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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.

GALE NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

DEFENDANTS' (1) MOTION FOR EXPEDITED CONSIDERATION; (2) MOTION FOR CLARIFICATION THAT DEFENDANTS AND THEIR ATTORNEYS ARE PERMITTED TO CONTACT PLAINTIFF EARL OLD PERSON OR, IN THE ALTERNATIVE, FOR PERMISSION TO DO SO; AND (3) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Defendants hereby move that this Court enter an order clarifying the Memorandum and Order dated March 5, 2003 (docket number 1864) (the "3/5/03 Order") or, in the alternative, granting Defendants and their attorneys permission to contact Plaintiff Earl Old Person directly. In a telephone conference on March 10, 2003, the Special Master-Monitor stated that the present motion should be presented directly to the Court. Defendants further move that the Court consider this motion on an expedited basis.

Introduction

Some confusion exists over whether and to what extent, in light of this Court's 3/5/03 Order, Defendants and their attorneys are permitted to contact Plaintiff Earl Old Person ("Mr.

Old Person"). Defendants attempted to resolve the matter by agreement with Plaintiffs' counsel, but Plaintiffs' counsel refused to agree to the substantive relief sought by this motion.[1]

Because the relief sought by this motion will have a significant impact on Defendants' ability to complete discovery of Mr. Old Person and whether to attempt to include him in conferences over motions and other matters, and may have an impact on class-related issues discussed below, Defendants respectfully request that the Court consider the motion on an expedited basis.

The significance of contacts with Mr. Old Person is highlighted by a recent newspaper article (attached hereto and discussed below) that suggests important conflicts of interest between Mr. Old Person and class counsel. Granting Defendants and their counsel permission to contact Mr. Old Person is likely to help determine whether such conflicts exist between members of the class and class counsel, and to assist in determining appropriate action, if any, needed to address those conflicts.

The 3/5/03 Order decided a series of motions by each of the parties regarding Mr. Old Person. Among other things, the Court ruled that Mr. Old Person be removed as a named class representative, that he "will not become an absent class member," and that he would "continue to be an individual plaintiff in this action." 3/5/03 Order at 6. But the Court also granted class

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[1] Defendants' attorney called Plaintiffs' attorney (Keith Harper) on March 19, 2003 to determine Plaintiffs' position with regard to the substantive relief sought by this motion. Mr. Harper stated that Plaintiffs would not consent to Defendants or their attorneys contacting Mr. Old Person other than by written correspondence with a copy to class counsel and the Special Master-Monitor, or by depositions or other conferences in which class counsel were present. As discussed below, those restrictions are not appropriate. Defendants' attorney attempted to call Mr. Harper on March 20, 2003 to determine Plaintiffs' position as to the request that this motion be considered on an expedited basis, but was unable to reach Mr. Harper.

counsel's motion "to withdraw from the representation of Old Person in any capacity other than as class counsel for a member of the certified class," and the Court ordered that Mr. Old Person "shall henceforth proceed pro se in connection with his individual claims as a plaintiff in this action." 3/5/03 Order at 10.

The Court also granted Defendants' motion to compel Mr. Old Person to comply with a prior document production order and to appear and testify at his deposition. 3/5/03 Order at 10.

Defendants' attorneys desire to contact Mr. Old Person directly in order to discuss a range of issues, including but not necessarily limited to scheduling of his deposition, his document production, and any knowledge that he might have regarding class-related issues such as class members' interests that are not being adequately represented by the class representatives or class counsel.

The 3/5/03 Order does not directly answer the question of whether Defendants' counsel may contact Mr. Old Person. Accordingly, Defendants' attorneys asked Plaintiffs' attorneys if they would consent to such contacts, but they did not give their unconditional approval. Thus, out of an abundance of caution, Defendants now ask the Court to clarify the 3/5/03 Order and to permit Defendants' attorneys to communicate directly with Mr. Old Person.

