U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	Civil Action No. 96-1285 (RCL)
v.	
GALE A. NORTON, et al.,	
Defendants.	

THE GOVERNMENT'S RESPONSE TO PLAINTIFFS' BILL OF PARTICULARS AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE WHY EDITH BLACKWELL SHOULD NOT BE HELD IN CONTEMPT IN CONNECTION WITH THE OVERWRITING OF BACKUP TAPES

On behalf of Edith Blackwell, in her official capacity, the United States hereby responds to and moves to dismiss the "Bill of Particulars for Edith Blackwell in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not Be Held in Civil and Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt " (hereinafter "Supplemental Memorandum"), filed July 29, 2002.[1] Ms. Blackwell, who is not a party to this case, is a Deputy Associate Solicitor of the Department of the Interior.

The Supplemental Memorandum purports to be filed "[i]n accordance with this Court's instruction on March 15, 2002," as the "second in a series of civil, and criminal contempt bills of particulars, clarifying and referencing specifications and evidence" against Ms. Blackwell and others who are the subject of plaintiffs' numerous contempt motions. Supplemental Memorandum

[1] Ms. Blackwell is separately represented in her personal capacity.

at 1 n.1. The Supplemental Memorandum is directed toward allegations concerning overwriting of backup e-mail tapes which were the subject of the March 20, 2002 contempt motion, and plaintiffs represent that another memorandum addressing other allegations against Ms. Blackwell will be forthcoming.

The Supplemental Memorandum, and the request that Ms. Blackwell be held in contempt, should be dismissed for several reasons. First, sovereign immunity precludes the imposition of criminal penalties against Ms. Blackwell in her official capacity.[2] Second, issues concerning the backup e-mail tapes have been fully briefed; plaintiffs have not sought nor been granted leave to file a supplemental brief on that issue; and the current filing does not set forth any basis for doing so.[3] Third, the Supplemental Memorandum, despite the title, is not a "bill of particulars" and does not comply with the Court's directive at the hearing of March 15, 2002, that the plaintiffs state "individual defendant by individual defendant" specific contempt charges and evidence supporting those charges. *Cobell v. Norton*, Civ. Action No. 96-1285(RCL), Transcript of March 15, 2002 Status Hearing, at 21:10-14 ("3/15/02 Tr."). Instead, the Supplemental Memorandum is, if possible, even less focused and more discursive than plaintiffs' earlier attempts on the backup tapes. Fourth, despite their repeated attempts to do so, plaintiffs have not presented a *prima facie* case of contempt, let alone made the heightened showing necessary to establish criminal contempt.

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[2] It is not clear from the Supplemental Memorandum whether plaintiffs are seeking civil contempt against Ms. Blackwell in relation to the backup tapes, though the draft order suggests that they are.

[3] The Supplemental Memorandum purports to incorporate by reference the plaintiffs' initial motion filed March 20, 2002 and the reply brief filed April 15, 2002. Supplemental Memorandum at 1 n.1. The United States moved to strike the reply brief. Plaintiffs did not respond to the motion to strike the reply brief, even though the Court did not rule on their motion to extend indefinitely the July 8, 2002 deadline for their response. Accordingly, the motion to strike the reply brief may be treated as conceded. Local Rule 7.1(b).

ARGUMENT

A. Sovereign Immunity Precludes the Imposition of Criminal Penalties Against Ms. Blackwell in Her Official Capacity

Plaintiffs request that Ms. Blackwell be referred for a prosecution for criminal contempt. Supplemental Memorandum at 1 n.1. As the government pointed out in "Government's Opposition to Plaintiffs' March 20, 2002 Motion for Orders to Show Cause Why Interior Defendants and their Employees and Counsel Should Not be Held in Contempt" filed April 3, 2002 (the "Government's Opposition"), at 13-16, sovereign immunity bars criminal contempt sanctions against Ms. Blackwell in her official capacity.

Since the government has received notice and an opportunity to respond to the contempt claim against Ms. Blackwell, the claim against her in her official capacity is to be treated as a claim against the government. *Coleman v. Espy*, 986 F.2d 1184, 1189 (8th Cir.), *cert. denied sub nom. Dye v. Espy*, 510 U.S. 913 (1993), *citing Kentucky v. Graham,* 473 U.S. 159 (1985). *See also Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002), and cases cited therein. The doctrine of sovereign immunity bars the imposition of fines or penalties against the government, except to the extent that the United States has explicitly consented to such sanctions. *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994). A waiver of sovereign immunity must be definitively and unequivocally expressed and must appear in the text of the statute itself. *In re Sealed Case*, 192 F.3d 995, 1000 (D.C. Cir. 1999), *citing Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Horn*, 29 F.3d at 762, *citing United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

The United States has not waived sovereign immunity from citations for criminal contempt. *Coleman v. Espy,* 986 F.2d at 1191; *United States v. Horn*, 29 F.3d at 763; *see also In re Sealed Case*, 192 F.3d 995, 999-1000 (D.C. Cir. 1999) ("...it is far from clear that Congress has waived

federal sovereign immunity in the context of criminal contempt . . . We know of no statutory provision expressly waiving federal sovereign immunity from criminal contempt proceedings.").[4] Similarly, the court in *In re Newlin*, 29 B.R. 781, 785 (E.D. Pa. 1983), held that a criminal contempt citation by a bankruptcy court against a federal agency violated sovereign immunity because the government had not expressly waived its immunity from citation for criminal contempt. Consequently, to the extent that plaintiffs now are attempting to have Ms. Blackwell in her official capacity prosecuted for criminal contempt, the plaintiffs' motion must be denied.

B. Plaintiffs' Repetitive Filing of Specious Contempt Motions is Improper.

1. Plaintiffs Should Not Be Permitted Multiple Bites at the Apple.

Plaintiffs are now on their **third** attempt to seek sanctions for overwriting of some backup tapes, a fully-disclosed event that occurred years ago and as to which plaintiffs have never proven that they suffered any material harm. Due process forbids such multiple and belated efforts to impose criminal sanctions upon an individual.

Plaintiffs sought sanctions based on the e-mail backup tape issue in their September 12, 2000 Motion for Leave and Request for Sanctions in Response to Defendants' Motion for a Protective Order. Plaintiffs did not, however, seek a recommendation for contempt as part of their request for sanctions in that motion. Nor did plaintiffs object within 10 days to the Special Master's July 27, 2001 recommendation regarding sanctions, which was limited to attorney's fees.

On March 20, 2002 – eight months after the Special Master's July 27, 2001 ruling – the plaintiffs filed yet another request for sanctions in connection with the e-mail backup tape issue,

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[4] *In re Sealed Case*, 192 F.3d 995 (D.C. Cir 1999), was not decided on the issue of whether sovereign immunity precluded criminal contempt against the United States, since the Court determined that a *prima facie* case of criminal contempt had not been alleged. 192 F.3d at 1000.

this time seeking civil and criminal contempt sanctions as to Ms. Blackwell and others. At the time plaintiffs filed their March 20 motion, they were fully aware of the legal and factual standards their motion must meet in order to present a colorable basis for a contempt finding. The legal standards had been fully briefed as part of the second contempt trial, and the Court had clearly stated the evidentiary standards their show cause motions must meet in the March 15, 2002 status call, at which the Court directed the plaintiffs to particularize their evidence as to each individual respondent. Yet plaintiffs ignored this directive in filing their March 20, 2002 motion just four days after the hearing. As demonstrated by the Government's Opposition and the oppositions to the March 20 motion filed by the individual respondents, plaintiffs had made no effort to tie any individual respondent to the violation of any "clear and reasonably specific" court order. Indeed, several of the respondents were no longer in Government service at the time some or all of the orders cited by plaintiff as the basis for that motion had been issued, and some of the "orders" themselves did not even qualify as a possible basis for a contempt motion. *See* Government's Opposition at 9-12. Plaintiffs' March 20 motion was inexcusably sloppy and fell so far short of the Court's March 15, 2002 directive that it should never have been filed.

