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DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' MOTION FOR ADJUSTMENT OF THE COURT MONITOR'S AUGUST 2002 COMPENSATION REQUEST

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") respectfully move for an adjustment of the Court Monitor's August 2002 compensation request, which seeks the sum of $48,834.37 for professional fees and expenses rendered from August 1, 2002 through August 31, 2002. The Interior Defendants respectfully request a reduction in said compensation in the amount of thirty-four thousand six hundred eighty-seven dollars and fifty cents ($34,687.50) and an order directing the Court Monitor to submit a revised invoice for further review.

Adjustment to the compensation request is necessary because the request is not reasonable or proper. The request fails to provide sufficient detail about the work performed to allow the Interior Defendants to scrutinize and fairly determine whether the charges submitted by the Court monitor are reasonable or proper. Additionally, some charges on the Court Monitor's invoice are not compensable because they relate to activities that are outside the scope of the Court Monitor's prescribed duties.

The Interior Defendants, therefore, respectfully move this Court for an order (1) granting

an adjustment of the Court Monitor's compensation to eliminate the improper charges and (2) directing the Court Monitor to file and serve a revised invoice for August 2002 that contains sufficient detail about his work and that removes charges for any activities beyond the scope of his appointment orders. The Interior Defendants also request an opportunity to review and object to any revised invoice submitted by the Court Monitor.

The grounds for this Motion are fully set forth in the supporting Memorandum that accompanies this Motion. Counsel for Interior Defendants conferred with counsel for Plaintiffs about this motion, and counsel for Plaintiffs stated that Plaintiffs oppose this motion.

Dated: September 24, 2002

Respectfully submitted,

ROBERT D. McCALLUM, JR.
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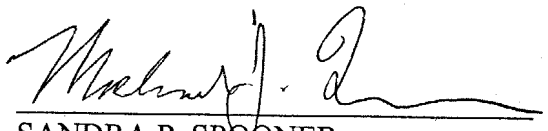

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Plaintiffs,	)	No. 1:96CV01285
v.	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

INTERIOR DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR ADJUSTMENT OF THE COURT MONITOR'S AUGUST 2002 COMPENSATION REQUEST

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") have moved this Court for an adjustment of the Court Monitor's August 2002 compensation request. In its Order on September 10, 2002, the Court directs the Department of the Interior to pay the Court Monitor the full amount of his September 1, 2002 invoice (the "invoice") within ten days. The full bill is $48,834.37 for professional fees and expenses for the period August 1, 2002 through August 31, 2002. Tthe Interior Defendants have moved to reduce the fee compensation by $34,687.50 and for an order directing the Court Monitor to submit a revised invoice.

The Interior Defendants did not receive a copy of this invoice until after the Order for payment was issued, see Order of Sept. 10, 2002 (appending copy of the invoice), and so the Interior Defendants did not have an opportunity to review, comment on, or object to the invoice until after being ordered to pay it. Serious deficiencies in the invoice warrant scrutiny and an adjustment in the Court Monitor's compensation.

This is not a new problem. The Interior Defendants have asserted similar motions and objections against previous invoices submitted by the Court Monitor,[1] yet the latest invoice continues to present only a scant – and insufficient – description of the work performed for which the Interior Defendants are expected to pay.

Although the Interior Defendants were not afforded an opportunity to review the invoice prior to being directed to pay it, the Court expressly contemplated that an adjustment in the payment to the Court Monitor might be necessary post hoc. The Court's Order of September 10, 2002 states that "[a]djustments to the professional fees in this compensation request will be made as deductions from subsequent compensation requests of the Court Monitor at the direction of the Court." Therefore, the Interior Defendants have respectfully moved to obtain an adjustment that reduces the Court Monitor's compensation based upon the most recent invoice.[2]

The objections to the invoice are as follows: (1) the invoice is unreasonably vague and fails to disclose sufficient detail about the work performed to enable a determination of the fairness of the charges or whether the work actually undertaken is properly chargeable; and (2) the invoice contains charges that are not compensable because they involve activities outside the scope of the Court Monitor's prescribed duties.