Argument

I. The 3/5/03 Order Leaves Some Uncertainty As To Whether Mr. Old Person Is Represented By Class Counsel In Any Capacity

One the one hand, the 3/5/03 Order (at 6) clearly states that Mr. Old Person is no longer a class representative, "will not become an absent class member," and shall proceed pro se as to his individual claims. If that were all that the 3/5/03 Order said on the subject, it would seem that

Defendants and their attorneys could freely contact Mr. Old Person. On the other hand, Defendants are concerned that the 3/5/03 Order may not be free from doubt because:

- The 3/5/03 Order (at 10) appears to grant in total, without limitations, class counsel's motion "to withdraw from the representation of Earl Old Person in any capacity other than as class counsel for a member of the certified class." (emphasis added.) By fully granting that motion, the Court's 3/5/03 Order might be construed to suggest that Mr. Old Person still is a "member of the certified class," and still represented in that capacity by class counsel.
- In a March 10, 2003 telephone conference among the respective attorneys for Plaintiffs and Defendants, and the Special Master Monitor, class counsel (Keith Harper) stated that class counsel believe that Mr. Old Person is still a member of the class, that he is represented by class counsel in that capacity, and that Defendants' attorneys are not permitted to contact him without the Court's permission or consent of class counsel, although they noted they might consent to certain, limited types of communication with him, such as written communications. See Transcript[2] excerpts (Exhibit A hereto) at 43-44, and see note 1, supra.

Additionally, Defendants are mindful of the Court's order dated December 23, 2002, in which the Court criticized Defendants' attorneys for not seeking Court permission before contacting class members and in which the Court prohibited such contacts.

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[2] Although the cover page of the Transcript is labeled "confidential," that is an error.

Therefore, out of an abundance of caution, Defendants ask that the Court clarify the 3/5/03 Order as to (1) whether Mr. Old Person is part of the class in any way; (2) whether Mr. Old Person is represented in any capacity by class counsel; and (3) whether Defendants and their attorneys are permitted to contact Mr. Old Person to discuss any and all matters pertaining to this case. This would include not only discussing any issues about the litigation but also serving him with copies of any papers in the case (since he is proceeding pro se as an individual plaintiff) and conferring with him about motions or other proceedings.

II. Alternatively, Defendants Request That the Court Enter an Order Permitting Defendants and Their Counsel to Communicate With Mr. Old Person

If the Court does not clarify the 3/5/03 Order to mean that Defendants and their attorneys are allowed to communicate with Mr. Old Person as indicated in the preceding section, then Defendants respectfully request that the Court enter an order expressly allowing such communications.

Communications with Mr. Old Person are appropriate. First, there may be no other effective way for Defendants to obtain Mr. Old Person's compliance with the 3/5/03 Order's provisions that Mr. Old Person appear for his deposition and produce documents. Defendants' counsel seek to contact him to attempt to obtain his voluntary compliance. Plaintiffs' counsel essentially have conceded that they were unable to obtain his appearance at deposition or his

production of documents.[3] Thus, Defendants' attorneys should be given an opportunity to persuade him to comply.

Second, recent developments strongly indicate that Mr. Old Person may have crucial information of which the Court should be informed, but that class counsel may have a direct conflict of interest with regard to obtaining that information from him and transmitting it to the Court. Thus, Defendants' attorneys seek to inquire into those matters.

Attached hereto as Exhibit B is a copy of an article that appeared in the March 9, 2003 edition of the Great Falls Tribune. According to the article, Mr. Old Person:

- Reportedly told class counsel that he was willing to carry out his duties as a class representative and wanted to stay on the team.
- Reportedly stated that class counsel "want him off the case [] because he has publicly criticized some of their tactics."
- Is quoted as saying, "I don't see any reason why they [class counsel] want to put me off unless they're afraid I'll continue questioning things that need to be questioned."
- Reportedly stated that he is unhappy with various forms of relief that class counsel have sought.