The Supplemental Memorandum is an obvious attempt by plaintiffs to clean up the failings of their March 20, 2002 motion. However, as discussed below, the Supplemental Memorandum is even less coherent than the March 20, 2002 filing and the September 12, 2000 motion before it. Plaintiffs now appear to have limited their focus to the Court's November 9, 1998 Order.[5] However, the Supplemental Memorandum is based entirely on information that was available to plaintiffs when they filed their March 20 show cause motion and, indeed, even earlier when

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5 Thus, plaintiffs have dropped their claims that Ms. Blackwell was involved in the violation of any of the other five "orders" cited by plaintiffs in their March 20, 2002 motion.

plaintiffs filed their September 12, 2000 Motion for Leave and Request for Sanctions in Response to Defendants' Motion for a Protective Order and the accompanying "Factual Appendix." Thus, plaintiffs have already had two bites at this apple, and in fairness to Ms. Blackwell and the other respondents, they should not be permitted yet another. Further, there is no question that plaintiffs have known for more than **three years** that Solicitor's Office e-mail backup tapes were reused and not saved for a period of several months in late 1998 and early 1999. The Government disclosed this information to the Court, the Special Master, and the plaintiffs in May 1999. The Court has not given plaintiffs a license to file specious allegations of contempt with the promise of unlimited opportunities to repackage and refile the same material multiple times. Such license would be inconsistent with due process because it would subject individuals like Ms. Blackwell to continual uncertainty regarding the nature of the charges against them.

2. Plaintiffs Did Not Seek Leave of Court Nor Did They Confer With Any Government Counsel Before Filing This "Supplemental Memorandum"

The Court's March 15, 2002 directive that plaintiffs file supplemental memoranda in support of their contempt charges obviously pertained to the contempt charges **then pending** before the Court. The directive, therefore, did not apply to the March 20, 2002 motion. Not only should the plaintiffs have adhered to the clear factual standards set forth by the Court in the March 15 status conference (as well as in the substantial body of existing caselaw), but they violated the rules in failing to seek the Court's leave before supplementing their March 20 motion. Likewise, plaintiffs did not confer with counsel for the Government before filing this supplemental brief, in violation of Local Rule 7.1(m). For these reasons, too, the supplemental memorandum should be dismissed.

C. The Supplemental Memorandum Does Not Comply with the Court's March 15, 2002 Directive that Plaintiffs' Specify Charges and Evidence in Contempt Motions.

At the status hearing on March 15, 2002, the Court directed plaintiffs to lay out "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." 3/15/02 Tr. at 21:10-14. The Court reiterated that plaintiffs should state the specific charges a respondent would have to defend against and also "lay out what the, in your view, the evidence that would be supporting" the specific charges. *Id.* at 21:21-23. Finally, the court concluded that "you need to specify by person so that each of them can respond to what the specifications would be and what the evidence would be so each of them can have an opportunity to have due process." *Id.* at 23:7-10.

Plaintiffs claim that the Supplemental Memorandum is filed to carry out the March 15, 2002 directive. A document fulfilling those directive would state the specific charges against Ms. Blackwell and the evidence supporting each of those specific charges. For example, if plaintiffs charge that Ms. Blackwell violated a Court order, a filing compliant with the March 15, 2002 directive would, at a minimum, identify the specific order she allegedly violated, her conduct or action which allegedly violated the obligations imposed by the order, the evidence supporting the allegation that she violated the order, and, if plaintiffs are requesting a finding of criminal contempt, evidence supporting the allegation that violation of the order was willful. Instead, the Supplemental Memorandum continues the almost studied imprecision and blizzard of misstatements which characterized the March 20, 2002 motion.

1. The Contempt Motions Concerning Backup Tapes Are Based Upon Plaintiffs' Third Formal Request for the Production of Documents

As set forth in the Government's Opposition at 3, plaintiffs' March 20, 2002 motion was premised upon the Special Master's Opinion of July 27, 2001 ("the July 27, 2001 Opinion") which the Court adopted on March 29, 2002. In the July 27, 2001 Opinion, the Special Master denied a motion for a protective order concerning the Department of the Interior's duty to produce information responsive to plaintiffs' Third Formal Request for the Production of Documents, served June 11, 1998 ("Third Document Request"), which was stored on e-mail backup tapes; recommended sanctions since he found that the motion for a protective order was not substantially justified[6]; and found that the Department had engaged in a practice of overwriting backup tapes which should have been retained so they could be searched for copies of e-mails response to the Third Document Request. *See* Government's Opposition at 3-5.

Item one of the Third Document Request requested production of "all documents prepared or signed " by three attorneys in the Solicitor's Office "which express legal advice, conclusions, opinions, assessments, instructions or directions to the Secretary or any and all other Department of Interior personnel not employed in the Office of the Solicitor, . . . pertaining to the administration of the Individual Indian Money (IIM) trust."[7] The Third Document Request also asked for "All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM Trust which express legal advice, conclusions, opinions, assessments, instructions or directions to Interior personnel" regarding the transfer of

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[6] Plaintiffs' suggestion (Supplemental Memorandum at 17, n.16) that the Special Master found that the overwriting of the backup tapes justified "the invocation of all relevant adverse inferences against defendants and their counsel" is untrue. The Special Master did not make any such finding.

[7] The Third Document Request is Exhibit 1 to this Memorandum.

trust assets to tribes (Item 2), the 1990 delegation of IIM trust fund disbursement authority to Interior area office and agency personnel (Item 3), proposed legislation referred to as the Tribal Trust Fund Settlement Act of 1998 (Item 4), or "interest overdrafts" described by the then Special Trustee in a deposition (Item 5). *Id.* The Third Document Request incorporated by reference definitions set forth in Plaintiffs' First Set of Interrogatories, and those definitions defined "documents" as including e-mails and information contained on tapes.

In the course of motion practice over the Third Document Request, defendants contended, among other things, that it was not necessary to produce both paper printouts and taped backup copies of e-mails responsive to the Third Document Request, arguing that the same information is depicted in the two media and that requiring defendants to review the increasing masses of backup tapes to find responsive copies was unduly burdensome and expensive. *See* July 27, 2001 Opinion at 3, 9. On November 9, 1998, the Court denied defendants' motion for a protective order (the "November 9, 1998 Order"), and on May 11, 1999, the Special Master entered an order denying a motion for reconsideration of the November 9, 1998 Order.

2. Plaintiffs have Not Alleged Specific Charges to Support a Referral for Criminal Contempt or a Show Cause Order for Civil Contempt.

(a) Legal Standards

Plaintiffs ask that the Court refer Ms. Blackwell for prosecution under 18 U.S.C. § 401(3), which permits the court "to punish by fine or imprisonment, at its discretion, such contempt of its authority ... as ... [d]isobedience or resistance to its lawful . . . order." To convict a defendant of criminal contempt under this statute, the Court must find, beyond a reasonable doubt, that Ms. Blackwell willfully violated a "clear and reasonably specific" order of the court. *United States v. Roach*, 108 F. 3d 1477, 1481 (D.C. Cir. 1997), *citing United States v. NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir.1993), and *United States v. Turner,* 812 F.2d 1552, 1563 (11th Cir.1987). For a

violation to be "willful," the defendant must have acted with deliberate or reckless disregard of the obligations created by the court order. *United States v. Roach*, 108 F.3d at 1481, *citing In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir.1993), *cert. denied*, 511 U.S. 1030 (1994), and *United States v. Greyhound Corp.*, 508 F.2d 529 (7th Cir.1974). Thus, in order to support a referral for criminal contempt, plaintiffs must initially show, by clear and convincing evidence, that (1) a clear and reasonably specific court order was in effect, (2) the order required certain conduct by Ms. Blackwell, and (3) that Ms. Blackwell willfully violated the court's order.

(b) Plaintiffs Have Not Specifically Alleged That Ms. Blackwell Violated Any Order Pertaining to Backup E-Mail Tapes.

Plaintiffs have fallen far short of meeting the March 15, 2002 directive to present specific charges justifying a referral for criminal contempt or, if they are still seeking one, a show cause order for civil contempt as to Ms. Blackwell. The Supplemental Memorandum rehashes allegations against Ms. Blackwell which were contained in the March 20, 2002 motion. As demonstrated by the Government's Opposition, as well as the "Opposition of Edith R. Blackwell to Plaintiff's Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not be Held in Contempt for Destroying E-Mail" filed April 4, 2002 (the "Blackwell Response"), that motion failed to meet the lesser standard of presenting a claim for civil contempt against Ms. Blackwell or against any of the other respondents.

