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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.	

INTERIOR DEFENDANTS' MOTION FOR PROTECTIVE ORDER REGARDING PRIVILEGED DOCUMENTS REFERENCED IN THE SEVENTH REPORT OF THE COURT MONITOR

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") hereby move that this Court enter an order providing Interior with relief in order to provide due protection to six specific privileged documents that the Court Monitor inappropriately used and disclosed in the Seventh Report of the Court Monitor ("Seventh Report"), filed May 2, 2002. In particular, Interior requests that the Court order (1) that the copies of the privileged documents attached to the Seventh Report be removed and deemed stricken from the record, and returned to Interior; (2) that portions of the Seventh Report that disclose or discuss the content of the Privileged Documents, e.g., pages 66 et seq., be stricken; (3) that the Court Monitor, Plaintiffs, and Plaintiffs' attorneys return all copies of the Privileged Documents to Interior; and (4) that publication or use of the Privileged Documents in any way shall be barred, without permission by the Government or an order from the Court, after due process to Interior.

Interior's Memorandum of Points and Authorities, which accompanies this motion, demonstrates the grounds for the relief we request.

Counsel for Interior Defendants called counsel for Plaintiffs to ask if he would agree to the relief sought by this motion, but he refused.

Therefore, Interior requests that this Court enter the proposed order submitted herewith, granting the relief stated above, or such other and further relief to which Interior might be entitled.

Respectfully submitted,

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

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OF COUNSEL:

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PROTECTIVE ORDER REGARDING
PRIVILEGED DOCUMENTS REFERENCED IN
THE SEVENTH REPORT OF THE COURT MONITOR

This matter coming before the Court on Interior's Defendants' Motion for Protective Order Regarding Privileged Documents Referenced in the Seventh Report of the Court Monitor ("Seventh Report"), and any responses thereto, the Court finds that the Motion should be GRANTED. The Court finds that the following documents identified in the Motion are and remain protected by the attorney-client privilege and the work product doctrine:

1. March 29, 2002 letter from Sandra P. Spooner, Deputy Director, Department of Justice ("DOJ"), to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing recent Special Master requests and attaching certain prior letters from DOJ (produced to Special Master as SMREQ0002156-P through SMREQ0002160-P), attached to Seventh Report at Tab 13;

2. March 25, 2002 letter and revised draft supplemental search memorandum for Special Master's February 7, 2002 request (as clarified on March 8, 2002) regarding the OIRM move from Peter B. Miller, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior (produced to Special Master as SMREQ0002167-P through SMREQ0002172-P), attached to Seventh Report at Tab 13;

3. March 20, 2002 letter from Peter B. Miller, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing

Special Master's March 20, 2002 request regarding IT security (produced to Special Master as SMREQ0002180-P), attached to Seventh Report at Tab 13.

4. April 12, 2002 memorandum from Thomas Slonaker, Special Trustee, to William Myers, Solicitor, DOI, discussing legal advice received by the Office of the Special Trustee concerning its document production in response to the Special Master's 3/19/02 request regarding the Lee's Summit records transfer and quoting and transmitting the 3/19/02 letter from the DOJ to the Office of the Solicitor transmitting and discussing the Special Master's 3/19/02 request (produced to Special Master as SMREQ0002610-P through SMREQ0002614-P); unnumbered copies are attached to Seventh Report at Tab 16.

5. March 19, 2002 letter from Amalia B. Kessler, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing Special Master's 3/19/02 request regarding Lee's Summit records transfer (produced to Special Master as SMREQ0001357-P through SMREQ0001358-P and as SMREQ0002613-P through SMREQ0002614-P); unnumbered copy of the letter is attached to Seventh Report at Tab 16.

6. April 24, 2002 memorandum from Thomas Thompson, Principal Deputy Special Trustee, Department of the Interior, to William Myers, Solicitor, Department of the Interior and Larry Jensen, Counselor to the Solicitor, through Tom Slonaker, Special Trustee, Department of the Interior discussing March 29, 2002 letter from Sandra Spooner, DOJ, to Larry Jensen, attached to Seventh Report at Tab 12 and Tab 16.

