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

INTERIOR DEFENDANTS' COMMENTS AND OBJECTIONS TO OCTOBER 18, 2002 REPORT AND RECOMMENDATION OF THE SPECIAL MASTER-MONITOR REGARDING MOTIONS TO COMPEL AND MOTIONS TO STAY CERTAIN DISCOVERY AND RULE 11 PROCEEDINGS

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Defendants"), pursuant to Fed. R. Civ. P. 53(e)(2), state the following in response to the Special Master-Monitor's October 18, 2002 Report and Recommendation ("October 18 Report and Recommendation").[1]

Introduction

The October 18 Report and Recommendation correctly recommends that Plaintiffs not be granted a protective order shielding them from document discovery or depositions. However,

[1] The full title of the October 18 Report and Recommendation is: "Report and Recommendation of the Special Master-Monitor on 'Motion for Protective Order Seeking: (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees (Served June 28, 2002)'; and 'Defendants' Motion to Compel Discovery' and 'Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition' and 'Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold.'"

certain aspects of the October 18 Report and Recommendation and the proposed order submitted with it are erroneous or require clarification. First, Plaintiffs should be ordered to serve their response to the Defendants' production request within ten days. Second, the Special Master-Monitor cannot be given authority to "resolve any further disputes" over discovery matters; only the Court has authority to do that. Third, no basis exists to pre-emptively order that Defendants not file a motion for attorney fees or costs regarding the discovery motions.[2]

The October 18 Report and Recommendation incorrectly recommends staying Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold ("Defendants' Motion for Sanctions"). Even if the Court were to defer ruling on that motion until it rules on the underlying April 29, 2002 statement of fees and expenses that is the subject of the Motion for Sanctions, no good reason exists to defer completion of briefing the Motion for Sanctions.

Argument

I. Discovery: Document Production and Depositions

The October 18 Report and Recommendation correctly recommends denial of Plaintiffs' motions to stay Defendants' request for the production of documents and the depositions of Elouise Cobell and the other named Plaintiffs. Several details of the October 18 Report and Recommendation, however, are somewhat erroneous or require clarification. First, the October

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[2] Further, the October 18 Report and Recommendation (e.g., at 8) is not completely clear as to the scope of discovery to be allowed to Defendants. Defendants should be allowed the full range and scope of discovery permitted under the Federal Rules of Civil Procedure ("Rules"). See, e.g., Rule 26(b)(1) (permitting discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party"). If and to the extent that the October 18 Report and Recommendation were read to recommend limiting the scope of discovery that otherwise would be available to Defendants under the Rules, Defendants object.

18 Report and Recommendation is silent as to a firm date for Plaintiffs' production of documents. Because the request for production has been outstanding since June, 2002, the request is narrow in scope, and such a short time frame exists with regard to scheduled proceedings in this case, that discovery should proceed forthwith. Under these particular circumstances, an appropriate order would be that, within 10 days, Plaintiffs shall respond as follows to each paragraph of Interior Defendants' Request for the Production of Documents, Dated June 5, 2002: (a) produce all documents requested by such paragraph; or (b) if Plaintiffs object to any such paragraph, Plaintiffs shall fully disclose and describe all documents responsive to that paragraph and shall state any and all objections to production.

Second, the October 18 Report and Recommendation includes a draft order that erroneously would give the Special Master-Monitor the power to "resolve" disputes between the parties regarding the Defendants' production request and regarding the deposition of Elouise Cobell.[3] But that exceeds the authority given the Special Master-Monitor in the Court's September 17, 2002 order of reference. That order provides (at 3-4):

> 8. The Special Master-Monitor shall also oversee the discovery process in this case and administer document production – except insofar as the issues raised by the parties relate to IT security, records preservation and retention, the Department of the Treasury, and Paragraph 19 documents – to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court. The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, <u>his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties</u>.

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[3] The third paragraph of the proposed draft order states that "[t]he Special Master-Monitor will oversee <u>and resolve</u> any further disputes between the parties regarding the scope or substance of this document production." (Emphasis added.) The sixth paragraph of the draft order (page 2) states that the Special Master-Monitor "will oversee <u>and resolve</u> any disputes regarding [the deposition of Elouise Cobell]." (Emphasis added.)

> 9. The Special Master-Monitor is directed to periodically file reports with the Court, . . . that bring to the Court's attention all discovery disputes encountered in this case, as contemplated in paragraph 8 of this order. These reports shall also apprise the Court of the status of the Special Master- Monitor's report and recommendation as to all such disputes.

(Emphasis added.) These provisions indicate that the Court did not grant the Special Master-Monitor the authority to make binding decisions or otherwise "resolve" discovery disputes. Rather, if such disputes arise and "cannot be resolved by the parties," the Special Master-Monitor is to file a report and recommendation with the Court, and the Court is to "resolve" the dispute by issuing an order.

