UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS RELATING TO PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE

Some three and a half years after demanding the imposition of severe contempt sanctions against 39 individuals, plaintiffs ask the Court to give them yet another opportunity to specify any factual basis for continuing to hold these individuals in an unconscionable form of legal suspense. Plaintiffs should have specified their grounds in October 2001, when they filed their motion. They were given until May 2003 by the Court and the former Special Master to do so. They failed. Now in a last desperate attempt to keep the Court from finally disposing of these unfounded charges, plaintiffs have filed a motion ("the Extension Motion") asking the Court to refrain from ruling on their inadequate (and, in the case of 22 individuals, non-existent) "bills of particulars," to allow them to engage in discovery, and to permit them to file additional or amended bills of particulars after conclusion of discovery. In so doing, the plaintiffs ask the Court to ignore the Court of Appeals' decision in *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), and prior decisions by this Court, and to disregard the Constitution. The Court should decline the plaintiffs' invitation.

Background

Plaintiffs assert that they are refiling their motion for enlargement of time to file Bills of Particulars with respect to the October 19, 2001 Show Cause Motion. (Docket # 892). Extension Motion at 1. Plaintiffs filed this show cause motion seeking civil and criminal contempt sanctions in connection with certain evidence presented at the Phase 1 Trial and certain reports filed thereafter. Plaintiffs named Secretary of the Interior Gale Norton and former Assistant Secretary of the Interior Neal McCaleb and 37 individual attorneys and employees of the Department of the Interior and the Department of Justice as the targets of their allegations.[1] The Court bifurcated plaintiffs' contempt motion and conducted a trial ("Contempt II") solely on the issue of whether defendants Norton and McCaleb, acting in their official capacities, had acted in civil contempt of court. Order to Show Cause, November 28, 2001, at 1-2. The Court issued its findings of contempt on September 17, 2002. *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002) (the "Sept. 17, 2002 Order"), and the Court of Appeals reversed on July 18, 2003. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

In a March 15, 2002 hearing, the Court directed the plaintiffs to lay out "individual defendant by individual defendant specifications of what the contempt proceedings would be for those 39 people so that they each have an opportunity to address what the evidence is and what you are citing against any of those 39." Tr. of Mar. 15, 2002 Status Hrg., at 21:10-14.[2] Exhibit 1.

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[1] To avoid any appearance of prejudgment, the Special Master adopted the term "Named Individuals" to refer to these persons against whom plaintiffs sought contempt findings. That was the term used throughout the briefings before the Master, and we continue that convention here.

[2] In referring to "39 people," the Court evidently included Secretary Norton and former Assistant Secretary McCaleb. Subsequently, the Court of Appeals' July 18, 2003 decision disposed fully of the contempt allegations made in the October 19, 2001 Motion as to Secretary

(continued...)

In the Sept. 17, 2002 Order, the Court referred the allegations against the 37 Named Individuals to then-Special Master Balaran. *Cobell*, 226 F. Supp. 2d at 155, 162.[3] At that time, the plaintiffs had provided a bill of particulars for only a single individual. The Master established a briefing schedule that required the plaintiffs to submit Bills of Particulars ("Bills") setting forth the facts and circumstances in support of their allegations of contempt against the Named Individuals on or before May 1, 2003. Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause, November 4, 2002 at 3 (Exhibit 2). The Master denied two motions by plaintiffs to extend the date to file Bills. (Exhibits 3, 4). Plaintiffs submitted Bills for only 15 of the 37 Named Individuals by the May 1, 2003 deadline established by the Master.[4]

Following the submission of the Bills, the Named Individuals and the Government filed briefs seeking termination of the show cause proceedings. Plaintiffs opposed, and the Named

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[2](...continued)
Norton and Mr. McCaleb in both their personal and official capacities.

[3]Subsequently, the Court dismissed as moot a show cause motion filed by the plaintiffs on August 27, 2001 and an October 29, 2001 motion by plaintiffs to supplement the October 19, 2001 Motion because it considered those issues incorporated in the October 19, 2001 Motion. *See* Order dated Sept. 17, 2002 (DKT #1482) (disposing of Oct. 29, 2001 motion to supplement); *Cobell v. Norton*, 237 F. Supp. 2d 71, 76 n.6 (D.D.C. 2003) (treating Aug. 27, 2001 motion as subsumed by October 19, 2001 Motion).

[4]Plaintiffs submitted Bills by the Master's deadline against Bruce Babbitt, John Berry, Edith Blackwell, Michael Carr, Edward Cohen, Kevin Gover, Robert Lamb, Sabrina McCarthy, Anne Shields, Stephen Swanson, Phillip Brooks, Charles Findlay, Sarah Himmelhoch, Lois Schiffer, and David Shuey.

