IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA

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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 TO REVOKE THE APPOINTMENT OF JOSEPH S. KIEFFER, III, AND TO CLARIFY THE ROLE AND AUTHORITY OF A COURT MONITOR

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") respectfully move for an order revoking the appointment of Joseph S. Kieffer, III, as Court Monitor. This motion is required because the Court Monitor's recent activities have exceeded the constitutional and statutory limits of the Court's jurisdiction and the authority delegated him in this Court's orders, and because the Court Monitor has demonstrated a lack of impartiality that requires his disqualification from further participation in this case.

In the event the Court determines that a continuing role for a court monitor is appropriate in this case, Interior Defendants request that the Court clarify the proper limits on the role and authority of any future court monitor to minimize the likelihood that the problems with the current Court Monitor will recur. Accordingly, in addition to requesting the vacation of Mr. Kieffer's appointment, Interior Defendants request that the Court clarify its previous orders regarding the role and authority of a court monitor to make them consistent with the constitutional and statutory limits on the Court's jurisdiction and to ensure in the future that the

court monitor's activities will conform to these limits and to the proper role of a judicial officer.

In support of this motion, the Interior Defendants rely upon the attached exhibits, the memorandum in support filed simultaneously herewith, and the record herein.

Counsel for the Interior Defendants conferred with counsel for the Plaintiffs concerning this motion. Counsel for Plaintiffs stated that the Plaintiffs oppose this motion.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
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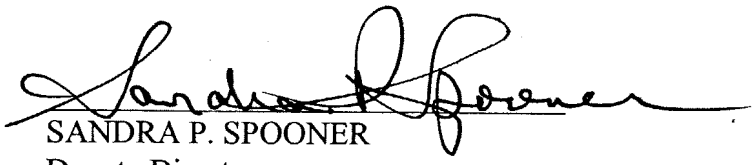
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

Dated: June 14, 2002



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INTERIOR DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO REVOKE THE APPOINTMENT OF JOSEPH S. KIEFFER, III, AND TO CLARIFY THE ROLE AND AUTHORITY OF A COURT MONITOR

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit this memorandum in support of their motion to revoke the appointment of Joseph S. Kieffer, III, as Court Monitor and to clarify the role and authority of a court monitor. Mr. Kieffer's appointment should be revoked because he has failed to respect the constitutional and statutory limits of this Court's jurisdiction and the limits on his own judicial authority by intruding impermissibly in the internal affairs of the Department of the Interior ("Interior") and has demonstrated a lack of impartiality that requires his disqualification from further participation in this case. The Interior Defendants did not consent to Mr. Kieffer's reappointment under the conditions set out in the order reappointing him for a second one-year term. Indeed, the reservations Interior Defendants expressed in their response to the Court's request for the views of the parties on the Court Monitor's proposed reappointment presaged recent events which have demonstrated that the Court Monitor does not recognize and will not

adhere to the limits on this Court's jurisdiction. His actions threaten public confidence in the integrity and impartiality of our court system.

In addition, in the event the Court determines that a continuing role for a court monitor is appropriate in this case, Interior Defendants request that the Court clarify the proper limits on the role and authority of any future court monitor to ensure that his or her actions will be consistent with the constitutional and statutory limits on the Court's jurisdiction and the proper role of a judicial officer.

BACKGROUND

I. Prior Proceedings.

A. December 21, 1999 Order and Appeal.

In its December 21, 1999 Opinion and Order, this Court declared that the Interior Defendants and the Secretary of the Treasury are required to provide the Plaintiffs with an "accurate accounting of all money in the IIM trust held in trust for the benefit of [P]laintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The Court further declared that the Interior Defendants breached a duty to retrieve and retain all information necessary to render an accurate accounting of money in the IIM trust, and a duty to establish written policies and procedures on a number of issues related to rendering the accounting. Id. The Court remanded to the agency "[t]o allow defendants the opportunity to promptly come into compliance through the establishment of the appropriate written policies and procedures." Id.

The Court retained jurisdiction over this action for five years, and ordered the Interior Defendants to "file with the [C]ourt . . . quarterly status reports setting forth and explaining the

steps that [they] have taken to rectify the breaches of trust declared [by the Court] and to bring themselves into compliance with their statutory trust duties . . . ." 91 F. Supp. 2d at 59. "Through [the] mechanism" of the quarterly reports, the Court sought to "ensure defendants' future compliance with their trust duties . . . 'without having to speculate over the possibility of further agency delays,'" and without "unduly intruding into the role of the Executive branch." Id. at 55 (quoting In re Center for Auto Safety, 793 F.2d 1346, 1354 (D.C. Cir. 1986)). In compliance with this Order, the Interior Defendants have filed nine quarterly reports.

Although the Plaintiffs requested that the Court place the IIM trust under court supervision and sought, among other things, appointment of a court monitor or special master, the Court declined to make such an appointment at that time. 91 F. Supp. 2d at 52-56. The Court noted that "defendants legitimately point out that more intrusive court involvement may lead to conflicting directions and thereby create a drag on defendants' discharge of their duties." Id. at 56. The Court stated its intent to "be diligent in its effort to ensure that trust reform is successfully completed but to exercise its power judicially and with appropriate deference and respect for the other two branches of government." Id.

In February 2001, the Court of Appeals affirmed this Court's holding that an accounting was required, but noted that the "district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate." Cobell v. Norton, 240 F.3d 1081, 1104 (D.C. Cir. 2001). Such decisions, the Court of Appeals held, "are properly left in the hands of administrative agencies." Id. Thus, the Court of Appeals warned that:

> [W]e expect the district court to be mindful of the limits of its jurisdiction. It remains to be seen whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction.

Id. at 1110. As no court monitor had yet been appointed, the Court of Appeals did not address whether or for what purposes the appointment of a court monitor might be appropriate.

B. Initial Appointment of the Court Monitor.

In March 2001, the Court proposed the appointment of a court monitor after Plaintiffs raised questions about the accuracy of information provided to the Court in Interior Defendants' quarterly reports. After a series of conferences with the Court, the Interior Defendants consented to appointment of a court monitor for one year. The Interior Defendants agreed to appointment of a court monitor "so that resources can be more directed towards trust reform and less directed towards litigation" about trust reform. Status Hearing, April 16, 2001 ("Status Hearing") at 5 (Exhibit A).

In an April 2001 Order, entered "in accordance with the Court's inherent powers," the Court appointed the present Court Monitor, Mr. Joseph S. Kieffer, III, for a period of one year to "monitor and review all of the Interior [D]efendants' trust reform activities and file written reports of his findings with the Court." Order, April 16, 2001 ("April 2001 Order") at 1 & ¶ 2 (Exhibit B). The order did not limit the monitoring of "trust reform activities" to the breaches of trust identified by the Court or make clear the purpose to be served by the "monitor[ing] and review[ing]." Nor did the Order clarify jurisdictional or other limits on the Court Monitor's

authority and activities. The Order permitted the Court Monitor to make and receive ex parte communications to the extent "necessary or proper to effectuate his duties," id. at ¶ 3, and directed the Interior Defendants to provide the Court Monitor with "access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." Id. at ¶ 4. In the event the Court Monitor had problems "with access to information or persons," he was directed to resolve them "informally" and, if that proved impossible, to bring them "to the attention of the Court." Id.