IT IS THEREFORE ORDERED that the Clerk of the Court shall remove the above-listed documents from the original and all copies of the Seventh Report of the Court Monitor, filed on May 2, 2002, the Clerk shall turn over such documents to Interior, and such documents shall be deemed stricken from the record of this case;

FURTHER ORDERED that the Court Monitor shall identify to the Court all parts and passages in the Seventh Report in which he disclosed or discussed the contents of the above-listed documents, and all such parts and passages of the Seventh Report shall be deemed stricken from the record;

FURTHER ORDERED that the Court Monitor, Plaintiffs, and Plaintiffs' attorneys shall

return to Interior all copies of the above-listed documents that are in their possession, custody or control;

FURTHER ORDERED that the above-listed documents shall not be disclosed or used without prior express permission of Interior or prior authorization by this Court.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 31, 2002 I served the Foregoing *Interior Defendants' Motion for Protective Order Regarding Privileged Documents Referenced in the Seventh Report of the Court Monitor*, by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
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1712 N Street, NW
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Dennis M Gingold, Esq.
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by Facsimile and U.S. Mail:

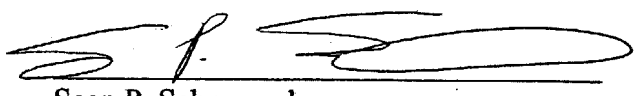
Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

by U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Courtesy Copy by U.S Mail:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004



Sean P. Schmergel

U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2002 MAY 31 PM 6:50
NANCY M.
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IN THE UNITED STATES DISTRICT COURT
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ELOUISE PEPION COBELL, et al.,	
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v.	Case No. 1:96CV01285
	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

INTERIOR DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER REGARDING PRIVILEGED DOCUMENTS REFERENCED IN THE SEVENTH REPORT OF THE COURT MONITOR

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") state the following in support of their Motion for Protective Order Regarding Privileged Documents Referenced in the Seventh Report of the Court Monitor.

Introduction

The Seventh Report of the Court Monitor inappropriately disclosed six privileged documents, without affording Interior Defendants a fair opportunity to have their claims of privilege protected or even decided after notice and a hearing. As shown below, the subject documents clearly are covered by the attorney-client privilege and the work product doctrine, those privileges have not been waived, and relief is appropriate in order to preserve the privileges.

Background

The Court Monitor filed the Seventh Report of the Court Monitor ("Seventh Report") on May 2, 2002. Attached to the Seventh Report are the following six documents (the "Privileged Documents"):

1. March 29, 2002 letter from Sandra P. Spooner, Deputy Director, Department of Justice ("DOJ"), to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing recent Special Master requests and attaching certain prior letters from DOJ (produced to Special Master as SMREQ0002156-P through SMREQ0002160-P),[1] attached to Seventh Report at Tab 13;

2. March 25, 2002 letter and revised draft supplemental search memorandum for Special Master's February 7, 2002 request (as clarified on March 8, 2002) regarding the OIRM move from Peter B. Miller, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior (produced to Special Master as SMREQ0002167-P through SMREQ0002172-P), attached to Seventh Report at Tab 13;

3. March 20, 2002 letter from Peter B. Miller, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing Special Master's March 20, 2002 request regarding IT security (produced to Special Master as SMREQ0002180-P), attached to Seventh Report at Tab 13.

4. April 12, 2002 memorandum from Thomas Slonaker, Special Trustee, to William Myers, Solicitor, DOI, discussing legal advice received by the Office of the Special Trustee concerning its document production in response to the Special Master's 3/19/02 request regarding the Lee's Summit records transfer and quoting and transmitting the 3/19/02 letter from the DOJ to the Office of the Solicitor transmitting and discussing the Special Master's 3/19/02 request (produced to Special Master as SMREQ0002610-P through SMREQ0002614-P); unnumbered copies are attached to Seventh Report at Tab 16.

