RECEIVED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
2002 NOV -5 PM 4: 03
NANCY M.
MAYER-WHITTINGTON
CLERK

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 NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION AND MEMORANDUM FOR PROTECTIVE ORDER REGARDING APPLICATION OF ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE

The Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Secretary of the Treasury ("Defendants") submit the following memorandum in support of their motion for a protective order to prevent the disclosure of communications and documents protected by the attorney-client privilege and the work-product doctrine.

SUMMARY OF ARGUMENT

Defendants are entitled to protect from discovery (1) communications to or from their attorneys concerning anticipated or ongoing litigation between beneficiaries and Defendants in their capacity as trustees, and (2) documents prepared with, for, or by their attorneys because of this litigation. As the "fiduciary exception" to the attorney-client privilege covers only those attorney-client communications related exclusively to the administration of the trust, and as there is no "fiduciary exception" to the work product privilege, these communications and documents are privileged as attorney-client communications and attorney work product.

Furthermore, the Special Master's May 12, 1999 Opinion and Order[1] does not preclude assertion of these privileges. Contrary to Plaintiffs' statements that the Special Master's May 12, 1999 opinion is the law of the case and that the Court has adopted it,[2] the Special Master's Opinion does not control here because this Court has not adopted it as required by Federal Rule of Civil Procedure 53(e). In the alternative, in the event that this Court adopts the Special Master's Opinion and Order, or finds that the Opinion is the law of the case, Defendants note that the Special Master's holding leaves intact the attorney-client privilege for communications otherwise protected by the privilege and not related to the administration of the trust, and also recognizes the protection afforded work product related to this or other pending litigation.

1. Attorney-Client Privilege Protects Communications Between Defendants and Their Attorneys During Litigation.

Communications between trustees and their attorneys exclusively concerning administration of the trust come within a special "fiduciary exception" to the attorney-client privilege. In such communications, "the attorney's client is [deemed to be] not the fiduciary personally, but, rather, the trust's beneficiaries," Everett v. USAir Group, Inc., 165 F.R.D. 1, 4 (D.D.C. 1995) (internal citation omitted), and therefore a "fiduciary exception" to the attorney-client privilege applies, which entitles the beneficiaries to disclosure. When the trustee communicates with its attorneys about matters other than trust administration, however, it is the

---

[1] Defendants note that despite the caption, a Rule 53 special master cannot enter orders.

[2] "MR. GINGOLD: We don't believe the law of the case has changed with regard to the decision. The judge has adopted the Special Master's position with regard to privilege." Transcript of October 3, 2002 Discovery Status Conference before Special Master-Monitor, at 61.

trustee – rather than the beneficiaries – who is considered the client, and thus the fiduciary exception does not apply. Thus, "[t]he attorney-client privilege . . . attach[es] to attorney-client communications with respect to the non-fiduciary activities of [a trustee]." Id. Furthermore, in litigation between beneficiaries and their trustee, attorney-client "communications that would be encompassed within the fiduciary exception" exclude those that "reflect advice concerning th[e] litigation." Martin v. Valley Nat'l Bank of Ariz., 140 F.R.D. 291, 326 (S.D.N.Y. 1991). In other words, as long as the attorney-client communications concern the litigation, the fiduciary exception to the attorney-client privilege does not apply – even if the communications also touch on trust administration. Due to the long-running, all-encompassing and ongoing scrutiny of IIM trust administration, virtually all attorney-trustee communications related to trust administration since the onset of this litigation also implicate the litigation and are therefore privileged.

The identity of the lawyer giving the advice does not affect the analysis of whether a communication is privileged. See In re Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997). For example, communications with a lawyer that are solely related to trust administration – and therefore subject to disclosure under the fiduciary exception – do not prevent assertion of the attorney-client privilege for communications with that same lawyer concerning litigation regarding the trust. Id. Here, then, Interior and Treasury attorneys may be involved in privileged as well as non-privileged communications with Defendants. Most, if not all, communications with Defendants by attorneys in the Civil Division and the Environment and Natural Resources Division of the Department of Justice, as well as the United States Attorney's Office, during the course of this litigation, have related to litigation. Accordingly, those communications are presumptively immune to the fiduciary exception.

