IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
GALE NORTON, SECRETARY OF THE INTERIOR et al.,	)	No. 1:96CV01285 RCL (Hon. Alan L. Balaran, Special Master)
	)	
Defendants.	)	

INTERIOR DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION AND MEMORANDUM REGARDING PROPOSAL TO (1) RESTORE AND SEARCH RETAINED BACKUP TAPES CONTAINING E-MAIL; (2) IMPLEMENT REAL-TIME CAPTURE OF E-MAIL TRAFFIC AND INCORPORATION OF E-MAIL INTO A SEARCHABLE ARCHIVE; AND (3) REPLACE INDEFINITE RETENTION OF BACKUP TAPES CONTAINING E-MAIL WITH BACKUP OF SEARCHABLE E-MAIL ARCHIVE

The United States, on behalf of the Interior Defendants, respectfully submits to the Special Master this reply in further support of its consolidated motion and memorandum ("Motion") regarding (1) restoration and search of retained backup tapes containing e-mail, (2) implementation of real-time capture of e-mail traffic and incorporation into a searchable archive; and (3) replacement of the indefinite retention of backup tapes containing e-mail with backup of the searchable e-mail archive (items 1-3 collectively, "E-Mail Proposal") and in response to the Plaintiffs' Opposition to the Motion ("Opposition").

The Plaintiffs sought discovery of electronic as well as hard copy versions of e-mail, and that process culminated with the Special Master's July 27, 2001 Opinion (entered July 30, 2001 and adopted by this Court on March 29, 2002) ("July 2001 Opinion"). The premise of the E-Mail Proposal is that system backup tapes containing e-mail ("e-mail backup tapes") by

themselves are essentially useless for discovery purposes and that e-mail contained on the retained backup tapes needs to be isolated in some fashion from the e-mail backup tapes before any search or other processing for production purposes can occur. See Motion at 3-4; see also August 8 Briefing (Motion Ex. 2) at 8:2–8 (ZANTAZ notes that "email backups are great . . . [b]ut you ask me to find something, it's a nightmare to do."). Nothing in the Opposition challenges this premise.

Given this premise, the remaining issue is the methodology used to isolate, search, and store the e-mail contained on the retained e-mail backup tapes. The Interior Defendants chose ZANTAZ to provide independent and objective assurance of the e-mail restoration, search, and archive process and, in addition, to provide a tested and proven product that meets the standards imposed on the financial services industry for handling, retaining, and searching e-mail. See Motion at 5-6 and exhibits cited therein.

The Opposition does not challenge ZANTAZ's credentials, criticize the standards with which ZANTAZ's methodology complies, or suggest even the existence of a viable alternative method for restoring e-mail from backup tapes, capturing future e-mail traffic electronically, and searching and retaining all unique e-mail. Given the Plaintiffs' insistence that discovery extend to electronic copies of e-mail, the Interior Defendants had no choice but to develop a feasible method for addressing the requirements of the July 2001 Opinion. The Interior Defendants believe that the E-Mail Proposal does so and that ZANTAZ provides a reasonable and workable approach for resolving the very complicated issues associated with capturing, searching, and retaining unique e-mails – both those on e-mail backup tapes and those captured real-time – in

electronic format.[1]

1. The Office of the Solicitor Is a "Designated Office" for the E-Mail Proposal

Although the isolated portion of the Motion cited by the Plaintiffs, Opposition at 2-3, could be read to suggest that the Office of the Solicitor is excluded from the Motion and E-Mail Proposal, that reading only works if one ignores the language of the Proposed Order, the remainder of the Motion, and the supporting attachments, all of which make it abundantly clear that the Office of the Solicitor is included in the E-Mail Proposal.[2] To make sure there is no confusion, the Interior Defendants reiterate that the following offices and bureaus are "Designated Offices" for purposes of the Motion and E-Mail Proposal: Office of the Solicitor;

---

[1]The Motion and E-Mail Proposal address only the capture, search, and storage of e-mail contained on retained e-mail backup tapes and of real-time e-mail traffic for purposes of complying with discovery and production obligations as they relate to electronic retention of e-mail. This Reply will not address the Opposition to the extent that it raises issues beyond the scope of the E-Mail Proposal. See, e.g., Opposition at 4 ("all responsive electronic records" (emphasis omitted)), id. at 5 ("nature and scope of systems and computers that send, receive, access, or house relevant electronic records").