5. March 19, 2002 letter from Amalia B. Kessler, Trial Attorney, DOJ, to Larry Jensen, Counselor to the Solicitor, Department of the Interior transmitting and discussing Special Master's 3/19/02 request regarding Lee's Summit records transfer (produced to Special Master as SMREQ0001357-P through

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[1] Although we list Bates numbers on the copies attached to the Seventh Report, Interior produced to the Special Master additional copies of some or all of these documents, with different Bates numbers.

SMREQ0001358-P and as SMREQ0002613-P through SMREQ0002614-P); unnumbered copy of the letter is attached to Seventh Report at Tab 16.

6. April 24, 2002 memorandum from Thomas Thompson, Principal Deputy Special Trustee, Department of the Interior, to William Myers, Solicitor, Department of the Interior and Larry Jensen, Counselor to the Solicitor, through Tom Slonaker, Special Trustee, Department of the Interior discussing March 29, 2002 letter from Sandra Spooner, DOJ, to Larry Jensen, attached to Seventh Report at Tab 12 and Tab 16.

The Seventh Report discusses the substance of these documents at a number of places. See, e.g., Seventh Report at 66 et seq. Interior filed its Response to the Seventh Report of the Court Monitor on May 16, 2002, asserting the privileges discussed herein, and objecting to the Court Monitor's publication and disclosure of these documents.

The Interior Defendants produced documents numbered 1 through 5 to the Special Master *in camera* with a privilege log in response to his March 29, 2002, request for "instructions" issued by the Department of the Interior, the Solicitor's Office and the DOJ, "seeking compliance" with his prior requests for documents relating to IT security, the OIRM move from Albuquerque to Reston, and the records move from Albuquerque to Lee's Summit. See transmittal letters and privilege logs within Attachments A through E to Interior's Response to the Seventh Report.

In so producing those documents to the Special Master, Interior Defendants claimed attorney-client and work product privileges because they concern the purely litigation-related topic of responding to the Special Master's document requests in Cobell v. Norton rather than the broader issue of Interior's trust obligations. The documents were listed on a privilege log and produced to the Special Master *in camera* on the condition that they not be produced or made public without Interior Defendants first having an opportunity to seek a final ruling on the issue

of work product and attorney/client protection. See letter dated February 7, 2002, from Alan Balaran to DOJ attorney Peter Miller (included at Tab 13 of the Seventh Report); see also each of the letters from DOJ attorneys to Alan Balaran, within Attachments A through E to Interior's Response to the Seventh Report. The sixth document (the April 24, 2002 memorandum), although not produced to the Special Master, is privileged nonetheless.

Although he does not state who gave him the Privileged Documents, the Court Monitor states that he secured these documents "[p]ursuant to this Court's April 16, 2001 Order and the Secretary of the Interior's April 24, 2001 subsequent direction in light of that Order that the Court Monitor should be provided 'access to any Interior offices or employees to gather information necessary or proper to fulfill his duties.'" Seventh Report at 68.

The Seventh Report does not indicate that the Court Monitor obtained a knowing waiver of privilege from anyone authorized to waive the privileges attached to these documents. Nor did the Court Monitor afford the Interior Defendants an opportunity to be heard on any privilege claims it had for these documents before publishing them with the Seventh Report. Indeed, the Court Monitor does not state that he challenges the validity of the privileges asserted – he simply disclosed the documents without addressing privilege questions.

Argument

I. The Documents Are Privileged

The six documents (which are described in the privilege logs (see Attachments A through E to Interior's Response to the Seventh Report submitted to the Special Master) are covered by

the attorney-client and work product privileges.[2] To further establish the applicability of the attorney-client privilege, the declaration of Larry Jensen is attached as Exhibit A. The letters dated March 29, 2002 (Spooner to Jensen), March 25, 2002 (Miller to Jensen), March 20, 2002 (Miller to Jensen) and March 19, 2002 (Kessler to Jensen) are letters from Interior's litigation counsel at DOJ to Larry Jensen, Counselor to the Solicitor of Interior, with copies to lawyers[3] within Interior's Office of the Solicitor and/or to a senior Interior official, Deputy Secretary J. Steven Griles.