Shortly after the Court Monitor was appointed, the Secretary advised all employees of the Department of the Interior "that Mr. Kieffer must be provided access to records and documents of the Department, its bureaus and offices, as well as to any officer and employee of the Department and to any of its offices, bureaus or contractors that he deems necessary for the accomplishment of his duties to review and monitor the trust reform efforts of the Department." Memorandum from Secretary Norton to All Employees of the Department of the Interior (April 24, 2001) at 1-2 (Exhibit C). The Secretary further advised her employees to read the directive "broadly." Id. at 2. Under the terms of his first appointment, the Court Monitor prepared six reports on trust reform issues.

C. Reappointment of the Court Monitor.

On April 4, 2002, the Court requested the views of the parties with respect to extension of the Court Monitor's term for an additional year. Order, April 4, 2002. The Interior Defendants responded by asserting that limitations should be imposed on the Court Monitor's powers in order to protect the government's privileges and allow the Interior Defendants "candidly to consider and debate the proper course of future trust reform efforts." Interior Defendants'

Response To Court Order Dated April 3, 2002 Regarding Court Monitor (April 11, 2002) ("Response Regarding Court Monitor") at 3. The Interior Defendants expressly conditioned their consent on the following conditions: "(1) [that] the Court Monitor's actions and reports [be] given no greater deference or status tha[n] those set out in Federal Rule of Civil Procedure 53, (2) [that] his reports [be] limited to reporting on steps taken by the Department to rectify the breaches of trust declared by the Court or steps taken that 'would necessarily delay rather than accelerate the ultimate provision of an adequate accounting,' Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001), and (3) [that] his findings of fact submitted to the Court [be] based upon witness testimony from on-the-record statements given under oath with an opportunity for cross-examination by the parties." Id. at 1-2.

On April 15, 2002, the Court extended the Court Monitor's term for an additional year, but rejected one of the conditions of the Interior Defendants' consent, i.e. that the Court Monitor's reports must be limited to steps taken to rectify the breaches declared by the Court or steps taken that would necessarily delay the provision of an adequate accounting. See Order, April 15, 2002 ("April 2002 Order") (Exhibit D). Instead, the Court ordered that the Court Monitor's duty to "monitor and review all of the Interior [D]efendants' trust reform activities" remained unchanged. Thus, the Court Monitor has been serving since April 15, 2002, without the consent of the Interior Defendants.

II. The Court Monitor's Recent Activities.

A. The Seventh Report Of The Court Monitor.

The Seventh Report Of the Court Monitor ("Seventh Report"), filed May 2, 2002, focused on the Secretary's evaluation and supervision of the Special Trustee's job performance

from November 14, 2001, through May 2, 2002. Because this area of inquiry is constitutionally off-limits to the Court Monitor, the Interior Defendants objected to the Seventh Report in its entirety and requested that the Court reject it. The Interior Defendants' objections are set forth in detail in their Response To The Seventh Report Of The Court Monitor, filed May 16, 2002, ("Interior's Response to the Seventh Report") and are incorporated by reference herein.

B. Meeting with Interior Officials.

On April 19, 2002, shortly after the Special Master issued reports critical of the Special Trustee's performance but before the Seventh Report was filed, the Court Monitor met with Deputy Secretary J. Steven Griles, Associate Deputy Secretary James E. Cason, Office of Indian Trust Transition Director Ross Swimmer, Special Trustee for Indian Affairs Thomas Slonaker, and (by phone) Principal Deputy Trustee for Indian Affairs Tom Thompson. See Declaration of J. Steven Griles, June 4, 2002 ("Griles Decl.") (Exhibit E); Declaration of James E. Cason, June 4, 2002, ("Cason Decl.") (Exhibit F); Declaration of Ross O. Swimmer, May 30, 2002, ("Swimmer Decl.") (Exhibit G). Near the beginning of the April 19, 2002, meeting, the Court Monitor told those attending the meeting that it was "ex parte," Griles Decl. ¶ 4, that they were not to take any notes, Cason Decl. ¶ 4, Griles Decl. ¶ 4, Swimmer Decl. ¶ 4, and that they were not to reveal or repeat the discussion held at the meeting to anyone. Cason Decl. ¶ 4. In addition, the Court Monitor, who happens to be an attorney, observed that they were not getting good legal advice.[1] Griles Decl. ¶ 6.

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[1] Echoing this comment, the Seventh Report is replete with the Court Monitor's personal opinions about the adequacy of Interior Defendants' legal representation. See Seventh Report at 44, 53, 54, 66, 68-73, 75-79, 81-83.

The Court Monitor said that he wished to discuss recent memoranda between the Secretary and the Special Trustee and that there had been an effort to misrepresent the actions of the Special Trustee to the Secretary. Griles Decl. ¶ 5; Swimmer Decl. ¶ 5; Cason Decl. ¶ 5. He stated that Interior had a major problem involving the relationship between the Special Trustee and the senior management team, and that the senior management team was undermining the Special Trustee's efforts to provide trust reform oversight. Cason Decl. ¶ 5. He stated that the Secretary had made a serious mistake by writing a memorandum criticizing the Special Trustee. Swimmer Decl. ¶ 5.

The Court Monitor then issued an ultimatum, giving these high-level Interior officials the choice between complying with his view regarding how the Department should manage its trust responsibilities, or declining to do so and suffering adverse consequences. Cason Decl. ¶¶ 6, 7, 15; Griles Decl. ¶ 9; Swimmer Decl. ¶ 6. In particular, the Court Monitor said that he wanted senior management to work more closely with the Special Trustee and to establish in writing that certain oversight and operational authority would be reserved to the Special Trustee. Cason Decl. ¶ 6; Griles Decl. ¶ 7. If senior officials failed to do as he directed, the Court Monitor stated that his Seventh Report would target them for criticism. Cason Decl. ¶¶ 6, 7, 12; Griles Decl. ¶ 9; Swimmer Decl. ¶ 6. Based upon the statements the Court Monitor made during the meeting, the Interior officials concluded that the Court Monitor had "chosen sides" and that "the senior management team had been put on notice that [they] must accept the Court Monitor's point of view or suffer unpleasant consequences." Cason Decl. ¶ 15. The Court Monitor also advised those present that appeals will be futile in this case because of a social relationship between the

district court judge and one of the judges in an appellate court. Cason Decl. ¶ 13; Swimmer Decl. ¶ 3, Griles Decl. ¶ 6.

C. Tribal Task Force Meeting

On May 20, 2002, the Court Monitor publicly expressed his views on trust reform and his opinions regarding certain Interior officials at a meeting of the Task Force On Trust Management Reform in Bloomington, Minnesota. See Transcript of Remarks of Joseph Kieffer at May 20, 2002 Task Force on Trust Management Reform Meeting ("Task Force Transcript") (Exhibit H).

ARGUMENT

It is with great reluctance that the Interior Defendants request that this Court revoke the appointment of Joseph S. Kieffer, III, as Court Monitor. Their initial consent to his appointment was predicated upon their understanding that his appointment would permit the government's resources to be "more directed towards trust reform and less directed towards litigation," Status Hearing at 5 (Exhibit A), and their expectation that the Court Monitor would observe the constitutional and jurisdictional limits on his authority and perform his duties with the impartiality required of a judicial officer.