Plaintiffs did not submit Bills for M. Sharon Blackwell, John Bryson, Tom C. Clark II, Peter Coppelman, John Cruden, James Douglas, James A. Eichner, Timothy Elliott, K. Jack Haugrud, John Leshy, Hilda Manuel, Chester Mills, John S. Most, William G. Myers III, Dominic Nessi, Michael Rossetti, Kenneth F. Rossman, Glenn Schumaker, David Shilton, James F. Simon, Terence Virden, or Daryl White.

Individuals and the Government filed replies. The 22 Named Individuals as to whom Plaintiffs had not submitted Bills filed a Praecipe with the Master seeking termination of the contempt proceedings as to themselves.

Argument

I. The Court of Appeals' Ruling Precludes Further Civil Contempt Proceedings.

The Court of Appeals definitively declared that the specifications upon which plaintiffs base their allegations against the Named Individuals cannot serve as a platform for a civil contempt proceeding. *Cobell*, 334 F.3d at 1146 (treating District Court's contempt citations on all five specifications as "criminal in nature"). As the Court of Appeals explained: "Although one may be held in civil contempt for refusing to comply with a court order, a sanction for one's past failure to comply with an order is criminal in nature." *Id.* at 1146-47. Plaintiffs' Show Cause Motion, as well as the Bills filed with the former Special Master, seek to impose punitive sanctions, rather than a coercive or compensatory measure, and therefore lack the essential characteristics of a civil contempt proceeding.

As we pointed out in our June 2, 2003 opposition to plaintiffs' Bills filed with the former Special Master (DKT #2091 at 7-9, 19) and again in our reply (DKT #2196 at 2), the Named Individuals are not in a position to purge any of the supposed contempts of which plaintiffs have accused them, nor did plaintiffs even bother to seek purgation conditions. Yet, the Court of Appeals explained that the opportunity to purge contempt is an essential hallmark of a civil contempt proceeding. *Cobell*, 334 F.3d at 1147. Further, the Court of Appeals made clear that merely seeking reimbursement of attorneys' fees incurred by plaintiffs' counsel in the contempt

trial "cannot be considered relief for the underlying contempt..." (*Cobell*, 334 F.3d at 1145-46) and, therefore, cannot convert this into a civil proceeding.[5]

While plaintiffs insist upon ignoring the clear holding of the Court of Appeals' decision, this Court should not do likewise. Notwithstanding plaintiffs' intentional blindness, the Court of Appeals decision leaves no room for doubt that the proceedings arising from plaintiffs' show cause motion cannot be civil in nature.

II. Plaintiffs Are Not Entitled to Conduct Discovery in an Effort to Support Their Contempt Charges.

Because these proceedings have potential criminal ramifications, and the allegedly contumacious conduct occurred outside the presence of the District Court, the Named Individuals are entitled to all the due process protections guaranteed by the Constitution, including trial by jury and proof beyond a reasonable doubt. *Cobell*, 334 F.3d at 1147. Likewise, as we argued in our June 2, 2003 opposition filed with the Special Master, it would not be proper to permit plaintiffs to conduct discovery because the Federal Rules of Criminal Procedure do not provide for such activities.

In its Sept. 2, 2004 Memorandum Opinion (DKT #2661), the Court expressly refused to permit plaintiffs to engage in discovery directed at obtaining evidence in support of some future criminal contempt proceeding: "Any deposition of defendants' trial counsel would appear to be directed only at uncovering facts useful for the prosecution of criminal contempt. Plaintiffs are ineligible to undertake such an investigation." Sept. 2, 2004 Order at 4-5. The Court's September 2, 2004 ruling was consistent with both the Supreme Court's decision in *Young v.*

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[5] Indeed, if it were otherwise, a party seeking purely punitive sanctions could deprive another of due process rights guaranteed by the Constitution simply by inserting a claim for attorneys' fees incurred in filing and pursuing the show cause motion.

United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 807 (1987) (plaintiff's counsel was ineligible to serve as special prosecutor of alleged criminal contempt), and the Court of Appeals' holding that district courts are not empowered to appoint agents to function in "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Cobell v. Norton*, 334 F.3d at 1142.

In short, the matters raised in plaintiffs' motion and Bills cannot be continued under the guise of a civil proceeding; plaintiffs cannot engage in discovery in an attempt to bolster their contempt charges; and these proceedings must be terminated because they are plainly not civil in nature. To do otherwise would seriously offend the protections afforded each of the Named Individuals by the Constitution.

III. Plaintiffs' Attempt to Further Extend These Proceedings Is Inexcusable.

Plaintiffs complain that the Special Master denied them an extension beyond May 1, 2003 to serve their bills of particulars upon the individuals named in their October 19, 2001 motion. However, the date specified by the Special Master to file bills of particulars was more than a year and a half after plaintiffs filed their motions to show cause, more than a year after the conclusion of a month-long trial against the Secretary and Assistant Secretary on the same charges, and more than a year after the March 15, 2002 status conference at which the Court directed plaintiffs to particularize their allegations. Further, the Master gave them another six months to accomplish this task after the matters had been referred to him. Accordingly, plaintiffs' complaint that they were denied adequate opportunity to particularize their charges rings hollow.