The Jensen Declaration (¶¶ 5-8) shows that the agency has made appropriate efforts to preserve the confidentiality of the letters. After having been sent from DOJ attorneys to agency counsel, the letters were further disseminated to agency officials who are responsible for their respective components' production of documents, and, in that regard, act or speak on behalf of their respective components, and thus for the agency with regard to their respective components' searches for and production of documents responsive to the production requests that are the subject of the letters. See Evans v. Atwood, 177 F.R.D. 1, 6 (D.D.C. 1997)("circulating truly confidential information among concerned officials does not defeat the privilege since all the recipients shared the attorney-client privilege with each other"); see also Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977)("where the client is an organization, the privilege extends to those communications between attorneys and

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[2] To date, neither the Court Monitor nor anyone else has argued that the privileges do not apply. Should such a challenge be made, Interior should be given a further opportunity to respond to the particulars of any objection to the privileges.

[3] All of the "cc" recipients of the letters dated March 25, 2002 (Sabrina McCarthy and Richard Zeitler), March 20, 2002 (Sabrina McCarthy), and March 19, 2002 (Michelle Singer) are attorneys within the Office of Solicitor, assigned to work on this case.

all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication").

The letters discuss responses to the Special Master's continuing requests for documents in the context of this ongoing litigation.[4] This case illustrates the observation that, "in practice it is generally impossible to separate [communications from client to attorney] from the ones made by the attorney to the client." Alexander, 193 F.R.D. at 5, quoting In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 388 n.20 (D.D.C. 1978). The court in In re Sealed Case, 737 F.2d at 101, found communications by an attorney to be privileged so long as they were "based, at least in part" on confidential information previously disclosed to him. See also Upjohn Company v. United States, 449 U.S. 383, 390 (1981)(the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer . . . .") (Emphasis added.)

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[4] Case law in this circuit indicates that, to be covered by the attorney-client privilege, communications from the lawyer to the client need "rest[] in significant and inseparable part on the client's confidential disclosure." Alexander v. Federal Bureau of Investigation, 193 F.R.D. 1, 5 (D.D.C. 2000), quoting In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). The March 29, 2002 and March 25, 2002 letters, for example, refer to and discuss information that DOJ learned from Interior regarding its procedures for compliance with document production requests.

Further, this is a case in which, because of its sheer magnitude and scope, the lawyers and the client are in virtually constant communication with each other, the lawyers continually receive information from the client, and the lawyers' advice and remarks to the client are necessarily based upon and inexorably intertwined with, the confidential communications that have taken place. Even letters which might not refer specifically to identifiable facts learned from the client nevertheless are based upon such confidential communications, for these determine in large part what the lawyers choose to say, how they say it, and what they emphasize, thus implicitly revealing what has been discussed. See, e.g., Coastal States Gas Corp. v. Dep't of Engergy, 617 F.2d 854, 862 (D.C. Cir. 1980)("the federal courts extend the privilege also to an attorney's written communications to a client, to ensure against inadvertent disclosure, either directly or by implication, of information which the client has previously provided to the attorney's trust").

The remaining two documents (the April 12, 2002 and April 24, 2002 memoranda, respectively) are memoranda from officers within the Office of Special Trustee to lawyers within Interior's Office of the Solicitor, providing information and seeking legal advice regarding document production or other matters pertaining to the litigation. The recipients of the two memoranda (the Solicitor and Larry Jensen) did not further disseminate them. Jensen Declaration, ¶ 8 .

In addition to being covered by the attorney-client privilege, each of the documents was prepared by the Interior Defendants' attorneys or officers (of the Office of Special Trustee) to assist in Interior's defense of this litigation, so the documents are covered by the work product doctrine.[5]

Although the Court Monitor makes baseless allegations and innuendo of wrongdoing (see Interior Defendants' Response to Seventh Report), he offers no facts or evidence that even remotely support avoidance of the attorney-client privilege on that basis; mere speculation and unfounded allegations cannot defeat the privilege. See In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997); Alexander v. Federal Bureau of Investigation, 192 F.R.D. 32, 36 (D.D.C. 2000).