Unfortunately, since his reappointment, the Court Monitor has taken actions that have created the very situation the Court was determined to avoid. He has deliberately intruded "unduly . . . into the role of the Executive [B]ranch," Cobell v. Babbitt, 91 F. Supp. 2d at 55, failed to "exercise [his] power judicially and with appropriate deference and respect for [the Executive Branch]," id. at 56, and created a serious "drag on [Interior] [D]efendants' discharge of their duties," id. The Court Monitor is not reporting as a neutral judicial observer on steps taken by the Interior Defendants in remedying the breaches of duty declared by the Court, but

instead is seeking to interfere with – and even control – sensitive agency decision-making that is at the heart of the constitutional prerogative of the Executive Branch. He has, moreover, demonstrated a lack of impartiality that requires his disqualification from further participation in this case.

Because it is clear from his actions that the Court Monitor does not recognize and will not adhere to the limits on this Court's jurisdiction, and because his actions threaten public confidence in the integrity and impartiality of our court system, the Interior Defendants respectfully request that the Court revoke the appointment of Joseph S. Kieffer, III, as Court Monitor. In addition, in the event the Court determines that a continuing role for a court monitor is appropriate in this case, Interior Defendants request that the Court clarify the proper limits on the role and authority of any future court monitor to ensure that his or her actions will be consistent with the constitutional and statutory limits on the Court's jurisdiction and the proper role of a judicial officer.

I. The Court Monitor's Order Of Appointment Must Be Vacated.

A. The Court Monitor Has Improperly Intruded In Executive Branch Functions In Violation Of The Constitutional And Statutory Constraints On The Court's Jurisdiction.

A court-appointed judicial officer cannot assume powers that exceed constitutional and statutory bounds on the jurisdiction of the Court itself. The Court Monitor has overstepped the bounds of the constitutional separation of powers doctrine, the waiver of sovereign immunity provided by the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and his mandate to report on matters concerning trust reform by inserting himself into the agency's deliberations to try to influence, and even control, decisions which are properly within the purview of the

Department of the Interior. While the Department of the Interior has afforded the Court Monitor unprecedented access to its deliberative process, the Court Monitor's use of the information he has obtained is constrained by the jurisdiction of this Court. The Court Monitor has apparently confused the access to the deliberative process that Interior Defendants have provided to facilitate his reporting function with an invitation to become an active participant in the decision-making process.

As this Court recognized, "the judicial branch must consider not only the parties' rights and correlative obligations, but also constitutional concerns such as separation of powers[;] . . . . [t]he [C]ourt cannot simply take over the role of the agency or bring all actions of [Interior Defendants] under its authority." Cobell v. Babbitt, 91 F. Supp. 2d at 53-54. The separation of powers into three distinct and co-equal branches of government is a fundamental component of our constitutional framework as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). The Constitution provides that the three branches of government are to be "entirely free from the control or coercive influence, direct or indirect, of either of the others." Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). The President has the exclusive authority to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This "broad power" is "conspicuously not granted to [courts] by the Constitution." INS v. Legalization Assistance Project, 510 U.S. 1301, 1304 (1993). Courts "'are not charged with general guardianship against all potential mischief in the complicated tasks of government.'" Sierra Club v. Army Corps of Engineers, 701 F.2d 1011, 1048 (2d Cir. 1983) (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940)).

The APA, which provides the waiver of sovereign immunity for this action, is consistent with the limitations imposed by the Constitution. Congress has recognized that an agency's substantive decisions are largely discretionary and not subject to review by the courts. Sierra Club v. Army Corps of Engineers, 701 F.2d at 1044. Consistent with the limitations imposed by APA review, both this Court and the Court of Appeals have recognized that courts "cannot 'become . . . enmeshed in the minutiae' of agency administration." Cobell v. Norton, 240 F.3d at 1108 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54, in turn quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)). Rather, "[i]t is proper for a court to allow the government 'the opportunity to cure the breaches of trust declared' by the court." Id. at 1108-09 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54).

Certainly, a court monitor may not exercise more control over a federal agency than a district judge can permissibly exercise. In Sierra Club v. Army Corps of Engineers, the Second Circuit made clear that a special master "may not control the internal operations of federal administrative agencies." 701 F.2d at 1042 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542-49 (1978); FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)). While this issue has rarely arisen because courts have only rarely appointed a court monitor or special master to report on the internal affairs of another branch of the federal government, courts have raised similar concerns in other contexts. See, e.g., Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.) (directing that special master and court monitors "are not to consider matters that go beyond superintending compliance with the district court's decree," and stating that "the powers of the court's appointed agents should not intrude to an unnecessary extent on

prison administration"), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982); Feliciano v. Barcelo, 672 F. Supp. 591, 624-25 (D.P.R. 1986) (directing that "Court Monitors and other persons operating on the Court's behalf shall not intervene in the administrative management of the [Puerto Rican prison administration]," and "shall not be empowered to direct defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance").

By his actions in preparing and filing his Seventh Report, and in the actions he took to promote its conclusions both before and after its publication, the Court Monitor has demonstrated his unwillingness to respect the limits on the Court's – and by extension his own – authority. In the Seventh Report, the Court Monitor goes beyond a review and report of Interior's trust reform activities and seeks to intrude into internal affairs of the agency and interfere with internal agency deliberation and decision making. The Seventh Report focuses almost exclusively on internal agency deliberations concerning sensitive matters that cannot, consistent with this Court's jurisdiction, be the subject of judicial review. As noted in Interior's Response to the Seventh Report, the Report advances as established and controlling fact the Court Monitor's own view on the competency of Interior personnel and the appropriate assignment of management responsibilities, and generally seeks to make the agency's sensitive internal deliberations about personnel issues into matters for public comment and judicial review. By critiquing Secretary Norton's assessment of the performance of the Special Trustee, defending the Special Trustee against any criticism or concern about his performance, and endorsing an expanded role for the Special Trustee, the Court Monitor infringes upon the

Secretary's authority as the top official of the Department of the Interior.[2] As the Special Trustee reports to the Secretary, their relationship and her comments regarding his performance are internal personnel matters not within the province of the judiciary. The Court Monitor's review of and comment upon such matters intrudes into the administration of an Executive Branch agency[3] and demonstrates that the Court Monitor either misunderstands or refuses to accept his role and the limits of his authority. As the Court Monitor is not an Executive Branch official charged with management of the Department of the Interior, but rather a judicial officer

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[2] The Seventh Report also brings the Court Monitor into conflict with the Special Master. The Court Monitor filed the Seventh Report on May 2, 2002, just a few weeks after the Special Master issued two reports that criticized the performance of the Special Trustee and his office. See Second Investigative Report of the Special Master Regarding the Office of Trust Records (April 11, 2002); Emergency Report of the Special Master Regarding Defendant's [sic] Proposed Relocation of Records to the Lee's Summit Federal Records Center (April 17, 2002). Yet, remarkably, the Court Monitor makes no mention in his Seventh Report of the serious concerns raised by the Special Master about the performance of the Special Trustee, even though the Seventh Report is devoted largely to a discussion of the Special Trustee's performance, and even though the Special Master's concerns were clearly an important factor in the decision of the Secretary to investigate the Special Trustee's performance.