Especially in view of the serious nature of the charges against these individuals, plaintiffs should never have filed the October 19, 2001 motion at all without adequate factual support. Their filing of the motion, and their persistence in filing additional contempt charges against

various individuals without adequate factual support, suggests a recklessness that is inconsistent with ethical practice in the Federal Courts. Indeed, plaintiffs' demand that they be permitted to engage in discovery before specifying the factual and legal bases for accusing the Named Individuals of contempt indicates that they failed to conduct the "reasonable inquiry" required by Rule 11 before they moved three and a half years ago for an order that the 39 individuals show cause why they should not be held in contempt.[6]

In short, plaintiffs should have had an adequate factual basis for their allegations of contempt against each of the Named Individuals before filing their show cause motions. The appropriate course now is not to perpetuate these proceedings by permitting them to engage in discovery that is both inappropriate and likely unconstitutional, but to terminate the proceedings because plaintiffs have failed to state a prima facie case of contempt against any individual.[7]

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[6] The concern that plaintiffs have pursued their show cause motions for an improper purpose, such as to harass (Rule 11(b)(1)), can only be heightened by the repeated offer made by plaintiffs' lead counsel Dennis Gingold at the March 3, 2005 status conference that plaintiffs would drop the contempt charges against the individuals if the Government would agree to a trial date on the merits of the litigation. Tr. 15, 16, 19, 25, 32, 33 (Exhibit 5). Lead plaintiff Elouise Cobell repeated the same offer before a Congressional subcommittee on March 9, 2005. Exhibit 6 at 7 n.6. Plaintiffs' offer to swap their pursuit of contempt proceedings for a merits trial raises serious questions about the propriety of their initiation of the show cause motions.

[7] Plaintiffs characterize their Extension Motion as a refiling of a motion for an enlargement of time to file bills of particulars with respect to individuals identified in the October 19, 2001 Show Cause Motion. Extension Motion at 1, 2, 3. Currently, three other motions for orders to show cause filed by plaintiffs are pending, the March 20, 2002 Show Cause Motion (DKT #1203), the February 26, 2003 Show Cause Motion Concerning Office of Historical Trust Accounting (DKT #1831), and the Motion to Amend March 20, 2002 Show Cause Motion regarding the Zantaz System and Its Implementation (DKT #2778). All of the motions seek sanctions for alleged past failures to comply with orders issued in this case. Therefore, the motions seek criminal, not civil, sanctions, and plaintiffs are precluded from conducting discovery. Plaintiffs have not requested, much less tried to justify, extensions to file new or supplemental bills of particulars on the other outstanding show cause motions.

CONCLUSION

Plaintiffs' failure to have stated an adequate factual basis for the severe contempt sanctions they seek cannot be excused. Plaintiffs should have conducted the necessary inquiry as to each person named before ever filing their motions for orders to show cause. Plaintiffs are forbidden from pursuing discovery where, as here, there can be no civil contempt remedy, and such a course is particularly inappropriate given the many years plaintiffs have already had to particularize their allegations. Enough is enough. The Court should rule on the legal adequacy of plaintiffs' allegations based on the many briefs already filed and should terminate these proceedings promptly for lack of merit.

Respectfully submitted,

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DATED: March 22, 2005

00001

01 UNITED STATES DISTRICT COURT

02 FOR THE DISTRICT OF COLUMBIA

03 Elouise Cobell, et al. Docket No. CA 96-1285 RCL

04 Plaintiffs

05 Washington, D.C.

06 vs. Friday, March 16, 2002

07 2:11 p.m.

08 Department of Interior, et al.

09 Defendants

10 Transcript of Status

11 Before the Honorable Royce C. Lamberth

12 United States District Judge

13 APPEARANCES:

14 For the Plaintiff: Dennis Gingold, Esq.

15 Keith Harper, Esq.

16 Mark Brown, Esq.

17 For the Defendant: John Stemplewicz, Esq.

18 John Warshawsky, Esq.

19 Reporter: WILLIAM D. MC ALLISTER, CVR-CM

20 Official Court Reporter

21 Room 4806-B

22 333 Constitution Avenue, N.W.

23 Washington, D.C. 20001-8306

24 (202) 371-6446

25 Reported by Stenomask and transcribed using SpeechCAT

26 Pages 1 through 23

01 information for you as well, sir.

02 THE COURT: Anything else you wanted to say on the

03 payment to Indians issue?

04 MR. STEMPLEWICZ: No, Your Honor

05 THE COURT: I'll await your report and set further

06 proceedings after I get that report. I do have one other issue

07 that I wanted to raise.

08 You want to say something else about that?

09 MR. GINGOLD: One point, Your Honor. There are a

10 number of accounts in IM trust that are not individual Indian

11 trust accounts. You've heard testimony with regard to special

12 deposit accounts.

