IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' MOTION FOR LEAVE TO FILE SURREPLY

The Department of the Interior Defendants ("Interior Defendants") respectfully move for leave to file the attached *Defendants' Surreply to Plaintiffs' Reply re: (1) Plaintiffs' Motion to Strike Defendants' Opposition to Edith Blackwell Contempt Specifications; and (2) Motion for Enlargement of Time to Reply to Such Opposition.*

Plaintiffs' Reply claims that Interior Defendants' service of *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* (filed Aug. 12, 2002) to Elliott Levitas was defective. Specifically, plaintiffs claim that service by mail to Elliott Levitas was not effective because of the two year absence of Mr. Levitas on plaintiffs' pleadings and the absence of Mr. Levitas's name on the pleading Interior Defendants' were responding to: *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 and Supplemental Memorandum of Points and Authorities in Support of Criminal Contempt.*

Interior Defendants seek leave to file a Surreply because plaintiffs did not make this argument in their original Motion, and Interior Defendants should be given an opportunity to respond since Mr. Levitas is still counsel of record and plaintiffs have specifically and recently requested that Mr. Levitas continue to receive service of pleadings in this action.

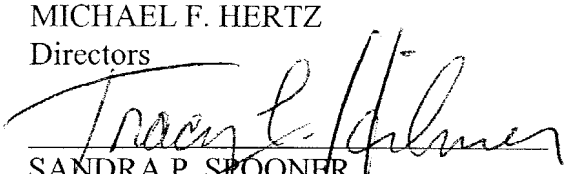
For these reasons, Interior Defendants respectfully request leave to file the attached *Defendants' Surreply to Plaintiffs' Reply re: (1) Plaintiffs' Motion to Strike Defendants' Opposition to Edith Blackwell Contempt Specifications; and (2) Motion for Enlargement of Time to Reply to Such Opposition*. Counsel for plaintiffs have stated that they oppose this motion.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
MICHAEL F. HERTZ
Directors



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DATED: September 6, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' SURREPLY TO PLAINTIFFS' REPLY re:
(1) PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' OPPOSITION TO BLACKWELL CONTEMPT SPECIFICATIONS; AND (2) MOTION FOR ENLARGEMENT OF TIME TO REPLY TO SUCH OPPOSITION

Plaintiffs' Reply claims that Interior Defendants' service of *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* (filed Aug. 12, 2002) on Elliott Levitas was defective. Plaintiffs state that because Mr. Levitas has not appeared on a brief in two years and because his name did not appear on Plaintiffs' *Bill of Particulars*, service to Mr. Levitas was ineffective. However, when a party is represented by more than one attorney, proper service upon any of the party's attorneys, under any of the means set forth in Rule 5(b), constitutes proper service upon the party. *See, e.g., Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 f.2d 1061, 1063 (5th Cir. 1990) ("The burden is to serve all other *parties*. This does not require service on each of several counsel appearing on behalf of a party."); *accord Buchanan v. Sherrill*, 51 F.3d 227, 228 (10th Cir. 1995) (*per curiam*) (citing *Daniel*); *Travers v. Computing Analysis Corp.*, 178 F.3d 1286,

1999 WL 285859 ** 2 (4th Cir. May 7, 1999) (table) (unpublished opinion) ("When a party is represented by more than one attorney, proper service upon any one of them satisfies the requirements of Rule 5.") (citing *Buchanan v. Sherrill).*

Elliot Levitas entered his appearance in this litigation on March 15, 1999. *See* Notice of Appearance for Elliot Levitas, Exhibit 1. He remains counsel of record for plaintiffs. His active participation for purposes of service upon plaintiffs is further documented in recent correspondence. On October 31, 2001, Dennis M. Gingold wrote to J. Christopher Kohn and Mark E. Nagle requesting suspension of mail service to Mr. Gingold, Thaddeus Holt, and Keith Harper. In this letter, Mr. Gingold stated that "Mr. Levitas will continue **service** via U.S. mail service." (Exhibit 2) (emphasis added). On May 23, 2002, Elliott H. Levitas wrote Sandra P. Spooner stating his preference for notification by fax or email of the location of depositions to be taken by the Court Monitor. Mr. Levitas continued, "For all other purposes of **service** and notification, please continue to **serve** or notify me by first class mail as you have been doing in the past." (Exhibit 3) (emphasis added). Mr. Levitas clearly remains counsel of record for plaintiffs, and service on plaintiffs through Mr. Levitas was effective.