By arguing that the Secretary and Deputy Secretary criticized the Special Trustee's performance in an effort to avoid a contempt finding, rather than an effort to address the concerns raised in the Special Master's reports, the Seventh Report attempts to insulate the Special Trustee from any negative consequences that might result from the Special Master's reports. In this way, the Court Monitor not only violates constitutional limits on his authority as a judicial officer, but also places the Department of the Interior in the untenable position of having to answer to two court-appointed officials – acting on behalf of the same judge – who offer radically different conclusions about the obstacles to trust reform. In other words, it is because the Interior Defendants sought to address the serious concerns raised by the Special Master about the performance of the Special Trustee that they find themselves under attack by the Court Monitor in the Seventh Report.

[3] It is not clear whether the Court Monitor's Seventh Report undertakes its strenuous defense of the Special Trustee as a personnel issue, see Seventh Report at 53-55, or a policy issue, see id. at 81-85, or both, but the Court Monitor's motivation for intervening in matters of Executive Branch policy making and administration is irrelevant.

appointed by the Court, even his seemingly broad mandate to monitor "trust reform activities" cannot authorize him to assume functions inconsistent with this Court's jurisdiction, which is circumscribed by the constitutional doctrine of separation of powers as well as the APA.

The Court Monitor's lack of respect for the limits on his authority is also demonstrated by the statements he made during the meeting with senior Interior officials on April 19, 2002 described above – a meeting in which he made explicit that the purpose of the Seventh Report was to protect the Special Trustee. In this meeting, held just two weeks before the Seventh Report was filed, the Court Monitor advised high-level Interior officials that the senior management team was undermining the Special Trustee's efforts to provide trust reform oversight, and stated that unless the senior management team deferred to the Court Monitor's view regarding the role and authority of the Special Trustee, the Court Monitor would file a Seventh Report critical of the senior management team. While the Court Monitor is permitted to meet ex parte with Interior officials, he has quite plainly exceeded the scope of his authority by asserting that those officials should take specific actions and by threatening adverse consequences if they do not alter their behavior as requested. The Court Monitor's duty is to gather and report information to the Court, not to formulate policy and coerce decisions by a co-equal branch of the government with the responsibility to make them.

The Court Monitor followed up his improper attempts to investigate and influence the decisions of agency officials with respect to the Special Trustee with a document production request[4] that reveals his continuing intent to pursue his unconstitutional review of the Secretary's

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[4] Neither the April 16, 2001 Order initially appointing the Court Monitor nor the April 15, 2002 Order reappointing the Court Monitor conferred upon him the authority to order or

(continued...)

performance evaluation of the Special Trustee, in spite of the objections lodged by the Interior Defendants in their Response to his Seventh Report. Many of the discovery requests evince a post-hoc fishing expedition to substantiate the unsubstantiated allegations contained in the Seventh Report (indeed the requests frequently cite pages of the Seventh Report to which the document requests relate), and to intrude further into the Secretary's review of the Special Trustee's job performance. Among many other documents, the Court Monitor has requested:

- Any and all documents and correspondence maintained in the Office of Special Trustee (OST) or by the OST employees regarding or relating to the receipt and/or the preparation of the response to the Secretary of the Interior's (Secretary) memorand[um] dated April 17, 2002 [to the Special Trustee, which expresses concern about the Special Trustee's performance] . . . .;

- Any and all documents and correspondence maintained in the Office of the Secretary or Office of the Solicitor or by the employees of these offices regarding or relating to the preparation of the [Secretary's April 17, 2002 memorandum to the Special Trustee];

- Any and all memoranda, summaries of briefings, or other correspondence and documents which the Secretary reviewed or relied on to prepare the [Secretary's April 17, 2002 memorandum to the Special Trustee];

- Any and all lists or notes of meetings and/or other compilations of the attendees at those meetings regarding preparation of the [Secretary's April 17, 2002 memorandum to the Special Trustee] including any at which the Secretary, the Deputy Secretary of the Interior (Deputy Secretary), the Associate Deputy Secretary, the Solicitor, or other DOI attorneys or employees attended;

- Any and all documents and correspondence regarding or relating to any actions taken, recommendations or decisions made by the Deputy Secretary or his staff regarding the Secretary's direction to him, discussed in her April 17, 2002 memorandum to the Special Trustee . . . that he review the "relative performance of OST."

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[4](...continued)
conduct formal discovery.

Letter from Joseph S. Kieffer, III, Court Monitor, to Sandra P. Spooner, Deputy Director, Department of Justice (May 22, 2002) at 2-5 (Exhibit I).

That the Court Monitor has chosen to interfere in this manner in the daily management of an Executive Branch agency demonstrates that he is either ignorant of the constitutional doctrine of separation of powers and the statutory limits on this Court's jurisdiction, or that he is willfully violating these fundamental principles. Either way, he has demonstrated that he is unfit to perform the significant responsibilities assigned to the Court Monitor in this case and that the Court must therefore revoke his appointment.

B. The Court Monitor Lacks The Impartiality Required Of A Judicial Officer.

The Court Monitor, as a judicial officer of this Court, is subject to the Code of Conduct For United States Judges. See In re Joint Eastern and Southern Districts Asbestos Litig., 737 F. Supp. 735, 739-40 (E.D.N.Y. and S.D.N.Y. 1990) (citing Belfiore v. New York Times Co., 826 F.2d 177, 185 (2d Cir. 1987)). The Code of Conduct for United States Judges ("Code of Conduct") provides that "[a]nyone who is an officer of the federal judicial system performing judicial functions is a judge for the purpose of this Code." Compliance with the Code of Conduct. All of the Code of Conduct's provisions, except certain provisions relating to potential conflicts arising from outside financial interests, are applicable. See Compliance with the Code of Conduct, ¶ B. This Circuit has specifically held that a "special master must hold himself to the same high standards applicable to the conduct of judges." Jenkins v. Sterlacci, 849 F.2d 627, 632 (D.C. Cir. 1988).

Section 455 of title 28, United States Code, though it does not refer expressly to court monitors or special masters, is applicable to such judicial officers in the D.C. Circuit. 849 F.2d

at 630-31. Section 455 requires disqualification "1) where 'impartiality might reasonably be questioned,' . . . and 2) where there is 'a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.'" In re Joint Eastern and Southern Districts Asbestos Litig., 737 F. Supp. at 740 (quoting 28 U.S.C. § 455). These provisions "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the [court monitor's] impartiality, he should disqualify himself. . . ." United States v. Werner, 916 F.2d 175, 178 (4th Cir. 1990) (quoting H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1, reprinted in 1974 U.S.C.C.A.N. 6351, 6355). The impartiality of a judicial officer charged with reporting on events can easily become clouded when that judicial officer injects himself into those very events while they are happening, and the Court Monitor's recent activities demonstrate that this risk is not theoretical. The Court Monitor's activities since his reappointment on April 16, 2002 reveal a lack of impartiality that requires his disqualification from further participation in this case.