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[1]See, e.g., Interior Defendants' Motion for Adjustment of the July 2002 Compensation Request of the Court Monitor, and Memorandum in Support of Motion (August 6, 2002); Interior Defendants' Motion for Adjustment of the June 2002 Compensation Request of the Court Monitor (July 17, 2002); Interior Defendants' Motion for Reconsideration of the May 31, 2002 Order to Pay Court Monitor Kieffer the Sum of $54,307.34 (June 14, 2002).

[2]The Interior Defendants do not object to the expense portion of the invoice at issue. Nevertheless, the Interior Defendants respectfully assert that they have not only the right but also the duty to scrutinize the entire invoice and seek adjustment for any improper or unsupported charge, whether it be a professional fee or an item of expense.

The Interior Defendants, therefore, respectfully request that this Court adjust the Court Monitor's compensation by reducing the fees by $34,687.50 in order to omit payment for vague time entries and work not within the scope of his duties. Additionally, the Court should direct the Court Monitor submit a revised invoice that includes sufficient supporting detail about his work and that removes charges for activities falling outside the scope of his appointment orders. If the Court Monitor submits a revised invoice, the Interior Defendants request an opportunity to review and, as necessary, object to the revised invoice.

ARGUMENT

I. The Compensation Request Is Not Reasonable Or Proper Because It Fails To Provide Sufficient Detail About The Work Performed And Its Vague Descriptions Constrain Interior Defendants' Ability To Assess The Propriety And Reasonableness of the Monitor's Fees.

The Court Monitor's August 2002 compensation request fails to provide sufficient detail about the work he has performed and, therefore, is improper and unreasonable. It provides only vague descriptions of the Court Monitor's activities that preclude a fair appraisal of the reasonableness of the requested fees.

In support of his invoice, the Court Monitor does little more than note the general category of the work performed and the hours of labor claimed. His work is summarily labeled in overly broad categories, such as "draft memorandum," "telcon with third party," "review pleadings" and "review documents" with no indication of the relevance or specific nature of the particular exercise. See Letter and Invoice from Joseph S. Kieffer, III, Court Monitor, to Hon. Royce C. Lamberth, United States District Judge (September 1, 2002) at 1-7 (the "invoice") (attachment to Order of September 10, 2002). Indeed, about all that can be discerned from the

invoice is that during August 2002, the Court Monitor spent the vast majority of his 185.25 hours reviewing *unidentified* pleadings and correspondence; reviewing *unidentified* documents; preparing, drafting or redrafting *unidentified* memoranda; having telecons with *unidentified* third parties; reviewing *unidentified* depositions; reviewing *unidentified* reports; and preparing for and attending Court meetings. Such dearth of description is grossly inadequate.[3]

As this Court has itself previously recognized in analogous circumstances, "where a fee is sought from the United States, which has infinite ability to pay, the court must scrutinize the claim with particular care." Cobell v. Babbitt, 188 F.R.D. 122, 125 (D.D.C. 1999) (reviewing attorney fee application)(quoting Copeland v. Marshall, 641 F.2d 880, 888 (D.C. Cir. 1980)). The Interior Defendants have a similar duty, on behalf of the United States, to scrutinize the Court Monitor's bill with particular care. That duty cannot be fairly discharged absent more information about the Court Monitor's work.

The issue is whether one can fairly determine whether the Court Monitor's charges are reasonable and proper. When commenting upon the United States Supreme Court's grant of fees and expenses to a Special Master, Justice Blackmun noted that:

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[3]So much of the invoice is objectionable, that it is simpler to identify which entries are not subject to objection. The Interior Defendants object to all professional fees, except those relating to the entries listed for the following dates: 8/4 (Review Tenth Quarterly Report); 8/6 (Review EDS "as is" status report and Ninth Quarterly Report); 8/7 (Review DOI Inspector General's Report and Court Monitor's reports, Draft Special Report, Review documents re: Special Report, Redraft and finalize Special Report for filing); 8/12 (Review and prepare correspondence re : Special Report, Review Tenth Quarterly Report and Special Trustee's Observations); 8/13 (Review Tenth Quarterly Report); 8/14 (Review IG Report); 8/15 (Review OHTA plan and Tenth Quarterly Report); 8/18 (Review EDS status reports, Review Tenth Quarterly Report and OHTA Historical accounting plan); 8/19 (Review EDS status reports and business model baseline draft, Review Tribal Task Force documents and Anchorage agenda); 8/22 & 8/25 (Prepare for Tribal Task Force meetings); 8/26 & 8/27 (Prepare for and attend Tribal Task Force Meeting). Invoice at 1-5.

