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 (Judge Lamberth)

INTERIOR DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO INTERIOR DEFENDANTS' MOTION FOR RECONSIDERATION OF THE MAY 31, 2002 ORDER TO PAY THE COURT MONITOR THE SUM OF $54,307.34

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants") submit this Reply to Plaintiffs' Opposition to their Motion For Reconsideration Of The May 31, 2002 Order To Pay The Court Monitor The Sum Of $54,307.34 ("Motion for Reconsideration").

The Court should grant Interior Defendants' Motion for Reconsideration for the reasons set forth in the motion: (1) Interior Defendants were deprived of an opportunity to review or object to the Court Monitor's compensation request; (2) the compensation request is not reasonable or proper because it fails to provide sufficiently detailed information about the work performed; and (3) the compensation request is not reasonable or proper because numerous charges are for activities and expenses not within the scope of Court Monitor's appointment order or the Court's jurisdiction.

The Court may treat Interior Defendants' Motion for Reconsideration as conceded because Plaintiffs did not timely file their Opposition to the motion. Local Civil Rule 7.1(b) provides that a memorandum in opposition to a motion must be filed "[w]ithin 11 days of the

date of service" and that "[i]f such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded." LCvR 7.1(b). Interior Defendants filed their Motion for Reconsideration, and served it by hand delivery upon Plaintiffs, on June 14, 2002. See Defs.' Mot. for Recons., dated June 14, 2002 (serving lead attorney Dennis Gingold by hand). Plaintiffs filed and served their Opposition on June 28, 2002, fourteen days after the receipt of Interior Defendants' motion, thus exceeding the eleven-day filing deadline provided in the Local Rules. Plaintiffs did not move for an enlargement of time within which to file their Opposition. They have, therefore, waived their opportunity to respond to Interior Defendants' motion, and the Court may treat the motion as conceded.

Even if the Court decides to consider Plaintiffs' Opposition, it fails on the merits. The one and one-half page Opposition simply asserts that Interior Defendants consented to the Court Monitor's fees and that the Court Monitor's work relating to the Seventh Report of the Court Monitor, formal discovery requests, legal research, and tribal meetings is within the scope of his authority. As explained below, these assertions are incorrect. Furthermore, Plaintiffs do not address - much less oppose - Interior Defendants' argument that reconsideration of the May 31, 2002 Order is warranted because the Court Monitor's compensation request does not provide sufficient detail regarding the work performed and, consequently, is not reasonable or proper.

ARGUMENT

I. Interior Defendants Are Entitled To Review And Object To The Court Monitor's Compensation Requests.

Plaintiffs contend that Interior Defendants consented to the payment of the Court Monitor's fees and should not have the opportunity to review or object to his compensation

requests. Specifically, Plaintiffs assert that "[i]n consenting to Mr. Kieffer's original appointment order, defendants asked for no mechanism to review and object to fees[;] [i]nstead, they gave blanket consent to Mr. Kieffer's appointment **and** his fees," and, when Mr. Kieffer was reappointed, "they again made no request to review the fees charged." See Pls.' Opp'n at 23 (emphasis in original).

Whether or not an appointment order contains a provision for review, comment, and/or objection to a judicial officer's fees, the party obligated to pay for these services is entitled to an opportunity to object. See Defs.' Mot. For Recons. at 3-4 (citing Casey v. Lewis, 43 F.3d 1261, 1272 (9th Cir. 1994), rev'd in part on other grounds, 518 U.S. 343 (1996)). In Casey v. Lewis, defendants requested an opportunity to object to the fees, costs, and expenses of a special master. 43 F.3d at 1272. The Ninth Circuit Court of Appeals held that "it would be unfair to order [d]efendants to pay the fees without an opportunity to object," and remanded the order of reference to the district court to incorporate defendants' request. Id. Thus, the lack of a provision in a judicial officer's appointment order allowing objection to fees does not foreclose a party's entitlement to make such objections. Plaintiffs cite no case law to the contrary (indeed, they cite no case law at all). Nor do Plaintiffs address or even acknowledge the Supreme Court's direction that the "rights of those who ultimately pay [the compensation of a master] must be carefully protected." Defs.' Mot. for Recons. at 3 (quoting Newton v. Consol. Gas Co., 259 U.S. 101, 105 (1922)). Accordingly, although the Court Monitor's appointing orders do not include an express provision stating that the Interior Defendants can object to his fees, such an opportunity must be provided in the interest of fairness and to protect the rights of the Interior Defendants.

II. Reconsideration Of The Court's Order Is Warranted Because The Court Monitor's Compensation Request Is Not Sufficiently Detailed.

