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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**INTERIOR DEFENDANTS' IMDA SAMPLING REPORT**

Pursuant to the Court's Order of September 17, 2002, the Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants," or "Interior") respectfully submit the following report regarding their review of a representative sample of documents to determine whether the broader collection of Interior documents contains information protected under the Indian Minerals Development Act of 1982 ("IMDA"), 25 U.S.C. §§ 2101-2108.

**BACKGROUND**

IMDA Section 2103(c) contains language requiring Interior to treat certain information, including information about "the Indian mineral resources," as "privileged proprietary information of the affected Indian or Indian tribe." 25 U.S.C. § 2103(c). A March 29, 2000 protective order ("Protective Order") addressed IMDA-protected information with respect to documents responsive to Paragraph 19. On December 22, 2000, Interior moved to modify the Protective Order ("Motion for Modification") such that the Protective Order's IMDA-related terms and conditions would apply to documents produced in response to proper formal discovery requests apart from Paragraph 19. Plaintiffs opposed the Motion for Modification and the

Special Master issued a Report and Recommendation on May 16, 2001, finding that the threshold question was whether documents containing IMDA-protected information, with respect to either tribal or individual mineral records, even existed. Report and Recommendation of the Special Master, at 4-6. He therefore directed Interior to review a "representative sample" of the documents it intends to produce and report whether, and to what extent, IMDA-protected tribal and individual mineral records were found. Report and Recommendation, at 5-6. On May 31, 2001, Interior objected, in part, to the Report and Recommendation.

In an order dated September 17, 2002 ("Order"), the Court adopted in part the Special Master's Report and Recommendation. In the Order, the Court directed that by October 17, 2002 Interior review a representative sample of the documents it intends to produce to determine whether they contain IMDA-protected tribal or individual mineral records.[1] The following report identifies how Interior compiled a representative sample and indicates that there are indeed IMDA-protected tribal and individual mineral records within that sample.

**COMPILING THE DOCUMENT SAMPLE**

Pursuant to the Order, Interior employees collected a sample of documents related to IMDA activity from the following agencies within the Interior Department: the Bureau of Indian Affairs, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining, the Office of the Solicitor, and the Office of Hearings and Appeals. The volume of documents collected totals approximately 4800 pages. These documents were then reviewed

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[1] The Court also stated that Interior need not conduct a sampling for individual mineral records if it was willing to stipulate that "such a representative sampling would not reveal any protected individual mineral records." Order at 2. As described below, however, a representative sampling has revealed the existence of such records.

to determine if they contained protected individual or tribal mineral information pursuant to the requirements set forth at 25 U.S.C. § 2103(c):

> . . . findings and all projections, studies, data or other information possessed by the Department of the Interior regarding the terms and conditions of the Minerals Agreement, the financial return to the Indian parties thereto, or the extent, nature, value or disposition of the Indian mineral resources, or the production, products or proceeds thereof, shall be held by the Department of Interior as privileged proprietary information of the affected Indian or Indian tribe.

In addition to collecting the documents, Interior requested that the Bureau of Indian Affairs ("BIA") further review its records to determine, if possible, the number of IMDA agreements for which it had records. The BIA is the office of record for all Indian mineral agreements.

## RESULTS OF IMDA REVIEW IN THE DOCUMENT SAMPLE

### Individual

In its sample, Interior located an oil and gas mining lease agreement between an Indian tribe and a company that also included the mineral interests of a number of individual Indians. Further, the inquiry of the 12 BIA regional offices about IMDA agreements yielded the existence of another IMDA agreement, for a total of 2, between a tribe and a company that also included the mineral interests of an individual Indian.

### Tribal

In its search, Interior found a number of documents containing IMDA-protected tribal mineral records. They include mineral agreements between Indian tribes and companies and samples of various records that are generated in the administration of IMDA agreements.

The inquiry of the BIA's regional offices disclosed that approximately 400 IMDA agreements were processed from 1982 through October 2000. It is estimated that approximately 50 additional IMDA agreements were processed between October 2000 and October 2002. This figure is estimated because of the unavailability of an automated tracking system due to the current condition of TAAMS.

Within the BIA, copies of IMDA agreements are maintained at the Regional or Agency office, another copy is filed at the Tribal office, and a third copy is provided to the mining company office. Further, copies of IMDA agreements are also filed at the Division of Energy and Mineral Resources office in Denver, Colorado. The offices of the Bureau of Land Management, the Minerals Management Service, and the Office of Surface Mining also receive copies of IMDA agreements through Interior's review process of IMDA agreements because each of these bureaus has responsibilities that relate to IMDA agreements.

During the term of an IMDA agreement, documents are received, generated and maintained by these Interior offices that contain IMDA-protected information. Examples include records of royalties, production volumes, sales revenue, monthly reports of operations from operators/companies, lease rental monies for lands that are mined, audits of royalties and rental monies, inspections of active mining operations for compliance with regulations. These documents all contain information protected by 25 U.S.C. § 2103(c).

It is difficult to estimate meaningfully the volume of documents that contain IMDA-protected information. Just within BIA, the estimate runs the gamut. Five Regional offices reported that they had no IMDA agreements. Another example, the Eastern Oklahoma Regional office, reported that it has protected documents in two different locations within the region and

estimates the volume at about one box. By comparison, the Southwest Regional office estimates it has 50 tribal IMDA agreements, maintains protected documents in six different locations, and estimates the amount of documents as voluminous. And, by further comparison, the Western Regional office estimates it has 225 IMDA agreements with voluminous protected documents.

Per the Order, a copy of this Report will be provided to Special Master Balaran. We appreciate the Court's willingness to consider further whether it would be appropriate to enter an order to protect information that is designated under the IMDA statute. We also appreciate the opportunity to provide information about the documents collected per the Order. If it would assist the Court, we are also ready to obtain or provide additional information.

Dated: October 17, 2002

Respectfully submitted,

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

Terry M. Petrie

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Attorney
TERRY M. PETRIE
Trial Attorney
D.C. Bar No. 454795
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 October 17, 2002 I served the foregoing *Interior Defendants' IMDA Sampling Report* by facsimile, in accordance with their written request of October 31, 2001 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

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

K. P. Kingston

Kevin P. Kingston