IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RECEIVED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

2003 MAR 19 PM 9: 13

NANCY M.
MAYER-WHITTINGTON
CLERK

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

DEFENDANTS' MOTION FOR RECONSIDERATION OF MARCH 5, 2003 ORDER DIRECTING PAYMENT TO SPECIAL MASTER ALAN L. BALARAN, AND MEMORANDUM IN SUPPORT

Defendants respectfully move for reconsideration of this Court's March 5, 2003 Order directing them to pay Special Master Alan L. Balaran the sum of $38,623.77. Reconsideration of the Order is appropriate in light of "an intervening change in controlling law." Cobell v. Norton, 226 F. Supp. 2d 175, 177 (D.D.C. 2002).[1]

On February 20, 2003, the President signed into law a joint resolution making consolidated appropriations for the fiscal year ending September 30, 2003 ("Consolidated Appropriations Resolution"). Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003). Section 132 of the resolution provides:

> None of the funds in this or any other Act for the Department of the Interior or the Department of Justice can be used to compensate the Special Master and the Special Master-Monitor, and all variations thereto, appointed by the United States District Court for the District of Columbia in the Cobell v. Norton litigation at an annual rate that exceeds 200 percent of the highest Senior

[1] In accordance with Local Rule 7.1(m), counsel for Defendants consulted with counsel for Plaintiffs regarding this motion. Plaintiffs' counsel stated that they oppose this motion.

> Executive Service rate of pay for the Washington-Baltimore locality pay area.

Id. at § 132.

The highest Senior Executive Service rate of pay for the Washington-Baltimore locality pay area for the fiscal year ending September 30, 2003 is $142,500. See 2003 Locality Rates Of Pay For Members Of The Senior Executive Service (Exhibit 1). Thus, the statute prohibits Defendants from compensating the Special Master at a rate that exceeds 200 percent of $142,500, or $285,000 per year.

The Consolidated Appropriations Resolution was not in effect at the beginning of this fiscal year, and Congress did not specify how this annual compensation rate is to be implemented in the middle of the fiscal year. Defendants submit that the most reasonable interpretation of Section 132 is that it sets a new "annual rate" of compensation for the Special Master, and requires the maximum annual compensation of $285,000 to be prorated for the period from the effective date of the statute, February 20, 2003, through September 30, 2003. The prorated compensation amount is the maximum amount the Special Master may be paid for the remainder of the fiscal year.[2]

The Court's March 5, 2003 Order requires Defendants to pay for work performed during February 2003, both before and after the Consolidated Appropriations Resolution became law on

---

[2] Another possible reading of Section 132 is that it caps the Special Master's compensation in fiscal year 2003 at $285,000, and that amounts paid to the Special Master during the period of the continuing resolutions count toward this cap. "[T]o the extent possible, obligations incurred or expenditures made under the continuing resolution are to be charged against the funds provided by the regular appropriation act." Matter of: Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, 62 Comp. Gen. 9, 11 (1982).

February 20, 2003. If the statute is interpreted to apply only to payments for work performed after its enactment, the Special Master must be compensated at the new statutory rate for work performed from February 20 through the end of the fiscal year, but may be compensated at his prevailing market rate for the period from February 1 through February 19, 2003.[3]

Section 5504(b) of Title 5 provides the formula to be used "to convert an annual rate of basic pay to a basic hourly, daily, weekly, or biweekly rate:"

> (1) To derive an hourly rate, divide the annual rate by 2,087.
>
> (2) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required.
>
> (3) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

5 U.S.C. § 5504(b). "Rates are computed to the nearest cent, counting one-half and over as a whole cent." Id. Applying this formula to the $285,000 maximum annual rate yields a maximum hourly rate of $136.56. As the compensation rate for members of the Senior Executive Service does not permit payment for overtime, the maximum daily rate is $1,092.48, or eight hours at $136.56 per hour. The maximum weekly rate is $5,462.40; the maximum biweekly rate is $10,924.80.

The Special Master's compensation request for the period from February 20, 2003, to February 28, 2003, is as follows:

Date	Hours	Rate	Amount
Friday, February 21	8.30	$200/hr.	$1660.00

[3] Because the new law restricts payments made rather than expenditures incurred, it may be better interpreted to require that the Special Master be compensated at the new statutory rate for work performed during the entire month of February.