II. Interior Has Not Waived Its Privileges

A. Production to the Special Master and/or the Court Monitor Should Be Deemed "Compelled" Production That Does Not Waive Privileges

We are aware of only two persons outside of the Department of the Interior who might have been given copies of the Privileged Documents (prior to the Court Monitor's filing of them

[5] See, e.g., Fed. R. Civ. P. 26(b)(3), which provides protection from disclosure for "documents. . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . ."

as exhibits to the Seventh Report) : The Special Master (to whom Interior, through DOJ, formally and *in camera* produced five of the six documents) and, apparently, the Court Monitor. But production to those persons does not waive the attorney-client privilege or the work product doctrine. Production of documents to the Special Master and the Court Monitor is equivalent to "court-compelled disclosure" that the D.C. Circuit has recognized is not the sort of voluntary disclosure that waives the attorney-client privilege. In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)("Short of court-compelled disclosure, [citation omitted], or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege").[6]

The Special Master has indicated to Interior that his requests for documents are to be treated as equivalent to orders under Fed. R. Civ. P. 53(c).[7] Therefore, when he issued his March 29, 2002 request for all "instructions" issued by Interior, the Solicitor's Office and the DOJ "seeking compliance" with his prior requests for documents relating to IT security, the OIRM move from Albuquerque to Reston, and the records move from Albuquerque to Lee's Summit, Interior and its counsel were effectively "compelled" to produce documents including those numbered 1 through 5 on the list at pages 2-3, supra.

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[6] We are aware of the case law in this circuit that even inadvertent disclosures to opposing counsel may waive the attorney-client privilege, see, e.g., In re Sealed Case, 877 F.2d at 980; Wichita Land & Cattle Co. v. American Federal Bank, 148 F.R.D. 456, 458 (D.D.C. 1992), but, for the reasons discussed herein, that principle should not be applied to the production of information to the Court Monitor or Special Master, who act as judicially appointed officers rather than an opposing litigant, and to whom disclosure should be treated as "court-compelled."

[7] See, e.g., letter dated March 4, 2002, from Alan Balaran to DOJ attorney Peter Miller (Attachment 1 to the portion of Interior's Response to the Seventh Report that was submitted to be filed under seal on May 16, 2002); see also April 26, 2002, from DOJ attorney Amalia Kessler to Special Master Alan Balaran (Attachment D to Interior's Response to the Seventh Report).

But the Special Master agreed that documents as to which Interior claims privilege would be viewed only *in camera*, and that such documents would not be produced or made public without Defendants first having an opportunity to seek a final ruling on the applicability of the claimed privileges. See letter dated February 7, 2002, from Alan Balaran to DOJ attorney Peter Miller (included at Tab 13 of the Seventh Report); see also each of the letters from DOJ attorneys to Alan Balaran, within Attachments A through E to Interior's Response to the Seventh Report. Interior thus asserted its claim of privilege by submitting privilege logs specifically identifying those documents. Therefore, production of the Privileged Documents to the Special Master did not waive any privilege.

The Court Monitor did not submit any similar requests to Interior's counsel for production of such documents. We do not know whether an Interior employee, acting on his own might have given copies of the Privileged Documents to the Court Monitor. But, assuming for the sake of argument that occurred, such disclosure to the Court Monitor should not be deemed a waiver of applicable privileges. While the Court Monitor's requests (whether formal or otherwise) are not equivalent to an order, this Court previously ordered Interior to "facilitate and assist Mr. Kieffer in the execution of his duties and responsibilities" and to provide him "with access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." See Order dated April 16, 2001 at 2 (¶ 4). In light of the Court's direction to "facilitate and assist" the Court Monitor, and to provide him "access," any disclosure of privileged information to him should be treated as an *in camera* disclosure to the Court that does not waive privileges. Although the Court Monitor lacks authority to conduct discovery or otherwise require production of evidence, materials voluntarily turned over to him nevertheless should be treated as "court-

compelled" for purposes of analyzing privileges because of the breadth of the "access" given him by the Court's order.

