

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA

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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' MOTION FOR LEAVE AND
SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF
THEIR MOTION FOR RECONSIDERATION OF THE MARCH 5, 2003
MEMORANDUM AND ORDER INsofar AS IT IMPOSED
SANCTIONS ON INTERIOR DEFENDANTS AND THEIR COUNSEL**

Interior Defendants hereby move for leave to file this supplemental memorandum to Interior Defendants' Motion For Reconsideration Of The Court's March 5, 2003 Memorandum And Order Insofar As It Imposed Sanctions On Interior Defendants And Their Counsel (March 18, 2003) ("Reconsideration Motion"). In its March 5, 2003 Memorandum and Order ("Memorandum and Order"), the Court imposed sanctions on Interior Defendants and their counsel for seeking relief from certain activities of former Special Master-Monitor Joseph Kieffer, III,¹ relating to investigative functions he had assumed, document demands he had issued, and his stated intention to make certain

¹ Interior Defendants' Motion For A Protective Order As To Discovery By The Special Master-Monitor And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning (Jan. 23, 2003) and accompanying Memorandum of Points and Authorities (Jan. 23, 2003) ("Protective Order Motion"); Interior Defendants' Motion For Leave To Supplement Their Motion And Supplement To Motion For A Protective Order As To Discovery By The Special Master-Monitor And As To The Rule Announced By The Special Master-Monitor Concerning Deposition Questioning (Jan. 31, 2003).

dispositive rulings during depositions. Interior Defendants have sought reconsideration of the Court's ruling imposing sanctions.

After the Reconsideration Motion was briefed, the Court of Appeals issued an opinion in this case in which it, inter alia, vacated the District Court's orders reappointing Mr. Kieffer as Court Monitor and elevating him to the role of Special Master-Monitor, and directed this Court to enter an order granting Interior Defendants' motion to revoke Mr. Kieffer's appointment, thereby terminating his participation in this case. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). In so doing, the Court of Appeals expressly found merit in arguments that Interior Defendants had asserted in their motion for a protective order as to the former Special Master-Monitor, and which this Court found to be frivolous. In light of the Court of Appeals ruling, the premise for awarding sanctions, i.e., the Court's finding that the contentions made by Interior Defendants in their Protective Order Motion were unsupported by fact or law, was mistaken. Accordingly, the Court should grant the motion for reconsideration and vacate its March 5, 2003 sanctions order.

BACKGROUND

A. Interior Defendants' Protective Order Motion

In their Protective Order Motion, Interior Defendants sought relief from activities of the Special Master-Monitor relating to the affirmative role he assumed in promulgating discovery, and with respect to the range of authority he claimed to resolve substantive disputes arising during depositions. Interior Defendants argued that the discovery role the Special Master-Monitor had assumed was improper for several reasons: (1) the Special Master-Monitor had undertaken his own affirmative discovery campaign against Interior Defendants and improperly become a "*de facto*

litigant" in the case, Protective Order Motion at 14-15; (2) through his pursuit of wide-ranging avenues of inquiry, the Special Master-Monitor had improperly "assumed the role of a roving investigator who identifies issues, seeks related discovery, and develops his own record with respect to those matters," *id.* at 16; (3) the Special-Master's active participation in discovery created an inherent conflict with his responsibility to oversee discovery, *id.* at 16-19; and (4) by issuing his own discovery demands and seeking his own evidence from Interior Defendants, the Special Master-Monitor had essentially become "a discovery adjunct for Plaintiffs rather than a neutral discovery master." *Id.* at 19-20.

With respect to the Special Master-Monitor's attempt to issue dispositive rulings on substantive disputes arising during depositions, Interior Defendants contended that such actions were contrary to the order appointing the Special Master-Monitor and beyond the permissible limits of a special master's authority generally. *Id.* at 21-23.

B. The Court's Memorandum And Order

The Court denied Interior Defendants' Protective Order Motion and imposed sanctions against Interior Defendants and their counsel for seeking such relief.² Memorandum and Order at 28-29. In so doing, the Court found that the Special Master-Monitor had acted properly, and that "it would be unjust not to sanction defendants and their counsel for wasting plaintiffs' time and

² Plaintiffs have submitted a fee application pursuant to the Court's sanctions ruling. See Plaintiffs' Application for Fees and Expenses Related to Defendants' Rejected Motion for Protective Order Re Powers of the Special Master-Monitor Pursuant to Court Order Issued March 5, 2003 (April 4, 2003) ("Plaintiffs' Fee Application"). Given that reconsideration and vacatur of the sanctions ruling is warranted, Plaintiffs' Fee Application should be denied.

resources by requiring them to respond to a completely frivolous motion." Id. at 27 (emphasis in original).

