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DISTRICT OF COLUMBIA
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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.	)	
	)	

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

Interior Defendants hereby move for reconsideration of the Court's Memorandum and Order, entered March 5, 2003 ("Memorandum and Order"), denying Interior Defendants' motion for a protective order as to discovery by the Special Master-Monitor and as to the Special Master-Monitor's rule concerning deposition questioning, insofar as the Court imposed sanctions on Interior Defendants and their counsel.[1]

BACKGROUND

In their motion for a protective order, Interior Defendants sought relief concerning two issues relating to the Special Master-Monitor. First, Interior Defendants asked for a protective order with

[1] Counsel for Interior Defendants recognize, given the tenor of the Court's ruling on their protective order motion, that the Court may react unfavorably to this motion. Nonetheless, counsel consider themselves obligated professionally to ensure that the record adequately reflects their position.

respect to document requests issued by the Special Master-Monitor.[2] Interior Defendants also sought relief from a rule announced by the Special Master-Monitor by which he purported to assume the authority to resolve substantive disputes arising during depositions, specifically in the context of an instruction by counsel that a witness not answer a question. See Protective Order Brief at 21. On March 5, 2003, the Court issued its Memorandum and Order denying Interior Defendants' motion in its entirety, and imposing sanctions on Interior Defendants and their counsel.

DISCUSSION

As has been previously recognized in this litigation, "courts have broad discretion to grant or deny a motion for reconsideration." Cobell v. Norton, 226 F. Supp. 2d 175, 177 (D.D.C. 2002). Reconsideration is appropriate where there has been an intervening change in controlling law, new evidence has become available, or it is necessary to correct clear error or manifest injustice. Id.

I. The Court's Denial Of A Protective Order As To Discovery By The Special Master-Monitor Does Not Support An Award Of Sanctions

A. The Assumptions Underlying The Court's Ruling Relating To The Special Master-Monitor's Handling Of Privileged Documents Are Erroneous

The Court rejected as "frivolous" Interior Defendants' request for relief with respect to document requests issued by the Special Master-Monitor. The Court's conclusion was based primarily on its finding that document requests issuing from a special master do not constitute discovery (and

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[2] See Interior Defendants Memorandum of Points And Authorities In Support Of Their 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 ("Protective Order Brief") at 13-20.

hence are not subject to Federal Rule of Civil Procedure 26),[3] and its rejection of Interior Defendants' contention that the manner in which the Special Master-Monitor has sought and obtained documents has deprived Interior Defendants of fair consideration of privilege and other objections. The Court erred in so holding, as the bases it relied upon do not support its decision.

The Court summarily dismissed Interior Defendants' contention that the Special Master-Monitor has been seeking to coerce them, under threat of disciplinary action, to abandon privilege objections to the disclosure of documents. The Court based its finding on the assumption that the documents would remain protected once produced to the Special Master-Monitor:

> the sole relevance of the privilege issue pertains to whether, after the Monitor had received the documents, it would be appropriate for him to disclose the contents of the documents, either in his reports or to plaintiffs. All that defendants were required to do to preserve her [sic] claim of privilege was to turn over the documents to the Monitor accompanied by a cover letter explaining that defendants were asserting attorney-client privilege over the documents. Then, before the Monitor could discuss their contents in his reports, or provide them to plaintiffs, it would be necessary for him to prepare a report and recommendation as to the application of the privilege, which would be ruled on by the Court after considering defendants' comments and objections to the report. . . . [I]f the party from whom the Monitor received the documents has asserted any form of privilege, the Monitor may not discuss the contents of the documents in his reports, or provide them to plaintiffs, unless he first prepares a report and recommendation for the Court regarding the applicability of the privileges asserted, and the Court has determined that the documents are not privileged.

Memorandum and Order at 12-14.

The practices of the Special Master-Monitor, however, have not been consistent with the

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[3] Although the Court held that Rule 26 was inapplicable to the issue presented to the Court, it nonetheless imposed sanctions pursuant to that Rule. See Memorandum and Order at 25-28.

assumptions underlying the Court's ruling because he has not been vigilant in shielding from disclosure documents that have been identified by Interior Defendants as privileged. For example, in the Seventh Report of the Court Monitor (May 2, 2002) that was publicly filed with the Court, the Special Master-Monitor (then the Court Monitor) discussed and attached six documents that obviously were of a privileged nature (*i.e.*, subject to the attorney-client privilege and work product doctrine), including letters from Department of Justice counsel providing legal advice to the Office of the Solicitor at the Department of the Interior. In an opinion issued on March 3, 2003, the Court granted Interior Defendants' motion for, inter alia, a protective order as to the documents that were improperly disclosed by the Court Monitor,[4] ordered the subject documents stricken from the public record and returned to Interior Defendants, and ordered all passages relating to the documents to be stricken from the Court Monitor's Report. See Memorandum and Order (Mar. 3, 2003).