Third, the draft order attached to the October 18 Report and Recommendation includes an injunctive prohibition ordering Defendants not to file any motions for sanctions as the prevailing party on the Motion to Compel Appearance and Testimony of Elouise Cobell at Deposition. The only rationale cited is "[defendants'] own past conduct in failing to provide information to this Court and the plaintiffs." October 18 Report and Recommendation at 11. That conclusory assertion is insufficient where, as here, Plaintiffs had no valid basis to refuse to appear for a deposition. Moreover, Defendants have not requested sanctions pertaining to the discovery motions considered in the October 18 Report and Recommendation. Even if it were appropriate for the Court to opine on whether such sanctions against Plaintiffs would be appropriate, issuance of what amounts to an injunctive order to not even file such a motion goes beyond what is necessary or appropriate to resolve the issues actually before the Court.

Finally, Defendants object to the allegation contained in the October 18 Report and Recommendation (at 10), asserting Defendants' "attempt to delay these proceedings through use of burdensome or overly-broad discovery and deposition requests . . . ." That statement is

unfounded and unsupported by the record.[4]

II. Proceedings Should Not Be Stayed Regarding Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold

The October 18 Report and Recommendation (at 14) recommends staying Defendants' Motion for Sanctions "pending the Court's consideration of and decision on plaintiffs' statement of fees and expenses filed on April 29, 2002." Defendants object in three respects. First, the characterization and treatment of the parties' positions is incorrect. The October 18 Report and Recommendation (at 12) begins by criticizing Defendants for allegedly mischaracterizing Plaintiffs' position: "Plaintiffs did not argue that a Rule 11 motion could not be filed promptly or decided immediately." It then criticizes Defendants for responding to such a "straw-man" argument. Id.

But Plaintiffs made that precise argument, as illustrated by the following statements contained in Plaintiffs' Motion for Protective Order, filed July 5, 2002 ("Pl. Mo."):

- "it is premature, harassing and itself a violation of Rule 11 for defendants to file a Rule 11 motion with respect to [Mr. Gingold's] affidavits." (Emphasis added.) Pl. Mo. at 11.
- "the appropriate timing for challenging such an affidavit is after the court or trier-of-fact weighs and passes on the affidavit in question. At that

[4] The only support cited is the Court's reference to Defendants' request for "additional evidence from an on-going proceeding before Special Master Balaran." See October 18 Report and Recommendation at 10 n.7, quoting the Court's Memorandum Opinion dated September 17, 2002 at 263-64 n.169. But that involved Defendants' request for the Court to consider depositions conducted by Special Master Balaran – not depositions or other discovery initiated by Defendants. Therefore, this fact does not support the conclusion that Defendants propounded burdensome or overly-broad discovery and deposition requests.

> point [after the court's ruling on the underlying affidavits] . . . then it would be appropriate for the opposing party to consider bringing a Rule 11 motion." (emphasis in original; footnote omitted). Pl. Mo. at 13.

Thus, the October 18 Report and Recommendation is simply incorrect in denying that Plaintiffs argued that Defendants' Motion for Sanctions could not properly have been filed until after the Court ruled on the merits of the offending papers. Defendants properly challenged and refuted that erroneous position, and the October 18 Report and Recommendation (at 12) essentially acknowledges such a position would be erroneous. It, in effect, recasts Plaintiffs' Motion to make it seem less erroneous than it was. The October 18 Report and Recommendation then discusses the question (which is not at issue) of whether the Court has the discretion to choose when it will rule on a motion for sanctions. But the real issue is not whether the Court could rule on the Motion for Sanctions later, but when should the Court rule on it. As shown in Defendants' memorandum in support of Defendants' Motion for Sanctions, and as discussed below, that time is now.

Second, the recommendation fails to discuss the precise relief requested by Plaintiffs, i.e., that they be excused even from responding to the Defendants' Motion for Sanctions until later. Plaintiffs' Motion for Protective Order filed July 5, 2002 (at 14) specifically requests that the Court "stay plaintiffs' obligation to respond to [Defendants' Motion for Sanctions] until . . . after this Court has ruled on plaintiffs' fee applications and passed on the Gingold Affidavit – or until further order of this Court." (Emphasis added.) The October 18 Report and Recommendation fails to discuss the merits of delaying the briefing on the Motion for Sanctions. For the reasons indicated in Defendants' brief on Plaintiffs' Motion and for the reasons stated below, Plaintiffs

should not be allowed to defer their response to the Motion for Sanctions.

Third, the October 18 Report and Recommendation (at 14) recommends staying a decision on the Defendants' Motion for Sanctions "pending the Court's consideration of and decision on plaintiffs' statement of fees and expenses filed on April 29, 2002." Further, it suggests that the Court could consider the Motion for Sanctions in conjunction with the next fee application that Plaintiffs submit, with regard to the contempt trial. Id. at 13.

