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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION TO PROTECT ANY INDIVIDUAL INDIAN TRUST DATA

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, Interior Defendants respectfully submit the following opposition to Plaintiffs' Motion for a Preliminary Injunction to Protect Any Individual Indian Trust Data ("PI Motion").

I. Plaintiffs Have Not Established a Legal Basis for This Court to Grant the Preliminary Injunctive Relief Sought in Their Motion

In considering whether to grant plaintiffs' application for a preliminary injunction, this Court must examine (1) whether there is a substantial likelihood that the plaintiffs will succeed on the merits, (2) whether the plaintiffs will suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the Government, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Brotherhood of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n. 2 (D.D.C. 2001).

Plaintiffs' PI Motion fails to establish a legal basis for this Court to exercise its extraordinary powers to issue a preliminary injunction. As we explain below, the PI motion provides no basis for this Court to conclude that any of the four legal elements to be considered for the granting of a preliminary injunction have been met. Moreover, while the PI motion is replete with the all-too-familiar hyperbole and irrelevant ad hominem attacks upon every conceivable Government employee, to the extent the motion addresses the legal requirements for a preliminary injunction, plaintiffs only provide arguments for the issuance of a preliminary injunction as to the limited move of records from Albuquerque to the Federal Records Center in Lee's Summit, Missouri. Any claimed need for such relief, however, was mooted prior to plaintiffs' filing their request for a temporary restraining order, when the Deputy Secretary directed that the move not take place. Attachment A.[1] Thus, a reasoned and dispassionate review of PI's Motion confirms that plaintiffs have not and cannot satisfy the legal standard for entry of a preliminary injunction.

A. Plaintiffs Have Not Established a Substantial Likelihood of Success on the Merits

This particular chapter in this litigation was precipitated by the plaintiffs' request for a temporary restraining order, based upon the Emergency Report of the Special Master Regarding Defendant's Proposed Relocation of Records to the Lee's Summit Federal Records Center (filed Apr. 17, 2002) ("Emergency Report"). Plaintiffs' Emergency Motion for Temporary Restraing Order (filed Apr. 17, 2002) ("TRO Motion"). While plaintiffs filed a subsequent application for extension of the TRO (which this Court granted by its Order filed on May 3, 2002) and the PI

[1] Except where otherwise noted, "Attachment" refers to a document attached to this opposition to the PI Motion.

Motion, plaintiffs have never filed a complaint seeking permanent injunctive relief with regard to the relocation of records to Lee's Summit or any other federal records center. Thus, on the face of their pleadings alone, plaintiffs fail to describe any permanent relief as to which they would have a substantial likelihood of success in obtaining on the merits.

In describing how plaintiffs allegedly satisfy this first requirement for the issuance of a preliminary injunction, plaintiffs essentially rely upon the Special Master's Emergency Report. PI Motion at 8-11. This, again, is restricted to the proposed transfer of documents from Albuquerque to Lee's Summit, a proposed transfer which was already placed on hold, at the direction of the Deputy Secretary of the Interior. As we explained in our initial opposition to plaintiffs' TRO Motion, this Court did not need to exercise its extraordinary injunctive powers because, prior to plaintiffs' filing their TRO Motion, Interior had already determined not to proceed with the proposed transfer. Attachment A; see Interior Defendants' Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order (filed Apr. 18, 2002) ("Opposition to TRO Motion) at 2-4 and Attachment A to Opposition to TRO Motion, pages A-2 to A-4.

In fact, the Deputy Secretary's directive, issued prior to the filing of the TRO Motion confirmed that the Interior Department's Office of the Secretary was in consultation with the Special Master regarding the records program and concluded by stating:

> Given the historical concerns about records retention and protection, I believe that it is imperative that we be extremely careful to ensure trust records are protected and preserved. I want to make sure that the Special Master is properly and timely

informed and that he has every opportunity to resolve concerns prior to the Department taking irreversible actions.

Attachment A. The Deputy Secretary's directive remains in place today.[2]

The plaintiffs cannot meet the burden of establishing a substantial likelihood of success on the merits. Indeed, to date, plaintiffs have not even bothered to articulate what those "merits" would constitute because they have failed to seek any form of permanent injunctive relief as to any transfers of documents.

B. Plaintiffs Will Not Suffer Irreparable Harm If the Court Denies Their Request for a Preliminary Injunction

Just as plaintiffs have failed to articulate any form of permanent injunctive relief sought in their pleadings, plaintiffs have failed to articulate any form of irreparable harm not already addressed by Deputy Secretary Griles' pre-TRO directive. Rather, their PI Motion, again, relies upon the Special Master's Emergency Report as proof of its alleged irreparable harm. PI Motion at 12-15.

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[2] A memorandum initially distributed by Deputy Commissioner Blackwell, discussed in plaintiffs' emergency notice filed with the Court on May 8, 2002, did not rescind Deputy Secretary Griles' directive. In fact, the memorandum stated, in the second paragraph, "Please be reminded that the Deputy Secretary's memo of April 16, 2002 continues to govern the movement of records containing individual Indian trust data." Attachment to Plaintiffs' Emergency Notice (filed May 8, 2002).