Plaintiffs fail to refute, or even respond to, Interior Defendants' argument that the Court Monitor's compensation request is improper and unreasonable because it does not provide sufficiently detailed information about the work performed, but instead provides only vague descriptions that do not identify the subject matters addressed by the Court Monitor or allow an assessment of the reasonableness of his fees. See Defs.' Mot. for Recons. at 4-8. Plaintiffs also fail to address the stark contrast between the level of detail in the Special Master's invoices and the lack of detail in the Court Monitor's invoices. See id. at 7-8. For the reasons set forth in Interior Defendants' Motion for Reconsideration, the Court should require the Court Monitor to revise his invoice to provide detailed descriptions of his activities sufficient to provide assurance that the fees charged are reasonable and properly within the scope of the Court Monitor's appointment orders.

III. The Court Monitor's Invoice Seeks Compensation For Activities That Are Inconsistent With The Separation Of Powers Doctrine And This Court's Jurisdiction Under the Administrative Procedure Act.

Plaintiffs assert that "the *Seventh Report* was clearly within the scope of [the Court Monitor's] authority to report on 'any other matter Mr. Kieffer deems pertinent to trust reform'" and, therefore, fees for preparation of the report are "plainly proper." See Pls.' Opp'n at 23. Plaintiffs fail to recognize that the Court Monitor's seemingly broad mandate to include in his reports "a summary of the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform," Order, April 15, 2002 at 2; Order, April 16, 2001 at ¶ 2, does not authorize him to disregard the constitutional doctrine of separation of powers or the bounds

of this Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. As demonstrated in Interior Defendants' Motion for Reconsideration, fees for the preparation of the Seventh Report should be excluded from the compensation request because the Report intrudes impermissibly into the internal affairs of the Department of the Interior and the authority of the Secretary of the Interior. See Defs.' Mot. For Recons. at 9-10; Defs.' Response To The Seventh Report Of The Court Monitor, filed May 16, 2002; Defs.' Mot. To Revoke The Appointment Of Joseph S. Kieffer, III, And To Clarify The Role And Authority Of A Court Monitor, filed June 14, 2002, at 10-17.

IV. The Court Monitor's Invoice Seeks Compensation For Activities That Exceed The Bounds Of His Authority.

Plaintiffs misunderstand the plain language of the Court Monitor's appointing orders when they contend that he should be compensated for formal discovery pursuant to Rule 53, legal research, and "attend[ing] and report[ing] on meetings with tribal leaders whenever and wherever he sees fit." Pls.' Opp'n at 24. As explained in Interior Defendants' Motion for Reconsideration, a party should not be required to pay for activities that are outside the scope of the order appointing a special master or court monitor. See Defs.' Mot. For Recons. at 8-9 (citing Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 748 (6th Cir. 1979)). The Court Monitor's appointment orders circumscribe his authority as follows:

> He shall monitor and review all of the Interior [D]efendants' trust reform activities and file written reports of his findings with the Court. These reports shall include a summary of the defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform.

See Order, April 16, 2001 at ¶ 2; Order, April 15, 2002 at 2 (emphasis added). Thus, activities beyond "monitor[ing] and review[ing] . . . Interior [D]efendants' trust reform activities" are outside the scope of the Court Monitor's appointment orders.

Accordingly, even if "[t]he concern of tribes with respect to trust reform is a matter Mr. Kieffer deems pertinent to trust reform," see Pls.' Opp'n at 24, his attendance at every tribal forum in which trust fund issues are discussed is not necessarily within the scope of his authority. Because his appointment orders direct that he "monitor and review . . . Interior [D]efendants' trust reform activities," the Court Monitor's attendance at a Tribal Task Force on Trust Management Reform meeting is probably in accordance with his appointment orders, as he may observe Interior Defendants' efforts to consult with Tribes regarding the creation of a new organization to manage trust systems. The Court Monitor's attendance at InterTribal Monitoring Association meetings, in contrast, is not within the purview of his appointment because Interior Defendants have no official role in these meetings and the Court Monitor does not attend them to "monitor and review" the Interior Defendants' trust reform efforts. Furthermore, fees for preparing speeches and speaking at any tribal forum are not within the Court Monitor's "monitoring" role and are not compensable.

Nor is it clear that the appointment orders authorize the Court Monitor to conduct legal research. As Plaintiffs recognize, "his mandate is to report on trust reform." See Pls.' Opp'n at 24. Reporting on actions taken by Interior Defendants and the progress of trust reform would not ordinarily necessitate legal research – it simply requires monitoring certain actions and then reporting them. The Court Monitor's sphere of responsibility does not require him to conduct legal research to determine Interior Defendants' legal duties and "what standards apply," see Pls.'

Opp'n at 24, as such issues are reserved to the adjudicatory authority of this Court. See, e.g., Prudential Ins. Co. v. United States Gypsum Co., 991 F.2d 1080, 1086 (3rd Cir. 1993) ("A district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate.").

