NANCY M. MAYER-WHITTINGTON CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR AN ENLARGEMENT OF TIME TO RESPOND TO:

(1) DEFENDANTS' CORRECTED MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING STATUTE OF LIMITATIONS AND LACHES (February 1,2003 *[SIC]*); and

(2) DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S HISTORICAL ACCOUNTING PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES (January 31,2003); and

(3) DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT THAT INTERIOR'S TRUST MANAGEMENT PLAN COMPORTS WITH THEIR OBLIGATION TO PERFORM AN ACCOUNTING AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES (January 31,2003)

Although Plaintiffs have had ample time under the rules to respond to the motions for partial summary judgment filed by Defendants, Plaintiffs have now moved to obtain an *additional* thirty days in order to complete their responses to these motions. Defendants oppose the motion because no good cause exists for the length of extension requested and because the extension would disrupt remaining pre-trial preparations to Defendants' prejudice.

Last September the Court ordered the parties to file any summary judgment motions relating to Phase 1.5 by January 31, 2003. Defendants filed three motions for partial summary judgment, as ordered by the Court, on January 31, 2003.[1] Plaintiffs were served by hand, so their opposition briefs were due in eleven days, February 11, 2003, pursuant to local rule.[2] On the last day of the response period, Plaintiffs filed the instant motion seeking an additional thirty days, until March 13, 2003, to oppose all three motions.

Contrary to Plaintiffs' assertions, the pending summary judgment motions address limited, not "myriad," issues and involve testimony and facts of which Plaintiffs have long been aware and with which they should already be highly familiar. Plaintiffs met with Defendants and the Special Master-Monitor last October and agreed to the negotiated trial preparation schedule now in place. Plaintiffs have known of the response deadline for months and must be deemed aware that an extension of the length they request will interfere with the preparation of expert reports and will prejudice the ability of both sides to have their cases ready for trial on May 1, 2003. Meanwhile, Plaintiffs appear to have had sufficient time during the response period to pursue other projects, such as noticing the deposition of Donna Erwin and issuing a

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[1]The three motions are (1) Defendants' Motion For Partial Summary Judgment Regarding Statute Of Limitations And Laches; (2) Defendants' Motion For Partial Summary Judgment That Interior's Historical Accounting Plan Comports With Their Obligation To Perform An Accounting And Supporting Memorandum Of Points And Authorities; and (3) Defendants' Motion for Partial Summary Judgment That Interior's Trust Management Plan Comports With Their Obligation To Perform An Accounting And Supporting Memorandum Of Points And Authorities.

[2]Although all of Defendants' motions were timely filed on January 31, 2003, Plaintiffs now claim that one set of papers arrived at their Washington, D.C. offices shortly after midnight, and thus were allegedly served late. See Plaintiffs' Motion For An Enlargement Of Time To Respond at 2 n.1 (filed Feb. 11, 2003). Defendants' position is that the papers were timely served.

document production request on February 5, 2003.[3] Having agreed to the pretrial schedule in place, and being familiar with the key elements of each motion already, Plaintiffs should not now be permitted to enlarge that time substantially when to do so will adversely affect the expert discovery process and could very well impair the parties' ability to have the case ready for trial. Moreover, if granted their extension, Plaintiffs promise also to include a motion for evidentiary "sanctions," which would impose another whole layer of briefing on top of their protracted timetable. For all these reasons, Defendants ask the Court to deny the motion.

1. No Basis Exists To Support A Thirty Day Extension For Responding To All Three Motions

The three motions filed by Defendants on January 31, 2003 are limited in scope and raise issues that have already been advanced by the parties or addressed by the Court at one time or another in the long history of this case. The motions can be summarized as follows: (1) seeking partial summary judgment as against certain claims that are time barred by the applicable statute of limitations or laches; (2) seeking a determination that Interior's Historical Accounting Plan proposed on January 6 comports with the Defendants' obligation to perform an accounting; and (3) seeking a determination that Interior's Trust Management Plan also comports with Defendants' obligation to perform an accounting. The first motion, dealing with the question of limitations, involves an issue the Court has previously addressed, see Cobell v. Babbitt, 30 F.