13 THE COURT: Right.

14 MR. GINGOLD: Those are large accounts. What is

15 important here, Your Honor, is not that the account holders be

16 paid, it's that the trust beneficiaries get paid.

17 THE COURT: Right.

18 MR. GINGOLD: So whether or not there is an oil

19 company or whether or not there is an automobile company or

20 whether or not there is something else in the IM trust, the

21 priority is to pay the individual Indian trust beneficiaries

22 and not those other accounts that are improperly the IM trust,

23 Your Honor.

24 THE COURT: The other issue I wanted to raise was for

25 the plaintiffs. The court monitor indicated to me that he

01 attended a hearing in the House yesterday where Mr. Griles
02 testified along with Mr. Slonaker and that in the course of
03 that hearing one of the congressman was questioning Mr. Griles
04 about the impact of the ongoing contempt motions and that Mr.
05 Griles indicated that progress was being thwarted because I had
06 not acted on the 39 motions for individual contempt and that he
07 had asked me to act on those and I had not yet acted.
08 What I would like to suggest to the plaintiffs is
09 that you start working on a memorandum to supplement your
10 orders to show cause where you layout individual defendant by
11 individual defendant specifications of what the contempt
12 proceedings would be for those 39 people so that they each have
13 an opportunity to address what the evidence is and what you are
14 citing against any of those 39.
15 Part of what they had raised and part of why I had
16 deferred acting on that was they thought there was not enough
17 evidence cited and individual charges made against individuals
18 and I think the time has come for the plaintiffs to lay it out.
19 You saw what I did in the order to show cause to the
20 Secretary and the Assistant Secretary where I laid out what the
21 specific charge they would have to defend against was and then
22 lay out what the, in your view, the evidence that would be
23 supporting that in your amended motion for order to show cause
24 or supplemental order or supplemental motion or however you
25 want to style it.

01 I'll let each of those 39 respond and I will address
02 Mr. Griles's desire that I move quickly on that.
03 MR. GINGOLD: Your Honor, may I address the court.
04 THE COURT: Yes.
05 MR. GINGOLD: We have no problem doing that, Your
06 Honor. I would like to point out a couple of things. We have
07 some notes of Mr. Griles's testimony. He made a few statements
08 suggesting that this litigation is interfering with what they
09 are doing. As you know, Your Honor, we've heard that before
10 now for several years.
11 Your Honor, I would like to point out that it is more
12 than 39 people. We have several motions for an order to show
13 cause including the solicitor's office destruction of evidence
14 in this case.
15 THE COURT: I am working on that one at the moment so
16 I don't need anything additional on that one. And I'm working
17 on the one regarding Mona Infield but I'm talking about all the
18 other ones.
19 MR. GINGOLD: Your Honor, with regard to the other
20 ones, actually there is one which is just 39. With regard to
21 the other ones, we would also like to clarify something. When
22 we lay this out in the detail that we understand that you would
23 like, we also would like the court to entertain once the
24 information is laid out, whether or not the court should
25 recommend that the Attorney General appoint a special

01 prosecutor.

02 We have document destruction in this case that has

03 far exceeded anything in the Enron case and we believe this

04 court should view that as seriously as the Attorney General

05 views it with regard to the private sector.

06 THE COURT: Okay. But as I say, because you have 39

07 law firms in here now, you need to specify by person so that

08 each of them can respond to what the specifications would be

09 and what the evidence would be so that each of them can have an

10 opportunity to have due process.

11 MR. GINGOLD: Your Honor, we will lay it out sort of

12 in an indictment form if that's convenient.

13 THE COURT: I will take a short recess before I call

14 the next case.

15 (Proceedings concluded at 2:44 PM)

16 CERTIFICATE OF REPORTER

17 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT

18 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

19 WILLIAM D. MCALLISTER

20 OFFICIAL COURT REPORTER

21

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ALAN L. BALARAN, P.L.L.C.

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MEMORANDUM

To: All Counsel

From: Special Master Alan L. Balaran

Re: Revised Procedures and Schedule for Investigation Into Plaintiffs' Motions for Orders to Show Cause

Date: November 4, 2002

On September 17, 2002, the Honorable Royce C. Lamberth referred the following matters to the Special Master: (1) plaintiffs' October 19, 2001 Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One and (2) plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail.[1] By memorandum dated October 7, 2002, the Special Master set out a proposed schedule and rules to which he invited comment. On October 30, 2002, a case management conference was convened to discuss these comments.

Upon consideration of both the written submissions of counsel and oral representations made during the case management conference, the proposed schedule set out in the October 7, 2002 memorandum is amended as follows.