Deputy Commissioner Blackwell's memorandum reflected a misunderstanding resulting from the fact that the Court's extension of the TRO was not filed until May 3, 2002. This misunderstanding was addressed immediately upon the Interior Department's being informed of the extension of the TRO. We have attached a declaration from Ms. Sabrina McCarthy, Interior Department Solicitor's Office, addressing the chronology of Deputy Commissioner Blackwell's memorandum. This declaration further confirms that as soon as Ms. McCarthy learned about the Court's extension of the TRO, she orally informed Interior employees about the extension and, further, that a clarifying memorandum from Deputy Commissioner Blackwell was distributed, as well, on May 8, 2002. Attachment B.

The indisputable evidence demonstrates that regardless of whether the Interior Defendants fully agree with the Special Master's Emergency Report – and there plainly are areas of disagreement – the Interior Department has acted responsibly to address the Special Master's concerns and has done so through timely consultation with the Special Master. Plaintiffs cannot establish any potential irreparable harm if the Court denies the PI Motion.

C. The Preliminary Injunction Would Substantially Injure the Government and Would Not Serve the Public Interest

While plaintiffs devote page-upon-page of their PI Motion to inflammatory attacks upon the Interior Department and its many employees, the PI Motion devotes less than two pages to the third and fourth elements required for entry of a preliminary injunction. There is a simple explanation for the dirth of arguments regarding injury to the Government and the public interest of the proposed injunctive relief: the proposed preliminary injunction is overly broad, designed to undermine the effective operations of the Interior Department, and is plainly harmful to the interests of the public.

The proposed preliminary injunction would bar the Secretary of the Interior Department and her employees and agents from taking any "action to transfer or relocate any trust records containing any individual Indian trust data ('Trust Records') without prior notice to the Court, and without the prior written approval of the Special Master." PI Motion, Proposed Preliminary Injunction. While the proposed preliminary injunction proceeds to set forth limited exceptions for certain duplicates, checks, and negotiable instruments, it plainly encompasses a vast body of original records, none of which will be transferrable until the Special Master has provided his written approval for the records to be transferred.

The proposed preliminary injunction would chill the ability of Interior Department employees to perform their duties: no Interior Department employee could feel legally permitted to move an original document within a building or use an original document for a routine business purpose without first asking for and obtaining the Special Master's written approval. Surely, this is not what the Court envisioned when it appointed a Special Master in this litigation. This is a draconian formula for introducing wholly unjustifiable waste into the operations of both the Interior Department and the Special Master.

Moreover, whatever concerns plaintiffs may have with regard to historic records, based upon the Special Master's Emergency Report, such concerns cannot provide a basis for placing a stranglehold upon the operations of the Interior Department or for creating a new burden for the Special Master. The plaintiffs' PI Motion should be denied because it clearly injures the Government and is contrary to the public interest. E.g., Macht v. Skinner, 715 F. Supp. 1131, 1137 (D.D.C.) (denying extraordinary remedy of preliminary injunctive relief where injunction would harm public and would be contrary to public interest), aff'd mem., 889 F.2d 291 (D.C. Cir. 1989).

II. The Court Should Deny Plaintiffs' PI Motion Because the Relief Sought Would Be Grossly Injurious to the Public Interest, Including Members of Plaintiffs' Class, and the Effective Operations of the Government

As we have explained above, plaintiffs cannot satisfy their burden for entry of the preliminary injunction sought in their motion. As a result of the entry of the TRO, the operations of the Interior Department have already been hamstrung, and in some cases, this has impacted even members of the plaintiffs' class. This fact can be gleaned from a review of the various

activities stopped by the TRO until Interior Defendants identified problems and filed notices regarding necessary document transfers following the TRO's entry. See Notice (filed May 3, 2002) and Notice (filed May 9, 2002) (copies attached as Attachments C and D); see also Interior Defendants' Status Report Regarding Documents (filed May 1, 2002). Now, plaintiffs wish to add yet another barrier to the Interior Department's ability to carry out its legal obligations and responsibilities by inserting the Special Master as a party who must provide written approval for any contemplated document transfers.

It bears repeating that the genesis of this chapter in this litigation was the Special Master's Emergency Report, in which he raised concerns about the Interior Department's plans to transfer documents to a federal records center in Lee's Summit, Missouri. As a product of Interior Defendants' interactions with the Special Master, Deputy Secretary Griles had already rescinded that planned transfer before plaintiffs filed their application for a TRO. With that planned transfer placed on hold, pending resolution of the Special Master's concerns, Attachment A, plaintiffs now seek to bar the transfer in any Interior Department office of virtually any trust record containing individual Indian trust data. Such a request goes far beyond any concern identified by the Special Master's Emergency Report and cannot be reconciled with any notion of the interests of the public.[3]

Conclusion

Plaintiffs' PI Motion is wholly without merit, given the concerns of the Special Master's

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[3] At the very least, in the event the Court concludes that it will grant some form of preliminary injunctive relief, the public interest unquestionably requires that the Court exempt from its coverage all routine Interior Department activities required for the administration of Individual Indian Money accounts, including the transfer and movement of Trust Records for such purposes.