In Hudson v. General Dynamics, 73 F. Supp. 2d 201, 202-03 (D. Conn. 1999), the court upheld the attorney-client privilege for the employer-trustee against employee-beneficiaries for communications that related to trust administration – even though no litigation was pending – because the communications were aimed at protecting the trustee from potential liability:

> The content of these documents reveals that the advice was not rendered for the benefit of the plan, its beneficiaries, or as a matter of plan administration involving the defendant's role as the beneficiaries' fiduciary, but rather for the benefit of the defendant seeking to protect itself from potential liability in connection with its consideration of future plan amendments or enhancements, which constitute non-fiduciary matters. Under these circumstances, the defendant enjoys a confidential attorney-client relationship.

73 F. Supp. 2d at 203. The court, noting that "such communication could arguably be broadly viewed as 'relating to' fiduciary matters insofar as disclosures of plan amendments would affect current plan participants," rejected "such an expansive interpretation of the fiduciary exception" for three reasons:

> 1) If such legal advice to an ERISA trustee were deemed to relate, even indirectly, to plan administration, such trustees would have no attorney-client privilege in effect;
>
> 2) such a result would undermine a core purpose of the attorney-client privilege "to encourage clients (e.g., employers considering the substance and logistics of plan amendments) to make full disclosure to their attorneys". See United States v. Ackert, 169 F.3d 136 (2d Cir. 1999); and,
>
> 3) if ERISA trustees without assurance of confidentiality are disinclined to seek legal counsel, they may act or fail to act in ways that harm the interests of the beneficiaries.

Id. Thus, the court concluded that "the legal advice communicated to the defendant on the subject of disclosure of forthcoming plan changes is protected by attorney-client confidentiality

privilege [sic] from discovery disclosure, and is not subject to the 'fiduciary exception.'" Id. (citing In re Long Island Lighting Co., 129 F.3d at 271-73).

A "'not one drop' rule" that "the fiduciary exception applies to all fiduciary-attorney communications *unless* the fiduciary can demonstrate that the advice was *solely* related to personal, non-fiduciary matters" misconstrues the fiduciary exception. United States v. Mett, 178 F.3d 1058, 1066 (9th Cir. 1999) (emphasis in original). Instead, "while the fiduciary exception does apply to advice on matters of plan administration, the attorney-client privilege reasserts itself as to any advice that a fiduciary obtains in an effort to protect herself from civil or criminal liability." Id.

Thus, the case law establishes that the attorney-client privilege precludes disclosure of litigation-related communications between Defendants and their counsel – even if related to trust administration[3] – since this litigation began.

2. The Work Product Doctrine Protects Documents Prepared By Defendants' Attorneys In Anticipation Of Litigation.

"The work-product privilege protects written materials lawyers prepare 'in anticipation of litigation.'" In re Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998) (citing Fed. R. Civ. P. 26(b)(3)). "By ensuring that lawyers can prepare for litigation without fear that opponents may obtain their private notes, memoranda, correspondence, and other written materials, the privilege

---

[3]As the Hudson Court observed, to impose a requirement that the communications relate exclusively to the litigation would be "in effect" to rule that the "trustees . . . have no attorney-client privilege," 73 F. Supp.2d at 203, since in a lawsuit such as this one – brought by beneficiaries concerning the trust – trust-related and litigation-related matters are inexorably intertwined. However, to deprive trustees of their attorney-client privilege in its entirety would ultimately be to the detriment of the beneficiaries, as trustees who are "disinclined to seek legal counsel . . . may act or fail to act in ways that harm the interests of the beneficiaries." Id.

protects the adversary process." Id.; see also Judicial Watch, Inc. v. United States Dep't of Commerce, 196 F. Supp. 2d 1 (D.D.C. 2001) (Lamberth, J.).