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[1] Regarding the first matter, the Court directed the Special Master to "develop a complete record with respect to these 37 non-party individuals . . . . [and] upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." Memorandum Opinion at 255 (September 17, 2002). By separate order, Judge Lamberth ordered "that the plaintiffs' motion for order to show why Interior defendants and their counsel should not be held in contempt for destroying e-mail, filed March 20, 2002, shall be referred to Special Master Balaran. Special Master Balaran shall issue a report and recommendation on the issues raised in the plaintiffs' motion." Order at 4 (September 17, 2002).

EXHIBIT 2
UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS RELATING TO PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE

SCHEDULE OF PROCEEDINGS

The Special Master will initially address those issues relevant to plaintiffs' March 20, 2002 Motion for Order to Show Cause Why Interior Alleged Contemnors and Their Counsel Should Not Be Held in Contempt for Destroying E-mail and then turn his attention to plaintiffs' October 19, 2001 Motion for Order to Show Cause with respect to each of the 37 Named Individuals. In accordance with the position urged by the majority of counsel for the Named Individuals, the Special Master will preliminarily decide whether the individual Bills of Particular warrant dismissal before initiating any discovery.

Schedule For The Investigation Regarding E-Mail Backup Tape Destruction

- November 11, 2002: Special Master issues memorandum setting out revised schedule.

- December 2, 2002: Deadline for plaintiffs to provide Bills of Particulars with respect to the following individuals named in their Motion for Order to Show Cause Why Interior Alleged Contemnors and their Counsel Should Not be Held in Contempt for Destroying E-Mail (March 20, 2002): Secretary Gale A. Norton; Assistant Secretary Neal A. McCaleb; Department of Justice attorneys Phillip A. Brooks, Charles W. Findlay III, James Simon; former Assistant Solicitor Willa Perlmutter; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.[2]

- January 6, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.

- February 17, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.

- March 3, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.

- March - April 2003: Oral arguments on Bills of Particulars – schedule to be determined.

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[2] Plaintiffs have already filed Bills of Particulars with respect to Deputy Associate Solicitor Edith Blackwell and former Deputy Solicitor Edward Cohen.

- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

Schedule for Investigation of Allegations Concerning Violation of Court Orders and Defrauding the Court in Connection with Trial One

- May 1, 2003: Deadline for plaintiffs to file Bills of Particulars with respect to the conduct of the following individuals named in their Motion for Order to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt for Violating Court Orders and for Defrauding This Court In Connection With Trial One (October 19, 2001): Former Secretary of the Interior Bruce Babbitt; Former Assistant Secretary for Policy, Management and Budget John Berry; Deputy Associate Solicitor Edith Blackwell; former Deputy Commissioner for Indian Affairs M. Sharon Blackwell; former Assistant Solicitor Michael Carr; former Deputy Solicitor Edward B. Cohen; Office of the Special Trustee Chief of Staff James Douglas; Deputy Solicitor Timothy Elliott; former Assistant Secretary for Indian Affairs Kevin Gover; Deputy Assistant Secretary for Budget and Finance Bob Lamb; former Solicitor John Leshy; former Deputy Commissioner for Indian Affairs Hilda Manuel; Assistant Solicitor Sabrina McCarthy; former TAAMS Project Manager Chester Mills; Solicitor William Myers; National Park Service Chief Information Officer Dominic Nessi; Counselor to the Secretary Michael Rossetti; Office of Trust Records Director Kenneth Rossman; Management Information System specialist Glenn Schumaker; former Chief of Staff to the Secretary Anne Shields; former Assistant Solicitor Stephen Swanson; Office of Trust Responsibility Director Terrence Virden; former Department of the Interior Chief Information Officer Daryl White; Department of Justice attorneys Phillip A. Brooks; John A. Bryson; Tom C. Clark; Peter Coppelman; James A. Eichner; Charles W. Findlay III; K. Jack Haugrud; Sarah D. Himmelhoch; John S. Most; David Shilton; David F. Shuey and James Simon; Acting Assistant Attorney General John C. Cruden; and former Assistant Attorney General Lois Schiffer. Plaintiffs' Bills of Particulars shall articulate with specificity whether the conduct alleged against each of these Named Individuals warrants the imposition of civil sanctions, criminal sanctions and/or constitutes a fraud on the court.

- June 2, 2003: Deadline for Named Individuals to file briefs explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.

- August 4, 2003: Deadline for plaintiffs to respond to briefs filed by Named Individuals explaining why the Bills of Particulars should be dismissed with respect to them.

- August 18, 2003: Deadline for Named Individuals to reply to plaintiffs' response to briefs filed by Named Individuals explaining why plaintiffs' Bills of Particulars should be dismissed with respect to them.

- September - October 2003: Oral argument on Bills of Particulars – schedule to be determined.

- Thereafter: The Special Master issues a report and recommendation to the Court regarding the legal sufficiency of the claims lodged against each of the Named Individuals.