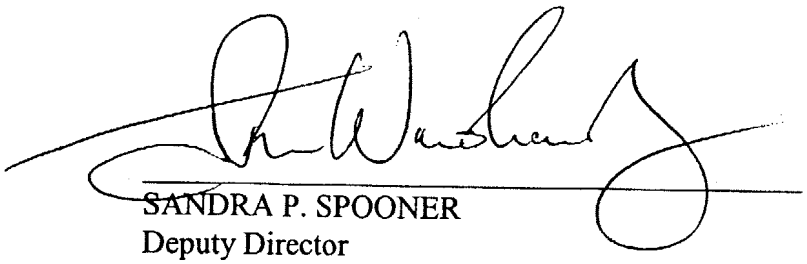
Emergency Report, the response of Interior Defendants, and the public's interest in receiving the services that the Interior Department is legally obligated to provide. For the foregoing reasons, plaintiffs' Motion for a Preliminary Injunction to Protect Any Individual Indian Trust Data should be denied.

Respectfully submitted,

ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



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May 14, 2002

United States Department of the Interior

THE DEPUTY SECRETARY
Washington, D.C. 20240

APR 16 2002

MEMORANDUM

To: Tom Slonaker
Special Trustee for American Indians

Neal McCaleb
Assistant Secretary, Indian Affairs

From: J. Steven Griles
Deputy Secretary

Subject: Indian Trust Records Management

As you know, we have records retention requirements associated with our ongoing trust obligations and our commitments to the Court in the Cobell v. Norton litigation. It is imperative that we identify, manage, protect and preserve both individual Indian and Tribal records. I have been informed that the Special Master has expressed grave concerns about our Indian trust records management program. Separately, the Associate Deputy Secretary has identified issues (e.g., insufficient planning for future records requirements, chain of custody accountability, inventory sufficiency, etc.) that warrant further senior management attention.

I want to evaluate closely the issues and concerns that have been expressed by the Special Master and the Associate Deputy Secretary. Indian trust records are one cornerstone of our trust management program, hence we must exercise due diligence and great care to address any threats or opportunities involving these trust assets.

The movement of these records has been raised as one significant concern. To address this issue, **OST and BIA are directed to maintain records, both Tribal and individual, in their current geographic locations, pending future direction from the Office of the Secretary on the disposition of inactive records.** Of course, routine use and intra-office movement of active records is permitted. In addition, any relocation of "Paragraph 19" documents continues to require the approval of the Cobell document production coordinator.

In particular, OST had announced an intent to relocate approximately 32,000 cubic feet of records from Albuquerque, New Mexico, to Lee's Summit, Missouri. These records are to remain in their current location until we have adequately addressed the concerns raised by the Associate Deputy Secretary and the Special Master. Since these records are to remain in place for the foreseeable future, the underlying premise of the notification letter from Dean Brinker, OST Personnel Management Specialist, to Mr.

Ziemer, Indian Educators Federal, AFT, AFL-CIO, has clearly changed. Therefore, until relevant aspects of the Indian trust records management program are evaluated and further direction is provided by the Office of the Secretary, the Division of Research, Litigation and Settlement and the Branch of Records Service Centers will need to continue operations.

The movement of records between BIA locations, OST locations and Lee's Summit is to be suspended immediately. If, as of the date of this memorandum, records are currently in transit, please complete the delivery to the intended location and provide me with immediate notification regarding the transit schedule and inventory of records being moved.

In addition, it appears that records placed in storage may be subject to a routine destruction schedule. It is unclear whether the records have been sufficiently separated, indexed and labeled to ensure no relevant Indian trust documents are destroyed inadvertently. **While we review the records management program more closely, please ensure that document destruction schedules are suspended.**

The Office of the Secretary, in consultation with the Special Master, will independently re-examine the records program to clarify our programmatic needs. To begin that process, please assemble comprehensive documentation regarding:

- the types and volumes of Indian trust records located at each BIA, OST or other Federal records repository. Further guidance, clarifying desired information, will be issued in the near future.

- any plan to relocate Indian trust records between geographic locations. In addition, provide documentation regarding the relocation of records since January 1, 1999, to present; include source location, destination, record volumes and types and chain of custody information.

- how Indian trust records will be made accessible, from these locations, for various anticipated purposes such as historical accounting, land management, ownership & title deliberations, and research requests from agency or area offices.

- records management policies and procedures, records-related agreements between BIA & OST and any plans demonstrating goals, objectives, tasks and subtasks associated with records management. In addition, please provide documentation regarding the organizations and personnel having records management responsibilities at each location where relevant Indian trust records are held.

- the suitability of records storage facilities at each location and the security measures employed to ensure that no documents are lost, stolen or

destroyed.

Given the historical concerns about records retention and protection, I believe that it is imperative that we be extremely careful to ensure trust records are protected and preserved. I want to make sure that the Special Master is properly and timely informed and that he has every opportunity to resolve concerns prior to the Department taking irreversible actions.

Thank you for your time and effort to respond to these concerns. Please let me know if you have any questions or concerns about these records management issues.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

No. 1:96CV01285 RCL

DECLARATION OF SABRINA A. MCCARTHY

I, Sabrina A. McCarthy, hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. Since I began employment as an attorney in the Solicitor's Office of the Department of the Interior in May 1999, I have been assigned to work on the Cobell v. Norton case. My current position is Assistant Solicitor, Branch of Trust Reform and Litigation, Division of Indian Affairs. In that capacity, I provide legal advice and counsel to Department of the Interior officials concerning this case. I have previously given declarations and one deposition in this case.