This recommendation is neither supported by case law or other authority, nor is it logical. First, it conflicts with authorities recognized in the October 18 Report and Recommendation. For example, at page 12, the following quotation (originally quoted in Defendants' brief) from Wright & Miller is noted: "Rule 11 motions should be made promptly after the challenged conduct takes place. If the alleged misconduct occurs during pretrial or discovery, the matter usually should be resolved at once." (Emphasis added.) 5A Charles Alan Wright and Arthur R. Miller et al., Federal Practice and Procedure § 1337, at 120-21 (2d ed. 1994). Although it notes that the Court has the discretion to decide when to rule, the October 18 Report and Recommendation cites no basis to depart from the normal, accepted practice (as reflected in Wright & Miller, quoted above) that the motion "should be resolved at once." Id.

Second, the October 18 Report and Recommendation recommends an illogical and wasteful sequence. It suggests that, because Plaintiffs will submit another fee application in coming months, the Court could defer ruling on the Motion for Sanctions until it reviews the new fee application. That analysis is backwards. The Court should rule promptly on the Motion for Sanctions precisely because Plaintiffs will be filing another fee application in the near future. The Defendants' Motion for Sanctions asserts that Plaintiffs' counsel submitted false or

misleading affidavits in support of the April 29, 2002 fee application. Deferring a ruling on those allegations will only encourage further false or misleading affidavits in connection with the upcoming fee applications. The October 18 Report and Recommendation suggests that Defendants could file new and additional motions for sanctions if Plaintiffs file more false affidavits. This approach not only will promote further satellite litigation over fee applications, but will encourage Plaintiffs' continuing obstruction of the Court's efforts to determine the correct amount of fees. The best way to deter future false filings by Plaintiffs and to promote a proper and time-efficient disposition of fee applications is to rule on Defendants' Motion for Sanctions promptly.

Moreover, the October 18 Report and Recommendation (at 13) suggests that the Court rule on the April 29, 2002 fee application and the Defendants' Motion for Sanctions at the same time. But to do that, the Court would need to have before it all briefs on the Motion for Sanctions. Therefore, Plaintiffs' request that they be excused from filing their response to the Motion for Sanctions until after the Court rules on the April 29, 2002 fee application would not comply with this recommended procedure. Thus, merely staying the Defendants' Motion for Sanctions would defer further briefing on that motion, and thus would be inconsistent with the sequence of events that the October 18 Report and Recommendation seems to advocate.

Conclusion

For the foregoing reasons, Defendants request that the Court accept in part and reject in

part the October 18 Report and Recommendation, and that the Court enter the attached proposed order.

Respectfully submitted,

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Assistant Attorney General
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Deputy Assistant Attorney General
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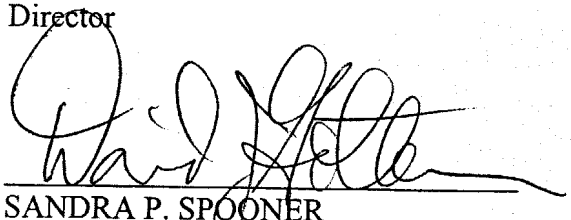
Director



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Dated: November 1, 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.	)	
	)	

ORDER

This matter coming before the Court on:

1. Plaintiffs' Motion for Protective Order Seeking: (1) Stay of Plaintiffs' Obligation to Respond to the Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Deposition s of the Five Named Plaintiffs; (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees ("Plaintiffs' Motion for Protective Order");

2. Defendants' Motion to Compel Discovery;

3. Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition; and

4. Defendants' Motion for Sanctions Regarding Submission of False or Misleading Affidavits by Plaintiffs' Attorney Dennis M. Gingold ("Defendants' Motion for Sanctions"),

the Court having considered the briefs and responses of the parties, the October 18, 2002 Report and Recommendation of the Special Master-Monitor, the parties' comments or objections thereto, and the record,

ORDERED that the Plaintiffs' Motion for Protective Order is DENIED. Defendants' Motion to Compel Discovery is GRANTED. Within 10 days from the date hereof, Plaintiffs shall respond as follows to each paragraph of Interior Defendants' Request for the Production of

Documents, Dated June 5, 2002: (a) produce all documents requested by such paragraph; or (b) if Plaintiffs object to any such paragraph, Plaintiffs shall fully disclose and describe all documents responsive to that paragraph and shall state any and all objections to production.

FURTHER ORDERED that, within 10 days from the date hereof, Plaintiffs shall file and serve any further response to Defendants' Motion for Sanctions, and Defendants shall file any reply within 10 days after service of Plaintiffs' response.

FURTHER ORDERED that Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition is GRANTED. Plaintiffs shall appear for depositions upon dates to be set by Defendants.

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 November 1, 2002 I served the foregoing *Interior Defendants' Comments and Objections to October 18,2002 Report and Recommendation of the Special Master-Monitor Regarding Motion to Compel and Motions to Stay Certain Discovery and Rule 11 Proceedings* by facsimile in accordance with their written request of October 31, 2002 upon:

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