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[3]Although there was no urgency, Plaintiffs prepared and served a notice of deposition on February 5, 2003 for Donna Erwin, in response to the Court's Memorandum and Order of that day, setting her deposition for Friday, February 7, 2003. On February 6, Plaintiffs also issued a deposition notice and document request for Michelle Singer, an assistant to Ms. Erwin, for February 14, 2003. Plaintiffs' deadline for filing their opposition to the summary judgment motions was February 11, 2003. (By subsequent agreement, Ms. Erwin's deposition was reconvened on February 12, 2003, and Ms. Singer's deposition has been set for February 27, 2003.)

Supp. 2d 24, 43 (D.D.C. 1998), and is a defense that Defendants expressly discussed in proceedings before the Special Master-Monitor last October, see Discovery Conference tr. at 112-113, 128-29 (Oct. 3, 2002). Thus, neither the motion on the limitations bar nor the defense itself comes as a surprise.

It is even more puzzling that Plaintiffs also request additional time to respond to the other two motions, both dealing with the plans proposed by the Interior Defendants on January 6, 2003. The need for so much time for these motions is puzzling because Plaintiffs have had the plans in hand since January 6, and they have already filed an elaborate critique of both plans on January 31, 2003, within the time prescribed by the Court. The instant motion, if granted, would give Plaintiffs well over *60 days* from the January 6 plan date to study the plans and more than *40 days* from the date of Defendants' corresponding summary judgment motions to address Defendants' arguments concerning the plans. Given that Plaintiffs already submitted an analysis of the plans, why do they require yet another thirty days to oppose the summary judgment motions? Plaintiffs' failure to proffer an explanation renders their motion suspect.

2. The Supporting Materials Generally Are Neither "New" Nor Complex

Plaintiffs complain that they have received a "banker's box" of documents to review in connection with the motions, but their assertion is misleading. What Plaintiffs omit to acknowledge is that they have already seen the large majority of the supporting exhibits. Here is a brief synopsis of the exhibits to the limitations summary judgement motion:

1. Four exhibits consisting of the complete transcript of deposition for four of the named Plaintiffs, including selected exhibits used in the depositions themselves (Exhibits 1-4)[4];

2. Interrogatories (Exhibits 5A and 5B) served on the Plaintiffs years ago, along with Plaintiffs own answers to the propounded queries, as provided by them back in 1997 and 1998 (Exhibits 6, 11, 12, 13 and 14);

3. Reports and other documents that have been previously cited or relied upon by Plaintiffs themselves, either in responding to past interrogatories or as part of Plaintiffs' own January 6, 2003 submission (see Exhibits 7-10 and 15-28); [5]

4. Congressional reports, hearings, excerpts from the popular press (newspapers, magazines, books, etc.) as well as GAO reports comprise the remainder of the supporting exhibits (Exhibits 29-38).

Of all these materials, only the last category (about 1 inch thick, in total) contain items even arguably "new" to Plaintiffs. Surely that one inch of documents is not so voluminous as to warrant another 30 days of time for review and study. Moreover, those materials are offered as evidence of public notice of the claim; thus they are offered not so much for the details they contain but for the fact that these public statements occurred.

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[4] The depositions were conducted in December 2002 and January 2003. Plaintiffs were free to obtain and review those transcripts at the same time as Defendants, so Plaintiffs have no basis to complain that they need more time to review them.

[5] See Defendants' Statement of Material Facts in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches (filed January 31, 2003) at 19-21 (discussing Plaintiffs' citation and reliance upon Exhibits 7 through 10 in their January 6, 2003 submission) and at 22-27 (discussing Plaintiffs' citation and reliance upon Exhibits 15 through 28 in their 1997 and 1998 answers to interrogatories).

The other exhibits (categories 1 through 3, above) consist of Plaintiffs' own recent deposition testimony, discovery responses from 1997 and 1998, and reports or other documents that Plaintiffs have previously cited and relied upon themselves. Plaintiffs cannot credibly argue that they need still another 30 days to review such materials. Simply nothing in the exhibits to the limitations motion requires another thirty days to study.