2. On April 26, 2002, I prepared a draft directive on the effect of the Temporary Restraining Order of April 18, 2002, entered by the U.S. District Court for the District of Columbia in the Cobell v. Norton case ("Temporary Restraining Order"). The draft directive concerned BIA business processes under 25 C.F.R. §150.6. On April 26, 2002, I delivered the draft directive to the office of the Deputy Commissioner of Indian Affairs. A copy of the draft directive is attached as Exhibit A.

3. On April 26, 2002, the Deputy Commissioner of Indian Affairs issued a directive on

Attachment B

Trust Records. A copy of the directive is attached as Exhibit B.

4. On May 3, 2002, I prepared a memorandum to the Deputy Commissioner of Indian Affairs and a draft directive on the expiration of the Temporary Restraining Order. During the day on May 3, 2002, I was in touch with the Justice Department to ascertain whether the Temporary Restraining Order had been extended and whether the Court had acted on Plaintiffs' Application to extend. When I left the office for the day, at approximately 2:00 p.m. on Friday, May 3, 2002, I had not heard that the Temporary Restraining Order had been extended by Order of the Court, dated May 2, 2002, and filed May 3, 2002. As I left the office for the day, I delivered the memorandum and the draft directive I had prepared to the office of the Deputy Commissioner of Indian Affairs. A copy of the memorandum is attached as Exhibit C, and a copy of the draft directive is attached as Exhibit D.

5. On May 3, 2002, the Deputy Commissioner of Indian Affairs issued a directive on the expiration of the Temporary Restraining Order of April 18, 2002. A copy of the directive is attached as Exhibit E.

6. On May 7, 2002, I prepared a draft directive on the extension of the Temporary Restraining Order. On May 7, 2002, I delivered the draft directive to the office of the Deputy Commissioner of Indian Affairs. A copy of the draft directive is attached as Exhibit F.

7. Since extension of the Temporary Restraining Order, I have informed Department of the Interior employees, both at headquarters and in the field, and both orally and in writing, that the Temporary Restraining Order has been extended and is in effect.

8. I have never had an intention to "flout this Court's orders" or to "place irreplaceable trust records at risk of loss or destruction," as suggested on page 1 of *Plaintiffs' Emergency*

Notice of Supplemental Authority in Support of Plaintiffs' Consolidated Motion for a Preliminary Injunction to Protect All Trust Records Containing any Individual Indian Trust Data and Reply to Interior Defendants' Opposition to Plaintiffs' Application for Extension of Temporary Restraining Order, dated May 8, 2002.

9. On May 8, 2002, the Deputy Commissioner of Indian Affairs issued a directive on the extension of the Temporary Restraining Order. A copy of the directive is attached as Exhibit G.

I hereby declare and affirm under the penalties of perjury that the foregoing is, to the best of my knowledge, true and correct.

Sabrina A. McCarthy

Date: May 14, 2002

Attachments A-G

This memo directs BIA personnel and contractors to immediately discontinue the process set forth under 25 C.F.R. §150.6 of mailing or otherwise transmitting original documents, signed duplicates or certified copies of documents to LTROs for recording. LTROs are likewise directed to immediately discontinue the process set forth under 25 C.F.R. §150.6 of returning documents to the originating offices, following the recording process.

This directive is necessary because of a Temporary Restraining Order entered by the U.S. District Court for the District of Columbia on April 18, 2002. The Order requires that:

> "the Interior Department shall take no action to transfer or relocate any trust records containing any individual Indian Trust data ("Trust Records") without the prior notice to the Court and the Special Master. To the extent that Trust Records have been transferred or relocated at any point in time, the defendants shall take all steps necessary to ensure that Trust Records are preserved and retained[.]"

The Department intends to seek permission from the Court to resume normal business processes under 25 C.F.R. Part 150. This directive remains in force until such permission is granted.

Please ensure that this memo is distributed to appropriate BIA personnel and contractors.

Exhibit A

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

APR 26 2002

To: Regional Directors
Central Office Directors

From: Deputy Commissioner of Indian Affairs

Subject: Trust Records

This memorandum directs Bureau of Indian Affairs' (BIA) personnel and contractors to immediately discontinue the process set forth under 25 C.F.R. § 150.6 of mailing or otherwise transmitting original documents, signed duplicates or certified copies of documents to LTROs for recording. LTROs are likewise directed to immediately discontinue the process set forth under 25 C.F.R. § 150.6 of returning documents to the originating offices, following the recording process.

This directive is necessary because of a Temporary Restraining Order entered by the U.S. District Court for the District of Columbia on April 18, 2002. The Order requires that:

> "...the Interior Department shall take no action to transfer or relocate any trust records containing any individual Indian Trust data ("Trust Records") without the prior notice to the Court and the Special Master. To the extent that Trust Records have been transferred or relocated at any point in time, the defendants shall take all steps necessary to ensure that Trust Records are preserved and retained[.]"

The Department intends to seek permission from the Court to resume normal business processes under 25 C.F.R. Part 150. This directive remains in force until such permission is granted.

Please ensure that this memorandum is distributed to appropriate BIA personnel and contractors.