Section 455(b)(1) of Title 28, which requires a judicial officer to disqualify himself when "he has a personal bias or prejudice concerning a party," looks to the individual's actual state of mind. In contrast, Section 455(a) requires a judicial officer to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." The appearance of impartiality is judged by an objective standard; the relevant question is whether a reasonable person would question the judicial officer's impartiality. See, e.g., Liteky v. United States, 510 U.S. 540, 548 (1994) (stating that Section 455(a) requires "evaluat[ion] on an *objective* basis" (emphasis in original)); United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981) (holding that "we join our sister circuits in concluding that a showing of an appearance of bias or prejudice sufficient to

permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal under section 455[(a)]" and that such an appearance is to be "judged by an objective standard"). In applying Section 455, courts may look not so much to "the specifics of particular conversations" in which the judge made remarks alleged to demonstrate bias or its appearance, but rather to the totality of the remarks and "their cumulative effect." United States v. Microsoft Corp., 253 F.3d 34, 109 (D.C. Cir. 2001). The Court Monitor has demonstrated repeatedly and in a variety of ways that he lacks the impartiality required of a judicial officer.

1. The Court Monitor Has Revealed His Bias In Public And Private Remarks About Trust Reform.

The Court Monitor has made several off-the-record remarks which, in their totality, either suggest that he is, in fact, biased or prejudiced in favor of the Special Trustee and against senior Interior officials, or would cause a reasonable person to doubt his impartiality toward these officials and, as a consequence, toward the efforts they are making to implement trust reform. The Court Monitor made these remarks in the April 19, 2002 meeting with high-level Interior officials, described above, and during a May 20, 2002 meeting of the Task Force on Trust Management Reform.[5]

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[5] Although bias or the appearance of bias is more likely to be found pursuant to Section 455 if the remarks at issue were made by the judicial officer in an extrajudicial context, the Supreme Court has held that there is no requirement that remarks establishing bias or its appearance be extrajudicial. See Liteky v. United States, 510 U.S. at 554 (stating that "neither the presence of an extrajudicial source necessarily establishes bias, nor the absence of an extrajudicial source necessarily precludes bias"). The remarks made by the Court Monitor at both the April 19, 2002 and May 20, 2002 meetings, however, were extrajudicial in that they were not made on the record, with an opportunity for all parties, represented by their counsel, to respond. Cf. United States v. Microsoft Corp., 253 F.3d at 115 (observing that if the judge had (continued...)

The circumstances of the April 19 meeting indicate that the Court Monitor is not, as required by law, impartially observing the facts, but is instead seeking to use his status as a judicial officer to force the Department of the Interior to manage its trust responsibilities as he sees fit. The Court Monitor made his remarks to high-level agency officials, outside of the presence of their counsel, told them not to take notes and not to discuss the meeting with others, and stated that Interior was not getting good legal advice. Taken together, those remarks suggested that the Interior officials should neither discuss the meeting with their counsel, nor seek their counsel's advice on what to do. The Court Monitor told these officials that if they did not take steps consistent with his agenda, he would write a hostile report about their actions. He also said that appeals in this case will be futile because of a social relationship between the district court judge and one of the judges in an appellate court, implying that no appeal taken by the Interior Defendants will be decided on the merits. These remarks made under these circumstances would, at a minimum, cause a reasonable person to believe that the Court Monitor is not impartial in reporting on trust reform – indeed, that he is determined that his own views on trust reform should prevail in the Department of the Interior.

The Court Monitor also made remarks revealing his bias for the Special Trustee and against senior Interior officials, or creating an objective appearance of such bias, during the May 20, 2002 meeting of the Task Force on Management Reform.[6] First, he stated, "I have a great

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[5](...continued)
made comments suggesting bias against Defendant Microsoft "from the bench," "Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal").

[6] That the Court Monitor's remarks at this meeting revealed bias or would create an (continued...)

deal of respect for the Special Trustee and what the Special Trustee has attempted to do . . . ." Transcript of Remarks of Joseph Kieffer at May 20, 2002 Task Force on Trust Management Reform Meeting ("Task Force Transcript") at 10-11. In vouching for the Special Trustee in this manner, the Court Monitor offered himself as a fact witness, presenting as evidence his own personal opinion of the Special Trustee's character and job performance. Under the reasonable person standard, this statement creates an appearance of bias in favor of the Special Trustee and against the senior Interior officials who (along with the court-appointed Special Master) have questioned the Special Trustee's performance. Indeed, the Court Monitor later stated: "I'm he[re] to say at the top of the totem pole things are not working fine . . . ." Id. at 60.

Second, the Court Monitor said that, in writing his reports to the Court, he always tried to shield Assistant Secretary - Indian Affairs Neal McCaleb from any negative consequences that might follow from the reports because Mr. McCaleb supported the Special Trustee: "The defendants in the case is [sic] the official defendants in the Cobell litigation, and that changes as the administration changes, and now it's Secretary Norton and Mr. McCaleb. In all my reports I have specifically excluded talking about Mr. McCaleb's performance because I think he has gone out of his way to try to support the Special Trustee, to work with the Special Trustee . . . ." Task Force Transcript at 10. In these remarks, the Court Monitor once again demonstrated that he is biased in favor of the Special Trustee – and by implication against the Secretary and her

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[6](...continued)
appearance of bias in the mind of any reasonable bystander is suggested by the following comment made by Ron Allen, Chairman of the Jamestown S'Klallam Tribe, after the Court Monitor had delivered his remarks: "[O]ne of the concerns I have is in your remarks you become a bit of an apologist for this Office of Special Trustee." Task Force Transcript at 55.

immediate staff. In addition, he indicated that he was seeking to use his power as a court-appointed officer to benefit those who support the Special Trustee.

Third, although the Court has yet to rule on whether it will accept jurisdiction over various tribal-trust cases which have been referred to it as matters relating to Cobell, the Court Monitor opined that the Court may well assume jurisdiction and that he, the Court Monitor, therefore has an interest in these cases and in any decisions made by the Task Force that might affect tribal-trust beneficiaries: "[I]n the near future, the judge should be making a decision on whether he will accept those [tribal-trust] cases or pass them off to other judges to handle. So in some ways my interest in what happens here at the Tribal Task Force is more than limited just to the individual beneficiaries, but since the Court may soon have jurisdiction over at least five of the tribal accounting cases, obviously I'm interested in what happens here . . . ." Task Force Transcript at 8. In making this statement, the Court Monitor implicitly pre-judged a matter pending before the Court, suggesting that the tribal-trust cases would be deemed related matters, and further implied that when this happened, he would be appointed to a similar monitoring function in those cases.[7]

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[7] The June 10, 2002 issue of the Washington Times periodical "Insight on the News" contains an article which quotes extensively from the Court Monitor's Seventh Report and which includes the following passage:

> A court-appointed official familiar with the Indian trust accounts who asks not to be identified tells Insight that "this is a business that the government never should have been in. No one ever conceptualized that the government overseeing this would go on in perpetuity. It's just impossible to administer, and the government doesn't have the wherewithal to do it and it just isn't a normal role of government."

(continued...)