The same is true for the exhibits Defendants submitted with the other two motions. Most the exhibits for the Historical Accounting Plan motion have been previously cited by Plaintiffs themselves or by Defendants in other filings in the case. The exhibits for the Historical Accounting Plan motion can be summarized as follows:

1. Documents prepared by historians researching, inter alia, the historical disposition of Indian trust records that Plaintiffs attached to their own January 6, 2002 plan submission and that Defendants initially produced on August 10 and November 16, 2001. See Defendants' Opposition To Plaintiffs' Motion For Partial Summary Judgment As To The Non-Settlement Of Accounts at 31 n. 20 (filed Feb. 14, 2003); compare Exhibit 16 to Defendants' historical accounting summary judgment motion with Exhibit 15 of Plaintiffs' January 6 , 2003 submission;
2. Public statutes, leasing regulations, and an Order of the Secretary of the Interior (Exhibits 7-10) that were previously attached to either Defendants' Motion for Partial Summary Judgment On Plaintiffs' Claims For An Historical Accounting Of IIM Accounts, filed on March 27, 2000, or Defendants' Second Phase II Motion for Partial Summary Judgment, filed on May 12, 2000, nearly *two* years ago;

3. BIA Tribal Trust Fund Account Reconciliation Results (Exhibit 4), a document Plaintiffs previously attached to their motion for Interim Relief almost *six* years ago, on April 16, 1997;

4. Correspondence with the Special Master, on which Plaintiffs' counsel were copied (Exhibit 15); and

5. Some recent declarations (Exhibits 1-3), recent correspondence (Exhibits 5 and 6), an excerpt from a listing of American Indian Reservations and Trust Areas (Exhibit 13), and Indian Affairs Laws and Treaties (Exhibit 14).

Again, of all the materials submitted as exhibits supporting the historical accounting motion, only the last category contains anything "new." Plaintiffs should be intimately familiar with everything else, and the "new" material is neither complicated nor lengthy.[6] None of this establishes a need for additional time, much less an extra 30 days.

The exhibits supporting Defendants' summary judgment motion concerning the trust management obligation also do not warrant an extension. Although most exhibits to this motion have not been cited before, all consist of either public documents – including a list of congressional hearings (Exhibit 5), hearing excerpts and congressional reports (Exhibits 9-12), FY 2003 Budget Justifications (Exhibit 8) and an Executive Order (Exhibit 3) – or materials previously produced or provided to Plaintiffs – such as Departmental Manual excerpts (Exhibits 1 and 2),[7] testimony of Deputy Secretary Griles (Exhibit 4), and letters from a congressman and Secretary Norton (Exhibits 6 and 7). There is nothing about this material that justifies the

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[6]Indeed, the referenced group of exhibits together do not exceed twenty-five pages.

[7]This material was produced to Plaintiffs on or about May 29, 2002.

additional time Plaintiffs' seek.

3. If Granted, Plaintiffs' Extension Of Time Will Disrupt The Agreed Schedule And Interfere With Other Trial Preparation

Plaintiffs' motion for enlargement also ignores the fact that Plaintiffs agreed to a pre-trial schedule, a schedule that they now seek to disrupt by extending summary judgment briefing into the final phase of trial preparation. The parties met in October to confer on a pre-trial schedule, culminating in a proposed stipulated Pre-Trial Order submitted by the Special Master-Monitor and entered by the Court. See Phase 1.5 Trial Discovery Schedule Order (Oct. 17, 2002). Plaintiffs now ask to upset that schedule without good reason. As agreed to by the parties, the remaining pre-trial schedule includes the following milestones:

Expert Reports due February 28, 2003

Expert Depositions from March 7 to 21, 2003

Fact Discovery Closes March 24, 2003

Rebuttal Expert Reports due March 31, 2003

Rebuttal Expert depositions from April 4 to 10, 2003

Joint Pretrial Statement and Witness Lists due April 11, 2003

Id. at 1-2. These dates were carefully negotiated in order to assure orderly and thorough preparation for the trial commencing May 1, 2003. If Plaintiffs' motion were granted, their arguments in opposition to Defendants' summary judgment motions would not be known until March 13, 2003. This change would necessarily require Defendants' experts to complete their reports and form their testifying opinions without having the fundamental and essential benefit

of knowing what Plaintiffs' arguments are on summary judgment. The responses would also come at the tail end of discovery, leaving fewer than ten days to conduct any follow up.

Plaintiffs' proposal would also mean that briefing would likely not close until April, nearly coinciding with the filing date for the Pre-Trial Statement. Plaintiffs have asked for an additional thirty days from the original deadline of February 11, which moves the due date to March 13, 2003. Defendants' reply briefs would thus be due on or about March 20 (or March 24 if served by mail).