The Supplemental Memorandum asserts that Ms. Blackwell willfully violated the November 9, 1998 Order, but does not specify why plaintiffs think she did so. As pointed out in the Government's Opposition, at 12, neither the November 9, 1998 Order nor the transcript of the November 6, 1998 hearing before the Court "definite[ly] and specific[ally]" required the government to retain newly created tapes. *See SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11

(D.D.C. 1996). Plaintiffs apparently claim that Ms. Blackwell allowed backup tapes to be overwritten and concealed the continued overwriting of backup tapes, but, as discussed below, even if such actions would have violated the November 9, 1998 Order, plaintiffs have not presented a *prima facie* case supporting these assertions. Plaintiffs have not otherwise articulated a theory of contempt fulfilling the first part of the March 15, 2002 directive.

Plaintiffs repeatedly refer to Ms. Blackwell's declaration of July 22, 1998, Supplemental Memorandum at 7-8, 23-24. However, plaintiffs do not specify what, if anything, they believe is wrong with that declaration, and they do not appear to be asserting that the declaration itself constitutes contempt.[8] If they are claiming that the declaration relates to the November 9, 1998 Order, they do not set forth how a declaration made in July 1998 could constitute or evidence a violation of an order entered four months later.

Plaintiffs also make the puzzling charge that Ms. Blackwell "refused" to submit a privilege log in regards to the Third Document Request and that this alleged failure to file a privilege log somehow violated the November 9, 1998 Order. Supplemental Memorandum at 25. While the Court specified deadlines for defendants to file privilege logs if defendants decided to claim privilege as to responsive documents, the Court did not require defendants, let alone Ms. Blackwell personally, to file such logs. The consequence for not filing a privilege log is the risk that the Court will find that claims of privilege have been waived, not a risk that a party or its counsel will be held in contempt.

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[8] Plaintiffs do allege that Ms. Blackwell "falsely declared under oath that she was gathering documents responsive to the [Third Document Request]." Supplemental Memorandum at 7. Actually, Ms. Blackwell stated that she had "taken the preliminary steps to gather responsive documents," and detailed what those preliminary steps were. *See* Exhibit 16 to the Supplemental Memorandum.

3. Plaintiffs Have Not Made a *Prima Facie Showing* That Ms. Blackwell Violated Any Order Pertaining to Backup E-Mail Tapes.

To the extent that plaintiffs attempt to comply with the Court's March 15, 2002 directive to set forth evidence supporting allegations that Ms. Blackwell has committed contempt, their efforts are purely rhetorical and rest upon repeated misstatements and mischaracterizations. While plaintiffs apparently recognize that the allegedly missing data at issue are solely those copies of Solicitor's Office e-mails that had been transferred to backup tapes which were periodically overwritten (Supplemental Memorandum at 2 n.2), and which were responsive to items one through five of the Third Document Request, plaintiffs repeatedly and misleadingly mischaracterize the data at issue generally as "e-mails" (Supplemental Memorandum at 2 n.2; 3 n.4; 7; 19; 21; 22 n.26; 23), "trust records" (Supplemental Memorandum at 2 n.2; 18; 19; 21 n.24), "records" (Supplemental Memorandum at 11), "official records" (Supplemental Memorandum at 15, 18.19), or "official trust records" (Supplemental Memorandum at 21).

Plaintiffs also fling around charges that Ms. Blackwell and others engaged in "massive destruction of records," records that were of critical importance to numerous issues in this litigation. Supplemental Memorandum at 2 n.2; 17; 25. Plaintiffs' characterizations of the allegedly missing data and the importance of the data are not supported by the record in this case and are belied by their own actions. Department of the Interior policy required Ms. Blackwell and other employees to print out hard copies of all e-mails which met the definition of a "record." *See* Exhibit 11 to the Supplemental Memorandum; Government's Opposition at 3, 12. Plaintiffs' loose charges that Ms. Blackwall or others have destroyed "e-mails" are unsubstantiated and are not supported by the July 27, 2001 Opinion.[9] The Special Master found only that **e-mail backup tapes**

[9] Plaintiffs claim that Ms. Blackwell "knowingly permitted the routine deletion of e-mails from her own computer in violation of this Court's orders." Supplemental Memorandum at 23. E-

had been erased, not that e-mails generally had not been printed out. Plaintiffs have not contended, nor cited any evidence, that Ms. Blackwell and other employees of the Solicitor's Office have not substantially complied with Department of the Interior's policies to print out e-mails, and plaintiffs have not alleged or shown that paper copies of e-mails responsive to the Third Production Request have not been retained. Accordingly, the loss is limited to backup copies of printed e-mails that are potentially responsive to the Third Document Request.

As the government pointed out in response to the March 20, 2002 motion (Government's Opposition at 17-18), the data on backup tapes are not "records" or "official records" under regulations established by the National Archives and Administration ("NARA") pursuant to its authority under the Federal Records Act, 44 U.S.C. §§ 3101-24. As to assertions that the data on backup tapes are "trust records" or "official trust records," the government also pointed out in opposition to the March 20, 2002 motion that documents and data maintained by the Solicitor's Office, either on back up tapes or any other media, were not listed among the categories of documents identified as "IIM Records" in the attachments to the August 12, 1999 Order Regarding Interior Department IIM Records Retention. Government's Opposition at 11.[10]

The Special Master found that defendants should have retained backup tapes made after service of the Third Document Request because they potentially contained information responsive

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mails older than 30 days were automatically deleted from computers under programs administered by the computer staff of the Department of the Interior. *See* Exhibit 11 to the Supplemental Memorandum. Plaintiffs have not identified any order which required Ms. Blackwell to attempt to override the system program. Again, plaintiffs have not asserted that Ms. Blackwell did not comply with Department policy on printing out e-mails.

[10] On November 20, 2000, in the context of motion practice on the Third Production Request, the Special Master directed retention of all Solicitor's Office backup tapes. *See* July 27, 2001 Opinion at 15. Plaintiffs have not alleged that Ms. Blackwell, or anyone else, has violated that order.

to that request. *See* July 27, 2001 Opinion at 5, 18. The importance plaintiffs place on data of the Solicitor's Office should be measured by the scope of the Third Document Request, not by plaintiffs' rhetoric in contempt motions. The Third Document Request did not request production of backup tapes. The Third Document Request did not request production of Solicitor's Office e-mails generally. The Third Document Request did not even request production of all Solicitor's Office documents or e-mails pertaining to the administration of the IIM trust. Interpreted broadly, item one of the Third Document Request asked for documents prepared or signed by three identified employees which pertained to administration of the IIM trust, while items two through five were limited to documents prepared or signed by other Solicitor's Office attorneys which addressed one or more of four specific topics. The scope of the requests directed to the Department of the Interior was far more limited than plaintiffs have represented in the March 20, 2002 motion and the Supplemental Memorandum.

Ms. Blackwell explained both in her July 22, 1998 Declaration (Exhibit 16 to the Supplemental Memorandum) and her letter of December 5, 2000 (Exhibit 2 hereto, and also included in Exhibit 31 to the Supplemental Memorandum), the basis for retention of backup tapes by the various offices of the Solicitor's Office. As stated in the December 5, 2000 letter:

> [A]fter the Special Master's May 11, 1999 decision, the Solicitor's Office began retaining backup tapes in those offices which would likely have documents relating to the [Third Document Request]. The first question in the [Third Document Request] related solely to three Interior Headquarters employees. The second request related to legal advice regarding, among other things, tribes compacting and contracting for trust functions. The remainder of the questions that applied to the Solicitor's office were narrow questions regarding specific issues in which I could identify the attorney who had worked on the issue. Other than the second question, no question implicated an attorney from the Field or Region.

December 5, 2000 letter from Edith Blackwell to Charles Findlay (Exhibit 2 hereto) at 2. Thus, after May 11, 1999, the Solicitor's Office maintained backup tapes from offices which might generate documents responsive to the Third Document Request, but did not order retention of backup tapes from offices which did not have responsive documents, until the Special Master on November 20, 2000 directed that backup tapes be retained from those offices also.