Saturday, February 22	7.80	$200/hr.	$1560.00
Monday, February 24	8.40	$200/hr.	$1680.00
	6.75	$100/hr.	$675.00
Tuesday, February 25	0.60	$200/hr.	$120.00
	8.75	$100/hr.	$875.00
Wednesday, February 26	1.40	$200/hr.	$280.00
	7.75	$100/hr.	$775.00
Thursday, February 27	4.80	$200/hr.	$960.00
	9.00	$100/hr.	$900.00
Friday, February 28	2.30	$200/hr.	$460.00
	7.70	$100/hr.	$770.00
TOTAL	73.55		$10715.00

See Invoice of Alan L. Balaran (March 2, 2003) (attached as Exhibit 5 to February 2003 Report of Special Master, dated March 3, 2003). Because there are nine days in the period February 20 through February 28, the maximum amount the statute permits Defendants to pay the Special Master for this period is $7,023.09, or 9/14ths of the biweekly maximum amount of $10,924.80.[4] The total amount that Defendants have been ordered to pay for the period February 20, 2003, through February 28, 2003, is $10,715.00, or $3,691.91 more than the $7,023.09 that the Consolidated Appropriations Resolution seems to permit.

The Court's March 5, 2003 Order also directs Defendants to pay the Law Office of Gaffney & Schember, PC the sum of $14,515.00; USinternetworking the sum of $44,921.22, and Joe Christie the sum of $687.78. Because the Court's March 5, 2003 Order requires Defendants to compensate the Special Master's consultants and contractors only for work performed prior to

---

[4] Alternative methods of calculating the maximum compensation amount for this period include applying the maximum hourly, daily, or weekly rates.

the effective date of the Consolidated Appropriations Resolution, Defendants do not seek reconsideration of the portion of the Court's Order directing payment to these consultants and contractors.[5]

However, if and when these or other consultants or contractors seek compensation for services performed between February 20, 2003, and the end of the fiscal year, the Consolidated Appropriations Resolution requires the inclusion of compensation paid not only to the Special Master, but also to employees, contractors and consultants he retains to perform services that he could be expected to perform himself when calculating the maximum compensation Defendants may pay for a specified period. In other words, the statutory biweekly maximum compensation rate of $10,924.80 is the maximum amount that Defendants can pay for work performed during a particular biweekly period by the Special Master and all of his employees, consultants, and contractors who perform services that the Special Master was appointed to perform.

Section 132 prohibits payment to the Special Master, the Special Master-Monitor "and all variations thereto" in excess of the statutory rate. In its report on the House appropriations bill, the House Committee on Appropriations cited "fiscal and budgetary constraints" in explaining the provision that became Section 132:

> The Committee notes that the Special Master and the Court Monitor appointed by the Court to review various aspects of trust reform at the Department are receiving compensation for their activities that exceed those of the Chief Justice and the Vice President of the United States. The Committee believes that, by any measure, the current level of compensation is excessive. Therefore, given current fiscal and budgetary constraints, the

---

[5] Of course, if the statute is applies to payments made after its effective date regardless of when the work was performed, then the payments Defendants have been ordered to make to the Special Master's consultants and contractors must be reconsidered in light of the statute.

> Committee has included a general provision that caps the compensation for each of these Court Officers at no more than 200 percent of the highest Senior Executive Service rate of pay.

H.R. Rep. No. 107-564, at 90 (2002). Requiring Defendants to pay in excess of the statutory rate to compensate contractors and consultants hired by the Special Master to perform his work would seem to contravene the intent of Congress to limit his compensation.

Accordingly, compensation sought by employees, consultants and contractors such as the Law Office of Gaffney & Schember, PC, a law firm the Special Master retained to draft his attorney fee opinion related to the retaliation complaint of Mona Infield, should be added to compensation sought by the Special Master for purposes of calculating the maximum payment allowed. If such employees, consultants, or contractors performing services that the Special Master could be expected to perform eventually seek compensation for services performed between February 20, 2003, and February 28, 2003, the statute appears to prohibit payment because Defendants will already have paid the maximum amount they are permitted to pay for that period. In contrast, compensation for consultants and contractors performing specialized services that the Special Master could not be expected to perform himself, such as technology vendors like USinternetworking, presumably would not be included in the maximum compensation calculation.