Notwithstanding its formal holding, the Court agreed with Interior Defendants that the Special Master-Monitor lacked the authority that he had asserted to issue substantive rulings on objections and instructions not to answer during depositions. Memorandum and Order at 24 ("In sum, the Court finds that each of the individual provisions of the Monitor's proposal, with the exception of resolving disputes concerning directions issued to counsel [sic] in response to questions propounded during a deposition, are permissible under the authority vested in the Monitor pursuant to his appointment order. . . . [I]f counsel instructs the deponent not to answer, and explains that the instruction is necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4), the examiner should proceed to the next question unless counsel decides to permit the witness to answer the previous question.") (emphasis added).³

C. Interior Defendants' Reconsideration Motion

Interior Defendants have sought reconsideration of the Memorandum and Order, insofar as it imposed sanctions, on the following grounds: (1) the Court's assumptions relating to the Special Master-Monitor's obligation to protect from disclosure privileged documents that were produced to him were not consistent with the Special Master-Monitor's practices in that regard, Reconsideration

³ The Court of Appeals decision did not address the issue of the Special Master-Monitor's claimed authority to resolve substantive disputes arising during depositions and, therefore, this supplemental memorandum does not encompass that issue. As set forth in Interior Defendants' Reconsideration Motion, however, the Court's concurrence with Interior Defendants' contention that the Special Master-Monitor lacked such authority provides an independent basis for reconsideration and vacatur of the sanctions ruling. Reconsideration Motion at 6-7.

Motion at 2-5; (2) the absence of controlling precedent or guidance on the issues raised in the Protective Order Motion did not reflect a lack of merit in Interior Defendants' contentions, but rather the novel nature of the questions presented as a result of a special master exercising expansive investigative powers, id. at 5-6; and (3) there was no basis for a finding of frivolousness and the imposition of sanctions in light of the fact that the Court found merit, and effectively granted relief, with respect to Interior Defendants' challenge to the Special Master-Monitor's claimed authority to make substantive rulings during depositions. The Reconsideration Motion remains sub judice.

D. The Court of Appeals Decision

On July 18, 2003, the Court of Appeals for the D.C. Circuit issued its decision relating to several orders issued by this Court on September 17, 2002. Among other matters, the Court of Appeals found that the reappointment of the Court Monitor "with wide-ranging extrajudicial duties over the Government's objection" after his initial one-year term had expired was inappropriate. Cobell v. Norton, 334 F.3d at 1140-43. In addition, the Court found that, in his extrajudicial role as Court Monitor, Mr. Kieffer had developed a "settled opinion about what the Department should and should not do on remand to comply with the order of the district court," which "so clearly cast a shadow over Kieffer's impartiality that the district court abused its discretion in appointing Kieffer to be Special Master (in addition to Monitor)." Id. at 1143-45.

Based on these holdings, the Court of Appeals vacated the District Court's order reappointing Mr. Kieffer as Court Monitor; directed the District Court to enter an order granting Interior Defendants' motion to revoke Mr. Kieffer's appointment; and vacated Mr. Kieffer's

appointment as Special Master-Monitor.⁴ Cobell v. Norton, 334 F.3d at 1150.

DISCUSSION

The Court should grant the Reconsideration Motion and vacate its order imposing sanctions on Interior Defendants and their counsel because the Court's ruling is inconsistent with the decision of the Court of Appeals. The appellate decision is in accord with the fundamental proposition underlying Interior Defendants' Protective Order Motion, i.e., that the Special Master-Monitor had assumed an extraordinary role that exceeded the permissible limits of his authority. The District Court's finding that this contention was untenable and merited sanctions cannot stand in light of the Court of Appeals decision.