If Mr. Old Person indeed said these things, that would raise important issues that the Court may wish to consider regarding whether the class representatives and class counsel have

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[3] See *Plaintiffs' Consolidated Reply Brief in Support of (1) Motion of Elouise Cobell [et al.] to Remove Earl Old Person as a Named Class Representative, and (2) Motion of Class Counsel to Withdraw From the Representation of Earl Old Person in any Capacity Other than as Class Counsel for a Member of the Certified Class* ("*Plaintiffs' 1/29/03 Consolidated Reply Brief*"), filed January 29, 2003.

interests that are antagonistic to other class members, and whether steps (e.g., formation of subclasses) should be taken in response. Interior's prior briefs regarding Mr. Old Person noted that the law requires the Court to continually reexamine whether the class representatives satisfy the requirements of Fed.R.Civ.P. 23.[4] Also, NEWBERG ON CLASS ACTIONS § 15.03, at 15-9 (3d ed. 1992), notes that "the imperative of protecting absent class members' interests subjects the relationship of representative counsel with class members to substantial scrutiny by the court." While it is too early to predict what relief, if any, might be appropriate in order to address any complaints held by Mr. Old Person or class members who share his opinions, the views held and information known by Mr. Old Person should be gathered and made available to the Court.

Even if Mr. Old Person were somehow considered as still a class member or represented in some capacity by class counsel, the circumstances justify departing from the general prohibition on Defendants and their attorneys contacting class members. In establishing the general prohibition on such contacts with class members, the Court relied upon its "duty and authority to restrict communications that interfere with the proper administration of a class action and to restrict conduct that abuses the rights of members of the class." Order dated December 23, 2002 at 8 (quoting Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co., 1985 WL 25746 (D.D.C.

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[4] As discussed more fully in *Interior Defendants' (1) Opposition to Motion of Elouise Cobell et al. to Remove Earl Old Person as a Named Class Representative, and (2) Opposition to Motion of Class Counsel to Withdraw from the Representation of Earl Old Person in any Capacity Other Than as Class Counsel,* filed on January 16, 2003, the Court has a continuing duty to ensure that the requirements for class certification remain satisfied. National Ass'n of Reg'l Med. Programs v. Mathews, 551 F.2d 340, 344 (D.C. Cir. 1976). If class members hold conflicting interests, formation of subclasses may be appropriate. See Fed.R.Civ.P. 23(c)(4)(B); Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527, 547 (5th Cir. 1980) (formation of subclass appropriate for class members who objected to a consent decree); Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975) (Rule 23(c)(4) "provides the mechanism of subsequent creation of subclasses [] to deal with latent conflicts which may surface as the suit progresses").

1985) at *5). But Defendants' or their attorneys' communication with Mr. Old Person would not run afoul of those principles. Mr. Old Person is quoted in a major newspaper as having sought to continue as a class representative, having been rebuffed by class counsel, and having expressed disagreements with the relief that they seek.

Under these circumstances, any efforts that will help establish what Mr. Old Person knows about such allegations will advance the administration of this class action and the rights of like-thinking class members by demonstrating whether a basis exists to provide relief such as formation of sub-classes or appointment of other or additional class counsel. Defendants' attorneys' direct communications with Mr. Old Person or his private attorney (also mentioned in the above-quoted newspaper article) are likely to help in getting Mr. Old Person's opinions into the record.

The record (including the newspaper article quoted above) establishes apparent conflicts of interest between Mr. Old Person and class counsel, indicating that class counsel are not likely to seek to develop Mr. Old Persons' views or to get them into the record.[5] Indeed, if what Mr. Old Person says (as quoted above) is true, and he communicated these views to class counsel in December, 2002, it is hard to understand how class counsel could have avoided mentioning such items in their filings with the Court[6] and how class counsel could assert that "Mr. Old Person no

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[5] Although newspaper articles may not, by themselves, be definitive proof of the matters they state, this particular article, which directly quotes Mr. Old Person, is sufficient to support the limited relief (mere permission to speak with Mr. Old Person) that Defendants seek.

[6] See, e.g., *Plaintiffs' 1/29/03 Consolidated Reply Brief*, with the accompanying *Affidavit of Dennis M. Gingold* (at 15) in which class counsel describe their conversations with Mr. Old Person in December, 2002, yet with no mention of his stating that he was willing to fulfill his duties and that he wanted to continue as a class representative.

longer wants to serve as a class representative."[7] Also, in the March 10, 2003 conference (which was the day after the article appeared), Plaintiffs' attorney, Mr. Harper, stated that class counsel intended to inform Mr. Old Person "what obligation he may have to the class" and that "he may not be fully knowledgeable as to his fiduciary duties to the class that are residual even though he is no longer a named plaintiff." Transcript at 45. Those remarks suggest that Plaintiffs are unlikely to encourage Mr. Old Person to express his views.