OTHER MATTERS

I. CIVILITY

The Special Master has a responsibility not to permit attorneys to ignore the concept of civility when its disregard may hinder the quest for a just resolution of the underlying issues.[3] As was noted during the October 30, 2002 case management conference, civility has been conspicuously absent during the development of this action. These proceedings will be different. Ad hominem attacks, spurious accusations and inappropriate tactics will not be tolerated. Named Individuals will be addressed either by title and name or as a "Named Individual(s)."

II. PRIOR FINDINGS AND REPORTS

Findings stemming from proceedings in which the Named Individuals have not been afforded the opportunity to participate and/or comment will not be considered during these proceedings.

III. PROTECTIVE ORDER

With a singular exception, counsel for plaintiffs and for the Named Individuals oppose the imposition of a protective order. The Special Master concurs and will not impose any such restrictions except to note that any information, the public disclosure of which may jeopardize the security of Interior's computer systems, will be placed under seal.

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[3] Civility has been defined as "[The] decent behavior and treatment characterized by generally accepted social behavior and politeness practiced toward those with whom we come into conduct whether they be judge, lawyer, witness, or court personnel.'" Bruce S. Mencher, CIVILITY: A CASUALTY OF MODERN LITIGATION, The Washington Lawyer, Sept.- Oct. 1993, at 19, 20.

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December 4, 2002

VIA FACSIMILE
Dennis M. Gingold, Esq.
1275 Pennsylvania Ave., N.W.
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Washington, DC 20004

RE: **Cobell et al. v. Norton et al., Civil Action No. 96-1285**
Proposed Protocol for Movement of Trust Records

Dear Mr. Gingold:

This letter responds to your correspondence of this date regarding the procedures that will govern the investigation into the conduct of the 39 Named Individuals[1]:

1. Until the report and recommendation issues regarding the legal sufficiency of the claims lodged against each of the Named Individuals, no discovery will commence.

2. Any requests for additional time to file the second set of Bills of Particulars or to segregate the issues therein will require the consent of counsel for the Named Individuals or the intervention of the Court.

Sincerely,

Alan L. Balaran
SPECIAL MASTER

cc: Sandra Spooner, Esq.
Attached Distribution List

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[1] I will assume, for the last time, that my direction concerning the manner in which these individuals are to be addressed was not clear and that your referral to them as "putative contemnors" was an oversight.

DISTRIBUTION LIST - VIA FIRST-CLASS POSTAGE

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 1:96CV01285 (RCL)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

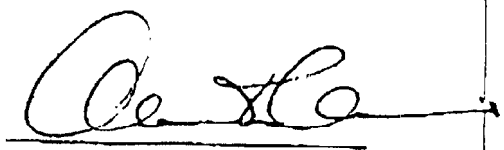
OPINION AND ORDER

This matter comes before the Special Master on Plaintiffs' Motion for Enlargement of Time to File Bills of Particulars With Respect to the Misconduct of Various Individuals Identified in Plaintiffs' Motion for Order to Show Cause, Filed October 19, 2001 ("Motion for Enlargement") and the Oppositions of the United States, John A. Bryson, Phillip A. Brooks, Sarah Himmelhoch, Michael Carr, K. Jack Haugrud, Bruce Babbitt, John Leshy, Edward Cohen, James F. Simon, John Berry, Glenn Schumaker, Lois Schiffer, Tom Clark, James A. Eichner, James Douglas, Stephen Swanson, Robert Lamb, Hilda Manuel, Timothy Elliott, M. Sharon Blackwell, Daryl White, William Myers and Dominic Nessi.

Upon review of the motions and the entire record herein, it is the opinion of the Special Master that the 37 individuals implicated in Plaintiffs' October 19, 2001 Motion for Order to Show Cause are entitled to have the issues pending for more than eighteen months adjudicated with all dispatch. Accordingly, plaintiffs' Motion for Enlargement be and hereby is

DENIED.

SO ORDERED.



Alan L. Balaran
SPECIAL MASTER

DATE: April 24, 2003

EXHIBIT 4
UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS RELATING TO PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
2
3
ELOUISE PEPION COBELL, et al., :
4 :
Plaintiffs : Civil Action No. 96-1285
5 :
v. : Washington, D.C.
6 :
SECRETARY OF THE INTERIOR : Thursday, March 3, 2005
7 et al., :
:
8 Defendants : 10:00 a.m.
:
9 X
10
11 TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE ROYCE C. LAMBERTH
12 UNITED STATES DISTRICT JUDGE
13
14 APPEARANCES:
15
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EXHIBIT 5
UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS RELATING TO PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE

1 are not fit to practice before this Court. That's the
2 prerogative of the Attorney General. We don't care about
3 whether the Solicitor's Office will continue to undermine the
4 litigation and help retaliate against Interior officials who
5 tell the truth to this Court, and we don't care if the Secretary
6 of the Interior has declared war on our clients. We want to get
7 to a resolution of this case on the merits. Nearly nine years
8 is too long. Our clients are dying; more will die tomorrow. We
9 have to get a resolution and treat them fairly.
10 The record is -- there is no stronger and more
11 disgusting record you will see in this district than the record
12 that the Government has presented before you. There is no more
13 disrespect for a United States District Court judge than any of
14 us have ever seen than the disrespect they have demonstrated to
15 you, and with that, their utter disdain for the fiduciary duties
16 that they owe our clients, and have owed them for 118 years.
17 Your Honor, enough. We've got to stop this. We've got
18 to make sure what happens is done properly. We would easily
19 forego contempt and allow these people to continue their lives
20 without any further interference from us if we can go to a trial
21 on the merits. We believe the corruption in the data and the
22 systems, and their absolute dishonesty with regard to their
23 declared accounting duty and their declared obligations to
24 protect the data, we believe everything they've told you about
25 that is a lie, and we've identified in detail with

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1 documentation, including perjurious testimony by government
2 witnesses in that regard.
3 Your Honor, we are prepared to spend the next several
4 years in this Court involved in litigating contempt and
5 assisting in the prosecution of criminal contempt. We believe,
6 however, we want to get to the end of this. We want to get to
7 the trial and a judgment on the merits. We want justice for our
8 clients. It's been a long time.
9 The Government is going to argue they don't understand
10 what they've done wrong, that it could be misinterpreted, that
11 judgments were made that turned out to be wrong. Your Honor, if
12 any of them read the deplorable history, observed the testimony
13 of their own witnesses, the admission of Kevin Gover that we're
14 going to perpetuate the myth until reality sets in, the every --
15 this Court pointed out quite clearly every single government
16 official has testified and said, we're going to take care of
17 this tomorrow, and waits until the next administration, because
18 it's the next administration that might take care of it. This
19 isn't a Republican or Democratic issue.
20 And indeed, I might point out that since this Court
21 reissued its structural injunction, the Secretary has testified
22 before both the Senate Energy Committee and the House Resources
23 Committee, raised and complained about the structural
24 injunction, complained that the burdens imposed by the Court
25 were even greater than they had been before, ignoring completely

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1 Tribal Trust, let alone even begin to look at the individual
2 trust, because too many documents have been destroyed and the
3 database is so corrupted.
4 Your Honor, this is not a Kabuki game. There are lives
5 at stake. But Your Honor, we would forgo contempt to move
6 forward with a Phase II trial promptly - I would suggest
7 June 10th of this year - to move forward with receivership, get
8 to the end of this. Not a single lawyer who has lied to you in
9 the past, as far as we're concerned - it's up to the Court to
10 deal with those people as it chooses - would be the target of
11 anything we're trying to do in the future because they don't
12 matter anymore. We care about one thing only, our clients. And
13 if people are harming our clients, we want it to stop.
14 And as this Court pointed out to everybody in this
15 courtroom at counsel table in 1997, if this Court's orders
16 aren't obeyed, everyone should know he will put people in jail.
17 Financial sanctions don't mean anything, Your Honor. They
18 haven't. Evidentiary and issue preclusion could very well mean
19 something, Your Honor. If we can fashion, for example, some
20 relief with the Treasury Department, who has been dealing with
21 us honestly since June 2nd, 2000 -- and I might give you a
22 footnote on that.
23 This Court might recall the absolute perjurious
24 representations made to the Court about the GAO settlements of
25 account. Notwithstanding the fact that at the same time the

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1 counsel. But Your Honor, it's time we move forward. They ask
2 for speedy action and then they block the Special Master from
3 going forward. They complain there's no specificity, and they
4 don't want any more information.
5 Give us the right to take discovery, Your Honor, give
6 us the right to go forward in this, and we will demonstrate to
7 you who is at fault and who isn't, and how the good and the bad
8 should be separated. We don't want to put people on the stand
9 or try them if they're not guilty. We believe the evidence is
10 so clear and so equivocal that it exists to proceed today with a
11 contempt trial with everyone who has been named, based on the
12 standards for contempt in this circuit, the established findings
13 of this Court in the Norton contempt, based on the record of
14 documentation that hasn't been destroyed.
15 But Your Honor, we want this to stick and we want this
16 to stick with these people for the rest of their lives; that is,
17 unless we can go to trial on the merits in Phase II and we can
18 go to a receivership, because then we don't care what happens to
19 those people. Thank you very much.
20 THE COURT: What is it you're envisioning for the trial
21 two if you were to try it this summer?
22 MR. GINGOLD: Your Honor, as the Government itself
23 argued recently in the Philip Morris case with regard to
24 spoliation, we believe a tremendous amount of the information in
25 its databases is now no longer usable because of the massive