In challenging the Special Master-Monitor's practice of affirmatively engaging in comprehensive document and other discovery, Interior Defendants argued that the Special Master-Monitor had become an active participant in the discovery process and tantamount to a litigant in the case. Protective Order Motion at 13 (protective order warranted because "Special Master-Monitor has become an active *participant* in the discovery process") (emphasis in original); *id.* at 14 ("The Special Master-Monitor Has Become A *De Facto* Litigant In The Case"); *id.* at 14-15 ("Yet, rather than focus on the oversight and monitoring roles set forth in the Appointment Order, the Special Master-Monitor has undertaken his own affirmative discovery campaign against the Interior Defendants. In so doing, he has transformed his position from a supervisory judicial officer to an active participant in the discovery process."); *id.* at 20 ("By affirmatively issuing his own discovery

⁴ Plaintiffs have sought rehearing *en banc* of the appellate decision, but their petition does not challenge any of the appellate panel's findings with respect to the former Special Master-Monitor. See Plaintiffs-Appellees' Petition for Rehearing En Banc (Sept. 2, 2003).

demands and seeking his own evidence from the Interior Defendants, the Special Master-Monitor has become, in essence, a discovery adjunct for Plaintiffs rather than a neutral discovery master.").

Further, Interior Defendants asserted that the Special Master-Monitor had assumed investigative powers that were well beyond his authority:

It is improper for the Special Master-Monitor (and by extension, the Court) to pursue wide-ranging avenues of inquiry through affirmative discovery, and to create for the Court its own independent evidentiary record. The Special Master-Monitor has, in essence, assumed the role of a roving federal investigator who identifies issues, seeks related discovery, and develops his own record with respect to those matters. Yet the Court did not -- and could not -- vest in the Special Master-Monitor the broad investigatory powers that he has assumed for himself.

Id. at 16 (citations omitted).

This Court rejected these contentions as devoid of any factual or legal support. Memorandum and Order at 11-15 (rejecting argument that Special Master Monitor's decision to pursue his own discovery created a conflict with his oversight responsibility); id. at 16 ("defendants have failed to present any evidence indicating that the Monitor has failed to keep separate his duties as discovery master and court monitor, made unduly burdensome document requests from defendants, or become a 'de facto litigant' in this case.") (footnote omitted); id. at 28 ("As a direct result of defendants' filing of a frivolous motion, the Court and plaintiffs were unnecessarily required to expend time and effort. Defense counsel also wasted the Monitor's time by refusing to respond to his document requests"). The Court took particular offense at Interior Defendants' assertion that the Special Master-Monitor's conduct made him akin to a party litigant:

Instead of examining this threshold issue [of the applicability of Federal Rule 26 to special masters], defendants engage in a

screed against the Monitor, culminating in the preposterous allegation that "[r]ather than adhere to the discovery oversight and trust reform monitoring roles for which he was appointed, the Special Master-Monitor has become an active participant in the discovery process, thereby making the Court tantamount to a litigant in this case." To listen to defendants, one would think that the Court had done something revolutionary in appointing a special master with the power to request documents from a party.

Id. at 10 (emphasis in original, footnote omitted).

The Court of Appeals, however, found Interior Defendants' contention that Mr. Kieffer had improperly assumed a role comparable to that of a litigant to be not preposterous, but meritorious. The Court of Appeals stated: "The Monitor's portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself." Cobell v. Norton, 334 F.3d at 1142 (emphasis added). The Court of Appeals also agreed that the investigative functions taken on by the Special Master-Monitor were improper:

The Monitor was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. When the parties consent to such an arrangement, we have no occasion to inject ourselves into their affairs. When a party has for a nonfrivolous reason denied its consent, however, the district court must confine itself (and its agents) to its accustomed judicial role.

Id.

In light of the ruling by the Court of Appeals, the sanctions issued by this Court against the Interior Defendants and their counsel should be vacated. The very arguments that this Court found to be frivolous in the context of Interior Defendants' Protective Order Motion were deemed to have merit by the Court of Appeals. Those arguments, therefore, cannot provide a basis for the imposition of sanctions.