The fiduciary exception does not apply to the work product privilege. Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co., 951 F. Supp. 679, 687 (W.D. Mich. 1996) (citing Cox v. Admin. U.S. Steel & Carnegie, 17 F.3d 1386, 1423 (11th Cir. 1994), modified, 30 F.3d 1347 (11th Cir. 1994) and In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1239 (5th Cir. 1982)). "The work product privilege is based on the existence of an adversarial relationship." International Sys. & Controls, 693 F.2d at 1239. "Thus, the mutuality of interest that is the rationale behind the fiduciary exception expires upon anticipation of litigation." Picard Chemical, 951 F. Supp. at 687 (citing International Sys. & Controls, 693 F.2d at 1239).

For this same reason, "[m]aterials need not be prepared solely for a litigation purpose . . . to merit protection." Strougo v. BEA Assocs., 199 F.R.D. 515, 521 (S.D.N.Y. 2001). When a document is created "because of" the prospect of litigation, and analyzes the likely outcome of that litigation, it does not lose protection merely because it is also created in order to assist with a business decision. United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998); accord Wessel v. City of Albuquerque, No. 00-00532, 2000 WL 1803818 at 3 (D.D.C. Nov. 30, 2000) (Kay, Magistrate J.) (quoting Adlman).

Because the work-product privilege is qualified, rather than absolute, in some cases "the normal limitations to the work-product rule and the limitations that would be imposed by the fiduciary exception, if it is applicable, are coextensive." Martin v. Valley Nat'l Bank, 140 F.R.D. at 327. Rule 26(b)(3) qualifies the work product privilege by permitting disclosure where a party can show "substantial need of the materials in the preparation of his case and that he is unable

without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Rule 26(b)(3) also provides, however, that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Id.

> The rule thus creates, as observed by the . . . D.C. Circuit, "in effect a two-tiered protection from discovery for attorney work product, in order to accommodate the liberal deposition-discovery policies of the Rules and the need to provide confidentiality for attorneys' files." In re Sealed Case, 676 F.2d 793, 809 (D.C.Cir.1982). Therefore, work product that contains only non-privileged facts must be produced if the party seeking discovery can show a "substantial need" for the factual information contained therein and an inability to collect the same factual information without undue hardship. Id.; Washington Bancorporation v. Said, 145 F.R.D. 274, 276 (D.D.C.1992). Work product that contains the opinions, judgments, and thought processes of an attorney, on the other hand, receives almost absolute protection from discovery and must be produced only if the party seeking the documents shows an "extraordinary justification" for production. Said, 145 F.R.D. at 276 (citing In re Sealed Case, 676 F.2d at 809).

Judicial Watch, 196 F. Supp. at 5. See also Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) ("As Rule 26 and [Hickman v. Taylor, 329 U.S. 495 (1947)] make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.").

Here, once the plaintiff IIM trust beneficiaries became adversaries of the Defendants in their trustee capacity, the work product privilege protected "any material obtained or prepared by a lawyer 'in the course of his legal duties, provided that the work was done with an 'eye toward

litigation.'" In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994) (quoting In re Sealed Case, 676 F.2d 793,809 (D.C. Cir. 1982)).

3. Special Master's "Opinion and Order" Does Not Preclude Assertion of Attorney-Client Privilege or Work Product Doctrine.

The parties first argued privilege issues in response to Plaintiffs' second, third, fourth and fifth formal requests for production of documents. Documents responsive to these requests included documents prepared by Interior or Treasury attorneys that related only to trust administration. The May 12, 1999 Special Master's Opinion and Order ("May 12th Opinion") concerned Plaintiffs' motion to compel that production. As the Court has never adopted the May 12th Opinion as required by Rule 53(e), that Opinion does not govern here.

In the alternative, in the event that this Court adopts the Special Master's May 12th Opinion or finds that it is the law of the case, the Special Master's holding leaves intact the attorney client privilege for communications otherwise protected and not related to the administration of the trust, and protects work product that is related to this or other pending litigation.

a. The District Court Has Not Adopted The Special Master's Opinion and Order, Which is Therefore Not Binding.

