IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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NANCY M.
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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-MONITOR JOSEPH S. KIEFFER, III, AND MEMORANDUM IN SUPPORT

Defendants respectfully move for reconsideration of this Court's March 5, 2003 Order directing the Department of the Interior ("Interior") to pay Special Master-Monitor Joseph S. Kieffer, III, the sum of $39,000. 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

[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.

> annual rate that exceeds 200 percent of the highest Senior 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 Interior from compensating the Special Master-Monitor 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-Monitor, 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-Monitor may be paid for the remainder of the fiscal year.[2]

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

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[2] Another possible reading of Section 132 is that it caps the Special Master-Monitor's compensation in fiscal year 2003 at $285,000, and that amounts paid to the Special Master-Monitor 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-Monitor 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-Monitor's compensation request for the period from February 20, 2003, to February 28, 2003, is as follows:

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

Date	Hours	Amount (at $250 per hour)
Thursday, February 20	11.00	$2750.00
Friday, February 21	7.25	$1812.50
Saturday, February 22	1.25	$312.50
Monday, February 24	9.25	$2312.50
Tuesday, February 25	11.75	$2937.50
Wednesday, February 26	11.00	$2500.00[4]
Thursday, February 27	10.00	$2500.00
Friday, February 28	6.50	$1625.00
TOTAL	68.00	$16750.00

See Invoice of Joseph S. Kieffer, III (Feb. 28, 2003). Because there are nine days in the period February 20 through February 28, the maximum amount the statute permits Interior to pay the Special Master-Monitor for this period is $7,023.09, or 9/14ths of the biweekly maximum amount of $10,924.80.[5] The total amount that Interior has been ordered to pay for the period February 20, 2003, through February 28, 2003, is $16,750, or $9,726.91 more than the $7,023.09 that the Consolidated Appropriations Resolution seems to permit.

Because 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

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[4] The Special Master-Monitor's invoice contains a line item billing 2.5 hours for "[l]egal research" on February 26, 2003, but seeking compensation of only $375 (or $150 per hour) for those 2.5 hours.

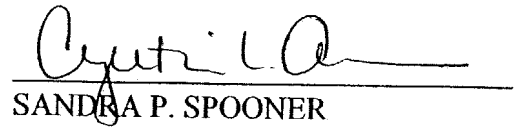
[5] Alternative methods of calculating the maximum compensation amount for this period include applying the maximum hourly, daily, or weekly rates.

Court amend its Order to require Interior to pay no more than $29,273.09[6] to the Special Master-Monitor for the work described in his Invoice #6, dated February 28, 2003.

Respectfully submitted,

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

Dated: March 19, 2003



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[6] The Court's March 5, 2003 Order directs Interior to pay the Special Master-Monitor $39,000. If this amount is reduced by $9,726.91 in accordance with the statute, the amount due would be $29,273.09.

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-Monitor Joseph S. Kieffer, III, 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 Joseph S. Kieffer, III, the sum of $39,000 is VACATED.

IT IS FURTHER ORDERED that the Department of the Interior ("Interior") shall pay Joseph S. Kieffer, III, the sum of $29,273.09 for work described in his Invoice #6, dated February 28, 2003.

IT IS FURTHER ORDERED that to the extent Interior has already paid Joseph S. Kieffer, III, more than $29,273.09 for work described in his Invoice #6, dated February 28, 2003, such excess payment shall be deducted from Interior's next payment to the Special Master-Monitor.

SO ORDERED this _____ day of _____, 2003.

_____
Royce C. Lamberth
United States District Judge

cc:

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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-Monitor Joseph S. Kieffer, III, and Memorandum in Support* by facsimile in accordance with their written request of October 31, 2001 upon:

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By hand upon:

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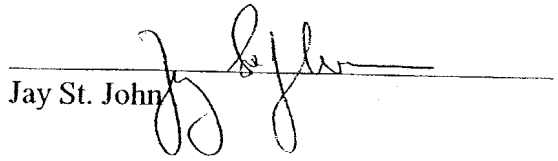

Jay St. John