In their totality, the Court Monitor's remarks at the April 19, 2002 and May 20, 2002 meetings suggest that he has a "personal bias or prejudice" in favor of the Special Trustee and against the Secretary and her immediate staff, or at a minimum, that his impartiality "might reasonably be questioned." He should, therefore, be disqualified pursuant to 28 U.S.C. § 455(a) and (b)(1).

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[7](...continued)

> According to the official, "There is no doubt that the government has screwed it up and there is no responsibility in this case, but they also inherited a mess. The problem is that this constituency [American Indians] doesn't get presidents elected, it doesn't have direct money connections to anyone and there's 100 years of data that in some cases were written on napkins. It is a totally decentralized system and the government isn't prepared to do the accountability."
>
> If the DOI has resorted to name-calling and retaliation and the government isn't equipped to do the accounting of the trust account, what's the answer? "Give the Indians back the land," the official says, "and let them run it themselves. From what I know of programs they've handled themselves, they've done remarkably well."

Kelly Patricia O'Meara, DOI Speaks With Forked Tongue, Insight on the News, June 10, 2002, at 17 (Exhibit J). Canon 3A(6) of the Code of Conduct requires federal judges (and, by extension, their appointees) to "avoid public comment on the merits of [] pending or impending" cases. United States v. Microsoft, 253 F.3d at 107. The "court-appointed official familiar with the Indian trust accounts" who made these remarks to the press, if they were reported accurately, breached his duty under this canon and should be recused. See id. at 107-117. It is not clear that the Court Monitor is responsible for these remarks, but the Court should immediately undertake an investigation of the matter and take appropriate action regarding the "court-appointed official" who is responsible.

2. The Court Monitor Is Not Reporting On Interior Defendants' Trust Reform Efforts In The Neutral, Objective Manner Required Of A Judicial Officer.

The Court Monitor's Seventh Report demonstrates conclusively that he does not recognize his obligation to report to the Court in a neutral fashion on the progress of trust reform. "[B]ecause he is the court's agent, he can and should perform his duties objectively." Ruiz v. Estelle, 679 F.2d at 1161-62. However, instead of providing the Court with a report addressing in an objective manner the steps the Interior Defendants are taking to implement trust reform, the Court Monitor has taken it upon himself to assess the credibility of the statements of certain government officials and their counsel, to infer motivation, and to opine about the veracity of statements by certain individuals. While some of these statements are characterized as "opinions," they are, for the most part, based upon little if any information contained in the report, are largely speculative, and address matters that the Interior Defendants should have a full opportunity to litigate if and when they are properly before the Court.

For example, the Court Monitor quotes extensively from an April 17, 2002 memorandum from the Secretary of the Interior to the Special Trustee. Seventh Report at 33-35. The Court Monitor then opines that "it is doubtful that the Secretary of the Interior compiled any part of it." Id. at 35. He concludes that the memorandum "reveals a critical lack of understanding of the history of trust reform under the past and present administrations and a lack of appreciation for and a misunderstanding of the role of the Special Trustee." Id. Later in his Report, he makes the extraordinary claim that the memorandum contains "patently false assertions and misinterpretation of past events." Id. at 55 n.16. The Court Monitor is not authorized by his appointing orders to hold hearings, hear evidence, weigh the credibility of witnesses or determine

the reliability of documentary evidence. The Interior Defendants have no opportunity to present evidence or even to know in advance the subject of the Court Monitor's reports. Reports based upon "'observations and investigations in the absence of a formal hearing' . . . not only transcend[] the powers traditionally given [to Special Masters] by courts of equity, but den[y] the parties due process." Ruiz v. Estelle, 679 F.2d at 1162-63.

Equally disturbing are the Court Monitor's unauthorized legal conclusions. For example, the Court Monitor's critique of the Secretary in the Seventh Report is based, in large part, on his opinion of the statutory relationship between the Secretary and the Special Trustee. Citing the 1994 Reform Act, 25 U.S.C. § 4042, the Court Monitor opines that the Special Trustee must report directly to the Secretary, and cannot perform his duties if he is required to report to the Deputy Secretary. Seventh Report at 35-36. Indeed, he concludes that by requiring the Special Trustee to report to the Deputy Secretary, the Secretary has "directly violat[ed] the 1994 Reform Act." Id. at 82.

Similarly, the Court Monitor has improperly prejudged approximately forty government employees as "contemnors" when the Court has not even issued a show cause order or held a hearing regarding contempt allegations made by the Plaintiffs, let alone issued a finding that any of these employees should be held in contempt. Indeed, inasmuch as Plaintiffs have not yet specified the allegedly contemptuous actions these employees have taken, the Court Monitor has drawn a conclusion about the guilt of these individuals without even knowing the specific allegations against them. Moreover, the Court Monitor has refused to remove these prejudicial references from his report despite having received a written request from the Interior Defendants'

counsel that he do so. See Interior Defendants' Motion to Strike Portions of the Seventh Report of the Court Monitor that Refer to Government Employees as "Contemnors," filed May 23, 2002.

While these legal conclusions have been refuted in Interior's Response to the Seventh Report, see Interior's Response to the Seventh Report at 26-30, 41-45, such intrusions into areas solely within the jurisdiction of the district court are inappropriate. These matters have not been, and cannot be, delegated to the Court Monitor. "A district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate." Prudential Ins. Co. v. United States Gypsum Co., 991 F.2d 1080, 1086 (3d Cir. 1993) (citing La Buy v. Howes Leather Co., 352 U.S. 249, 256 (1957)). The "findings" and "conclusions" contained in the Seventh Report go far beyond any neutral reporting and provide further evidence of the Court Monitor's lack of objectivity. His behavior leaves the public impression that he has chosen to take sides with the Plaintiffs and cannot monitor and report on trust reform activities in a neutral manner as he is obligated to do.

Furthermore, as discussed in more detail in Interior's Response to the Seventh Report, filed May 16, 2002 and the Interior Defendants' Motion to Strike, the Court Monitor's Seventh Report contains innuendo and *ad hominem* comments that are inappropriate for a judicial officer, disrespectful of the many government employees involved with trust reform, and generally demonstrate the lack of a professional manner that "promotes public confidence in the integrity and impartiality of the judiciary." Code of Conduct, Canon 2(A).

3. The Court Monitor Has Violated Defendants' Fundamental Right To Communicate With Their Litigation Counsel in Confidence.

As the Interior Defendants explained to the Court in their May 31, 2002 Motion for Protective Order Regarding Privileged Documents Referenced In The Seventh Report of the Court Monitor and supporting memorandum (collectively, the "Motion for Protective Order"), the Court Monitor published in his Seventh Report six documents as to which the Interior Defendants claim privileges. The Court Monitor did not obtain those documents through Interior's trial attorneys at the Department of Justice, but, instead, apparently obtained them directly from employees of the Department of the Interior. Even though the documents are, on their face, privileged in nature, the Court Monitor did not even ask the Department of Justice lawyers whether the Interior Defendants wished to maintain the privileges, nor did he give them advance notice that he planned to disclose the documents in a public filing.[8] Rather, the Court Monitor simply attached the privileged documents as exhibits to the Seventh Report and discussed their substance in its text. The Motion for Protective Order demonstrates that the six documents are covered by the attorney-client and work product privileges, Memo. In Supp. of Mot. for Prot. Order at 4-7, and that those privileges have not been waived, id. at 7-13. The communications at issue are concerned directly with the current litigation – specifically, responses to the Special Master's document requests, id. at 4-7 – and their production should be treated as a court-compelled disclosure, id. at 7-13.