Additionally, defendants did not receive service of plaintiffs' Reply in any manner on August 27, 2002 – the date set forth in plaintiffs' certificate of service. Defendants received the Reply by facsimile transmission on August 29, 2002, and only after defendants' agent contacted plaintiffs to ask if the Reply had been served. Thus, there is a question as to the accuracy of plaintiffs' own certificate of service. Defendants, however, believe this petty nonsense should end here. Hopefully, plaintiffs have learned that people who live in glass houses should not cast stones.

CONCLUSION

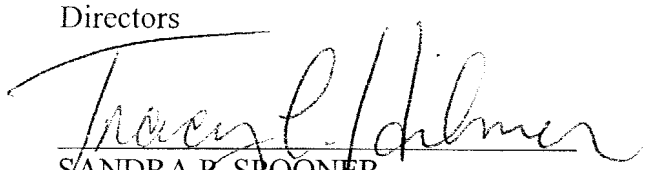
For the foregoing reasons and those stated in *Defendants' Opposition to (1) Plaintiffs' Motion to Strike Defendants' Opposition to Edith Blackwell Contempt Specifications; and (2) Motion for Enlargement of Time to Reply to Such Opposition*, plaintiffs' motion to strike the Blackwell Opposition should be denied.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
MICHAEL F. HERTZ
Directors



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(202) 307-0474

DATED: September 6, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Defendants' Motion for Leave to File Surreply, and the entire record in this case, it is this _____ day of _____, 2002, hereby

ORDERED that Defendants' Motion be, and hereby is, GRANTED; and it is

FURTHER ORDERED that Defendants' lodged Surreply to Plaintiffs' Reply re: (1) Plaintiffs' Motion to Strike Defendants' Opposition to Blackwell Contempt Specifications; and (2) Motion for Enlargement of Time to Reply to Such Opposition shall be filed in the record as of this date.

_____
Honorable Royce C. Lamberth
United States District Judge

cc:

Tracy Hilmer
Dodge Wells
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 616-3085

Sandra P. Spooner
John T. Stemplewicz
Cynthia L. Alexander
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W., Ninth Floor
Washington, D.C. 20004
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
Fax (202) 822-0068

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

Amy Berman Jackson
Trout & Richards
1100 Connecticut Avenue, N.W.
Suite 730
Washington, D.C. 20036
Fax: (202)463-1925

CERTIFICATE OF SERVICE

I hereby certify that, on September 6, 2002, I served the foregoing *DEFENDANTS' SURREPLY TO PLAINTIFFS' REPLY re: (1) PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' OPPOSITION TO BLACKWELL CONTEMPT SPECIFICATIONS; AND (2) MOTION FOR ENLARGEMENT OF TIME TO REPLY TO SUCH OPPOSITION* and *DEFENDANTS' MOTION FOR LEAVE TO FILE SURREPLY* by first-class mail, postage prepaid, and by facsimile transmission, pursuant to agreement, upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
Fax No.: (202)822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
Fax No.: (202)318-2372

and by U.S. Mail only upon:

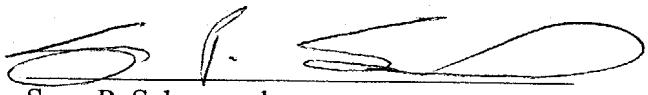
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Courtesy copies provided to:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

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

Amy Berman Jackson
Trout & Richards
1100 Connecticut Avenue, N.W.
Suite 730
Washington, D.C. 20036



Sean P. Schmergel

United States District Court
for the District of Columbia

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

BRUCE BABBITT, et al.,

Defendants.

APPEARANCE

CASE NUMBER: 1:96 CV 01285 (RCL)

To the Clerk of this court and all parties of record:

Enter my appearance as counsel in this case for

the Plaintiffs, ELOUISE PEPION COBELL, et al.

March 15, 1999
Date

384758
BAR IDENTIFICATION NO.

Signature

Elliott H. Levitas
Print Name

1100 Peachtree Street, Suite 2800
Address

Atlanta, GA 30309
City State Zip Code

404-815-6450
Phone Number

EXHIBIT 1
Defendants' Surreply

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 1999, copies of the forgoing Notice of Appearance was sent via United State first-class mail, postage prepaid, to:

Counsel of Record:

Phillip A Brooks, Esq.
Environment and Natural
Resources Division
Department of Justice
601 Penn. Avenue, NW
Room 5616
Washington, DC 20044-0663

Of Counsel:
Edith Blackwell, Esq.
Connie Lundgren, Esq.
Office of the Solicitor
Division of Indian Affairs
Department of Interior
1849 C Street, NW MS-6456
Washington, DC 20240