[2]See, e.g., Proposed Order at 1-2 ("ORDERED that the following offices and bureaus within the Department of the Interior shall be 'Designated Offices' for purposes of implementing the E-Mail Proposal: Office of the Solicitor; Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service, Bureau of Land Management, Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals; and Office of the Assistant Secretary for Policy, Management and Budget" (emphasis added)); Motion at 4 (physical inventory of backup tapes containing e-mail conducted in Designated Offices including the Office of the Solicitor), id. at 5 n.2 (Office of the Solicitor not listed as one of the offices excluded from the E-Mail Proposal), id. at 6 (pilot test of real-time e-mail capture conducted in the Office of the Solicitor), id. at 14 (restoration proposal: "begin by restoring e-mail from backup tapes for the Office of the Solicitor, then continue in the following order: [listing remaining Designated Offices as in the Proposed Order]" (emphasis added)); February 20 Letter (Motion Ex. 1) at 2 (Office of the Solicitor included in proposal); Transcript of August 8 Briefing (Motion Ex. 2) at 24:8–18 (same); Federal Register Notice of Privacy Act System (Motion Ex. 4) at 2 (same); Draft Statement of Work (Motion Ex. 5) at 1 (same).

Bureau of Indian Affairs; Office of the Special Trustee; Office of Historical Trust Accounting; Minerals Management Service; Bureau of Land Management; Office of the Secretary; Office of the Assistant Secretary for Indian Affairs; Office of Hearings and Appeals; and Office of the Assistant Secretary for Policy, Management and Budget.

As noted, Motion at 6, the Interior Defendants selected the Designated Offices on the basis of statutory trust responsibility, as well as the Interior Defendants' belief that those offices and bureaus were likely to have e-mail traffic relating to Individual Indian Money accounts and the Cobell litigation. The Plaintiffs cite no factual support to contradict the selection of the Designated Offices, but instead refer to the absence of a definition of Individual Indian Trust Data ("IITD") and the resulting effect on "systems – in any bureau or any office – [that] access and house such data and other information." Opposition at 5. The Plaintiffs' Opposition misses the point – the Motion and the E-Mail Proposal, like the July 2001 Opinion, arise in the context of discovery and address only the retention and search of electronic (as opposed to hard copy) versions of e-mail. Issues relating to the preservation of IITD and the systems housing IITD have been and continue to be addressed separately in the context of the Special Master's IT-related proceedings. The issue raised by this Motion is whether the e-mail traffic for a particular office or bureau is sufficiently likely to be responsive to discovery and other production requests in the Cobell litigation to merit the special handling of electronic versions of e-mail as described in the Motion and E-Mail Proposal.[3]

---

[3]The draft agreement with ZANTAZ includes an option that would expand the real-time capture and archive of e-mail traffic to include, in addition to the Designated Offices, the remaining offices and bureaus within Interior (with the exception of the Office of the Inspector General). See Draft Statement of Work (Motion Ex. 5) at ¶ 6.4. The Interior Defendants may very well implement the real-time capture and archive of e-mail traffic in the remaining offices

2. Electronic Search of Electronically Archived E-Mails Is Entirely Appropriate

The Plaintiffs suggest, absurdly, that searching electronically retained e-mails on the basis of an agreed-upon list of search terms would somehow be improper and could lead to production of responsive materials being evaded because "a sub-language or code could be developed and used that would place critical records beyond the scope of the agreed-upon terms." Opposition at 6 n.7. More than anything else in the Opposition, this assertion demonstrates a fundamental misunderstanding of the Motion and E-Mail Proposal and of the discovery process in general. Furthermore, the assertion strongly suggests that any resolution proposed by the Interior Defendants would not be acceptable and that the Plaintiffs are not interested in resolving discovery issues relating to e-mail retained in electronic rather than hard copy format.

Implementation of the e-mail archive discussed in the Motion and E-Mail Proposal will result in all unique e-mail, with attachments, being captured automatically for each of the Designated Offices and routed to ZANTAZ for archiving in a searchable electronic format, without regard to the content of any individual e-mail. See August 8 Briefing (Motion Ex. 2) at 18:2–11 (capture at e-mail server doesn't affect users), id. at 29:3–13 (attachments also captured), id. at 32:17–25 ("[W]e don't evaluate the content. We just store the original"). Because the capture is automatic, no one in the Designated Offices will be able to avoid having e-mail that they send or receive captured and placed in ZANTAZ's searchable electronic archive. Similarly, all unique e-mails, with attachments, from the retained e-mail backup tapes will be incorporated

---

and bureaus for reasons related to the Interior Defendants' goal of implementing a comprehensive e-mail management system. Regardless of whether the e-mail capture and archive is later implemented more broadly, the Designated Offices identified in the Motion and E-Mail Proposal represent the Interior Defendants' prioritization for addressing discovery and production-related aspects of electronic retention of e-mail as it relates to the Cobell litigation.

into a searchable archive, regardless of content. Because the universe of e-mails captured and incorporated into the archive will be much larger than the set of e-mails relating to Cobell, the resulting e-mail archive will need to be searched for potentially responsive materials.

