U.S. DISTRICT COURT
2002 APR 13 PM 1:50
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.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Civil Rule 65.1, Interior Defendants respectfully submit the following opposition to plaintiffs' Emergency Motion for Temporary Restraing Order ("TRO Motion").

Plaintiffs' TRO Motion Is Wholly Without Merit and Should Be Denied Because the Deputy Secretary Directed That the Subject Trust Records Not Be Transferred to Lee's Summit On the Day Before the TRO Motion Was Filed and, Therefore, Plaintiffs Cannot Establish Either a Substantial Likelihood of Success on the Merits or Any Potential for "Irreparable Injury"

In considering whether to grant an application for a temporary restraining order or a preliminary injunction, this Court must examine (1) whether there is a substantial likelihood that the plaintiff would succeed on the merits, (2) whether the plaintiff would suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the other party, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Brotherhood of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-

18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 note 2 (D.D.C. 2001) (application for temporary restraining order would be denied when plaintiffs failed to show substantial likelihood of prevailing on merits or irreparable harm).

In their TRO Motion, plaintiffs seek an order directing the Interior Department to "take no action to transfer or relocate any trust records containing any individual Indian trust data . . . . without prior written approval of the Special Master." Attachment B, page 7 (proposed order accompanying TRO Motion). Plaintiffs cannot satisfy their substantial burden to establish entitlement to this order, however, because the undeniable facts confirm that Interior has no present plan to transfer or relocate any of the records described in the TRO Motion.

Defendant's counsel first became aware that plaintiffs were contemplating filing the TRO Motion when counsel for plaintiffs, Mr. Keith Harper, called counsel for defendants, Ms. Sandra Spooner, at approximately 3:00 p.m. on the afternoon of April 17, 2002. Upon being advised of the substance of the contemplated motion, Ms. Spooner informed Mr. Harper that the motion was unnecessary because the Interior Department's Deputy Secretary had already issued a directive to the Special Trustee and to the Assistant Secretary for Indian Affairs, dated April 16, 2002, which provided, among other things, that "[t]he movement of records between BIA locations, OST locations and Lee's Summit is to be suspended immediately." Attachment A, page 3. Ms. Spooner further advised Mr. Harper that she would attempt to obtain and consider providing him with a copy of the Deputy Secretary's directive, and she did so in a letter transmitted by facsimile to Mr. Harper. Attachment A.

Ms. Spooner's letter to Mr. Harper was transmitted between 5:08 p.m. and 5:12 p.m.,

Attachment A, page 5,[1] and in addition to providing Mr. Harper with a copy of the Deputy Secretary's directive, she further stated:

> In your telephone call this afternoon, you indicated that plaintiffs are planning to seek a court order preventing the Lee's Summit move. In view of the Deputy Secretary's instructions, it would appear that any such motion would be unfounded. If, however, you continue to have concerns, I remain available to discuss them with you.

Attachment A, page 1. Despite this offer, defendants' counsel heard nothing further from plaintiffs's counsel until they transmitted the TRO Motion by facsimile several hours later, some time after 7:30 p.m. Attachment B.[2]

At the very least, plaintiffs' TRO Motion should be summarily denied because plaintiffs cannot demonstrate either a substantial likelihood of prevailing on merits or the potential for irreparable harm. While the only concern of the TRO motion is the contemplated movement of trust records to Lee's Summit, Missouri, the Deputy Secretary's directive confirms that the movement of trust records to Lee's Summit will not take place. The directive further confirms that the Office of the Secretary is in consultation with the Special Master regarding the records program and concludes by stating:

> Given the historical concerns about records retention and protection, I believe that it is imperative that we be extremely careful to ensure trust records are protected and preserved. I want

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[1] At that time, a copy of Ms. Spooner's letter to Mr. Harper was also transmitted by facsimile to the Special Master.

[2] Plaintiffs' counsel's facsimile header displays Greenwich Mean Time and shows a transmission beginning at "23:33:19 (GMT)"; this corresponds to 7:33 p.m. (Eastern Daylight Time). Attachment B, page 1. This header is consistent with the Justice Department facsimile journal, which shows that the document was received at 7:43 p.m. (Eastern Daylight Time). Attachment C (facsimile machine journal, redacted to delete entries for other transmissions).

> to make sure that the Special Master is properly and timely informed and that he has every opportunity to resolve concerns prior to the Department taking irreversible actions.

Attachment A, page 4 (emphasis added).

Plaintiff's TRO Motion sets forth no factual basis for this Court to disregard the Deputy Secretary's directive. Indeed, the TRO Motion states nothing regarding the Deputy Secretary's directive, which plaintiffs' counsel apparently possessed prior to filing the TRO Motion.[3] Planitiffs' TRO Motion wholly fails to satisfy the legal burden required for this Court to grant the extraordinary relief sought in its motion, and in light of the Deputy Secretary's directive, which plaintiffs have chosen to ignore for obvious reasons, the Court should summarily deny plaintiffs' TRO Motion.

Conclusion

For the foregoing reasons, we respectfully request that the Court deny plaintiffs' TRO Motion.