In February 2003, the Special Master-Monitor announced that he would again release to plaintiffs documents as to which the Interior Defendants asserted privilege. Letter from Joseph S. Kieffer, III to Keith Harper (Feb. 21, 2003) (a true copy of which is attached hereto as Exhibit 1). Although he recognized that Interior Defendants asserted that the documents (Attachments IV and V of a July 16, 2002 memorandum prepared by Bert Edwards) were protected from disclosure by the attorney-client privilege and work product doctrine, and that accordingly he was required to submit to

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[4] It is noteworthy that, in its March 3, 2003 Memorandum and Order, the Court granted the Interior Defendants' motion for a protective order as to the Court Monitor. In contrast, in the March 5, 2003 Memorandum and Order for which reconsideration is now sought, the Court not only denied Interior Defendants' request for a protective order as to the Special Master-Monitor, but found the concept of a protective order in this context to be so far-fetched as to be "frivolous" and to warrant sanctions.

the Court a report and recommendation concerning those assertions of privilege, he nonetheless provided copies of the documents (albeit under seal) to the plaintiffs prior to any ruling by the Court. See id. at 2.

As the foregoing examples illustrate, contrary to the assumptions that informed the Court's ruling, the Special Master-Monitor has disclosed documents as to which privilege has been claimed without allowing the Court to rule on those privilege assertions. See Memorandum and Order at 13. Because a key assumption relied upon by the Court in rejecting Interior Defendants' concerns relating to the production of documents to the Special Master-Monitor was inaccurate, it was clear error and manifestly unjust for the Court to issue sanctions against Interior Defendants for presenting those concerns to the Court.

B. It Was Error For The Court To Base Its Sanctions Ruling On The Absence Of Controlling Or Guiding Precedent

The Court acknowledged that there is no authority, controlling or otherwise, that squarely addresses the issues raised in Interior Defendants' motion for a protective order. See Memorandum and Order at 26. Moreover, both Federal Rule 26 and Federal Rule 53 are silent with regard to seeking relief from conduct of a special master. Given the absence of instructive precedent, it was error for the Court to conclude that "it would be unjust not to sanction defendants and their counsel for wasting plaintiffs' time and resources by requiring them to respond to a completely frivolous motion." Id. at 27 (emphasis in original).[5] Interior Defendants submit that the absence of precedent on the issues that were before the Court reflects not the lack of merit in Interior Defendants' protective order motion,

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[5] This is particularly so given that, in its Memorandum and Order of March 3, 2003, it granted Interior Defendants' motion for a protective order as to conduct by the Special Master-Monitor.

but the uniqueness of the issues that arise where a special master assumes the role of an active investigator delving into broad categories of an agency's affairs, without providing the agency a sufficient avenue to challenge his actions. The Court's determination that the motion for a protective order was frivolous, insofar as it was based on the lack of precedential caselaw, was clear error, and the imposition of sanctions on Interior Defendants manifestly unjust.

II. There Is No Basis For The Imposition Of Sanctions Given That The Court Effectively Granted The Relief Sought By Interior Defendants As To The Special Master-Monitor's Rule Concerning Substantive Disputes Arising In Depositions

Although the Court denied Interior Defendants' motion in its entirety, see Memorandum and Order at 25, its opinion reveals that it granted the relief sought by Interior Defendants with respect to the Special Master-Monitor's attempt to assume the authority to make substantive rulings at depositions. Specifically, the Court agreed (albeit not explicitly) with Interior Defendants that the Special Master-Monitor could not issue substantive rulings on objections and instructions not to answer during depositions:

> The Court agrees that the ordinary practice during depositions in the instant case when an objection is raised should be to proceed with the examination with the objection noted by the Monitor unless, pursuant to Rule 30(d)(1), counsel properly instructs the deponent not to answer "when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." . . . [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.

Memorandum and Order at 22, 24. Thus, the Court granted precisely the relief sought by Interior Defendants with respect to the rule announced by the Special Master-Monitor concerning deposition

questions.[6] See Protective Order Brief at 10-11, 21-23. Indeed, no other result could follow. As this Court has previously recognized, "although Article III judges may render dispositions on contested substantive issues, the ability to make such determinations lies beyond the authority that may properly be referred to special masters." Memorandum and Order (filed Jan. 17, 2003) at 16-17 (citing In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991); In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987)). Accordingly, the Court's determination that Interior Defendants' motion was frivolous, and its imposition of sanctions based on that conclusion, are unsupportable and manifestly unjust.