Finally, Plaintiffs erroneously contend that the Court Monitor may propound formal discovery pursuant to Rule 53. See Pls.' Opp'n at 23-24. Although the April 15, 2002 Order reappointing the Court Monitor provided that "the Court Monitor's reports shall be given no greater deference than those set out in Federal Rule of Civil Procedure 53," the Court did not reappoint the Court Monitor pursuant to Rule 53, but instead reappointed him "in accordance with the Court's inherent powers." See Order, April 15, 2002 at 2; compare Order, Feb. 24, 1999 ("Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the court HEREBY APPOINTS Alan L. Balaran to serve as special master") with Order, April 15, 2002 at 1-2 ("By Order dated April 16, 2001, . . . in accordance with the Court's inherent powers, the Court appointed Joseph S. Kieffer, III to serve as Court Monitor . . .ORDERED that, pursuant to the Court's Order of April 16, 2001, Mr. Kieffer's term of service as Court Monitor is extended for one year."). Consequently, the Court Monitor does not possess the powers endowed on a Rule 53 special master, including the power to order document production or the examination of witnesses in an adjudicatory capacity. See Fed. R. Civ. P. 53(c).

Nor does the provision in the April 15, 2002 Order stating that "to the extent the Court Monitor's findings of fact submitted to the Court are based upon witness statements, those statements should be developed from on-the-record testimony given under oath with an opportunity for cross-examination by the parties," Order, April 15, 2002 at 2-3, transform the

Court Monitor into a Rule 53 special master with the power to require the production of evidence or the authority to examine witnesses for evidence development. As explained in Interior Defendants' Motion for Reconsideration, this provision simply allows the Court Monitor, if he wishes to rely upon certain witness statements in his reports, to confirm those particular statements in recorded, sworn interviews.

Furthermore, the April 15, 2002 Order reappointing the Court Monitor did not alter the initial appointment order's direction regarding the Court Monitor's fact-gathering process. Specifically, the initial appointment order directed that "Mr. Kieffer is permitted to make and receive ex parte communications with all entities necessary or proper to effectuate his duties," "Interior shall also provide Mr. Kieffer with access to any Interior offices or employees to gather information necessary or proper to fulfill his duties," and "Mr. Kieffer shall bring to the attention of the Court any problems with access to information or persons that cannot be resolved informally." See Order, April 15, 2001 at ¶¶ 3-4. Interior Defendants have assisted the Court Monitor in his fact-gathering on the informal basis contemplated by the initial appointment order and intend to cooperate with such fact-gathering even if it is conducted in a formal process. See Letter from Sandra P. Spooner to Joseph S. Kieffer III, May 22, 2002 at 1 ("As the Court Monitor embarks upon a formal information-gathering process, it is important to note that the Appointing Order does not authorize the Court Monitor to issue directives, such as orders to provide or permit discovery. This is not intimate any intent to not cooperate.") (Attachment 1). However, a formal fact-gathering process cannot include investigatory proceedings or evidence development, as those activities are beyond the scope of the appointment orders. Therefore, the Court Monitor should not be remunerated for such activities.

CONCLUSION

For the reasons set forth above and in Interior Defendants' Motion for Reconsideration, Interior Defendants respectfully request that the Court reconsider its May 31, 2002 Order, allow Interior Defendants to object to the Court Monitor's invoice, and direct the Court Monitor to revise his invoice to include sufficiently detailed information about his work and to delete all charges for activities outside the scope of the Court Monitor's appointment orders or the jurisdiction of this Court.

Dated: July 11, 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
JOHN T. STEMPLEWICZ
Senior Trial Counsel
CYNTHIA L. ALEXANDER
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 11, 2002 I served the foregoing *Interior Defendants' Reply to Plaintiffs' Opposition to Interior Defendants' Motion for Reconsideration of the May 31, 2002 Order to Pay the Court Monitor the Sum of $54,307.34*, by facsimile in accordance with their written request of October 31, 2001 upon:

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

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

By U.S. Mail upon:

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

By Facsimile and U.S. Mail:

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

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

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

May 22, 2002

BY FACSIMILE & FIRST CLASS MAIL

Joseph S. Kieffer, III, Esq.
Court Monitor
420 7th Street, NW, #705
Washington, DC 20004

Re: Cobell v. Norton – Court Monitor Discovery Requests

Dear Mr. Kieffer:

This concerns your letters of May 6, 10, 15, and 22, 2002, regarding depositions you plan to take of Department of the Interior officials and documents you request be produced. These letters raise a number of issues surrounding the Order of April 16, 2001, appointing the Court Monitor (the "Appointing Order").