A special master's report is not binding unless adopted by the district court: "[T]he trial court . . . makes the final determination of all the issues." D.M.W. Contracting Co. v. Stolz, 158 F.2d 405, 407 (D.C. Cir. 1946), cert. denied, 330 U.S. 839 (1947).

> The report of the master is advisory only and is without effect until confirmed by the court. For while he is charged with accepting the master's findings of fact unless clearly erroneous, it is necessary for him to review the transcript of the proceedings to determine if such error has been made . . . . And in no instance is he bound by the master's conclusions of law.

Id. (footnotes omitted) "[A] master's conclusions of law are entitled to no special deference from the reviewing court, and will be overturned whenever they are believed to be erroneous." Oil, Chem. and Atomic Workers Int'l Union, AFL-CIO v. National Labor Relations Bd., 547 F.2d 575, 580 (D.C. Cir. 1977) (citing Case v. Morrisette, 475 F.2d 1300, 1308 and n.39 (D.C. Cir. 1973)).

"A master's legal conclusions, unlike his or her findings of fact, must be reviewed de novo." Stauble v. Warrob, Inc., 977 F.2d 690, 696 (1st Cir. 1992) (citing D.M.W. Contracting, 158 F.2d at 407). "If the master makes significant decisions without careful review by the trial judge, judicial authority is effectively delegated to an official who has not been appointed pursuant to Article III of the Constitution." Meerpol v. Meese, 790 F.2d 942, 961 (D.C. Cir. 1986). "The Court has a duty to review a Master's report and make the final determination of all the issues." In re Ampicillin Antitrust Litig., 81 F.R.D. 377, 380 n.3 (D.D.C. 1978). Thus, even though Defendants did not object to the May 12th Opinion, the conclusions of law must be reviewed de novo, and the May 12th Opinion is not binding on the parties until the district court has adopted it.

b. The Special Master Recognized That The Fiduciary Exception to Attorney Client Privilege Is Limited In Scope And That This Exception Does Not Apply To The Work Product Doctrine.

If this Court adopts the Special Master's May 12th Opinion or finds that it is the law of the case, the Special Master's holding leaves intact the attorney-client privilege for communications otherwise protected and not related to the administration of the trust, and protects work product that is related to this or pending litigation. The Special Master recognized

the difference between documents prepared in the normal course of trust administration in his "holding" on attorney-client privilege:

> [T]his opinion assumes and thus holds that the activities of trust administration and the documents *created or maintained in the course of the fiduciary activity of trust administration* are for the primary if not the sole benefit of trust beneficiaries. No attorney-client privilege is held by the Defendants in regard to *those* fiduciary activities which will shield information regarding administration of the trust from disclosure to the trust beneficiaries.

May 12th Opinion, at 10-11 (emphasis added). Defending litigation brought by the beneficiary is not within the scope of the fiduciary duty, and thus documents created as a result of litigation are protected by the attorney client privilege. See United States v. Mett, 178 F3d 1058, 1066 (9th Cir. 1999); Widbur v. ARCO Chemical Co., 974 F.2d 631, 645 (5th Cir. 1992). Moreover, the Special Master recognized that attorney-client communications relating to a trustee's non-fiduciary activities – including "'plan design' decisions concerning the formation, amendment or termination of the trust" – are privileged. May 12th Opinion, at 10. Thus, the May 12th Opinion does not support the proposition that the government has no attorney-client privilege.[4]

---

[4] This Court and Plaintiffs acknowledged a fiduciary's right to attorney-client privilege during the recent contempt trial:

> [The Court]
> 18 In terms of attorney/client privilege and work
> 19 product, I mean, I really think it depends on the -- I don't
> 20 see how the Court can decide those kinds of questions across
> 21 the board without knowing the question and what the area is.
> 22 I have always thought that even a trustee who is then in
> 23 litigation has some attorney/client right to talk to her
> 24 attorney who is representing her in the litigation -- here,
> 25 the U.S. Attorney and Mr. Finster, I assume.
> 4257: 1 So I don't quite know how to deal beyond that with
> 2 what attorney/client privilege matters may arise. Maybe you
> 3 know what areas you are going to try to go into that wouldn't