CONCLUSION

For all of the foregoing reasons, Interior Defendants request that the Court enter an order granting Interior Defendants' motion for reconsideration, and vacating the imposition of sanctions in its Memorandum and Order. Counsel for Interior Defendants have conferred with Plaintiffs' counsel, who stated that they oppose this motion.

Dated: March 18, 2003

Respectfully submitted,

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

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[6] Although the Court analyzed the Special Master-Monitor's proposed rule as a "series of discrete issues," and included discussion of the Special Master-Monitor's purported authority to regulate deposition questioning, terminate a deposition, and file a report with the Court recommending disciplinary action against counsel, see Memorandum and Order at 20-24, the challenge raised by Interior Defendants in their motion for a protective order related to the Special Master-Monitor's claimed authority to issue substantive rulings at depositions by seeking to compel a witness to answer a question over the objection and instruction of his or her counsel.

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Defendants.	)	
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ORDER

This matter coming before the Court on the motion of Interior Defendants for reconsideration of the Court's March 5, 2003 Memorandum and Order insofar as it imposed sanctions upon Interior Defendants and their counsel, and having considered the motion and any responses thereto, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED THAT the portion of the Court's March 5, 2003 Memorandum and Order imposing sanctions on Interior Defendants and their counsel is VACATED.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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February 21, 2003

Keith Harper, Esquire
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285
(Judge Lamberth)

Dear Mr. Harper:

This letter is in response to your letter dated February 20, 2003 regarding your request that I release Attachments IV and V of the Edwards' July 16, 2002 Memorandum.

You are correct that the defendants' have not properly protected their claim of deliberative process privilege in Ms. Spooner's February 13, 2003 letter having failed to provide an affidavit to me that conforms with the requirements for invoking the privilege pursuant to the Court's February 5, 2003 Memorandum and Opinion regarding the submission to the Special Master-Monitor of an affidavit in support of the invocation of the deliberative process privilege.

However, defendants' counsel asserted not only the deliberative process privilege but also the attorney-client and work product doctrine privileges over Attachments IV and V in Ms. Spooner's January 17, 2003 letter to me. She apparently has renewed those privilege claims in her February 13, 2003 letter that also provided copies of Attachments IV and V to me.

As I stated in my February 5, 2003 letter to her, I will now proceed to file a Report and Recommendation with the Court regarding the propriety of the privilege assertions for the Court's consideration and further action.

Exhibit 1
Defs' Motion for Reconsideration
of March 5, 2003 Sanctions

In light of her February 13, 2003 response, and the Court's previous direction to me concerning "Attachment C" regarding handling allegedly privileged documents in order to give the parties an opportunity to present their arguments to me on the applicability of the privileges, I will release to you today, under seal, Attachments IV and V. Please call me to make arrangements for hand delivery of these documents.

Following receipt of the sealed documents, you may submit argument to me with a copy to defendants, under seal if necessary, regarding your position on the privilege claims by close of business, Wednesday, February 26, 2003. Upon defendants' response submitted to me by close of business, Monday, March 3, 2003, I will prepare and file with the Court a Report and Recommendation regarding both parties' arguments and my recommendations for the Court's consideration.

Sincerely yours,

Joseph S. Kieffer, III
Special Master – Monitor

cc: Mark Brown, Esq.
Dennis Gingold, Esq.
Elliot Levitas, Esq.
Sandra Spooner

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 18, 2003 I served the foregoing *Interior Defendants' Motion and Memorandum of Points and Authorities in Support of Their Motion for Reconsideration of the Court's March 6, 2003 Memorandum and Order Insofar as it Imposed Sanctions on Interior Defendants* by facsimile in accordance with their written request of October 31, 2001 upon:

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Dennis M Gingold, Esq.
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By U.S. Mail upon:

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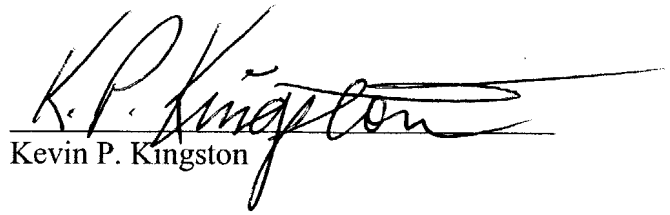

Kevin P. Kingston