Exhibit B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Memorandum

To: Deputy Commissioner of Indian Affairs
From: Sabrina A. McCarthy
Date: May 3, 2002
Subject: Temporary Restraining Order of April 18, 2002 and Transmission of Trust Records

This memorandum advises that the Cobell v. Norton Court's Temporary Restraining Order of April 18, 2002 expired on May 2, 2002, and that the Deputy Secretary's memo of April 16, 2002 continues to govern the movement of records containing individual Indian trust data. The April 18 Temporary Restraining Order had ordered that "the Interior Department shall take no action to transfer or relocate any trust records containing any individual Indian trust data ("Trust Records") without the prior notice to the Court and the Special Master." The Deputy Secretary's memo permits "routine use and intra-office movement of active records." It prohibits the movement of inactive trust records from "their current geographic locations" to another storage facility and the destruction of any records in storage.

Please also be advised that, on May 2, 2002, Plaintiffs in Cobell v. Norton filed Plaintiffs' Application for Extension of Temporary Restraining Order, with a proposed order to extend the April 18, 2002 Temporary Restraining Order for an additional 10 days. On May 2, 2002, the government filed Interior Defendants' Opposition to Plaintiffs' Application for Extension of Temporary Restraining Order. The Justice Department advises that the Court did not act on Plaintiffs' Application yesterday.

On May 3, 2002, Plaintiffs in Cobell v. Norton transmitted to the Justice Department Plaintiffs' Consolidated Motion for a Preliminary Injunction to Protect All Trust Records Containing Any Individual Indian Trust Data and Reply to Interior Defendants' Opposition to Plaintiffs' Application for Extension of Temporary Restraining Order. As of now, we do not know whether this Motion has been filed with the Court.

Copies of Plaintiffs' Application, Interior Defendants' Opposition, and Plaintiffs' Motion are attached. Because the Temporary Restraining Order of April 18, 2002 has expired, it no longer restricts the movement of trust records for any purpose. We will keep you informed as to whether the Court acts on Plaintiffs' motion for a preliminary injunction. We do not expect that the Court will act now on Plaintiffs' Application for Extension of Temporary Restraining Order, since the Temporary Restraining Order has expired.

Please call me at 202-219-2139 if you have questions.

Exhibit C

Memorandum

To: Regional Directors
Central Office Directors

From: Deputy Commissioner of Indian Affairs

Subject: Expiration of Temporary Restraining Order of April 18, 2002

This memorandum directs that Bureau of Indian Affairs (BIA) personnel and contractors may resume "routine use and intra-office movement of active records" containing individual Indian trust data. This includes use and movement of both original records and copies of records. The Justice Department has advised that the Cobell v. Norton Court's Temporary Restraining Order of April 18, 2002 expired on May 2, 2002.

Please be reminded that the Deputy Secretary's memo of April 16, 2002 continues to govern the movement of records containing individual Indian trust data. The Deputy Secretary's memo permits "routine use and intra-office movement of active records." It prohibits the movement of inactive trust records from "their current geographic locations" to another storage facility and the destruction of any records in storage.

The April 18 Temporary Restraining Order had ordered that "the Interior Department shall take no action to transfer or relocate any trust records containing any individual Indian trust data ("Trust Records") without the prior notice to the Court and the Special Master." Because the Temporary Restraining Order of April 18, 2002 has expired, it no longer restricts the movement, for any purpose, of records containing individual Indian trust data.

Please be sure that this memorandum is distributed to appropriate BIA personnel and contractors.

Legal questions may be directed to Sabrina McCarthy in the Solicitor's Office at 202-219-2139.

Exhibit D

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 0 3 2002

Memorandum

To: Regional Directors
Central Office Directors

From: Deputy Commissioner of Indian Affairs

Subject: Expiration of Temporary Restraining Order of April 18, 2002

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Please be reminded that the Deputy Secretary's memo of April 16, 2002 continues to govern the movement of records containing individual Indian trust data. The Deputy Secretary's memo permits "routine use and intra-office movement of active records." It prohibits the movement of inactive trust records from "their current geographic locations" to another storage facility and the destruction of any records in storage.

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Please be sure that this memorandum is distributed to appropriate BIA personnel and contractors.

Legal questions may be directed to Sabrina McCarthy in the Solicitor's Office at 202-219-2139.

Exhibit E

Memorandum

To: Regional Directors
Central Office Directors

From: Deputy Commissioner of Indian Affairs

Subject: Extension of Temporary Restraining Order of April 18, 2002

This memorandum directs that Bureau of Indian Affairs (BIA) personnel and contractors must immediately discontinue transmission of original trust records from one office to another, until further notice. On May 3, 2002, an Order granting Plaintiffs' Application for Extension of Temporary Restraining Order in the Cobell v. Norton case was filed in the U.S. District Court for the District of Columbia. The Order extends the Temporary Restraining Order issued April 18, 2002 for an additional 10 days. For purpose of complying with the Order, original trust records are any original records containing any individual Indian trust data.

This memorandum also directs that BIA personnel and contractors may transmit copies of trust records from one office to another, in the ordinary course of business. For purpose of complying with the Order, copies of trust records include facsimiles, photocopies, and carbon copies of original trust records.

Please be reminded that the Deputy Secretary's memo of April 16, 2002 continues to govern the movement of records containing individual Indian trust data. The Deputy Secretary's memo permits "routine use and intra-office movement of active records." It prohibits the movement of inactive trust records from "their current geographic locations" to another storage facility and the destruction of any records in storage.

Please ensure that this memorandum is distributed to appropriate BIA personnel and contractors.

Legal questions may be directed to Sabrina McCarthy in the Solicitor's Office at 202-219-2139.