In Securities and Exchange Comm'n v. Lavin, 111 F.3d 921, 932 (D.C. Cir. 1997), an employer produced to a Federal Reserve Bank tape recordings of an employee's phone calls, not even pursuant to a subpoena (let alone a court order), but merely "in response to the Federal Reserve's exercise of its examination powers" regarding banks. The employee had informed the employer that the employee asserted the marital privilege, and the employer thus asserted that privilege on the employee's behalf. Id. at 933. In a later investigation by the SEC, the SEC claimed that release of the tapes to the Federal Reserve Bank was a waiver of the privilege. The D.C. Circuit, however, held that disclosure to the Federal Reserve Bank pursuant to its "examination powers" did not constitute a waiver of the employee's marital privilege, and thus, the court refused to order production of the privileged tapes to the SEC . Id. at 932.

Similarly in this case, this Court has conferred broad monitoring authority upon the Court Monitor. Once Interior learned that the Court Monitor possessed and publicly disclosed the Privileged Documents, Interior objected and asserted the privileges (i.e., in its Response to the Seventh Report). Thus, disclosure, if any, to the Court Monitor should not be deemed a waiver of privilege. At a minimum, the Court Monitor at least should have avoided further disclosure of any obviously privileged materials (and each of the Privileged Documents is, on its face, a privileged communication between client and counsel) until Interior was given notice and an opportunity to obtain a final ruling on the applicability of privileges.

Even if any employees of the Department of the Interior who produced the documents had wanted to waive privileges, it is doubtful that the privilege could be waived in the context of

ongoing litigation without consent of the Department of Justice (which gave no such consent) because, pursuant to 28 U.S.C. § 516, the Department of Justice has exclusive authority to conduct the litigation.[8]

Further, even if an employee of Interior had authority to waive the attorney-client privilege, that would not waive the work product privilege. In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982)("the work product privilege is not automatically waived by any disclosure to a third party"); see also Permian Corp. v. United States, 665 F.2d 1214, 1222 (D.C. Cir. 1981)(even though production of documents to SEC waived attorney-client privilege, that did not waive the work-product doctrine as to those documents). DOJ has a separate right to claim the work product privilege which no one at Interior can waive, at least with regard to the Privileged Documents generated by DOJ attorneys. In re Sealed Case, 676 F.2d at 809 n.56 ("[t]o the extent that the interests do not conflict, attorneys should be entitled to claim [work product] privilege even if their clients have relinquished their claims").

Although an attorney's production of documents to his opponent may waive the work product protection, that principle should not apply here. In In re Subpoenas Duces Tecum, 738 F.2d 1367, 1372 (D.C. Cir. 1984), the court held that voluntary production to the SEC waived the work product protection because, under the circumstances, the SEC was an "opponent," the disclosing party had no reasonable basis to believe that the materials would be kept confidential, and waiver under those circumstances would not "trench on any policy elements now inherent in

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[8] 28 U.S.C. § 516 provides, "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."

this privilege." In finding that the SEC was an "opponent," the court noted that the documents were produced under a program in which the SEC would impose reduced punishment for violations that it found in voluntarily produced documents. Id. Thus, the court observed, it would be unfair to allow a litigant to gain an advantage by disclosing work product to one opposing litigant (in that case, the SEC), while denying other opposing litigants access to the same documents. Id.

But production of materials to the Court Monitor, if that occurred, is different. The Court's order appointing the Court Monitor does not cast him in the role of an opponent, but rather as a judicially appointed official who is to "monitor and review" trust reform activities.[9] The Court Monitor thus stands on a different footing from the Government's opposing litigants or the public. If an Interior employee determined, correctly or incorrectly, that the Court Monitor was entitled to the documents to carry out his duties, that is not equivalent to a party's selective disclosure to certain of its opposing litigants to gain an advantage, as occurred in In re Subpoenas Duces Tecum.