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[8] The Interior Defendants previously produced most of the same documents *in camera* to the Special Master and included them on a privilege log.

The Court Monitor's cavalier mistreatment of the Interior Defendants' fundamental right to consult with their litigation counsel in confidence[9] risks harm to the "broader public interests in the observance of law and administration of justice" that the recognition of privileges is designed to protect. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); see also In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998) ("By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the [work product] privilege protects the adversary process.").

4. The Court Monitor Has Improperly Commented Upon Evidence In A Matter That Has Been Tried To The Court and Is Pending For A Decision

The Court Monitor's Seventh Report goes to great lengths to characterize and comment upon the evidence before the Court in the contempt proceeding which has been fully tried and is now pending before the Court for a decision.[10] The District Court has before it extensive proposed findings and conclusions that analyze the contempt trial testimony and its import. It is

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[9] See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) (when "the Government is dealing with its attorneys as would any private party seeking advice to protect personal interests, [it] needs the same assurance of confidentiality so it will not be deterred from full and frank communications with its counselors").

[10] See, e.g., Seventh Report at 15-19, 21 (quoting with approval the Special Trustee's contempt trial testimony); id. at 24-27 (quoting and characterizing the contempt trial testimony of the Secretary and Deputy Secretary); id. at 28-31, 39 n.9, 42 n.13, 48-51 (quoting and crediting the contempt trial testimony of the Special Trustee regarding his preparation of and refusal to verify quarterly reports and his involvement in statistical sampling decisions); id. at 37 (quoting and characterizing the Secretary's contempt trial testimony regarding the Special Trustee); id. at 40 (quoting and discrediting Secretary's contempt trial testimony that she had read most of the Court Monitor's reports); id. at 45 n.14 (quoting and characterizing Special Trustee's contempt trial testimony about funding for TAAMS and other projects); id. at 51-52 (quoting and characterizing Deputy Secretary's contempt trial testimony about the role of the Special Trustee); id. at 80 n.24 (quoting and characterizing Special Trustee's contempt trial testimony as "highlight[ing]" an "obvious concern [with] retaliation").

inappropriate for the Court Monitor to comment on and assess the witnesses' testimony and draw inferences regarding matters pending before the Court.

First, these matters are outside the scope of his authority, which extends only to reporting on Interior's current efforts to accomplish trust reform and not to commenting on trial testimony and the weight it should be given. Second, it is a violation of fundamental principles of judicial conduct for the Court Monitor to comment publicly on a matter pending before the Court.[11] See Code of Conduct, Canon 3A(6) ("A judge should avoid public comment on the merits of a pending or impending action, requiring similar restraint by court personnel subject to the judge's direction and control."). The contempt trial concluded with closing arguments on February 21, 2002; proposed findings and conclusions were filed on February 28, 2002. As of May 2, 2002, when the Court Monitor filed his Seventh Report, the Court had yet to enter judgment – and indeed, still has not. Thus, as of the filing of the Seventh Report, the contempt trial was a pending action. Because the Seventh Report was filed as a public document, and because the contempt trial was then (and remains) a pending action, the Court Monitor, as "personnel subject to the judge's direction and control," was forbidden from commenting on the evidence presented at trial in the Seventh Report.[12] See also United States v. Microsoft Corp., 253 F.3d at 112 (holding that judge who, while an action was pending, publicly "disclosed his views on the

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[11] Pursuant to Canon 3A(6) of the Code of Conduct, an action is deemed pending "until completion of the appellate process." Code of Conduct, Canon 3A(6) cmt.

[12] The Court Monitor was not authorized by the Court to issue a report and recommendation concerning the contempt trial, and indeed, his Seventh Report does not purport to be such a report and recommendation. The Court Monitor's unsupported opinions concerning matters at issue in the contempt trial cannot be considered by the Court because they are not "evidence" admitted into the record.

factual and legal matters at the heart of the case" – including "opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, [and] the choice of remedy" – had violated Canon 3A(6)).

The actions of the Court Monitor discussed above clearly demonstrate that he will not respect the constitutional and statutory limits on this Court's jurisdiction and that he lacks the impartiality required of a judicial officer.[13] He has improperly sought to make himself a participant in the events he is charged with monitoring, and is actively advocating and promoting his views regarding how trust reform should be implemented and who should manage the effort. For all of the reasons set forth above, the Court Monitor can no longer serve the Court as a neutral and objective reporter on trust reform issues and his appointment should be revoked.

II. If A Court Monitor Is Appropriate In This Case, The Court Should Clarify Its Previous Orders Regarding The Authority Of The Court Monitor To Ensure That The Role Of The Court Monitor Is Consistent With This Court's Jurisdiction And The Proper Judicial Role.

Court monitors, which are closely related to special masters, are appointed only rarely and when the court has clearly documented the existence of extraordinary circumstances. Federal Rule of Civil Procedure 53(b), which governs special masters, provides that a reference to a master "shall be the exception and not the rule." See, e.g., Sierra Club v. Army Corps of Engineers, 701 F.2d at 1042 (reversing order appointing special master due to absence of

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[13] The conduct of the Court Monitor discussed above should also be considered in light of the Plaintiffs' having moved for his appointment as receiver. See Plaintiffs' Consolidated Motion To Amend Their Motion To Reopen Trial One In This Action To Appoint A Receiver And Memorandum Of Points And Authorities In Support Thereof and Motion For Order To Show Cause Why Interior Defendants And Their Employees And Counsel Should Not Be Held In Contempt For Violating Court Orders And For Defrauding This Court In Connection With Trial One, and the accompanying proposed Order at 4 (filed Oct. 19, 2001).

extraordinary circumstances); see also Code of Conduct, Canon 3(B)(4) ("A judge should not make unnecessary appointments . . . .").

A court monitor appointed under the court's inherent authority is appointed even more rarely and is subject to the same restrictive requirements.[14] The activities of court monitors are typically limited to monitoring compliance with previous court orders. See, e.g., United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C. Cir. 1998) (well-established tradition allowing use of special masters to oversee compliance) (citing Apex Fountain Sales, Inc. v. Kleinfeld, 818 F.2d 1089, 1097 (3d Cir. 1987)); Ruiz v. Estelle, 679 F.2d at 1161. Here, the Court has ordered the Interior Defendants to provide an accounting of IIM funds to the Plaintiffs. Presumably the purpose of appointing a court monitor in this case was to monitor the Interior Defendants' compliance with this order. However, as the Court of Appeals pointed out, "supervision of the Department's conduct in preparing an accounting [with the possible exception of detecting "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting"] may well be beyond the district court's jurisdiction." Cobell v. Norton, 240 F. 3d at 1110. In contrast to the so-called "institutional reform" cases in which court monitors are typically appointed to monitor the implementation of specific and detailed remedies over time, in this case the manner of implementing the Court's order is expressly left to the discretion of the Interior Defendants. See id. at 1104 (noting that "[t]he district court explicitly

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[14] Although the district court appointed the Court Monitor under its "inherent authority," it is not clear that such inherent authority exists in this context. It has been have held that the term "court monitor" is simply another name for a special master and that court monitors are governed by the standards for special masters set forth in Fed. R. Civ. P. 53. See, e.g., Juan F. v. Weicker, 37 F.3d 874, 880 (2d Cir. 1994).

left open the choice of how the accounting would be conducted, and whether certain accounting methods . . . would be appropriate").