The Interior Defendants have neither suggested that a single set of search terms be used for all searches nor placed any limitations on what searches of the electronically archived e-mails might be performed. ZANTAZ's system will allow the Interior Defendants to conduct objectively verifiable searches based on any of a large number of criteria. See, e.g., August 8 Briefing (Motion Ex. 2) at 8:9–19 ("searching on any criteria, whether it's the header information or any keywords within the body of the text"), id. at 16:17–24 ("we content-index . . . the To, the From, the Subject, as well as the body of the email and the attachments. So any text that's imported into the system is searchable. So you can do a content search, you can do time search based on dates. We index both on receive dat[e] and sent date."). Although some uncertainty is inherent in any discovery process, the Interior Defendants are not aware of any more feasible or more reliable basis for retrieving electronically archived e-mails than by conducting a verifiable electronic search using specified terms – mutually agreeable search terms, if at all possible – to identify potentially responsive e-mails. The Plaintiffs suggest none.

3. No E-Mail Will be Destroyed When Back-up Tapes Are Restored and Real-Time Capture of E-Mail Is Implemented

The Plaintiffs cite no evidence to support their assertion that "De-duping Responsive E-Mails Will Result in Massive Spoliation," much less the assertion that de-duping will "result in the destruction or loss of at least the following information: (1) time of receipt, delivery, transmission, (2) deleted mail messages, (3) the modification date, (4) conversation topic

information, (5) Internet or gateway information, or (6) any and all other embedded information in backup tapes." Opposition at 6. Both unsubstantiated assertions are inconsistent with the information provided by ZANTAZ in the documentation supporting the Motion and with the discussion at the August 8 briefing, which included a discussion on this very topic between counsel for the Plaintiffs and ZANTAZ. See, e.g., February 20 Letter (Motion Ex. 1) at Att. A, DEF0043319, 43321, 43326-28 (detailing information that ZANTAZ captures and retains); August 8 Briefing (Motion Ex. 2) at 30:15-19 (ZANTAZ "do[es]n't know of any [Lotus Notes] fields that we don't capture"), id. at 35:4 – 38:12 (discussion between Plaintiffs' counsel and ZANTAZ personnel regarding information that ZANTAZ will isolate, archive, and retain from e-mail backup tapes and real-time capture of e-mail traffic); August 8 Briefing Handout (Motion Ex. 3) at 2–6 (detailing e-mail information that ZANTAZ captures and retains).

As explained in the Motion, the E-Mail Proposal is premised on retaining an electronic copy of all unique e-mails, with attachments, that are sent or received. See generally Motion at 9-17 and exhibits cited therein. In many cases, the retained backup tapes from which e-mail is to be isolated will contain multiple copies of the same e-mail, and "de-duping" simply reduces multiple occurrences of an identical e-mail to a single unique copy. No information is lost as a result of de-duping, because all available information is contained in and associated with the single unique copy of the e-mail that ZANTAZ incorporates into the searchable archive, whether from e-mail backup tape or real-time capture of e-mail traffic. See August 8 Briefing (Motion Ex. 2) at 15:14 – 16:4 ("daily backups typically run almost a 90 percent duplicate rate. There's no reason to go store all of that because they are identical duplicates and the email environments are very good about keeping unique message ID's for the messages"), id. at 15:23 – 16:1

(ZANTAZ process creates master index against which e-mails are checked to determine if unique), id. at 21:20–25 (similar), id. at 27:21 – 28:18 (ZANTAZ definition of "unique message"). Thus, although only one copy of each unique e-mail will be captured and preserved by ZANTAZ, that copy will contain all relevant information. If that e-mail is forwarded (with or without alteration of the text or attachments) or if the recipient replies to the original e-mail, that subsequent e-mail would also be identified as a unique e-mail, captured, and archived. See id. at 31:13 – 32:9.