Furthermore, the May 12th Opinion allows some work product privilege protection. According to that Opinion, "the only documents as to which work-product protection in this case will be afforded are those which the Defendants have shown were prepared and created solely for use by counsel in anticipation of or in the course of this litigation." May 12th Opinion, at 13. Although the May 12th Opinion limits Defendants' work-product privilege by requiring that the documents for which protection is sought be created "solely" for litigation purposes, the Special Master himself has not imposed such a strict limitation. Shortly after issuing the May 12th Opinion, the Special Master upheld Defendants' motion for a protective order based on the work product doctrine to protect over 700 pages of documents related to the creation of the administrative record regarding the Strategic Plan and the High Level Implementation Plan ("HLIP"). This administrative record for the Strategic Plan and the HLIP – both plans for

---

4 include that kind of attorney/client privilege, but even a
5 trustee, when they are under attack, has a right to try to
6 defend themselves.
7 MR. GINGOLD: We don't disagree.
8 THE COURT: Which is a different question, Your
9 Honor.
10 MR. GINGOLD: That's right. The Washington Star
11 case is quite clear in that regard. But our position is
12 different. Again to clarify it, her understanding of the
13 privilege that applies to a trustee in litigation or out of
14 litigation excludes anything related to the management or the
15 administration of a trust.
16 THE COURT: Of the trust itself.
17 MR. GINGOLD: That's correct. And that is -- and we
18 are not suggesting that litigation counsel could not have
19 privileged communications. As a matter of fact, we've never
20 suggested that, Your Honor.

Transcript of Contempt Trial, Monday, February 11, 2002

implementing trust reform – clearly did not encompass documents created solely for purposes of litigation. Nonetheless, the Special Master found that:

> the documents in issue fall squarely within the ambit of the work-product doctrine insofar as they reflect the "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party conducting the litigation," Fed. R. Civ.P. 26(b)(3). Accordingly, I am recommending that defendants' Motion for a Protective Order be granted.

Recommendation and Report of the Special Master Regarding Defendants' Motion for a Protective Order at 1-2 (July 8, 1999) ("Report").[5] In other words, the Special Master simply relied on the standard work product protection analysis (which incorporates limitations designed to protect the legitimate interests of the party seeking disclosure).

Therefore, even if the Court adopts the Special Master's May 12th Opinion and Order, the Defendants' attorney-client and work-product privileges are intact, except as to those communications covered by the fiduciary exception to the attorney-client privilege – that is, documents generated by Interior or Treasury attorneys that relate only to trust administration.

CONCLUSION

For the reasons set forth above, the Court should enter a Protective Order to prevent the disclosure of attorney-client communications made and attorney work product created from a

[5] The Court has not ruled on the July 8, 1999 Report either.

date no later than the onset of this litigation, whether it involved Defendants' counsel at the Department of the Interior, Department of the Treasury or the Department of Justice.

November 5, 2002

Respectfully submitted,

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

Sandra P. Spooner

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

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 NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter coming before the Court on Defendants' Motion and Memorandum for Protective Order Regarding Application of the Attorney-Client Privilege and Work-Product Doctrine, any responses thereto, and the record in this case, the Court finds that the Motion should be GRANTED.

IT IS THEREFORE ORDERED that a protective order be entered to read as follows:

ORDERED that Defendants are entitled to protect from discovery (1) communications to or from their attorneys concerning anticipated or ongoing litigation between beneficiaries and Defendants in their capacity as trustees, even if such communications also relate to trust administration, and (2) documents prepared with, for, or by their attorneys in anticipation of

litigation, even if not prepared solely for purposes of litigation.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

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

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

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 5, 2002 I served the foregoing *Defendants' Motion and Memorandum for Protective Order Regarding Application of Attorney-Client Privilege and Work-Product Doctrine* by facsimile in accordance with their written request of October 31, 2002 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

By U.S. Mail upon:

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

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