Interior can justifiably expect that the Court Monitor will respect its privileges on documents that he obtains. Had the Court Monitor asked for production of the documents he sought, Interior could have insisted upon the same assurances of *in camera* confidentiality as the Special Master afforded. Such a process provides a fair opportunity to decide deliberately whether to assert privileges and, if necessary, to defend them. Under such circumstances, fairness dictates that Interior's privileges should be deemed to remain in effect unless and until they have been overruled after notice and an opportunity to have the claims of privilege heard.

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[9] See Order dated April 15, 2002, at 2.

III. Interior's Privileges Were Not Waived by the Court Monitor's Filing of the Privileged Documents, Nor by Any Other Disclosure by the Court Monitor

Although the Court Monitor inappropriately attached the Privileged Documents to his Seventh Report and discussed them in the text, neither that nor any other disclosures by the Court Monitor effected a waiver of Interior's privileges. Disclosure by third parties – especially Governmental entities that acquire the information under their legal authority to collect it – does not waive the privilege of the entity that supplied it. Thus, for example, in Nat'l Wildlife Federation v. Environmental Protection Agency, 286 F.3d 554, 575-76 (D.C. Cir. 2002), EPA, pursuant to its statutory authority, collected certain confidential business information about private industry. In a later suit by environmental organizations challenging EPA rules, the court refused to order EPA to produce the confidential industry information. Later, EPA inadvertently produced some of the confidential information to one of the plaintiffs. The court held that such disclosure by a third party (EPA) did not constitute a waiver of the industry's privilege. Id. Similarly, the Court Monitor's disclosure of the Privileged Documents, occurring outside the control of Interior, should not be deemed a waiver of Interior's privileges.

Relief Requested

Although it is difficult to "put the genie back in the bottle," the Court can fashion a remedy that will fairly protect Interior's privileges. First, the copies of the Privileged Documents attached to the Court Monitor's Seventh Report filed with the Court should be removed from the record, returned to Interior, and deemed stricken from the record. Second, the portions of the Seventh Report that disclose or discuss the content of the Privileged Documents, e.g., pages 66 et seq., should be stricken. Third, the Court Monitor, Plaintiffs, and Plaintiffs' attorneys should be

required to return all copies of the Privileged Documents to Interior. Fourth, publication or use of the Privileged Documents in any way should be barred, absent express consent by the Government or an order from the Court, after Interior has been given notice and an opportunity to litigate the validity of the privileges, that such documents may be used.

Conclusion

For the reasons stated, Interior Defendants respectfully request that the Court enter an order as described above, and provide them such other and further relief as may be appropriate.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 31, 2002 I served the Foregoing *Interior Defendants' Memorandum of Points and Authorities in Support of Motion for Protective Order Regarding Privileged Documents Referenced in the Seventh Report of the Court Monitor*, by facsimile 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

by Facsimile and U.S. Mail:

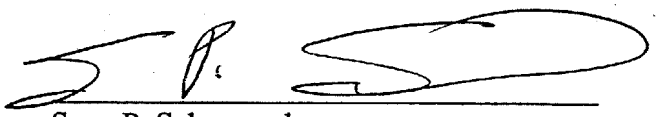
Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

by U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Courtesy Copy by U.S Mail:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004



Sean P. Schmergel

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.	

DECLARATION OF LARRY JENSEN

LARRY JENSEN, for this declaration, pursuant to 28 U.S.C. § 1746, states as follows:

1. I am Counselor to the Solicitor of the Department of the Interior. Since approximately March 8, 2002, I have been the attorney in the Office of the Solicitor who is responsible, under the Solicitor's supervision, for overall coordination with the Department of Justice ("DOJ") regarding the legal defense of the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants) in this litigation. I also am the lawyer to whom the Department of Justice attorneys representing the Interior Defendants send most correspondence in connection with representation of the Defendants. Thus, I am one of the principal contact points between the Interior Defendants and the DOJ attorneys who represent the Interior Defendants.