The Special Master's February invoice also seeks reimbursement for expenses in the amount of $3,978.77. Defendants do not understand the Consolidated Appropriations Resolution to require inclusion of reasonable ordinary expenses (such as travel expenses) in the maximum payment calculation. Thus, Defendants do not seek reconsideration of that portion of the Court's Order directing payment of these expenses.

Defendants seek reconsideration only of that portion of the Court's March 5, 2003 Order requiring them to pay the Special Master $10,715 for the period February 20, 2003, through February 28, 2003, because that amount is $3,691.91 higher than the $7,023.09 that Section 132 of the Consolidated Appropriations Resolution seems to permit them to pay, as explained above. Because this portion of the Court's March 5, 2003 Order appears incompatible with the Consolidated Appropriations Resolution, Defendants respectfully request that the Court reconsider its March 5, 2003 Order in light of the intervening change in controlling law. Defendants request that the Court amend its Order to require them to pay no more than $34,931.86[6] to the Special Master for the work described in his March 2, 2003 invoice.

Respectfully submitted,

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

Dated: March 19, 2003

SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Counsel
CYNTHIA L. ALEXANDER
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice

---

[6] The Court's March 5, 2003 Order directs Interior to pay the Special Master $38,623.77. If this amount is reduced by $3,691.91 in accordance with the statute, the amount due would be $34,931.86.

P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 307-0183

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Defendants' Motion For Reconsideration Of March 5, 2003 Order Directing Payment To Special Master Alan L. Balaran, any responses thereto, and the record in this case, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED that the portion of the Court's March 5, 2003 Order requiring Defendants to pay the Law Office of Alan L. Balaran the sum of $38,623.77 is VACATED.

IT IS FURTHER ORDERED that Defendants shall pay the Law Office of Alan L. Balaran the sum of $34,931.86 for work described in the monthly Report of the Special Master dated February 3, 2003, no later than March 31, 2003.

IT IS FURTHER ORDERED that to the extent Defendants have already paid the Law Office of Alan L. Balaran more than $34,931.86 for work described in the monthly Report of the Special Master dated February 3, 2003, such excess payment shall be deducted from Defendants' next payment to the Special Master.

SO ORDERED this _____ day of _____, 2003.

_____
Royce C. Lamberth
United States District Judge

cc:

J. Christopher Kohn
Sandra P. Spooner
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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

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

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

2003 LOCALITY RATES OF PAY FOR MEMBERS OF THE SENIOR EXECUTIVE SERVICE

EFFECTIVE JANUARY 2003

SALARY TABLE 2003-ES (LOC)