Defendants, on the other hand, are interested in finding out, among other things, Mr. Old Person's uninhibited views about whether the class representatives and class counsel are properly looking after the interests of the class. Allowing Defendants and their attorneys to communicate freely with Mr. Old Person (whether individually or through his private attorney) will increase the likelihood that his views will be heard.

Additionally, since the Court has made Mr. Old Person a party in his own right, proceeding pro se, Defendants should be free to serve Mr. Old Person with papers in the case and to communicate with him about motions, discovery, trial, and other aspects of the proceedings, just as with any other litigant.

Plaintiffs' suggestion that Defendants and counsel be allowed only to communicate with Mr. Old Person in writing (with copies to class counsel) or by deposition or conferences with class counsel present is neither workable nor appropriate. First, because of the apparent conflict of interest between Mr. Old Person and class counsel, Mr. Old Person may speak more openly without them present. That is beneficial for it will help promote a fuller airing of his views. Second, since Mr. Old Person is now a party in his own right, no basis exists to require that class

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[7] See id. at 2.

counsel be privy to every communication with him. We are aware of no rule that prohibits discussions among fewer than all parties. Third, because of the logistical difficulties of contacting Mr. Old Person (as suggested in Mr. Gingold's affidavit (cited above)), it may be difficult enough for Defendants' counsel to contact him alone, without having to do so only when Plaintiffs' counsel can be reached.

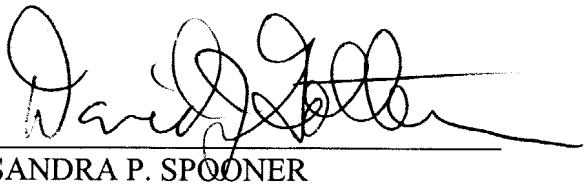
Conclusion

For the reasons stated above, Defendants respectfully request that the Court enter an order clarifying the 3/5/03 Order, to permit Defendants and their attorneys to communicate directly with Plaintiff Earl Old Person as to any and all matters or, in the alternative, that the Court grant Defendants and their attorneys permission to so communicate with Plaintiff Earl Old Person.

Dated: March 20, 2003

Respectfully submitted,

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



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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 NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter coming before the Court on Defendants' (1) Motion for Expedited Consideration; (2) Motion for Clarification that Defendants and Their Attorneys Are Permitted to Contact Plaintiff Earl Old Person or, In the Alternative, For Permission To Do So, and any responses thereto, the Court finds that the motions should be GRANTED.

IT IS THEREFORE ORDERED that Defendants and their attorneys are granted permission to contact and communicate with Plaintiff Earl Old Person.

SO ORDERED this _____ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - - X
ELOUISE PEPION COBELL, et al., :
Plaintiffs, :
v. : No. 96-1285
GALE NORTON, et al., :
Defendants. :
- - - - - - - - - - - - - - - - - - - X

CONFIDENTIAL
Washington, D.C.
Monday, March 10, 2003

Telephonic hearing before Special Master Monitor Kieffer in the above-entitled matter at 3:00 p.m., Monday, March 10, 2003, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

Exhibit A
Defs' Motion to Clarify Contact with E. Old Person or Permission to do so

APPEARANCES:

On behalf of the Plaintiffs:

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On behalf of the Defendants:

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DAVID J. GOTTESMAN, ESQ.
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1100 L Street, N.W., Room 10030
Washington, D.C. 20530
202-307-0243

On behalf of NARF:

KEITH M. HARPER, ESQ.
Native American Rights Fund
Washington, D.C.

MR. HARPER: Yes.

SPECIAL MASTER MONITOR KIEFFER: Let's try to work it out. And hopefully, Mr. Quinn, tomorrow we'll have the March 11 production of the rest of the Erwin materials which may make the plaintiffs feel a little better about producing theirs.