The story does not end there, however, for Plaintiffs also plan to combine their response with yet another "new" motion, one apparently seeking multiple sanctions, based upon comments in the Court's September 17, 2002 contempt decision. See Cobell v. Norton, 226 F. Supp. 2d 1, 160 (D.D.C. 2002). Plaintiffs do not elaborate but only mention that they will seek "issue and evidentiary sanctions as well as a request for adverse inferences." Plaintiffs' Motion For An Enlargement Of Time To Respond at 2 (filed Feb. 11, 2003). By waiting to assert a claim for sanctions until filing their summary judgment opposition, Plaintiffs' "motion" for such adverse inferences, issue preclusion or evidentiary exclusion would ignite a whole new round of briefing that would probably run into April – just weeks before trial 1.5 is set to begin.

Plaintiffs' angling here is patently unfair and unreasonable. Plaintiffs' approach would work a double prejudice on Defendants. It would delay disclosure of Plaintiffs' arguments and theories for more than a month and keep Defendants' experts in the dark until after their reports are issued. Moreover, it delays the question of possible "issue preclusion" or other sanction until after discovery is closed, thereby unfairly prejudicing Defendants' ability to alter trial strategy or assemble appropriate evidence in response to possible sanctions. Indeed, neither the Court nor

Defendants would even learn what sanction Plaintiffs are seeking until a week before fact discovery closes. The extended briefing schedule may also deprive the Court of sufficient time to rule on the motions before trial 1.5 begins. That would be wasteful for all concerned, for Defendants' motions for partial summary judgment, if granted, could significantly narrow the issues for trial in Phase 1.5.

Thus, if Plaintiffs wish to request a sanction of such broad impact that it would alter the summary judgment outcome, then that motion should be filed sooner, not later. Plaintiffs' motion for an enlargement of time should be denied in all respects, and the Court should direct Plaintiffs to file any sanction motion without further delay.

4. Alternatively, If Plaintiffs Are Given Their Requested Enlargement, Then Defendants Should Be Allowed Fourteen Days to Reply

Although Defendants are loathe to extend the briefing schedule, if Plaintiffs were allowed the 30-day enlargement they seek, fairness dictates that Defendants should be afforded reasonable additional time to file any reply in support of their motions for partial summary judgment, as well as their response to Plaintiffs' expected motion for sanctions. Thus, if Plaintiffs' motion is granted, Defendants should be allowed 14 days to file their replies and response.

Conclusion

For the foregoing reasons, Plaintiffs' motion for an enlargement of time to respond to Defendants' motions for partial summary judgment should be denied and the Court should grant such other and further relief as deemed just and proper.

Dated: February 20, 2003

Respectfully submitted,

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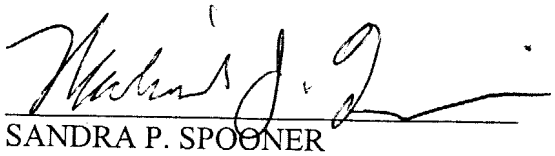

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FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
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Plaintiffs,	)	
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v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,)		
	)	
Defendants.	)	
	)	

ORDER

Upon consideration of Plaintiffs' Motion For an Enlargement of Time to Respond To: (1) Defendants' Corrected Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches (February 1,2003 *[sic]*); and (2) Defendants' Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports with Their Obligation to Perform an Accounting and Supporting Memorandum of Points and Authorities (January 31,2003); and (3) Defendants' Motion for Partial Summary Judgment That Interior's Trust Management Plan Comports with Their Obligation to Perform an Accounting and Supporting Memorandum of Points and Authorities (January 31,2003) ; and Defendants' opposition thereto, and the entire record in this case, it is hereby

ORDERED that Plaintiffs' motion for an enlargement of time to respond to Defendants' motions for partial summary judgment, filed January 31, 2003, should be and hereby is DENIED.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 21, 2003, I served the foregoing *Defendants' Opposition to Plaintiffs' Motion For an Enlargement of Time to Respond To: (1) Defendants' Corrected Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment Regarding Statute of Limitations and Laches (February 1,2003 [Sic]); and (2) Defendants' Motion for Partial Summary Judgment That Interior's Historical Accounting Plan Comports with Their Obligation to Perform an Accounting and Supporting Memorandum of Points and Authorities (January 31,2003); and (3) Defendants' Motion for Partial Summary Judgment That Interior's Trust Management Plan Comports with Their Obligation to Perform an Accounting and Supporting Memorandum of Points and Authorities (January 31,2003)* by hand upon:

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