On a broader level, reconsideration is also warranted because the Memorandum and Order, and the imposition of sanctions therein, were based on the premise that the authority being exercised by the Special Master-Monitor, and being challenged by Interior Defendants, was permissible and appropriate. See Memorandum and Order at 15 (citing "institutional reform" cases in support of determination that Mr. Kieffer's oversight and monitoring roles could be reconciled); id. at 16 ("the Court has scrutinized defense counsel's communications with the Monitor without finding any claim that the Monitor's requests are unduly burdensome."); id. ("defendants have failed to present any evidence indicating that the Monitor has failed to keep separate his duties as discovery master and court monitor, made unduly burdensome document requests from [sic] defendants, or become a 'de facto litigant' in this case."); id. at 27 ("defense counsel repeatedly stonewalled in response to the Monitor's requests and challenged the Monitor's legitimate authority") (emphasis added).

As the Court of Appeals has made clear, that premise was not correct. In contrast to cases in which masters were properly appointed to supervise implementation and compliance with a specific remedial order, such as one requiring structural reform of a state institution, Mr. Kieffer's authority was virtually unfettered:

The Monitor was not limited to "superintending compliance with the district court's decree," but was instead ordered to "monitor and review all of the . . . defendants' trust reform activities," including the "defendants' trust reform progress and any other matter Mr. Kieffer deems pertinent to trust reform." Nor could the Monitor have been limited to enforcing a decree, for there was no decree to enforce, let alone the sort of specific and detailed decree issued in Ruiz⁵ and typical of such cases. . . . In this case,

⁵ Ruiz v. Estelle, 679 F.2d 1115, amended in part, reh'g denied in part on other grounds, 688 F.2d 266 (5th Cir. 1982).

the district court's appointment of the Monitor entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers.

Cobell v. Norton, 334 F.3d at 1143. Because the District Court's finding that the Protective Order Motion was frivolous and its decision to impose sanctions on Interior Defendants and their counsel were based on the inaccurate assumption that the conduct being challenged by Interior Defendants was proper, reconsideration is warranted.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Reconsideration Motion, Interior Defendants respectfully request that the Court enter an order granting leave to file this supplemental memorandum, granting the Reconsideration Motion, vacating the imposition of sanctions in the Memorandum and Order, and denying Plaintiffs' Fee Application.⁶

Dated: September 11, 2003

Respectfully submitted,

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

⁶ In accordance with Local Civil Rule 7.1(m), counsel for Interior Defendants conferred with counsel for Plaintiffs, who stated that they oppose this motion.

A handwritten signature in black ink, appearing to read 'Sandra P. Spooner', is written over a horizontal line.

SANDRA P. SPOONER

D.C. Bar No. 261495

Deputy Director

JOHN T. STEMPLEWICZ

Senior Trial Attorney

Commercial Litigation Branch

Civil Division

P.O. Box 875

Ben Franklin Station

Washington, D.C. 20044-0875

Telephone: (202) 514-7194

Facsimile: (202) 514-9163

ELOUISE PEPION COBELL, et al.,
 Plaintiffs,
 v.
 GALE NORTON, Secretary of the Interior, et al.,
 Defendants.

Case No. 1:96CV01285
 (Judge Lamberth)

This matter comes before the Court on the *Interior Defendants' Motion for Leave and Supplemental Memorandum in Further Support of Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar as it Imposed Sanctions on Interior Defendants and Their Counsel*. Upon consideration of the Opposition, any Reply thereto, and the entire record of this case, it is hereby

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

Date: _____

cc:

Sandra P. Spooner
John T. Stemplewicz
John Siemietkowski
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
607 - 14th Street, NW
Box 6
Washington, D.C. 20005
Fax (202) 318-2372

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

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

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006
(202) 986-8477

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

Mr. Eddie Jacobs (*Pro se*)
P.O. Box 2322
Oklahoma City, OK 73101

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 11, 2003 I served the foregoing *Interior Defendants' Motion for Leave and Supplemental Memorandum in Further Support of Their Motion for Reconsideration of the March 5, 2003 Memorandum and Order Insofar as it Imposed Sanctions on Interior Defendants and Their Counsel* 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.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(202) 318-2372

Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

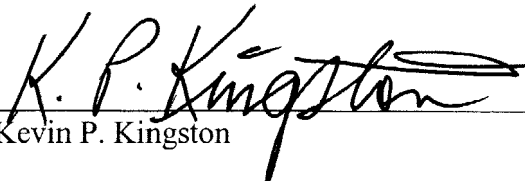
By U.S. Mail upon:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

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.
13th Floor
Washington, D.C. 20006
(202) 986-8477


Kevin P. Kingston