MR. QUINN: It sounds like they don't have anybody that has time to go look at them.

SPECIAL MASTER MONITOR KIEFFER: Well, we'll see.

MR. QUINN: We had a second issue that I had asked Mr. Harper to notify you about, I don't know if he mentioned it at all to you.

SPECIAL MASTER MONITOR KIEFFER: What's that?

MR. QUINN: It relates to the court's order and decision last week concerning the status of Earl Old Person.

SPECIAL MASTER MONITOR KIEFFER: No, I wasn't informed.

MR. HARPER: I do not recall Mr. Quinn's statement that I was supposed to discuss this with the Special Master.

MR. QUINN: I asked you if you would.

MR. HARPER: We discussed the issue. I

think it's incorrect to represent that I was in some way asked to identify that issue with the Special Master.

SPECIAL MASTER MONITOR KIEFFER: Now you have identified it. Why don't you, Mr. Quinn, it's your issue. I'm willing to hear it if the plaintiffs don't have any objection to us discussing it now.

MR. HARPER: We have no objection, Your Honor.

MR. QUINN: Mr. Kieffer, if I could turn to David Gottesman who has been looking at these issues. There are a number of concerns from several different aspects based on the changes in this particular plaintiff's status. David.

MR. GOTTESON: On March 5th the Court entered an order with regard to Earl Old Person. Among other things the Court directed that Mr. Old Person would be removed as a class representative but would remain in the case in an individual capacity as a claimant.

SPECIAL MASTER MONITOR KIEFFER: That's correct. Individual plaintiff.

MR. HARPER: Pro se.

MR. GOTTESON: Without being represented by counsel in that capacity. The Court also granted

class counsel's motion to withdraw as attorney for Earl Old Person except to the extent that class counsel represents class members.

And so what I want to be sure everyone is reading from the same page on with regard to this is simply this issue, I am inclined to want to contact Mr. Old Person to set up his deposition because the court also granted our motion to compel his deposition. So I want to contact him to set that up.

And I may want to discuss with him any and all issues about this case, whether they pertain to his individual claims or class claims or class related issues. And I just want to be sure that nobody thinks that that is a problem, for me to contact him.

SPECIAL MASTER MONITOR KIEFFER: It may be a problem practically from what I have read about getting ahold of him. Mr. Harper, what's your position?

MR. HARPER: Your Honor, we have looked at this issue over the last few hours, ever since the defendants brought it up; actually ever since the order came down. And we do believe that he is a member of the class still as per the Court's order. And because of that we still have an attorney-client

relationship as we would with any other class member.

And, as has been clear by the court's prior decisions on this point, defendants cannot contact class members without violating Rule 4.2. We believe that the appropriate approach is to seek leave from the court on that -- on this issue, for the defendants to seek leave. And, depending on how that is stated, there are certain motions in that regard that we would consent to.

We do believe that the proper approach is for them to have correspondence sent to Mr. Old Person that we are copied on. Our difficulty is this, Your Honor. Mr. Old Person served as a named plaintiff. And in that capacity, as all other named plaintiffs, as the Court, and as class counsel, we all have fiduciary responsibilities to the class.

And, prior to Mr. Old Person having any ex parte conversations with Mr. Gottesman, we would need to make very clear his obligation and continuing obligations to the class since he once was a class representative.

We believe then the appropriate approach is for the defendants to seek leave and to go forward on that basis, send correspondence copying us, and we will make clear through our own correspondence with

Mr. Old Person what obligation he may have to the class.

SPECIAL MASTER MONITOR KIEFFER: And this is with the understanding that the Court has said that the defendants have the right to depose Mr. Old Person in Washington, D.C., barring Mr. Old Person's -- or if he has an attorney or gets an attorney -- assertion for some reason medically or age-wise he can't come here, right?

MR. HARPER: That is true. And we're not objecting to that obviously. The Court made a decision on the motion to compel. And we will be present at that deposition. Mr. Old Person, though, may not -- particularly because he is proceeding pro se at this point, as far as we understand, he may not be fully knowledgeable as to his fiduciary duties to the class that are residual even though he is no longer a named plaintiff.