Once all unique e-mails have been isolated and copied from a backup tape and placed into ZANTAZ's searchable archive, the e-mail backup tapes contain no additional information relevant to those e-mails that hasn't already been captured. Furthermore, no information is lost as a result of isolating e-mails from backup tapes and de-duping those e-mails before placing them into ZANTAZ's archives.[4] The same is true when real-time capture of e-mail traffic is implemented at the e-mail server: the Interior Defendants will not need to generate and retain e-mail backup tapes because ZANTAZ will be capturing and archiving all unique e-mail that is sent or received. Once the unique e-mails have been captured and incorporated into the searchable archive from the retained e-mail backup tapes and real-time capture of e-mail traffic has been implemented, therefore, ZANTAZ assumes all of the maintenance, administration, and preservation functions that were previously performed by Interior with regard to its e-mail traffic. Finally, if ZANTAZ and the Interior Defendants were to decide at some point after implementing

---

[4]The one possible exception occurs if a particular backup tape is compromised or if ZANTAZ is otherwise unable to isolate and copy e-mail from a particular backup tape. In those instances, the backup tape will be quarantined, see, e.g., August 8 Briefing (Motion Ex. 2) at 35:4–23, and the Interior Defendants, in consultation with the Special Master, will determine how to proceed.

the E-Mail Proposal to terminate the contract, no e-mail information would be lost or destroyed, because the electronic data necessary to allow recreation of the archived e-mails would be returned to the Interior Defendants. See August 8 Briefing (Motion Ex. 2) at 47:17 – 49:7, id. at 50:22–24.

The Interior Defendants are aware of no requirements – and the Plaintiffs cite none – that would require the Interior Defendants to retain, search, and produce multiple electronic copies of an identical e-mail where that e-mail has been captured in its "as sent" form, complete with related data and any attachments, and verifiably retained in a searchable electronic archive. Similarly, the Plaintiffs cite no factual basis for concluding that ZANTAZ cannot or will not capture all operative information accompanying the e-mail. The Motion and supporting documentation regarding the ZANTAZ process make clear that the E-Mail Proposal, if implemented, will result in the preservation and capture of all e-mail – related information that is available, either from the retained e-mail backup tapes or from the real-time capture of e-mail traffic, and thus that no e-mail – related data would be destroyed.[5]

---

[5]Although the Plaintiffs do not raise any facts to support their allegations that implementing the E-Mail Proposal would result in the destruction of e-mail – related data, if any questions remain regarding the integrity of the ZANTAZ process, the Special Master and his technical experts are free to consult directly with ZANTAZ. Similarly, any questions about whether all e-mail–related data have been captured from the e-mail backup tapes can be addressed by ZANTAZ. Finally, the Interior Defendants are willing to consult with the Special Master regarding the disposition of the retained e-mail backup tapes after they have been processed by ZANTAZ.

4. The Funds to Implement the E-Mail Proposal Are Currently Available

The Plaintiffs' suggestion that the E-Mail Proposal is "speculative," Opposition at 4 n.5 is, at best, disingenuous. The Interior Defendants' commitment to implementing the E-Mail Proposal – if it is approved – is real. As is true with any government contract, however, issues of funding, timing, and compliance with legal requirements affect the Interior Defendants' ability to implement the E-Mail Proposal and to finalize the contract with ZANTAZ. See Motion at 7-9 (identifying additional considerations). As explained during the August 8 briefing and in the Motion, the Interior Defendants can currently fund the E-Mail Proposal described in the Motion by using funds remaining in Interior's Fiscal Year 2002 ("FY2002") budget, provided that those funds can be obligated before the fiscal year ends on September 30, 2002. See Motion at 8-9; August 8 Briefing (Motion Ex. 2) at 4:17 – 5:3 (funding issues), id. at 41:6–17 (same). If those funds cannot be obligated in FY2002, however, they will not automatically and necessarily carry over and be available in Interior's FY2003 budget. The E-Mail Proposal merely acknowledges that reality.

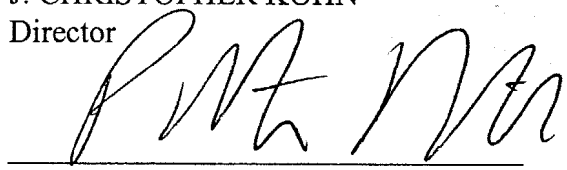
CONCLUSION

For all of the reasons stated above and in the Motion, the Interior Defendants request approval of the E-Mail Proposal.

Dated: September 9, 2002

Respectfully submitted,

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



SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Counsel
PETER B. MILLER
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 9, 2002 I served the foregoing *Interior Defendants' Reply in Further Support of Motion and Memorandum Regarding Proposal to(1) Restore and Search Retained Backup Tapes Containing E-mail;(2) Implement Real-time Capture of E-mail Traffic and Incorporation of E-mail into a Searchable Archive; and (3) Replace Indefinite Retention of Backup Tapes Containing E-mail with Backup of Searchable E-mail Archive* by facsimile upon:

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

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

and by U.S. Mail upon:

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

Copy by Facsimile and U.S. Mail upon:

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

Courtesy Copy By U.S. Mail:

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

K. P. Kingston

Kevin P. Kingston