Plaintiffs also repeatedly allege that Ms. Blackwell and others concealed, or failed to disclose, the practice of periodically overwriting backup tapes. Supplemental Memorandum at 11-13, 16, 17, 20, 23, 25. These charges are also inconsistent with the record. On November 20, 1998, defendants moved for reconsideration of the November 9, 1998 Order. An exhibit to the November 20, 1998 motion for reconsideration was a declaration, also dated November 20, 1998, by Glenn W. Schumaker, who was the Management Information System Team Leader of the Office of the Solicitor (the "Schumaker Declaration," attached hereto as Exhibit 3).[11] Mr. Schumaker explained that the Office had a policy of automatically erasing from computers e-mail messages older than thirty days from the current operating data base. Schumaker Declaration at ¶ 2. Mr. Schumaker also stated that, in order to recover from potential catastrophic failure of the computer system, data files, including e-mail, were transferred to backup tapes on daily and weekly bases. *Id.* at ¶¶ 3, 4. Mr. Schumaker also stated that "Under the routine backup policy of the Office, daily tapes are rotated (overwritten) every two weeks, and weekly backup tapes are rotated every four weeks. *Id.* at ¶ 6. However due to a possible Independent Counsel investigation, the Office had retained, by November 30, 1998, 185 backup "sets" dating from November 21, 1997, with a few

[11] As plaintiffs note (Supplemental Memorandum at 10-11), Ms. Blackwell was "Of counsel" on the November 20, 1998 motion.

missing dates, as well as one tape dated April 1, 1995. *Id.* Mr. Schumaker's declaration disclosed what backup tapes the Solicitor's Office had as of November 20, 1998.

Further, on May 20, 1999, defendants filed with the Special Master the "Motion for Establishment of Time Frame for Production of Certain Electronic Records and Notice to the Court Regarding Retention of Such Records" (the "May 20, 1999 Memorandum"). Defendants disclosed that they did not have backup tapes created from November 23, 1998 through March 21, 1999. May 20, 1999 Memorandum at 3 n.3; 4-5. *See* Exhibit 4 hereto. Attached to the May 20, 1999 Memorandum was a declaration of Ms. Blackwell (attached hereto as Exhibit 5), which also stated that backup tapes had not been retained from November 23, 1998 to March 19, 1999. Exhibit 5 at 4-5.[12] Thus, contrary to plaintiffs' charges of concealment and coverup, Ms. Blackwell and the defendants did inform the Court, the Special Master and plaintiffs as to the status of backup tapes.

In sum, the Supplemental Memorandum is little more than a mass of unfocused, generalized mischaracterizations and invectives which cannot survive close analysis. The Supplemental Memorandum does not come close to complying with the March 15, 2002 directive. On the record put forward by the plaintiffs, there simply is no basis for concluding that Ms. Blackwell acted "willfully" or in bad faith to disobey a Court order or to deceive the Special Master or the Court regarding the e-mail backup tapes.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court enter an order denying plaintiffs' motion to refer Edith Blackwell for criminal contempt, and, if plaintiffs

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[12] While plaintiffs mention the May 20, 1999 Memorandum (Supplemental Memorandum at 14), their discussion misleadingly omits the fact that the Memorandum disclosed overwriting of e-mail tapes and completely ignores Ms. Blackwells' declaration.

are requesting an order to show cause why she should not be held in civil contempt, denying that motion also.

Respectfully submitted,

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DATED: August 12, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' Bill of Particulars for Edith Blackwell in Support of Plaintiffs' Motion for Order to Show Cause Why Interior Defendants and Their Counsel Should Not be Held in Criminal Contempt for Destroying E-Mail (3/20/02) and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt, the Government's response in opposition thereto, and the entire record in this case, it is hereby ORDERED that Plaintiffs' motion is DENIED.

UNITED STATES DISTRICT JUDGE

Date:

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 12, 2002 I served the foregoing *The Government's Response to Plaintiffs' Bill of Particulars and Supplemental Memorandum in Support of Plaintiffs' Motion for an Order to Show Cause Why Edith Blackwell Should Not Be Held in Contempt in Connection with the Overwriting of Backup Tapes* by hand upon:

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Copy of the Response, without attachments, served by facsimile on August 12, 2002; a complete copy to be delivered by hand the morning of August 13, 2002 upon:

Alan L. Balaran, Esq.
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K.P. Kingston

Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al., on their own behalf and on behalf of all persons similarly situated Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants.	)	Civil Action No. 1:96 CV 01285 (RCL)

PLAINTIFFS' THIRD FORMAL REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs hereby request Defendants to produce within 30 days of the service hereof, at the offices of Price Waterhouse LLP, 1301 K Street, N.W., 800 West, Washington, D.C. 20005-3333, the following documents and information. The Definitions and General Instructions contained in Plaintiffs' First Set of Interrogatories, served December 24, 1997, are incorporated herein by reference and are applicable to this Request.

1. All documents prepared or signed by Ed Cohen, Willa Perlmutter or Anne Shields which express legal advice, conclusions, opinions, assessments, instructions, or directions to the Secretary or any and all other Department of Interior personnel not employed in the Office of the Solicitor, including but not limited to Special Trustee Paul Homan (individually and

Exhibit 1
Govt's Resp. to Pltffs' Bill of Particulars and Supplt. Motion to Show Cause Why Edith Blackwell Should Not Be Held in Contempt

collectively "Interior Personnel"), pertaining to the administration of the Individual Indian Money (IIM) trust.

2. All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Interior Personnel relevant to the transfer or assignment in any way whatsoever, by contract or compact, of individual Indian trust assets and the custody and control of related records to tribes or tribal entities for management and administration, including but not limited to any such transfers which are currently pending (e.g., Quinault).

3. All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Interior Personnel relevant to the 1990 delegation of IIM trust fund disbursement authority to Interior Personnel at the Area Office and Agency levels.

4. All documents prepared or signed since June 10, 1996, by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Interior Personnel relevant to the proposed legislation introduced as HR 3782, Tribal Trust Fund Settlement Act of 1998, in the second session of the 105th Congress.

5. All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Interior Personnel relevant to "interest overdrafts" [in the approximate amount $42 million] which deprive current [IIM] account holders of income," described by Special Trustee Paul Homan in his June 26, 1997 deposition in this case. (Homan deposition at 98-102.)

6. All documents prepared or signed by past or present attorneys in the Office of the General Counsel, Department of Treasury, including but not limited to attorneys in the Office of the Chief Counsel, Financial Management Service, to the Secretary or any and all other Department of Treasury personnel (individually and collectively "Treasury Personnel"), pertaining to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions, or directions to Treasury Personnel.

7. All work papers used by Arthur Andersen in the preparation of its January 28, 1992, "Bureau of Indian Affairs Trust Funds Reconciliation Project Overview Presentation," including but not limited to any work papers relating to the reconciliation of IIM accounts at the Uintah & Ouray, Fort Peck, and Olympic Peninsula Agencies.

8. All work papers used by Arthur Andersen in the preparation of its December 31, 1995, "Tribal Trust Funds Reconciliation,

Agreed-Upon Procedures and Findings Report for July 1, 1972 through September 30, 1992," including but not limited to lists of errors and unsupported documents.

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June 11th, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of June, 1998 a copy of Plaintiffs' Third Formal Request for Production of Documents was sent via facsimile to the following:

Lewis Wiener, Esq.
Andrew M. Eschen, Esq.
Environment and Natural
Resources Division
601 Pennsylvania Avenue, N.W.
Room 5616
Washington, D.C. 20044-0663

LORNA K. BABBY

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

VIA FACSIMILE

December 5, 2000

Mr. Charles Findlay
Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663

RE: Cobell et al. v. Babbitt et al. Civil Action No. 96-1285
Solicitor's Office E-mail Backup Tapes

Dear Spinner:

Pursuant to the Special Master's request, this letter explains how the Office of the Solicitor determined which of its offices were required to retain backup tapes. I apologize for any delay in this response, I was out on sick leave last week and I have the institutional knowledge on this issue. I think it would be helpful to provide some background in order to better understand how we reached the decision we did.

On June 11, 1998, the Interior Department and the Treasury Department were served with Plaintiffs' Third Request for the Production of Documents. In this request, plaintiffs asked for documents in which attorneys provided legal advice regarding the administration of the IIM trust.

There were several pleadings filed in relation to the Third Formal Request for Production of Documents, including a request for extension of time and a Motion for a Protective Order. On November 9, 1999 the Court, as part of an Order covering many issues, denied Defendants' Motion for a Protective Order. The November 9, 1999 Order was silent regarding the issue of backup tapes; therefore, on November 20, 1998, defendants filed a "Consolidated Motion for Reconsideration of the Court's November 9, 1998 Order Relating to the Scope of Defendants' Obligations in Responding to Plaintiffs' 3rd Request for Production of Documents and Request for Enlargement of Time to Respond to Plaintiffs' 3rd Request for Production of Documents and Memorandum of Points and Authorities in Support Thereof" ("Reconsideration Motion").