SPECIAL MASTER MONITOR KIEFFER: And you would want to send him correspondence about that to tell him what his fiduciary obligations are or have defendants do that or what?

MR. HARPER: We could send him correspondence in that regard to clarify that. But I think that, because of the delicate nature of this,

all matters of contact between Mr. Gottesman and Mr. Old Person should be on the record either through deposition or through correspondence with copies to the parties.

SPECIAL MASTER MONITOR KIEFFER: I think two things. One, I think the Court -- I think Mr. Quinn -- I don't think I can give you leave. I think this is an issue that should be put before the Court. Two, I believe you have the right to -- after notice and after I'm sure the Court will authorize you to contact Mr. Old Person to do that.

But I think, since the Court is the one that wrote this order, it might be appropriate for you to motion the court for leave to contact him.

MR. GOTTESMAN: It may simply be a matter of also asking for clarification of whether the Court already intended that by the order entered last week.

SPECIAL MASTER MONITOR KIEFFER: I don't know.

MR. QUINN: The matter with respect to Mr. Old Person's status is that, while there is some consideration that he may still be a member of the class, the court nonetheless left him a pro se individual plaintiff which, to the extent he's going to have any kind of individual role in this case, we

have to have the liberty to contact him to whatever extent we need for any procedural matters to the same extent that we would contact any other active litigant in the case, notwithstanding the fact that he may still have some residual interest in terms of the relief the class is seeking I mean by virtue of him being made a nonrepresentative party in this case.

And this leads to the second set of questions. He needs to be treated as such unless that's not -- unless the Court didn't intend to leave him as a party at all, an individual party in this case.

We've been looking at this. And I think, absent some further guidance, that we have a duty to begin providing him copies of all pleadings, including him on these conference calls, giving him an active role and as much access as we would any other plaintiff or plaintiff's counsel who is part of the case.

And so that creates a question. Are we free to talk to him as we would if he were an attorney representing another individual in the case?

SPECIAL MASTER MONITOR KIEFFER: I took all those orders down with me out of town this week

and was reading them. And that was one that frankly, don't tell the Court, but I'm confused about, because it seems he has a dual status. He's a class member but he's also a pro se member.

MR. GOTTESMAN: And I don't want us to be slipped for not serving him with things if we're supposed to be serving him and, for instance, including him even in this phone conversation.

SPECIAL MASTER MONITOR KIEFFER: Then why don't you put that before the Court, both those issues.

MR. GOTTESON: So we are kind of put in the middle, not wanting to run afoul of the rules and not wanting to run afoul of the Court's direction not to be in contact with class members.

SPECIAL MASTER MONITOR KIEFFER: And I would hesitate to contact him since he is still a class member, if he is to be now treated as a plaintiff that must receive what you said.

MR. QUINN: Would you like us to present that motion directly to the judge?

SPECIAL MASTER MONITOR KIEFFER: Yes.

MR. QUINN: With respect to that motion, if we were to make it to the Court which I suspect that we will, will defendants be able to get some

assurance from Your Honor that, to the extent this takes time beyond March 24 to clarify so that we can obtain a deposition date, that we're not, therefore, bound by the fact -- discovery closure date that's now before us in terms of taking discovery from Earl Old Person?

SPECIAL MASTER MONITOR KIEFFER: Yes.

MR. QUINN: Thank you.

SPECIAL MASTER MONITOR KIEFFER: I have said before that, if something comes up like this, I was going to be flexible on the dates. And the Court is taking its time -- not time. Strike that. The Court has now wrote on this, but I think it needs clarification. Therefore, you want to get that and, therefore, there may have to be an extension of time which the Court has authorized you to do. Anything else?

MR. BROWN: On the proposed expert order that the defendants have circulated, number one, I believe we agreed that experts are to be paid for their travel time. I believe --

MR. QUINN: I'm sorry, Mark.

MR. BROWN: I believe we agreed that experts be paid for their travel time, not just their airfare.

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Sunday, March 9, 2003

Old Person wants to remain in trust suit

By FAITH BREMNER
Tribune Washington Bureau

WASHINGTON -- Lawyers representing the plaintiffs in the lawsuit over Indian trust funds are seeking to remove Blackfeet tribal leader Earl Old Person from the case.