LOCALITY PAY AREA	ES-1	ES-2	ES-3	ES-4	ES-5	ES-6
Atlanta, GA	$ 127,847	$ 133,883	$ 139,919	$ 142,500 *	$ 142,500 *	$ 142,500 *
Boston-Worcester-Lawrence, MA-NH-ME-CT-RI	132,309	138,555	142,500 *	142,500 *	142,500 *	142,500 *
Chicago-Gary-Kenosha, IL-IN-WI	133,486	139,788	142,500 *	142,500 *	142,500 *	142,500 *
Cincinnati-Hamilton, OH-KY-IN	130,585	136,750	142,500 *	142,500 *	142,500 *	142,500 *
Cleveland-Akron, OH	128,534	134,603	140,671	142,500 *	142,500 *	142,500 *
Columbus, OH	128,966	135,054	141,143	142,500 *	142,500 *	142,500 *
Dallas-Fort Worth, TX	129,199	135,298	141,398	142,500 *	142,500 *	142,500 *
Dayton-Springfield, OH	127,707	133,736	139,766	142,500 *	142,500 *	142,500 *
Denver-Boulder-Greeley, CO	132,041	138,275	142,500 *	142,500 *	142,500 *	142,500 *
Detroit-Ann Arbor-Flint, MI	133,637	139,946	142,500 *	142,500 *	142,500 *	142,500 *
Hartford, CT	132,938	139,214	142,500 *	142,500 *	142,500 *	142,500 *
Houston-Galveston-Brazoria, TX	138,181	142,500 *	142,500 *	142,500 *	142,500 *	142,500 *
Huntsville, AL	127,078	133,078	139,077	142,500 *	142,500 *	142,500 *
Indianapolis, IN	126,810	132,797	138,784	142,500 *	142,500 *	142,500 *
Kansas City, MO-KS	127,311	133,322	139,332	142,500 *	142,500 *	142,500 *
Los Angeles-Riverside-Orange County, CA	135,198	141,581	142,500 *	142,500 *	142,500 *	142,500 *
Miami-Fort Lauderdale, FL	131,004	137,189	142,500 *	142,500 *	142,500 *	142,500 *
Milwaukee-Racine, WI	128,208	134,261	140,314	142,500 *	142,500 *	142,500 *
Minneapolis-St. Paul, MN-WI	129,967	136,103	142,239	142,500 *	142,500 *	142,500 *
New York-N. New Jersey-Long Island, NY-NJ-CT-PA	134,243	140,581	142,500 *	142,500 *	142,500 *	142,500 *
Orlando, FL	126,601	132,577	138,554	142,500 *	142,500 *	142,500 *
Philadelphia-Wilmington-Atlantic City, PA-NJ-DE-MD	130,608	136,774	142,500 *	142,500 *	142,500 *	142,500 *
Pittsburgh, PA	127,591	133,614	139,638	142,500 *	142,500 *	142,500 *
Portland-Salem, OR-WA	130,061	136,201	142,341	142,500 *	142,500 *	142,500 *
Richmond-Petersburg, VA	127,766	133,797	139,829	142,500 *	142,500 *	142,500 *
Sacramento-Yolo, CA	130,468	136,628	142,500 *	142,500 *	142,500 *	142,500 *
St. Louis, MO-IL	126,962	132,956	138,950	142,500 *	142,500 *	142,500 *
San Diego, CA	131,296	137,494	142,500 *	142,500 *	142,500 *	142,500 *
San Francisco-Oakland-San Jose, CA	138,682	142,500 *	142,500 *	142,500 *	142,500 *	142,500 *
Seattle-Tacoma-Bremerton, WA	130,212	136,359	142,500 *	142,500 *	142,500 *	142,500 *
Washington-Baltimore, DC-MD-VA-WV	129,874	136,006	142,137	142,500 *	142,500 *	142,500 *
Rest of U.S	126,566	132,541	138,516	142,500 *	142,500 *	142,500 *

* Rate limited to the rate for level III of the Executive Schedule (5 U.S.C. 5304(g)(2)).

NOTE: Law enforcement officers in the Boston and New York CMSAs are entitled to the rates on salary table 2003-ES (LEO). Locality rates of pay are basic pay only for certain purposes--see "2003 Salary Tables for Members of the Senior Executive Service, Employees in Senior-Level and Scientific or Professional Positions, Administrative Law Judges, and Members of Boards of Contract Appeals" cover sheet.

Exhibit 1
Defendants' Motion for Reconsideration

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 19, 2003, I served the foregoing *Defendants' Motion for Reconsideration of March 5, 2003 Order Directing Payment to Special Master Alan L. Balaran* 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, DC 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, NW
Ninth Floor
Washington, DC 20004
202-318-2372

and by U.S. Mail upon:

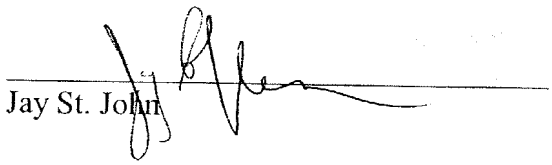
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

and by U.S. Mail and by facsimile upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., NW
13th Floor
Washington, DC 20006
202-986-8477

and by hand upon:

Joseph S. Kieffer, III, Esq.
Special Master-Monitor
420 7th Street, NW
Apt 705
Washington, DC 20004



Jay St. John