In the Reconsideration Motion, Defendants discussed again that the only reason the Department had saved backup tapes was related to the Independent Counsel investigation. Consequently, at the time of filing the Reconsideration Motion, the only Solicitor's Office backup tapes that were being saved were from Headquarters and the Minneapolis Field Office.

Exhibit 2
Govt's Resp. to Pltffs' Bill of Particulars and Supplt. Motion to Show Cause Why Edith Blackwell Should Not Be Held in Contempt

In response to the Reconsideration Motion, on May 11, 1999, the Special Master ordered the Solicitor's Office to "produce those e-mail documents responsive to Plaintiffs' Third Request for Production of Documents[.]"

Thus, after the Special Master's May 11, 1999 decision, the Solicitor's Office began retaining backup tapes in those office which would likely have documents relating to the Third Request. The first question in the Third Request related solely to three Interior Headquarters employees. The second request related to legal advice regarding, among other things, tribes compacting and contracting for trust functions. The remainder of the questions that applied to the Solicitor's office were narrow questions regarding specific issues in which I could identify the attorney who had worked on the issue. Other than the second question, no question implicated an attorney from the Field or Region. On July 22, 1998 I filed a declaration which declared that the only question that would implicate field and regional offices was question number 2. That request reads:

> 2. All documents prepared or signed by past or present attorneys in the Solicitor's Office and relating to the administration of the IIM trust which express legal advice, conclusions, opinions, assessments, instructions or directions to Interior personnel relevant to the transfer or assignment in any way whatsoever, by contract or compact, of individual Indian trust assets and the custody and control of related records to tribes or tribal entities for management and administration, including but not limited to any such transfer which are currently pending (e.g. Quinault.)

Therefore, the offices engaged in work related to the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended, 25 U.S.C. 450 et seq.,[1] ("638") could have responsive documents. In July 1998, I made a preliminary estimate that approximately 13 offices might have responsive documents. However, after the Special Master's ruling on May 11, 1999, it was determined that only seven Field and Regional offices conduct such work.[2]

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[1] These laws provide for the contracting or compacting of government functions, including records functions, to Indian tribes. Also, it should be understood that some offices do 638 work which is unrelated to the IIM trust, and on behalf of clients other than the BIA since a tribe may contract or compact for functions in other DOI Bureaus and Offices.

[2] In my July 1998 declaration my preliminary findings were that thirteen offices could have Self-Determination activities out of 19 offices. These preliminary findings were incorrect in two respects. First there are 18 and not 19 Field and Regional Offices. Second, I surmised that any office in a geographic location that had a BIA Area office, could do self-determination contracting work. In addition, I included the Pittsburgh Regional Office since Minneapolis was a Field office of the Pittsburgh Office. I believe, but am not certain, that this is how I arrived at the 13 offices. Sometime in the late Winter of 1998 or the Early Spring of 1999, the Division of Indian Affairs began sponsoring a regular conference call with all attorneys in the Solicitor's Office who worked on 638 issues. The calls were to discuss various aspects of 638. In arriving at the seven offices that worked on 638 issues, we only counted those office that had attorneys who participated in the 638 conference call. These conferences calls were not in existence when I drafted my July 1998 declaration but provide a more accurate list of those offices that may have

As my July 1998 declaration made clear, no other offices were implicated by Plaintiffs' Third Request for Production of Documents. There are eighteen Field and Regional Offices in the Solicitor's Office. Not all of these offices provide legal counsel that touches on Indian issues. As you know, the Solicitor's office as a whole provides representation to all Bureau's and Offices within the Department. This includes the National Park Service, the Fish and Wildlife Service, the Bureau of Reclamation, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service. In many parts of the country, there is no Indian land (tribal or individual) but only Federal land which is managed by these DOI entities.

Recently we began a survey to better determine which offices may have responsive materials to any Cobell discovery request. In the survey we asked the following questions. A yes response to any question would require the retention of backup tapes. The questions were:

(1) Does any attorney in your office provide legal advice regarding IIM accounts?
(2) Does any attorney in your office provide legal advice regarding any aspect of managing individual Indian trust assets (including land, natural resources, and funds)?
(3) Does any attorney in your office provide legal advice regarding any aspect of American Indian trust reform?
(4) Does any individual in your office respond to requests concerning the Cobell litigation?
(5) Does any attorney in your office provide legal advice regarding tribes contracting or compacting to manage individual Indian trust assets (including land, natural resources, or funds)?
(6) Does any attorney in your office provide legal advice regarding any aspect of individual Indian trust assets or rights, including but not limited to probate, appraisals, trespass, rights-of-way, easements, water rights, etc.?
(7) Does any attorney in your office provide legal advice regarding proceeds (e.g., royalties for minerals, timber sales, etc.) derived from individual Indian trust lands?
(8) If you answer "No" to all questions and you can certify that they only American Indian trust issues in your office pertain to tribal land into trust applications, tribal trust land boundary issues and/or tribal trust jurisdiction issues, then you do not have to retain backup tapes.

The preliminary results of the survey are that twelve offices answered "no" to questions numbered 1-7. However, we are following up the survey with calls to a couple of offices to confirm their responses. We will provide you with more information when our survey is completed.

Finally, as you know, Trial I concluded in July 2000, and on December 21, 2000, Judge Lamberth imposed restrictions on Trial I discovery. Therefore, on February 18, 2000, we notified plaintiffs that the Solicitor's Office was no longer actively searching for documents responsive to specific requests pertaining to Trial I.

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documents responsive to question two.

If you any further questions on this matter, please feel free to call me at (202) 208-3401.

Sincerely,

Edith R. Blackwell
Deputy Associate Solicitor
Division of Indian Affairs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF GLENN W. SCHUMAKER

1. I am the Management Information Systems (MIS) Team Leader for the Office of the Solicitor (Office). I direct the operations of the local area networks and computer systems for the Office nationwide. In addition to myself, the MIS Team consists of three senior technicians and two junior technicians. The Office has nineteen locations nationwide, with approximately 260 attorneys and 100 support personnel. I have held this position in the Office since 1983. The information in this declaration is based on my personal knowledge and experience obtained in the performance of my official duties.

2. The Office's electronic mail system must be managed to control the explosive growth of data that results from ordinary use, and which would render the system inoperable if not checked. Consistent with industry practices, the Office has adopted a policy of automatically erasing messages older than thirty days from its current operating database. As a result, employees have access only to messages created in the last thirty days or less.

3. To recover from a potential catastrophic failure of its computer systems (word

Exhibit 3
Govt's Resp. to Pltffs' Bill of Particulars and Suppl. Motion to Show Cause Why Edith Blackwell Should Not Be Held in Contempt

processing, electronic mail, database management systems and all attendant software) the Office employs routine procedures for backing up those systems so as to provide for the reliable recovery of data and software. The backup procedures are designed to capture the minimum amount of information necessary to accomplish the recovery with the least burdensome effect on the system and Office staff. The tape backup system is designed only for these purposes and not for storage and retrieval of electronic mail messages. The message data are encrypted by the system's software into a large composite database, which renders the message data unsearchable unless the entire database is restored and accessed with the original software.

4. The computer system backup procedures incorporate tape backups of the system data and program files on a daily and weekly basis. The daily backups consist of copies of all files that have been created or modified since the last backup, provided they have not been deleted in the meantime. The weekly backups are run after midnight on Friday nights and consist of "snapshots" of all data (not program) files in the system at the time the backup is performed.

5. After the backup process is run, the data is contained on the tapes in a compressed, encoded, proprietary format. As such, the tapes can only be read after a process of restoration performed by the original backup software.

6. Under the routine backup policy of the Office, daily tapes are rotated (overwritten) every two weeks, and weekly backup tapes are rotated every four weeks. However, the Office dispensed with the routine tape rotation between February and November, 1998, due to changes in the backup tape format and due to the possibility that an Independent Counsel would be appointed to investigate a request that the Secretary of the Interior take land into trust for Indian gaming purposes. Whereas on a given day the Office normally would have ten daily and four

weekly backup sets (each set corresponds to a backup date), as of the date of this declaration the Office has approximately 185 backup sets dating from November 21, 1997 to today. Because of occasional problems with the backup system hardware or software, there are a few dates during this period on which the backup system was unable to operate and for which no backup data exists. Additionally, the Office has one tape dated April 1, 1995, which had been misfiled and was not overwritten in the normal tape rotation cycle.