Until now, Interior has assisted the Court Monitor on the informal basis that the Appointing Order seemingly contemplates. As the Court Monitor embarks upon a formal information-gathering process, it is important to note that the Appointing Order does not authorize the Court Monitor to issue directives, such as orders to provide or permit discovery. This is not to intimate any intent to not cooperate. To the contrary, we stand ready to assist Interior to fulfill its duties under the Appointing Order. Nevertheless, the Government understands that the aforementioned letters constitute invitations, not orders, to cooperate in a formal discovery process.

We note that your letter of May 6th proposes a protocol for depositions, and we appreciate the opportunity to address your proposal in detail should the depositions go forward. However, as a preliminary matter, our voluntary participation in any formal discovery process that includes depositions raises serious concerns. For example, depositions connote investigatory proceedings, or evidence development, as opposed to the strictly fact-gathering function which the Appointing Order authorizes. Also, we could not consent to depositions without assurances that the Court

Monitor would not engage in the review of matters beyond the Court's jurisdiction, such as pre-decisional activities, or seek to probe the mental impressions and deliberations of Government officials and employees. Additionally, to proceed with depositions without a clear, prior understanding of the precise subject matter to be explored would be unfair to the witnesses and unduly interfere with the functioning of the agency. Accordingly, we cannot consent to the proposed depositions unless these issues are resolved or an appropriate order can be obtained.

In any event, we could not consent to the deposition of Mr. Edwards until after June 30, 2002, the planned completion date for the Comprehensive Plan for the Historical Accounting. We know you appreciate that efforts to complete the Comprehensive Plan are at a critical stage. The time spent on and distraction caused by the preparation for and conduct of depositions can only detract from these efforts and thereby do a disservice to individual Indian trust beneficiaries. Furthermore, we understand that the Office of Historical Trust Accounting ("OHTA") funding advances may be linked to completion of the Plan. Postponing the deposition would also lessen the jurisdictional complications caused by the premature insertion of the Judicial Branch into Interior's decision-making process.

As far as document production is concerned, your letters of May 10th and 22d request the production of forty-two categories of documents, many from OHTA, to begin by May 17th and be completed by May 31st. In the spirit of cooperation, Interior provided some responsive documents on May 17. However, Interior cannot complete production until the requests are processed in accordance with its standard procedures and without unduly interfering with the on-going work of the Department – in particular, the important task of completing the Comprehensive Plan for the Historical Accounting by June 30th.

Under Interior's procedures, a document request is managed by the Document Management Unit ("DMU"). Upon receiving a request, the DMU identifies the offices likely to have responsive documents and circulates a set of instructions to them. The search is then conducted; the efforts of the various persons participating in the search are documented; the potentially responsive documents are scanned into an electronic database; a CD containing the database of all the documents is reviewed by the Solicitor's office for responsiveness and privilege; the Department of Justice independently conducts a responsiveness and privilege review; the DMU then creates a privilege log derived from the database and makes hard copies and/or CDs of the responsive and non-privileged documents; those documents, together with a draft privilege log and the privileged documents are then provided to the Department of Justice for final review and production. As you can surely appreciate, a system like this is necessary in a large government department like Interior and in a case as complex as this to insure a proper response to document requests.

We have not had time to review all of the Court Monitor's May 10th and 22d requests with Interior sufficiently to permit a point-by-point response in this letter. In producing some documents on May 17th, Interior did not waive any objections it may have to your document requests. Preliminarily, the following can be noted:

* A number of the requests appear to seek information relating to matters beyond the scope of the Court Monitor's duties and even beyond the Court's jurisdiction to review.

* Categories 5 and 6 of the May 10th request relate to the meeting of January 22, 2002, and the erroneous statement in Interior's Ninth Report that OHTA staff did not meet with the Court Monitor during the period covered by the Report. This error was corrected via the Notice of Erratum to Interior's Ninth Status Report, which was filed with the Court on May 14, 2002. We assume that the Erratum obviates the need to respond to the request for documents in these categories unless such documents would be responsive to some other request.

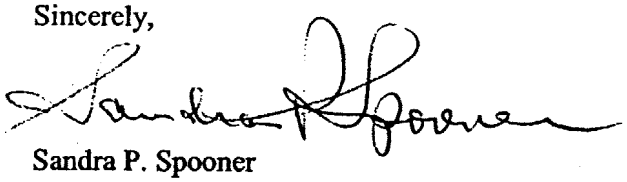
* We object to any request to produce privileged documents and for the production of documents by any entity other than the Department of the Interior.

* We object to application of Local Civil Rule 5.1, which can be expected to delay completion of responses to more comprehensive requests; however, we would certainly expect that those involved in searching for documents will use their best efforts to look for all responsive items.

I would be pleased to discuss these concerns with you further.

Thank you for your cooperation and assistance.

Sincerely,



Sandra P. Spooner

cc: Dennis Gingold
Keith Harper