Old Person is not fit to be a lead plaintiff in the class-action lawsuit because he failed to appear for a deposition in Washington in December and did not produce requested documents, the plaintiffs' lawyers said in court documents filed in January. The request is pending before Federal District Court Judge Royce C. Lamberth, who is hearing the case.

But in a recent interview, Old Person -- a member of the Blackfeet Tribal Business Council -- and his personal lawyer, Joe McKay, said the reason the plaintiffs' lawyers want him off the case is because he has publicly criticized some of their tactics.

Old Person said he missed his deposition because his wife died last fall and because the tribe has been in political turmoil. Old Person said he told the lawyers he is ready to carry out his duty as a lead plaintiff and wants to stay on the team.

"I don't see any reason why they want to put me off unless they're afraid I'll continue questioning things that need to be questioned," he said.

The lawsuit alleges the federal government kept such sloppy records that it lost or misplaced up to $100 billion in land royalties that ranchers, farmers, oil drillers and others who use Indian-owned land paid into trust fund accounts managed by the Interior Department. The lawsuit has five named plaintiffs who represent the 300,000 individual Indians who own trust fund accounts. If he is removed, Old Person would remain a member of the certified class because he is a trust fund account holder.

The other lead plaintiffs are Elouise Cobell, also a member of the Blackfeet Tribe; Thomas Maulson, a member of Wisconsin's Lac du Flambeau Chippewa Tribe; James Louis LaRose, a member of Nebraska's Winnebago Tribe, and Penny Cleghorn, a member of Oklahoma's Fort Sill Apache Tribe.

Exhibit B
Defs' Motion to Clarify Contact with E. Old Person or Permission to do so

Messages left this week with the lead lawyer handling the case, Dennis Gingold, were not returned.

Cobell said it's important that the lead plaintiffs respond to the government's demands for depositions and documents.

"He wasn't responding to the requests and that's a serious issue," said Cobell, the most visible of the five lead plaintiffs. "When they asked for my deposition, I had to drop everything and go to Washington, D.C."

Old Person, 73, and his attorney said they're unhappy that Gingold is asking the court to take the trust fund system away from Interior and appoint a third-party receiver to run it. Old Person said he wants the department to do the work, just as the lawsuit originally demanded.

Gingold now says Interior cannot be trusted to do an accounting because it has destroyed so many documents. Instead he wants Washington lawyer Joseph S. Kieffer III, who is the special master-monitor on the case and has expertise in trust fund law, to be the receiver.

"(Kieffer) is not an Indian, he has no experience with Indian laws or tribes," McKay said. "Indian Country is not a corporation and the solution is not to handle us as if we are a corporation."

Old Person said he is also unhappy Gingold asked the court in December 2001 to order the department to shut down its computer systems after a court-appointed hacker broke in and set up phony trust fund accounts.

Many Indian families didn't have a Christmas that year because the computers were off and Interior couldn't get the checks out, McKay said.

"I'm not saying the computer system was perfect but on the other hand there's no evidence that I'm aware of that anyone hacked into it and stole money from any Indian," McKay said. "They could've waited a month or two longer to do that. It wouldn't have hurt as much."

Faith Bremner is a reporter for Gannett News Service.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on March 20, 2003 I served the foregoing *Defendants' (1) Motion for Expedited Consideration; (2) Motion for Clarification That Defendants and Their Attorneys Are Permitted to Contact Plaintiff Earl Old Person Or, in the Alternative, for Permission to Do So; and (3) Memorandum of Points and Authorities in Support* 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.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

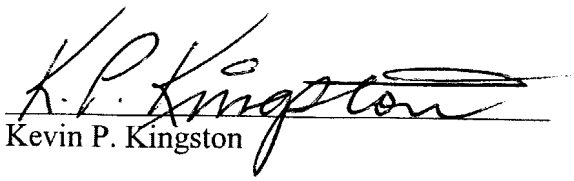
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

By facsimile and U.S. Mail upon:

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

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958



Kevin P. Kingston