7. The procedures for restoring and searching backup tapes were developed and refined by the MIS Branch in consultation with attorneys earlier this year to assist the Office in responding to the OIC subpoena and criminal investigation of the Secretary. The restoration and search was unprecedented in the Office and in the MIS Branch, and was seriously disruptive to our ongoing efforts to upgrade and maintain the Office's computer systems.

8. The process for restoring and searching backup tapes is set forth below:

a. Before restoring backup tapes, we must build a file server to create a separate place to restore the recovered backup data off-line. This is necessary to avoid having to shut down the normal office routine, which depends on the production file servers for activities such as word processing and electronic mail. This consists of assembling hardware and loading operating system software. This step is essential, and the restoration and search cannot be performed without it. I estimate that this procedure will take two to three work days with two technicians from my staff.

b. The next step is to set up the tape drive to read backup tapes. Depending on time range of tapes covered by the request, the tape formats may be different. For the period for which backup tapes exist, the Office has used two different formats. To restore tapes in different

formats; we must set up a separate tape drive for each format. I estimate this step would take one day to set up and test, using one employee.

c. We next create a file and directory structure on the temporary server for storage of those documents identified by the search routine as containing one or more of the search terms. This process will take approximately two full days using two employees.

d. Next we review the time period covered by request, which we compare to the inventory of existing tapes. Through this step we verify the existence of all tapes, noting errors in logs and other related documentation. I estimate this procedure would take one staff member one full day to complete.

e. A list of search terms must be identified to be used in the automated search routine. The search terms must be formulated to obtain a broad range of records that are most likely to be responsive to the given request. In the case of electronic mail, this includes not only defining key substantive terms, but also determining which employees were most likely to have communicated with attorneys whose mailboxes we are searching. These names are used as search terms. As a result, the list is developed in close consultation with the attorneys handling the case. In my most recent experience, in response to a subpoena issued to the Department the Office of the Independent Counsel (OIC), this step took at least two weeks.

f. We then must compose an automated search routine(s), which incorporates search terms chosen to recover documents most likely to be responsive. The number of search terms directly affects how many searches must be performed, and how long each search will take. The search routine requires software and expertise not currently possessed by the Office. In order to compose and run the search routine, the Office must enlist the services of a programmer from

another office within the Department or procure those services by contract. In my previous experience, composing the search routine took one outside programmer approximately two to three days. While some of the previous search routine might be useable again, I estimate that the necessary testing and revision of the routine using new search terms would take the same period of time.

g. We then identify those individual computer users whose mailboxes must be searched. The number of mailboxes directly affects how long each search will take. I understand that in this case, the mailboxes for the entire staff of the Division of Indian Affairs would have to be searched. This process takes a nominal amount of time.

h. The actual restoration process follows, in which we mount each tape, one at a time, in the appropriate tape drive, then initiate the restoration process using the tape backup software. I estimate that the restoration of the electronic mail database from the backup tapes will take approximately one hour for each of the 185 backup sets, with one staff member.

i. After the restoration is completed, the search routine is run on each restored tape set. This consists of running the automated search program against each user mailbox previously identified. Because users have passwords restricting access to their mailboxes, we must manually override the passwords for each user. In my previous experience responding to the OIC subpoena, the search routine was able to accommodate only fifteen terms at time; because we used forty-two search terms to gather responsive documents, we had to run the search routine three times for each user mailbox. Based on my experience, I estimate that running the search routine one time (for up to fifteen search terms) would take a half-hour per tape set, or approximately ninety hours. This process can overlap at least partly with the restoration process, using a separate staff

employee.

j. We then copy to the temporary storage area all messages containing one or more of the search terms that are identified through the search routines. This entire process would add approximately one full work day to the process, using one staff employee.

k. Extensive documentation and monitoring of each step of this process are necessary to maintain the integrity of the process. This involves creating spread sheets and logging each computer user whose records were being searched, each date of backup set searched, status of each restoration and search and review, movement of responsive records to appropriate electronic directory structures, maintenance of security protocols to ensure that electronic files are not commingled, omitted or improperly disseminated. The documentation and monitoring process would add approximately two days with one employee.

l. Once the automated search of each mailbox is complete, the documents identified in the automated search are reviewed by the computer user in whose mailbox the message was stored. This review is for responsiveness to the request and for identification of any applicable privileges. The process by which this review takes place must be designed and tested prior to use. The length of this process will vary based on the volume of responsive records and the ability of the attorneys to complete their review. While I did not participate directly in the review by the attorneys of backup electronic mail messages that were responsive to the OIC subpoena, I was frequently called upon to resolve technical questions during their review. I believe the review process took several weeks with only 83 backup sets.

9. Based on the estimates above, I estimate that the entire process of restoring and searching the backup tapes for electronic mail messages for the Division of Indian Affairs, prior to

review by the individual attorneys, will take fifty-six to fifty-eight work days and will involve twenty percent to fifty percent of the MIS Branch staff.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

November 20, 1978
Date

GLENN W. SCHUMAKER

RECEIVED
MAY 20 3 29 PM '99
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,
Plaintiffs,
v.
BRUCE BABBITT, Secretary of the Interior, et al.,
Defendants

No. 1:96CV01285 RCL

Before Alan Balaran Special Master

MOTION FOR ESTABLISHMENT OF TIME FRAME FOR PRODUCTION OF CERTAIN ELECTRONIC RECORDS AND NOTICE TO THE COURT REGARDING RETENTION OF SUCH RECORDS

On May 11, 1999, the Special Master issued an Opinion and Order denying Defendants' Motion for Reconsideration of the Court's November 9, 1998, Order relating to the production of documents responsive to Plaintiffs' Third Request for Production of Documents. By this Motion is, Defendants request 65 working days from May 17, 1999, to and including August 17, 1999, to conduct the review of the backup tapes, identify responsive documents, produce non-privileged documents, and submit a privilege log for any documents subject to a claim of privilege. As grounds for this Motion, Defendants rely upon the accompanying Memorandum in Support. By this filing, as elaborated in the accompanying memorandum, Defendants also disclose an inadvertent overwrite of certain system backup tapes created after the filing of the Motion to Reconsider.

WHEREFORE, for the reasons stated in the Memorandum in Support, Defendants request entry of the attached proposed Order.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al., Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants	No. 1:96CV01285 RCL Before Alan Balaran Special Master

[proposed]

ORDER ESTABLISHING OF TIME FRAME FOR PRODUCTION OF CERTAIN ELECTRONIC RECORDS

Upon consideration of Defendants' Motion for Order Establishment of a Time Frame for Production of Certain Electronic Records and Notice to the Court Regarding the Retention of Such Records, the response thereto, and the entire record herein,

IT IS HEREBY ORDERED THAT:

Defendants shall have to and including August 17, 1999, to (1) review the electronic backup tapes identified in the Opinion and Order of the Special Master issued May 11, 1999, for responsiveness to Plaintiffs' Third Request for Production; (2) prepare a log of all such documents for which a claim of privilege is asserted; and (3) produce all responsive documents for which no privilege is asserted.

Dated: _____

_____
ALAN L. BALARAN
Special Master

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al., Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants	No. 1:96CV01285 RCL Before Alan Balaran Special Master

MEMORANDUM IN SUPPORT OF MOTION FOR ESTABLISHMENT OF TIME FRAME FOR PRODUCTION OF CERTAIN ELECTRONIC RECORDS AND NOTICE TO THE COURT REGARDING RETENTION OF SUCH RECORDS

On May 11, 1999, the Special Master issued an Opinion and Order denying Defendants' Motion for Reconsideration of the Court's November 9, 1998, Order relating to the production of documents responsive to Plaintiffs' Third Request for Production of Documents. At issue in that motion was whether the Department of the Interior ("DOI") was required to review e-mail messages of the Office of the Solicitor that were on certain "backup" tapes that had been preserved in connection with an unrelated investigation by the Office of the Independent Counsel. As of the time of the motion for reconsideration, DOI had in its possession approximately 185 system backup tapes covering the period of November 21, 1997 through November 20, 1998. These tapes were not archival records, but rather system maintenance tapes that had captured, among other things, e-mail messages of the Office of the Solicitor. One ground for the motion for reconsideration was the time and expense involved in reviewing these backup tapes.

As a consequence of the Special Master's denial of the Motion for Reconsideration, DOI must review these backup tapes to determine whether they contain any documents responsive to Plaintiffs' Third Request for Production and determine whether to assert a claim of privilege over them. As the Special Master noted in his opinion and order, that process was previously estimated to take 56 to 58 working days. As there are some additional tapes created since November 20, 1998, the process will take slightly longer. One purpose of this Motion is, therefore, to request 65 working days from May 17, 1999, to and including August 17, 1999, to conduct the review of the backup tapes, identify responsive documents, produce non-privileged documents, and submit a privilege log for any documents subject to a claim of privilege.