Exhibit F

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 8 2002

Memorandum

To: Regional Directors
Central Office Directors

From: Deputy Commissioner of Indian Affairs

Subject: Extension of Temporary Restraining Order of April 18, 2002

This memorandum directs that Bureau of Indian Affairs (BIA) personnel and contractors must immediately discontinue transmission of original trust records from one office to another, until further notice. On May 3, 2002, an Order granting Plaintiffs' Application for Extension of Temporary Restraining Order in the Cobell v. Norton case was filed in the U.S. District Court for the District of Columbia. The Order extends the Temporary Restraining Order issued April 18, 2002 for an additional 10 days. For purpose of complying with the Order, original trust records are any original records containing any individual Indian trust data.

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Please ensure that this memorandum is distributed to appropriate BIA personnel and contractors.

Legal questions may be directed to Sabrina McCarthy in the Solicitor's Office at 202-219-2139.

Exhibit G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

NOTICE

4

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") hereby provide notice to the Court and the Special Master[1] that the Department of the Interior intends to "transfer or relocate . . . trust records" in the following manner:[2]

1. Original probate orders issued by Administrative Law Judges and Attorney Decision Makers of the Office of Hearings and Appeals will be sent to Land Titles and Records Offices (LTROs) in accordance with 43 C.F.R. Part 4;

2. Original trust title documents will be submitted by agency offices and other entities to LTROs for recording purposes and then returned to the originating offices;

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[1] The Temporary Restraining Order entered by the Court on April 18, 2002, and extended by Order signed May 2, 2002, orders the "Interior Department [to] take no action to transfer or relocate any trust records containing individual Indian Trust data ("Trust Records") without prior notice to the Court and the Special Master."

[2] This notice is provided in an abundance of caution and is not intended to waive any argument that the activities listed in this notice are not covered by the Court's orders. By letter of April 30, 2002 (Exhibit A), the Interior defendants advised the Special Master and plaintiffs' counsel that Interior interprets "transfer or relocate" not to include transmission of a copy of a trust record in the ordinary course of business.

90-2-4-1570

Attachment C

3. Agency offices will collect payments in the form of checks from entities that are using, leasing, permitting or acquiring trust lands or interests in trust lands and transmit them, usually by mail, to certain designated regional banks for deposit;

4. Agency and regional Bureau of Indian Affairs (BIA) offices will create documents, including Journal Vouchers, Bills for Collection, Public Vouchers, and Collection Vouchers, as part of the process of disbursing trust funds and those documents will authorize or accompany the proper handling, moving, or disbursing of trust funds;

5. BIA will convey to the Office of Trust Funds Management (OTFM) original documents or original signatures to support requests that OTFM take action regarding individual Indian money accounts, including creating an account, closing an account, disbursing funds from an account, and placing or removing a hold on an account.

6. BIA field staff will give original documents to OTFM clerks for processing.

Dated: May 3, 2002

Respectfully submitted,

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

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
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

OF COUNSEL:

Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

EX. A

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 514-7194
Fax: (202) 307-0494
Email:sandra.spooner@usdoj.gov

April 30, 2002

BY FACSIMILE

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave. NW, 12th Floor
Washington, DC 20006

Re: Cobell v. Norton – April 18, 2002 Temporary Restraining Order

Dear Mr. Balaran:

The temporary restraining order entered by the Court on April 18, 2002, orders the Department of the Interior to refrain from taking any "action to transfer or relocate any trust records containing any individual Indian Trust data without prior notice to the Court and the Special Master." I am writing to advise you and, by copy of this letter, plaintiffs' counsel that the government interprets "transfer or relocate" not to include transmission of a copy of a trust record in the ordinary course of business.

In the course of providing services and communicating with Native Americans, Interior is often required to send copies of documents – e.g., probate orders issued by administrative law judges, change orders creating or taking some other actions with regard to IIM accounts, and documentation necessary for processing payments to individual Indian – from one office to another or to Congress or a beneficiary. We believe that neither the dictionary definitions of "transfer or relocate," nor the concerns addressed by the TRO, suggest that the Court's order is intended to require the Department of the Interior to stop its usual practice of transmitting copies of trust-related documents as required to perform these services. If your understanding is otherwise, please advise.

I understand that some of the services rendered to Native Americans by the Department of the Interior do require conveying an original document from one office to another – e.g.,

recordation of title documents. The Court's order appears to preclude this practice. As these instances are identified and we are able to obtain appropriate information in the form of a declaration, we will, as required by the TRO, advise you of Interior's intention to "transfer or relocate" those documents as necessary to serve Native Americans.

Sincerely,

/S/

Sandra P. Spooner

cc: Dennis Gingold
Keith Harper

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 3, 2002 I served the Foregoing *Notice*, by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

by Facsimile and U.S. Mail:

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

by U.S. Mail upon:

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

Courtesy Copy by U.S Mail:

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

K P Kingston

Kevin P. Kingston

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.	)	
	)	

NOTICE

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") hereby provide notice to the Court and the Special Master[1] that the Department of the Interior intends to "transfer or relocate . . . trust records" in the following manner:[2]

Official Case Records Before the Hearings Division, Office of Hearings and Appeals ("OHA")

1. Administrative Law Judges and Indian Probate Judges within the Hearings Division conduct hearings to probate the trust and restricted property estates of individual Indians and issue decisions approving or disapproving wills and any claims against the estates, determining heirs at law, and directing the distribution of the estates. These judges rely upon an offical case record, also referred to as a "probate package," which typically consists of a certified inventory of all trust or restricted real property, a statement describing income-generating activity, and a copy of the decedent's Individual Indian Money account ledger showing the balance in the account as of the date of death and as of the date of probate package submission. Although some of the documents in the probate package are new original documents that may

---

[1] The Temporary Restraining Order entered by the Court on April 18, 2002, and extended by Order signed May 2, 2002, orders the "Interior Department [to] take no action to transfer or relocate any trust records containing individual Indian Trust data ('Trust Records') without prior notice to the Court and the Special Master."