Based on the experience of the past fourteen months with the present Court Monitor, the Court should seriously consider whether the appointment of any court monitor is appropriate in a setting in which the separation of powers doctrine requires each branch of government to remain "entirely free from the control or coercive influence, direct or indirect, of either of the others," Humphrey's Executor v. United States, 295 U.S. at 629, and in which the Court's jurisdiction prevents it from "'becom[ing] . . . enmeshed in the minutiae' of agency admininstration," Cobell v. Norton, 240 F.3d at 1108 (quoting Cobell v. Babbitt, 91 F. Supp. 2d at 54, in turn quoting Bell v. Wolfish, 441 U.S. at 562). Where, as here, the manner of implementing the Court's order is expressly left to the discretion of the Interior Defendants, the policy-making activities necessary to plan and implement the Court's order should not be subject to the day-to-day supervision of a court monitor.

However, in the event the Court determines that a court monitor is appropriate in this case, Interior Defendants request that the Court clarify the proper limits on the role and authority of any future court monitor to minimize the likelihood that the problems with the current Court Monitor will recur. Supervision of a court monitor rests solely with the District Court, at least in the first instance. It is, therefore, the District Court that determines whether a court monitor has complied with the order of reference, the law, and the high standards of conduct required of a judicial officer. See, e.g., Code of Conduct, Canon 3(B)(2) ("A judge should require court officials, staff, and others subject to the judge's direction and control, to observe the same standards of fidelity and diligence applicable to the judge.") Unlike a judge whose conduct is

subject to the provisions of 28 U.S.C. § 372(c) and local rules governing judicial misconduct, see, e.g., Rules of the Judicial Counsel for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability, Rule 1(c), a court monitor's conduct is subject to supervision by the District Court.

Accordingly, the Court should clarify that the court monitor's only legitimate function is to report to the Court the steps taken by the Interior Defendants to comply with the Court's December 21, 1999 Order. The court monitor's activities should not be more extensive than the allegations in the complaint and proofs of the parties. See Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 319 (3d Cir. 1944). Similarly, the court monitor's functions must be limited to those within this Court's jurisdiction. Id. Furthermore, because reports based upon "'observations and investigations in the absence of a formal hearing' . . . not only transcend[] the powers traditionally given [to Special Masters] by courts of equity, but den[y] the parties due process," any "reports, findings, [or] conclusions" submitted by a court monitor cannot be "accorded any presumption of correctness." Ruiz v. Estelle, 679 F.2d at 1162-63. Therefore, the Court should clarify that, in any proceeding before the Court, the reports, findings, and conclusions of the Court Monitor will be reviewed de novo after the Interior Defendants have been afforded an opportunity to be heard and present evidence regarding such reports, findings, or conclusions.

Interior Defendants submit that the following clarifications to the Court's orders would assist in ensuring that the court monitor's role is properly circumscribed. The Court should:

(1) Clarify that the court monitor's reports must be limited to actions taken by the Interior Defendants with respect to matters identified in the Court's December 21, 1999 Order;

(2) Clarify that the court monitor may not intrude into the management of the Department of the Interior and may not advise the Interior Defendants or any of their employees to take any specific action with regard to trust reform;

(3) Clarify that the court monitor may not interfere or become involved in any manner with matters that are the subject of agency deliberations and as to which no final agency decision has been rendered;

(4) Clarify that the court monitor's reports may not disclose or rely upon information as to which the Interior Defendants assert a privilege or which is subject to a protective order;

(5) Clarify that the court monitor may not comment on evidence submitted to the Court;

(6) Clarify that the court monitor may submit reports based upon on-the-record statements of witnesses and non-privileged documents;

(7) Clarify that the court monitor may not conduct discovery;

(8) Clarify that the court monitor may not conduct hearings or render legal decisions or conclusions of law;

(9) Clarify that, in any proceeding before the Court, the reports, findings, and conclusions of the Court Monitor will be reviewed de novo after the Interior Defendants have been afforded an opportunity to be heard and present evidence regarding such reports, findings, or conclusions; and

(10) Clarify that the court monitor is a judicial officer who must comply with the Code of Conduct for United States Judges.

CONCLUSION

In view of the Court Monitor's failure to conform to the acceptable limits of his role and his lack of impartiality, the Interior Defendants request an order revoking his appointment. In addition, in the event the Court determines that a continuing role for a court monitor is appropriate in this case, the Interior Defendants request that this Court clarify its previous orders to ensure in the future that the court monitor's activities are consistent with the limits on the Court's jurisdiction and the proper role of a judicial officer.

Respectfully submitted,

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Dated: June 14, 2002

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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 NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of the Interior Defendants' Motion To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court Monitor and supporting memorandum, the oppositions filed, and the materials and record herein,

IT IS ORDERED that the Interior Defendants' motion is GRANTED; and

IT IS FURTHER ORDERED that the Court's April 15, 2002 Order reappointing Joseph S. Kieffer, III, as Court Monitor is hereby vacated; and

IT IS FURTHER ORDERED that the role and authority of the court monitor in this case is clarified as follows:

1. The court monitor's reports shall be limited to actions taken by the Interior Defendants with respect to matters identified in the Court's December 21, 1999 Order;

2. The court monitor shall not intrude into the management of the Department of the Interior and shall not advise the Interior Defendants or any of their employees to take any specific action with regard to trust reform;

3. The court monitor shall not interfere or become involved in any manner with matters that are the subject of agency deliberations and as to which no final agency decision has been rendered;

4. The court monitor's reports shall not disclose or rely upon information as to which the Interior Defendants assert a privilege or which is subject to a protective order;

5. The court monitor shall not comment on evidence submitted to the Court;

6. The court monitor may submit reports based upon on-the-record statements of witnesses and non-privileged documents;

7. The court monitor shall not conduct discovery;

8. The court monitor shall not conduct hearings or render legal decisions or conclusions of law;

9. In any proceeding before the Court, the reports, findings, and conclusions of the court monitor shall be reviewed de novo after the Interior Defendants have been afforded an opportunity to be heard and present evidence regarding such reports, findings, or conclusions;

10. The court monitor is a judicial officer who must comply with the Code of Conduct for United States Judges.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Cynthia L. Alexander
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on June 14, 2002 I served the Foregoing *Interior Defendants' Motion To Revoke the Appointment of Joseph S. Kieffer, III, and to Clarify the Role and Authority of a Court Monitor* and the attached *Memorandum in Support of Interior Defendants' Motion To Revoke the Appointment of Joseph S. Kieffer, III, and to Clarify the Role and Authority of a Court Monitor*, by hand upon:

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