 2003

Respectfully submitted,

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	).	

ORDER

This matter comes before the Court on Interior Defendants' Motion In Limine To Exclude Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report and All Evidence Relating to the Special Master's Incomplete Investigation. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants' Motion is GRANTED;

ORDERED that the Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report will not be admitted into evidence at the Phase 1.5 trial;

ORDERED that the testimony of Jerry Moran, Michael Smith and Chester Mills will be excluded from the Phase 1.5 trial;

ORDERED that all evidence related to the Special Master's incomplete investigation into the filing of Interior's Eighth Quarterly Report will be excluded from the Phase 1.5 trial.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 28, 2003 I served the foregoing *Interior Defendants' Motion in Limine to Exclude Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report and All Evidence Related to the Special Master's Incomplete Investigation* by facsimile in accordance with their written request of October 31, 2001 upon:

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

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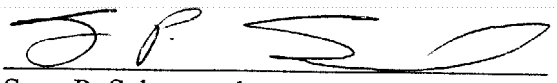

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