[2] This notice is provided in an abundance of caution and is not intended to waive any argument that the activities listed in this notice are not covered by the Court's orders. By letter of April 30, 2002 (Exhibit A), the Interior defendants advised the Special Master and plaintiffs' counsel that Interior interprets "transfer or relocate" not to include transmission of a copy of a trust record in the ordinary course of business.

fall within the definition of "trust records containing individual Indian trust data," they are prepared or compiled by BIA for the purposeof probating the estate using other pre-existing trust records in the BIA agency's possession.

2. The judges in the Hearings Division will normally receive the original probate package by mail or commercial overnight delivery service, such as Federal Express.

3. The judges in the Hearings Division may transfer the probate package to another deciding official within the same office or a different office to allow for a hearing to be held in a forum more convenient to interested parties.

4. Following the issuance of a decision, the judge will transmit to the appropriate BIA Land Titles and Records Office the original official record of the proceeding, which includes the probate package. A copy of the official record will also be transmitted to the Superintendent of the agency that originated the probate.

Official Case Records Before the Interior Boards of Appeals

1. Interior's boards of appeals (the Interior Board of Contract Appeals, the Interior Board of Indian Appeals, and the Interior Board of Lands Appeals) may consider and decide appeals that contain Trust Records, as defined in the Temporary Restraining Order. In those cases, the Trust Records will be transmitted to these boards of appeals as part of the official case record in support of the decision being appealed.

2. These three OHA boards of appeals issue decisions which may reference Trust Records.

3. Following the issuance of a decision by the Interior Board of Contract Appeals, that board of appeals will send the original case file to the National Archives and Records Administration and will retain the original decision in its own records.

4. Following the issuance of a probate decision by the Interior Board of Indian Appeals (IBIA), that board will return the official record, i.e., the original case file and IBIA decision, order, and other pleadings, to the appropriate Land Titles and Records Office. After issuing a non-probate decision, the IBIA will return the copy of the official file that it received from BIA, the original documents filed with it during the appeal, and its original decision to the appropriate BIA regional office.

5. Following the issuance of a decision by the Interior Board of Lands Appeals, that board will return the official case record to the agency office from which the appeal was taken.

6. Following the issuance of a decision by the Interior Board of Indian Appeals or the Interior Board of Land Appeals, those two boards of appeals will return the official case record to the agency from which the appeal was taken.

Transfer of Electronic Files Within Solicitor's Office

In preparation for the submission of a plan to reconnect its systems to the Internet, the Solicitor's Office is inventorying data on its systems to identify individual Indian trust data. As part of this process, the Solicitor's Office may move files electronically from existing electronic folders to newly created electronic folders, and may choose to archive the files on a Compact Disk (CD), rather than retain them on its systems. Where the Solicitor's Office chooses to remove such data from its systems, it will retain copies of the data in CD format.

Transfer of Other Files Within Solicitor's Office

In the normal course of business, the Solicitor's Office (1) receives original, signed, and witnessed wills that are transmitted to BIA and transmits the original wills back to BIA after review, (2) receives from BIA maps evidencing or describing trust allotments, (3) files original documents containing individual Indian trust data in administrative proceedings, and (4) transmits to clients and the U.S. Department of Justice memoranda containing individual Indian trust data, for the purpose of rendering or obtaining legal advice.

BIA and Office of Trust Funds Management

BIA and OTFM are legally obligated to discharge various trust responsibilities to beneficiaries, and to do so, they need to transmit original trust records from office to office, in the normal course of business. Transmission of these records may be by U.S. mail, courier service, hand-delivery, or other means. The following provides examples regarding the nature of the trust records encompassed in this notice.

(a) In the normal course of business, original probate orders issued issued by Administrative Law Judges and BIA Attorney Decisionmakers are sent to Land Title and Records Offices (LTROs). Original trust title documents are submitted by BIA agency offices and other entities to LTROs for recording purposes and are returned to the originating offices with the appropriate recording information, following the recording process.

(b) BIA Attorney Decisionmakers rely upon an official case record, referred to as a "probate package," which typically consists of a certified inventory of all trust or restricted real property, a statement describing income-generating activity, and a copy of the decedent's Individual Indian Money account ledger showing the balance in the account as of the date of death and as of the date of probate package submission. The probate package is prepared or compiled by BIA personnel and transmitted to the Attorney Decisionmakers.

(c) Checks from entitites using, leasing, permitting, or acquiring interests in trust lands are transmitted, generally by mail, to regional banks for deposit and/or to OTFM for allocation to the appropriate accounts. BIA offices create documents as part of the process of allocating and distributing trust funds to authorize or accompany the movement, handling, or disbursement of trust funds, in the normal course of business. OTFM requires an original document or original signature to process BIA requests for action regarding Individual Indian Money accounts. OTFM disburses original checks, explanations of payments, and statements of accounts to beneficiaries in the normal course of business.