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1 conclusion.
2 In addition to the CFR issues that I mentioned, the
3 36 CFR 1234.36 and 1220.14, the compensatory sanctions that
4 exist in civil contempt include issue and evidentiary sanctions.
5 And this is official capacity. By demonstrating what I'm
6 stating this morning, we are also entitled to those same
7 sanctions, and that will also allow us to go forward with regard
8 to a Phase II trial and demonstrate the inadmissibility of
9 anything the Government purports to be evidence of their
10 accounting.
11 Your Honor, everything they have done in that regard is
12 pernicious, including using statistical sampling for what is
13 characterized by the former acting Special Trustee, Tom
14 Thompson, as a low-lying fruit. Judgment funds, you don't have
15 to go back to the land records, you don't have millions of
16 transactions. And what did they use for that? Statistical
17 sampling. They didn't even use an accounting for each
18 transaction, and they didn't use an accounting for each Trust
19 beneficiary. Indeed, their own experts provided memoranda that
20 said, we don't even know who the Trust beneficiaries are. We
21 need verification.
22 Your Honor, you have demonstrated the patience that
23 none of us at plaintiffs' table have ever seen before. We think
24 the structural injunction that you structured was designed to
25 protect the Government. You are telling them what they needed

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1 to minimize or reduce their liability. If they did that, they
2 would have been able to discharge their duty to you and minimize
3 their liability. But Your Honor, they won't do it. They didn't
4 do it. They won't even have the courtesy to come back to this
5 Court today to tell you under paragraph five of the reissued
6 injunction that by the way, there is something that might affect
7 our ability to do it, and that's a discussion that the Secretary
8 had with members of Congress yesterday where they're talking
9 about reenacting a midnight rider.
10 Your Honor, that's precisely what the imperative
11 language requires them to tell you. We didn't see a notice to
12 the Court filed yesterday and we didn't see anything filed this
13 morning. It will be very interesting to hear how they describe
14 it to you today. But Your Honor, there is no order, there's no
15 provision of any order, there's no law, there's no regulation,
16 there's no rule that they haven't violated and are continuing to
17 violate today.
18 Your Honor, while civil contempt can't reverse a delay,
19 we can certainly make sure it doesn't continue. And if the
20 Government wants to consent to go forward with Phase II trial on
21 June 10th, we don't need to do it. If we can apply the law with
22 regard to the evidentiary and issue sanctions that exist and we
23 can brief those issues, we don't have to go through contempt.
24 And Your Honor, these are not collateral proceedings. This is
25 the integrity of this litigation itself. If there is no

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TESTIMONY OF ELOUISE C. COBELL, LEAD PLAINTIFF IN *COBELL V. NORTON*

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

OVERSIGHT HEARING ON TRUST REFORM

MARCH 9, 2005

EXHIBIT 6
UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR
ENLARGEMENT OF TIME TO FILE BILLS OF PARTICULARS
RELATING TO PLAINTIFFS' MOTIONS FOR ORDER TO SHOW CAUSE

> As this case approaches its ninth year, it is this Court's hope that the defendants' next appeal will be truly expedited, and will lead to the resolution of these legal issues. Elderly class members' hopes of receiving an accounting in their lifetimes are diminishing year by year by year as **the government fights – and re-fights – every legal battle**. For example, the defendants continue to contend today that this is a simple record-review Administrative Procedures Act case – a proposition that has been squarely rejected by this Court on more than one occasion, as well as by three different Court of Appeals panels in *Cobell VI, Cobell XII,* and *Cobell XIII.*
>
> **In this case the government has not only set the gold standard for mismanagement, it is on the verge of setting the gold standard for arrogance in litigation strategy and tactics.**[5]

It is these insidious litigation tactics by the government that have led to numerous contempt proceedings[6] and our calls in 2001 for a receivership. Let me be clear on this point, the record amply supports the conclusion that the Interior Department does not have the political will or the institutional competence to reform itself. A receiver – temporarily appointed during the pendency of reform – with the requisite competence and charged with, and singularly focused on, instituting reforms that permit the safe and sound management and administration the Individual Indian Trust is, in my view, the sole way to **ensure** reform will occur.

But I also understand that the government is highly resistant to the receivership approach and has called it a "non-starter." So while plaintiffs will continue to pursue this relief, among others, through judicial proceedings, I understand that this is not likely an acceptable avenue to attain the requisite political support for settlement legislation. It is with this baseline

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[5]*Cobell v. Norton*, __ F. Supp. 2d __, 2005 WL 419293 at *7 (D.D.C. February 23, 2005) (emphasis added).

[6]While plaintiffs would prefer not to have to resort to contempt, we have been left with no alternative in light of the government's persistent violation of court orders and other serious misconduct. In addition, we note, that we have offered to drop all contempt charges if the government would agree to stop its obstructionist behavior and consent to a prompt accounting trial date. To date, the government has not accepted this offer.

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 comes before the Court on *Plaintiffs' Motion for Enlargement of Time to File Bills of Particulars with Respect to Various Individuals Identified in Plaintiffs' Motions for Order to Show Cause,* Dkt # 2875. Upon consideration of Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, the applicable law and the entire record of this case, it is hereby

ORDERED that the Motion is DENIED.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____

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