Ingrid Falanga, Esq.
Daniel Mazella, Esq.
Office of General Counsel
Department of Treasury
401 14th Street, S.W.
Room 531
Washington, DC 20237

Elliott H. Levitas

Given

FAX COVER SHEET

TO	Chris Kohn
COMPANY	
FAX NUMBER	12025147450
FROM	Geoffrey Rempel
DATE	2001-10-31
RE	Fax from Geoffrey Rempel

COVER MESSAGE

Memo: none

EXHIBIT 2
Defendants' Surreply

Dennis M. Gingold
P.O. Box 14464
Washington, D.C. 20044-4464
202 661-6380
Fax 202 318-2372

VIA FACSIMILE

October 31, 2001

Mark E. Nagle
Judiciary Center Building
555 Fourth Street, N.W., Room 10-403
Washington, D.C. 20001

J. Christopher Kohn
United States Department of Justice
Civil Division
P.O. Bo 975
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell v. Norton 1:96CV01285

Dear Messrs. Nagle and Kohn:

In light of the recent contamination of Department of Justice mailrooms with anthrax and the ongoing threat to the United States Postal Service, generally, plaintiffs respectfully request that you suspend indefinitely mail service to the following individuals:

Dennis M. Gingold, Esq.
Mark K. Brown, Esq.
1275 Pennsylvania Avenue, N.W.
9th Floor
Washington, D.C. 20004

Thaddeus Holt, Esq.
P.O. Box 440
Point Clear, AL 36564

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Service in the alternative, including all relevant correspondence, filings (w/ attachments, exhibits, etc.), and other documents, can be completed via facsimile at the following numbers:

Dennis M. Gingold, Esq. and Mark K. Brown, Esq.
202.318.2372

Keith Harper, Esq.
Native American Rights Fund
202.822.0068

Mr. Levitas will continue service via U.S. mail service. Of course, facsimile service may not be appropriate for certain material. Please contact Geoffrey Rempel (202.661.6381) to coordinate alternative arrangements. Thank you.

Very truly yours,

Dennis M. Gingold

cc: Brian Ferrell (by facsimile)
Alan Balaran (by facsimile)
Elliott Levitas (by facsimile)
Keith Harper (by facsimile).

KILPATRICK
STOCKTON LLP
Attorneys at Law

Suite 900 607 14th St., NW
Washington DC 20005-2018
t 202 508 5800 f 202 508 5858
www.KilpatrickStockton.com

May 23, 2002

direct dial 202 508 5815
ELevitas@KilpatrickStockton.com

FAX

RECIPIENT/ PHONE NO.	FAX NO.	COMPANY/ CITY, STATE, COUNTRY
Sandra P. Spooner 202-514-7194	202-514-9163	Department of Justice Washington, DC

Elliott H. Levitas
FROM

2
PAGES (WITH COVER)

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CLIENT/MATTER NO.

PLEASE CALL 202 508 5816 IF YOU HAVE DIFFICULTY WITH THIS TRANSMISSION.

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COMMENTS

TO BE COMPLETED BY KS OPERATIONS CENTER

TRANSMISSION RECEIPT DATE/TIME: _____

COMPLETED BY: _____ JOB CODE _____

EXHIBIT 3
Defendants' Surreply

KILPATRICK
STOCKTON LLP
Attorneys at Law

Suite 900 607 14th St., NW
Washington DC 20005-2018
t 202 508 5800 f 202 508 5858
www.KilpatrickStockton.com

May 23, 2002

direct dial 202 508 5815
ELevitas@KilpatrickStockton.com

Via Facsimile and U.S. Mail

Sandra P. Spooner, Esq.
Deputy Director, Commercial Litigation Branch
Department of Justice, Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: **Cobell, et al. v. Norton, et al.**
Civil Action No. 1:96 CV 01285
(Judge Lamberth)

Dear Ms. Spooner:

With regard to the Court Monitor's request that you notify Plaintiffs' counsel concerning the location in Washington, D.C. for taking the depositions referred to in the Court Monitor's letter to you of May 15, I would appreciate your notifying me of this information by email or by fax, as you prefer. My email address is elevitas@kilpatrickstockton.com, and my fax number is 404-541-3280.

For all other purposes of service and notification, please continue to serve or notify me by first class mail as you have been doing in the past.

Thank you for your cooperation.

Sincerely yours,

Elliott H. Levitas

EHL/crb

cc: Dennis M. Gingold
Joseph S. Kieffer, III