Minerals Management Service (MMS)

1. In the normal course of business, MMS occasionally receives checks from producers, which it transmits to the United States Treasury.

2. In the normal course of business, MMS transmits to the OTFM a form referred to as Standard Form 1081. This form is a voucher and schedule of withdrawal and credit that functions as documentation to transfer funds from an MMS Treasury account to an OTFM Treasury account.

3. The MMS Minerals Revenue Management, Onshore Compliance and Asset Management Office is currently located in two offices in Lakewood, Colorado. MMS intends to move its two offices to a single location at the Federal Center in Lakewood, Colorado, on June 7, 2002. The move is to be undertaken because (1) the lease for one of the current locations will expire soon and (2) the office's operations will be better-served by consolidation in one location.

Respectfully submitted,

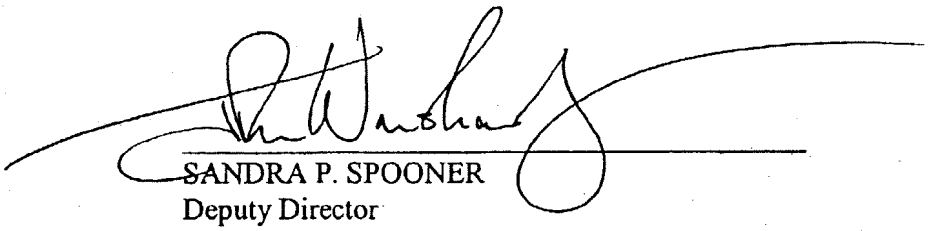
ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director

OF COUNSEL:

SABRINA A. McCARTHY
Department of the Interior
Office of the Solicitor



SANDRA P. SPOONER
Deputy Director
JOHN T. STEMPLEWICZ
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May 9, 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.	)	
	)	

NOTICE

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") hereby provide notice to the Court and the Special Master[1] that the Department of the Interior intends to "transfer or relocate . . . trust records" in the following manner:[2]

1. Original probate orders issued by Administrative Law Judges and Attorney Decision Makers of the Office of Hearings and Appeals will be sent to Land Titles and Records Offices (LTROs) in accordance with 43 C.F.R. Part 4;

2. Original trust title documents will be submitted by agency offices and other entities to LTROs for recording purposes and then returned to the originating offices;

---

[1] The Temporary Restraining Order entered by the Court on April 18, 2002, and extended by Order signed May 2, 2002, orders the "Interior Department [to] take no action to transfer or relocate any trust records containing individual Indian Trust data ("Trust Records") without prior notice to the Court and the Special Master."

[2] This notice is provided in an abundance of caution and is not intended to waive any argument that the activities listed in this notice are not covered by the Court's orders. By letter of April 30, 2002 (Exhibit A), the Interior defendants advised the Special Master and plaintiffs' counsel that Interior interprets "transfer or relocate" not to include transmission of a copy of a trust record in the ordinary course of business.

EXHIBIT A 90-2-4-1854

3. Agency offices will collect payments in the form of checks from entities that are using, leasing, permitting or acquiring trust lands or interests in trust lands and transmit them, usually by mail, to certain designated regional banks for deposit;

4. Agency and regional Bureau of Indian Affairs (BIA) offices will create documents, including Journal Vouchers, Bills for Collection, Public Vouchers, and Collection Vouchers, as part of the process of disbursing trust funds and those documents will authorize or accompany the proper handling, moving, or disbursing of trust funds;

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6. BIA field staff will give original documents to OTFM clerks for processing.

Dated: May 3, 2002

Respectfully submitted,

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

SANDRA P. SPOONER
Deputy Director
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JOHN T. STEMPLEWICZ
Senior Trial Counsel
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OF COUNSEL:

Sabrina A. McCarthy
Department of the Interior
Office of the Solicitor

EXHIBIT A

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 514-7194
Fax: (202) 307-0494
Email:sandra.spooner@usdoj.gov

April 30, 2002

BY FACSIMILE

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave. NW, 12th Floor
Washington, DC 20006

Re: Cobell v. Norton – April 18, 2002 Temporary Restraining Order

Dear Mr. Balaran:

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recordation of title documents. The Court's order appears to preclude this practice. As these instances are identified and we are able to obtain appropriate information in the form of a declaration, we will, as required by the TRO, advise you of Interior's intention to "transfer or relocate" those documents as necessary to serve Native Americans.

Sincerely,

/s/

Sandra P. Spooner

cc: Dennis Gingold
Keith Harper

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 3, 2002 I served the Foregoing *Notice*, by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

by Facsimile and U.S. Mail:

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

by U.S. Mail upon:

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

Courtesy Copy by U.S Mail:

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

K P. Kingston

Kevin P. Kingston

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 9, 2002 I served the Foregoing *Notice*, by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
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1275 Pennsylvania Avenue, N.W.
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420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

K. P. Kingston

Kevin P. Kingston

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on May 14, 2002 I served the Foregoing *Interior Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction to Protect Any Individual Indian Trust Data*, by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

By Hand Delivery:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
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By U.S. Mail upon:

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