Defendants could begin production of documents for which no privilege is claimed once the retrieval system is up and running and documents have been identified, printed, and reviewed for possible assertion of privilege. DOI has already written the search program and has begun searching tapes. It is expected that actual production of e-mails or the privilege logs could begin by mid-June, assuming responsive non-privileged documents are being found.

The second purpose of this filing is to formally report an inadvertent overwrite of certain system backup tapes created after the filing of the Motion to Reconsider. In the Special Master's May 11, 1999, Opinion and Order the Special Master noted that backup tapes had been maintained for the period November 21, 1997 to the present. This is not correct.[1]

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[1] It is, of course, what we indicated in prior filings with the Court.

While DOI believed until last week that all of the Solicitor's Office backup tapes to the present had been retained, Blackwell Decl. at ¶ 12, as explained below, the only complete set of backup tapes are those for the period November 21, 1997 through November 20, 1998. Although DOI has backup tapes that were created after November 20, 1998, as the inadvertent result of a directive in an unrelated matter, DOI does not have a comprehensive collection of such tapes through the present.[2] Therefore, production of responsive e-mails generated or received by the Office of the Solicitor for the period of November 21, 1998, through the present, DOI must rely primarily upon copies of e-mails retained by each system user, though the existing backup tapes for this period will also be searched.[3] By November 20, 1998, Solicitor Office attorneys had been advised of the document sought by Plaintiffs' Third Request for Production and had been instructed to retain all responsive e-mails.

As the Special Master is aware, the Office of the Solicitor does not have an electronic e-mail archival system. It does have a system backup that periodically takes a "snap shot" of existing data on the entire system for use in system reconstruction in the event of a

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[2] Despite the discontinuance of routine preservation of backup tapes by MIS, however, there are eleven daily and five weekly tapes created after November 20, 1998, that have not been overwritten in the normal course of business. Hall Dec. at ¶ 6. The tape created March 22, 1999, contains many e-mail messages, the oldest of which date back to January 11, 1999. Id. at ¶ 8. There are also ten other daily and five weekly backup tapes created since March 22, 1999, that may provide coverage for that period since that date that provide substantial coverage for the period April 19, 1999, through the present. Id. These tapes will also be searched for responsive e-mails. MIS has now been instructed to retain all new backup tapes from now until the Special Master indicates that MIS can resume routine overwriting practices.

[3] As explained below, DOI does not have backup tapes that were created from November 23, 1998, through March 21, 1999. There is, however, one tape made on March 22, 1999, that contains data from a significant portion of this time.

system failure. Declaration of Glen W. Schumaker, dated November 20, 1998 ("Schumaker Nov. 1998, Dec."), attached hereto as Exhibit A[4] The backup tape system is operated by the Management Information Systems ("MIS") group. Id. As a general rule, this backup system reuses the backup tapes. Id. at ¶ 6. Moreover, the backup system is not readily searchable. Id. at ¶ 3. To locate relevant documents, key words are identified and searched for in the base of thousands of e-mails on the backup tapes. Thus the archival utility of the backup system is quite limited.

Because of some system changes and instructions received by the Office of Independent Counsel for an investigation unrelated to this case, as of November 20, 1998, when DOI moved for reconsideration of the Court's denial of an earlier motion for a protective order, DOI had in its possession approximately 185 backup tapes. Id. at ¶ 6. These backup tapes dated from November 21, 1997 to November 20, 1998, with a single additional tape dated April 1, 1995. Id. at ¶ 6. DOI still has these tapes. Declarations of Glenn Schumaker, dated May 18, 1999 ("Schumaker May 1999 Dec.") at ¶ 3 (attached hereto as Exhibit B); and Alexander Daniel Hall, III at ¶ 4 (attached hereto as Exhibit C). Pursuant to the Special Master's order, these tapes will be searched.[5]

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[4] Mr. Schumaker's November 1998 declaration was originally submitted as Exhibit A to Defendants' Consolidated Motion for Reconsideration of the Court's November 9, 1998, Order relating to the scope of Defendants' Obligations in Responding to Plaintiffs' 3rd Request for Production, etc., filed November 20, 1998.

[5] Because the backup tapes are "snap shots" of e-mails on the system as of the day the backup tape was made, e-mail deleted by the user prior to the date of the backup would not be captured. Schumaker November 1998 Dec. at ¶ 4.

In late November 1998, DOI was informed by the Office of the Independent Counsel that, although DOI must continue to retain the backup tapes created and retained to date, the Department could return to its usual practice of overwriting backup tapes from that time forward. Schumaker May 1999 Dec. at ¶ 2. Backup tape overwrite resumed as of November 23, 1998. Id. As a consequence, although MIS retained the backup tapes previously identified to this Court as being retained, not all of the backup tapes created after November 23, 1998 have been retained. Hall Dec. at ¶ 4.

We acknowledge that it was a mistake not to have either provided explicit instructions to MIS to continue the practice of preserving all newly created backup tapes after the release of the Office of the Independent Counsel, or to have petitioned the Court to allow DOI to resume normal overwriting practices. Fortunately, the Solicitor's Office had in place since at least November 20, 1998, an appropriate mechanism for retaining responsive e-mails. While we apologize for the mistake, the failure to maintain all system backup tapes for a limited period of time, this is unlikely to have prejudiced Plaintiffs in any way.

Aside from the fact that all of the electronic backups should have been retained until the Court authorized resumption of routine overwriting practices,[6/] the backup tapes are not the method used by the Office of the Solicitor for the routine preservation of e-mails meeting the

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[6] DOI will separately make such request at an appropriate time. In that request DOI will demonstrate that not reusing backup tapes is an expensive redundancy that is not necessary in the context of this litigation. For the time being, however, newly created backup tapes for the Solicitor's Office system will be retained.

definition of "federal records."[7] See Declaration of Edith R. Blackwell, dated May 19, 1999 ("Blackwell Dec.") at ¶¶ 3-8 (attached hereto as Exhibit D). Instead, DOI's record retention policies require e-mail records to be saved by each system user, usually by printing them out in hard copy and filing in the normal course of business with the matters to which they relate. Id. Given the limitations of the computer system used by the Solicitor's Office, this is the practical solution to this record management issue.[8]

DOI's e-mail retention policy was the specific focus of a session at the October 28-30, 1998, Solicitor's Office Conference. Declaration of Edith Blackwell at ¶ 2. (Exhibit D). At this conference, the policy regarding retention of e-mails that meet the definition of "federal records" was distributed to all attendees, and the obligation of each individual to retain e-mail records was emphasized to all attendees. Id. at ¶¶ 4-6. On November 10, 1998, the day after the Court denied Defendants' Motion for Protective Order, the Deputy Solicitor issued a written directive to all Solicitor's Office attorneys (including Headquarters, Regional and Field Offices) requiring production of documents identified in Plaintiffs' Third Request for Production. Id. at

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[7] In our Motion for Reconsideration, we argued that the burden of searching for e-mails on the system backup tapes outweighed the utility of such documents since the facts needed by Plaintiffs were contained in other readily available hard copy documents. The Special Master rejected this argument requiring production of the e-mails themselves because they may contain unique information. Opinion and Order at 4. We note here that the production of e-mails retained in hard copy is production of the e-mail and that we are not re-arguing the position rejected by the Special Master.

[8] In the normal course of events, all backup tapes are routinely overwritten in the course of system maintenance. As the Special Master is aware, the existence of a collection of backup tapes was the result of a demand by the Independent Counsel. We note that this command to retain backup tapes covered more systems than just the one used by the Office of the Solicitor. Those systems also resumed normal operations in November 1998.

¶ 9. This directive specifically required the production of copies of e-mail messages. Id. On or about November 17, 1998, Ms. Blackwell convened a meeting of the Office of the Solicitor, Division of Indian Affairs, to discuss e-mail retention specifically. Id. at ¶¶ 7 and 8. At that meeting attorneys within the Division of Indian Affairs were again specifically instructed that DOI policy requires retaining either hard copy printouts of substantive e-mails that are federal records or saving such e-mails on discs. Id. at 8.