2. The Seventh Report of the Court Monitor, filed May 2, 2002, included (attached to it and discussed within it) six documents as to which Interior Defendants claim attorney-client privilege and work-product protection: (1) letter dated March 29, 2002 from Sandra P. Spooner,

EXHIBIT A

Deputy Director, Department of Justice ("DOJ"), to me; (2) letter dated March 25, 2002 with draft supplemental search memorandum, from Peter B. Miller, Trial Attorney, DOJ, to me; (3) letter dated March 20, 2002 from Peter Miller, Trial Attorney, DOJ, to me; (4) letter dated March 19, 2002 from Amalia B. Kessler, Trial Attorney, DOJ, to me; (5) memorandum dated April 12, 2002 from Thomas Slonaker, Special Trustee, to William Myers, Solicitor; and (6) memorandum dated April 24, 2002, from Thomas Thompson, Principal Deputy Special Trustee to William Myers, Solicitor, and to me.

3. The first four of the documents listed in the preceding paragraph (the "Four Privileged Letters") were sent by DOJ to me, with copies sent to and/or received by other attorneys within the Office of the Solicitor who work on this case. A copy of the first of the documents (the letter dated March 29, 2002) also was sent to Deputy Secretary J. Steven Griles (who is a senior official of the Department). I coordinate the work of the other attorneys (all of whom are licensed attorneys) in the Office of the Solicitor who received copies of the Four Privileged Letters, with regard to this case. They and I are among the attorneys who are involved in providing the Interior Defendants with legal advice, legal services and/or assistance in this case, and we received the Four Privileged Letters for those purposes.

4. Department of Interior officials, attorneys from the Office of the Solicitor, and attorneys from DOJ handling this case are in constant communication with each other about this case, in which confidential communications from the client are conveyed to the attorneys. I believe that the free flow of confidential information from client to the attorneys would be chilled and hampered if letters from the DOJ attorneys to me or other agency counsel – including

documents such as the Four Privileged Letters – were not afforded the protection of the attorney-client privilege.

5. The Interior Defendants regard and have treated the Four Privileged Letters as confidential materials protected by the attorney-client and work product privileges. I have discussed the handling of those letters with each of the attorneys listed as "cc" recipients on, or who otherwise handled matters in, the letters dated March 19, 2002, March 20, 2002, and March 25, 2002, and they have told me to whom, if anyone, they gave copies of those letters. I also have spoken with Mr. Griles, who is listed a "cc" recipient of the letter dated March 29, 2002.

6. I did not give copies of the Four Privileged Documents to others. Based upon what I have learned from inquiring of the other persons described in the preceding paragraph, the other recipients of the Four Privileged Letters distributed copies only to other agency attorneys working on this case and to officials of various components of the Department of the Interior who are responsible for handling, on behalf of their respective components and thus on behalf of the Department, the document production described in those letters. In that respect, each of those officials who received copies was a person whose responsibilities include acting or speaking on behalf of their respective components, and thus on behalf of the Department, with regard to their respective components' searches for and production of documents in response to the document requests to which the letters refer.

7. For example, I learned from Michelle Singer (an attorney in the Office of the Solicitor who received copies of and handled matters in the March 19 and March 29, 2002 letters) that the letter dated March 29, 2002, was distributed to Thomas Thompson (Principal

Deputy Special Trustee), and that the letter dated March 19, 2002, was distributed to Thomas Thompson (as Acting Director of OTR), Linda Skotta (as the ranking official of OTR present at the time), and Ken Rossman (Acting Chief of Staff for OST). Those officials were sent copies of the letters because they are responsible for producing documents on behalf of their respective components and thus on behalf of the Department. I believe that the Department of the Interior and its lawyers have properly preserved the confidential nature of the Four Privileged Letters.

8. The remaining two privileged documents, a memorandum dated April 12, 2002 from Thomas Thompson, and a memorandum dated April 24, 2002 from Thomas Slonaker, were received by the Solicitor, and I also received the April 24, 2002 memorandum. The Solicitor gave a copy of the April 12, 2002 memorandum to me. We did not further disseminate these memoranda, and thus we made appropriate efforts to preserve their confidentiality.

9. The Interior Defendants continue to assert the attorney-client privilege and the work product doctrine as to the six documents described herein.

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

Larry Jensen
LARRY JENSEN

Dated: May 31, 2002