> fees and expenses charged by a Special Master, when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper. A party's consent to the allowance of fees and expenses does not absolve this Court of its duty to make that determination.

Kansas v. Colorado, 498 U.S. 933, 934 (1990) (Justice Blackmun commenting on the Court's order granting motion of Special Master for interim fees and expenses, but reserving his formal dissent). Similarly, in Texas v. New Mexico, 475 U.S. 1004 (1986), Chief Justice Burger, joined by Justice Blackmun and Justice Rehnquist, dissented from the Court's grant of interim fees and expenses to a Special Master on the ground that the information provided in support of the fee request was lacking, stating:

> I am unwilling to act without being provided with at least as much information as private clients routinely receive from their privately retained counsel. . . . I would defer action on the application for interim fees until adequate information is provided. Without such data, this Court cannot protect the legitimate public interests implicated.

475 U.S. at 1005[4] (finding that the Special Master omitted information concerning the experience levels of the attorneys working with him and information regarding the specific hourly rates of the Special Master and each attorney).

This Circuit has likewise held in the analogous circumstances of attorney fee applications that "it is insufficient to provide the District Court with very broad summaries." National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982). Although

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[4] Chief Justice Burger, quoting from his dissent in Louisiana v. Mississippi, 466 U.S. 921 (1984), reiterated that "[a] Special Master of this Court is a surrogate of the Court and in that sense the service performed is an important public duty of high order in much the same way as is serving in the Judiciary. I do not suggest that Special Masters should serve without compensation, as for example, Senior Federal Judges have done for a number of years in such cases, but I believe the public service aspect of the appointment is a factor that is not to be wholly ignored in determining the reasonableness of fees charged in a case like this." Texas, 475 U.S. at 1005 (dissent).

a fee application need not identify the "exact number of minutes spent nor the precise activity to which each hour was devoted," "the application must be sufficiently detailed to permit the District Court to make an independent determination whether or not the hours claimed are justified." Id. (advising that "[t]he better practice is to prepare detailed summaries based on contemporaneous time records") (quoting in part Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980)).

The Court Monitor's recent invoice is too vague and nonspecific to satisfy this reasonable standard. With the bill for telephone call talk time alone approaching $5,000 last month,[5] it is only reasonable to require the Court Monitor to be more forthcoming about all his work. The current invoice does not even identify the phone call participants or the subject of the calls. Such imprecise disclosure makes it impossible to determine whether the work is within the scope of the Court Monitor's legitimate duties or whether the time devoted is reasonable. The same problem is posed by virtually every entry on the invoice.

The Interior Defendants have previously expressed this concern and asserted similar objections concerning the vagueness of the Court Monitor's billing entries. See, supra, note 1. Yet, the Court Monitor continues to present time entries that do no more than generically classify the type of work he was doing. These ambiguous descriptions lack any notation relating the task to a subject matter under the Court Monitor's consideration or any aspects of trust reform under his review.

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[5] The August invoice claims 18.75 hours in calls involving unidentified "Third Parties," for a total fee charge of $4,687.50 at the Court Monitor's $250 per hour rate.

Absent such information, the Interior Defendants cannot fairly determine nor knowledgeably consent to the reasonableness of the Court Monitor's charges for these activities. Thus, not only do the descriptions of the work performed by the Court Monitor fail to assure that the fees charged are reasonable and proper, but this very lack of specificity prevents the Interior Defendants from adequately reviewing or approving such fees. Accordingly, the Court should reduce the Court Monitor's compensation for the inadequately identified work, direct the Court Monitor to revise his August 2002 invoice to provide sufficient detail, and afford the Interior Defendants an opportunity to review and object to the revised invoice.

II. The Compensation Request Is Not Reasonable Or Proper Because The Court Monitor Includes Charges For Activities That Are Outside The Scope Of His Assigned Duties.

To the extent that it is possible to ascertain from the invoice what tasks the Court Monitor performed, it appears to include some charges for activities that are outside the scope of his prescribed duties. The Interior Defendants should not be required to pay for activities that are not within the order of reference for a special master or court monitor. See, e.g., Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 748 (6th Cir. 1979).