The reliance upon individuals to save copies of e-mails is a practical approach to retention of such documents given the limitations of DOI's system. As discussed in the attached November 1998 declaration of Mr. Schumaker, the system used by the Office of the Solicitor does not provide for archiving e-mails system-wide. The backup tapes are used only to restore the system in the event of a crash. These tapes would be a poor method for archiving because of the difficulty of searching them for particular e-mails. Therefore, retention of hard copy or individually saved and labeled e-mails by system users (i.e. the attorneys) is a practical way to preserve such documents.

In fact, this system of document retention and retrieval already has been utilized for document production in this action. For example, in December 1998, DOI responded to Plaintiffs' Second, Third, Fourth, and/or Fifth Request for Production. As part of the search for responsive documents, the Office of the Solicitor attorneys were instructed to produce hard copies of responsive e-mail messages by either photocopying existing hard copy printouts of such messages, or by printing out those responsive e-mail messages that had been saved electronically by individual attorneys. Blackwell Dec. at ¶¶ 9 and 10. A number of responsive e-mail messages were collected and either produced, or listed on a privilege log. Id. at ¶ 10. DOI,

including the Office of the Solicitor, must rely upon this method of production as the primary approach to supplementing its production in connection with the Special Master's Order of May 11, 1999. Notwithstanding the reliance upon the e-mail retention policy, DOI will of course search all of the existing backup tapes for this production (including the approximately 185 identified in the Schumaker declaration of November 20, 1998, plus the eleven daily and five weekly tapes identified in the attached declaration of Mr. Hall).

Though the Solicitor's Office must rely upon its system users to create copies of e-mail records, we recognize that this is inconsistent with both the implication of the declaration of Mr. Schumaker, filed with the Court on November 20, 1998, and the statement in footnote 2 of our February 12, 1999, opposition to Plaintiffs motion to compel. There we indicated that newly created backup tapes would also be kept. The fact that these representations were incorrect was not learned until May 12, 1999. The error came to light in a meeting that was held to discuss a timetable for complying with the Special Master's May 11, 1999, Opinion and Order that required the search of the e-mails retained on backup tapes. Schumaker May 1999 Dec. at ¶ 5; and, Blackwell Dec at 12. At this meeting, personnel from the Office of the Solicitor and the Department of Justice first learned that system backup tapes had not been routinely made and kept since November 20, 1998. Blackwell Dec. at ¶ 12. The information was relayed to the undersigned counsel who then made sufficient inquiry to allow for informed notice to the Special Master. This notice was provided orally by telephone to the Special Master on May 17, 1999, and this brief is a further explanation of the matter.

CONCLUSION

For the reasons stated above, Defendants respectfully request to and including August 17, 1999, to (1) review backup tapes for the Office of Solicitor computer system to retrieve any e-mails covered by Plaintiffs' Third Request for Production; and (2) to either produce responsive documents or to identify them on a privilege log.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF EDITH R. BLACKWELL

I, Edith R. Blackwell, declare:

1. I am the Deputy Associate Solicitor, Division of Indian Affairs, Office of the Solicitor, Department of the Interior. I have held this position since October 1998. I have been with the Department of the Interior since August 1997 and for my entire tenure part of my duties have included working on the Cobell v. Babbitt litigation.

2. In July 1998, shortly after receiving Plaintiffs 3rd Request for Production of Documents, I convened a meeting with Division of Indian Affairs attorneys. At this meeting I circulated a copy of the 3rd Request and put these attorneys on notice that we may have to gather responsive documents. I also informed the attorneys that responsive documents included drafts and e-mails.

3. On October 28 -30, 1998, I attended the Solicitor's Conference in Solomons, Maryland. The attendees were supervisory and management attorneys from throughout the

Exhibit 5
Govt's Resp. to Pltffs' Bill of Particulars and Suppl. Motion to Show Cause Why Edith Blackwell Should Not Be Held in Contempt

Solicitor's Office including Regional and Field Offices. Attached at Attachment 1 is a list of the attendees.

4. On Thursday, October 29, 1998, the attendees discussed "Records management issues." Subtopics included record creation, retention, and disposition; electronic records – searching for documents, status of NARA litigation/regulations, E-FOIA, etc.; and document requests from litigants, Congress, and FOIA requesters. The issue of government's ability to retain electronic data is the subject of ongoing litigation in Public Citizen v. Carlin. Copies of recent decisions in that case as well as National Archives and Records Administration (NARA) Bulletins were provided to the attendees.

5. Circulated as one of the hand-outs for this discussion was a July 25, 1996, Memorandum from Gayle Gordon, Acting Director, Office of Information Resources Management. This memorandum states that:

> Until new records software is developed, piloted, and installed, all E-Mail messages or attachments that meet the definition of a Federal record must be added to the organizations files by printing them out (including the essential transmission data) and filing them with all related paper records.

A true and correct copy of the entire memorandum I received at the conference is at Attachment 2.

6. At the conference we discussed the recent time-consuming task of reviewing the backup tapes for the Independent Counsel. It was agreed at the Solicitor's Conference that each manager would be responsible for ensuring that his or her Division, Regional, or Field

Office was reminded that attorneys must print copies of all e-mails which are considered a Federal record. We also discussed saving e-mails to disk as an alternative.

7. It was my understanding from the conference that each Division, Regional, and Field Office manager should meet with his or her staff to discuss the importance of saving e-mails. On November 6, 1998, shortly after I returned from the conference, I sent an e-mail to all attorneys in the Division of Indian Affairs, for which I am the Deputy Associate Solicitor, calling a Division staff meeting. In the attached copy of my November 6 e-mail it states that one of the purposes of the Division meeting is to discuss "the requirements for preserving electronic data, including e-mails." A copy of this e-mail is Attachment 3.

8. The Division of Indian Affairs meeting was held on November 17, 1998. At this meeting the Associate Solicitor, Derril Jordan, and I relayed the issues discussed at the Solicitor's Conference. We instructed all Division of Indian Affairs attorneys that the Department's policy was that all e-mails which are Federal records should be printed. I discussed that our existing system had the limited ability to save e-mails to disks. We also circulated the March 13, 1996, instructions from the Department of Justice which provided additional information on what is a Federal record. It is attached as Attachment 4.

9. On November 9, 1998, the Court denied Defendants' Motion for a Protective Order to block certain discovery including discovery of records created by the Office of the Solicitor which provided legal advice. In response to this decision, on November 10, 1998, the Deputy Solicitor, Ed Cohen, sent an e-mail to all Associate, Regional, and Field Solicitors requesting that they produce all documents responsive to the Plaintiffs' Third

Discovery Request. In this memorandum we included the document request. The beginning of the memorandum states:

> We have been ordered to collect certain Solicitor documents for production or identification for a privilege log in Cobell v. Babbitt, the IIM trust funds class action litigation. Below is a list of documents requests that seek documents you or your office may have. Please note that these requests are very broad and include all documents, memos, drafts, and e-mails, and some are not limited in time.

A copy of this e-mail with the attached memorandum is attached to this declaration at Attachment 5.

10. The resulting document search of Solicitor's Office attorneys' files found a number of documents that were identified as responsive, and placed on a privilege log. Among these documents were paper copies of e-mails. See, for example, IIMP03|Q001D001, IIMP03|Q001D003, IIMP03|Q001D007, IIMP03|Q004D013, IIMP03|Q004D016, and IIMP03|Q006D001.

11. On May 6, 1999, the Deputy Solicitor e-mailed a copy of his November 10, 1998-memorandum to all Associate, Field, and Regional Solicitors. In the e-mail the Deputy Solicitor asked that the offices provide all supplemental documents by Tuesday, May 11, 1999.

12. On May 12, 1999, Ed Cohen, Robert More, Glenn Schumaker, Susan Cook, David Knight, and I attended a meeting to discuss compliance with the Special Master's May 11, 1999, Decision regarding Solicitor's Office e-mails. It was at this meeting that I discovered for the first time that we had not retained backup tapes from November 23,

1998, to March 19, 1999. Up until the meeting it had been my understanding that, although we were producing paper copies of e-mails, the MIS Team was nevertheless retaining all backup tapes and not overwriting those tapes. I did not receive a copy of the November 13, 1998, memorandum regarding backup tapes and was unaware of its existence until this week. Therefore, I had no reason to believe that the backup tapes had not been retained. Further, I believed that individual attorneys who were likely to have responsive documents were keeping copies of potentially responsive e-mails.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge information and belief.

Executed on this 20th day of May, 1999.

Edith R. Blackwell