The initial appointment order of the Court Monitor in this case states that "Mr. Kieffer shall be compensated at a rate of not less than $250.00/hour for his services and shall be reimbursed for all expenses incurred *in connection with* his appointment." Order of April 16, 2001 at ¶ 6 (emphasis supplied).[6] The scope of the Court Monitor's appointment is to "monitor and review all of the Interior [D]efendants' trust reform activities and file written reports of his findings with the Court." Order of April 15, 2002 at 2. The reports are to "include a summary of

[6]This compensation provision has not changed. See Order of April 15, 2002.

the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform" and the parties, including the Interior Defendants are to be "given prompt notice" of reports submitted by the Court Monitor. Id.

The August 2002 invoice, however, appears to include improper charges for activities not within the scope of the appointment. For example, it is not within the Court Monitor's charge to examine any aspect of the contempt proceedings then before the Court, yet time is logged for work apparently related to that proceeding. See, e.g., Invoice at 5 (entry for 8/21: "[r]eview plaintiffs' bill of particulars"). To the extent that any time logged concerns activities not connected with the Court Monitor's duties, the invoice must be adjusted.

Similarly, the invoice reflects over 30 hours in August spent drafting memoranda. There is no indication, however, that any of these memoranda drafted by the Court Monitor were submitted to the Court, or that the parties were notified of any such submission. Therefore, the memoranda reflected on the invoice appear to involve writing activities that are outside the scope of the prescribed duties of the Court Monitor.

Other activities likely fall outside the scope of the Court Monitor's appointed duties as well, but the invoice is so vague and nonspecific that it is impossible to determine whether the hours logged involve compensable work within the scope of the Court Monitor's duties. For example, the invoice includes almost daily charges for "Telcons with third parties," see Invoice (entries for August 5,6,7,8,9,12,13,14,15,19,21,22,28,29,30). There is nothing to demonstrate that these contacts with "third parties"-- including meetings and interviews with third parties as well as telephone calls -- bear any relationship to "monitor[ing] and review[ing] . . . [D]efendants' trust reform activities." Order of April 15, 2002 at 2. Unless the invoice specifies

some connection to the Court Monitor's assigned duties, the time charged should be omitted from the Court Monitor's compensation.

Accordingly, the Interior Defendants have respectfully moved the Court for an adjustment to the Court Monitor's compensation and for an order directing the Court Monitor to file a revised invoice that corrects the deficiencies noted above (and affording the Interior Defendants and opportunity to review and object to the revised invoice).

CONCLUSION

For the foregoing reasons, the Court should grant the Interior Defendants' Motion For Adjustment Of The Court Monitor's August 2002 Compensation Request.

Dated: September 24, 2002

Respectfully submitted,

ROBERT D. McCALLUM, JR.
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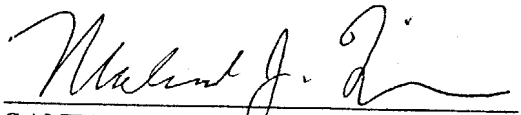

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	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of the Interior Defendants' Motion For Adjustment Of The Court Monitor's August 2002 Compensation Request, Plaintiffs' responses thereto, and the entire record in this case, it is hereby ORDERED that Interior Defendants' motion should be and hereby is GRANTED; and it is further

ORDERED that an adjustment of thirty-four thousand six hundred eighty-seven dollars and fifty cents ($34,687.50) shall be made to and deducted from the compensation paid to the Court Monitor; and, it is further

ORDERED that the Court Monitor shall revise Invoice #16 (August 1 - August 31, 2002) to provide sufficient detail about the work performed to identify its relationship to his appointment orders and otherwise remove all items and charges for activities that fall outside the scope of his prescribed duties; and, it is further

ORDERED that the Court Monitor shall file and serve a copy of his revised August 2002 invoice within ten (10) days; and, it is further

ORDERED that the Interior Defendants will have ten (10) days from service of the Court Monitor's revised invoice to submit any further objections thereto.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 24, 2002 I served the foregoing *Interior Defendants' Motion For Adjustment of the Court Monitor's August 2002 Compensation Request and Interior Defendants' Memorandum in Support of Motion For Adjustment of the Court Monitor's August 2002 Compensation Request* by facsimile, in accordance with their written request of October 31, 2001 upon:

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