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[3] Based upon materials served upon defendants' counsel, the TRO Motion apparently fails to comply with Local Civil Rule 65.1(a) because, among other things, it was not "accompanied by a certificate of counsel . . . stating (1) that actual notice of the time of making the application . . . have been furnished to the adverse party . . . ." Based upon the substance of the conversation between Mr. Harper and Ms. Spooner on the afternoon of April 17, 2002, however, the undersigned counsel understands that at that time, plaintiffs had not yet filed the TRO Motion.

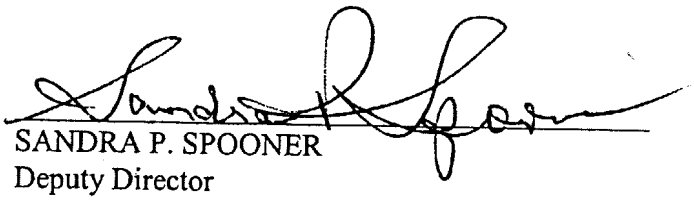
Although the TRO Motion states that counsel for the parties met and conferred prior to the filing of plaintiffs' motion, TRO Motion, page 3, note 5, the only conference between counsel was the telephone call from Mr. Harper prior to his being provided with the Deputy Secretary's directive. There was no subsequent conference regarding the TRO Motion, and this presumably provides the reason for plaintiffs' vague assertion that "it is fair to say that defendants do not consent [to] this motion." Id.

Respectfully submitted,

ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



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April 18, 2002

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April 17, 2002

BY FACSIMILE and FIRST-CLASS MAIL

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, DC 20036-2976

Re: Cobell v. Norton

Dear Mr. Harper:

Enclosed, as you requested, is a copy of the April 16, 2002 memorandum from the Deputy Secretary of the Interior to the Special Trustee for American Indians and the Assistant Secretary, Indian Affairs, directing, among other things, that Indian trust records not be moved pending future direction from the Office of the Secretary. In particular, the memorandum requires that the proposed Lee's Summit move, the subject of the Special Master's report of this date, not take place until the concerns raised within the Department of the Interior and by the Special Master are adequately addressed.

In your telephone call this afternoon, you indicated that plaintiffs' are planning to seek a court order preventing the Lee's Summit move. In view of the Deputy Secretary's instructions, it would appear that any such motion would be unfounded. If, however, you continue to have concerns, I remain available to discuss them with you.

Sincerely,

Sandra P. Spooner

cc: Special Master Balaran

ATTACHMENT A

United States Department of the Interior

THE DEPUTY SECRETARY
Washington, D.C. 20240

APR 16 2002

MEMORANDUM

To: Tom Slonaker
Special Trustee for American Indians

Neal McCaleb
Assistant Secretary, Indian Affairs

From: J. Steven Griles
Deputy Secretary

Subject: Indian Trust Records Management

As you know, we have records retention requirements associated with our ongoing trust obligations and our commitments to the Court in the Cobell v. Norton litigation. It is imperative that we identify, manage, protect and preserve both individual Indian and Tribal records. I have been informed that the Special Master has expressed grave concerns about our Indian trust records management program. Separately, the Associate Deputy Secretary has identified issues (e.g., insufficient planning for future records requirements, chain of custody accountability, inventory sufficiency, etc.) that warrant further senior management attention.

I want to evaluate closely the issues and concerns that have been expressed by the Special Master and the Associate Deputy Secretary. Indian trust records are one cornerstone of our trust management program, hence we must exercise due diligence and great care to address any threats or opportunities involving these trust assets.

The movement of these records has been raised as one significant concern. To address this issue, **OST and BIA are directed to maintain records, both Tribal and individual, in their current geographic locations, pending future direction from the Office of the Secretary on the disposition of inactive records.** Of course, routine use and intra-office movement of active records is permitted. In addition, any relocation of "Paragraph 19" documents continues to require the approval of the Cobell document production coordinator.

In particular, OST had announced an intent to relocate approximately 32,000 cubic feet of records from Albuquerque, New Mexico, to Lee's Summit, Missouri. These records are to remain in their current location until we have adequately addressed the concerns raised by the Associate Deputy Secretary and the Special Master. Since these records are to remain in place for the foreseeable future, the underlying premise of the notification letter from Dean Brinker, OST Personnel Management Specialist, to Mr.

A-2

Ziemer, Indian Educators Federal, AFT, AFL-CIO, has clearly changed. Therefore, until relevant aspects of the Indian trust records management program are evaluated and further direction is provided by the Office of the Secretary, the Division of Research, Litigation and Settlement and the Branch of Records Service Centers will need to continue operations.

The movement of records between BIA locations, OST locations and Lee's Summit is to be suspended immediately. If, as of the date of this memorandum, records are currently in transit, please complete the delivery to the intended location and provide me with immediate notification regarding the transit schedule and inventory of records being moved.

In addition, it appears that records placed in storage may be subject to a routine destruction schedule. It is unclear whether the records have been sufficiently separated, indexed and labeled to ensure no relevant Indian trust documents are destroyed inadvertently. **While we review the records management program more closely, please ensure that document destruction schedules are suspended.**

The Office of the Secretary, in consultation with the Special Master, will independently re-examine the records program to clarify our programmatic needs. To begin that process, please assemble comprehensive documentation regarding:

- the types and volumes of Indian trust records located at each BIA, OST or other Federal records repository. Further guidance, clarifying desired information, will be issued in the near future.

- any plan to relocate Indian trust records between geographic locations. In addition, provide documentation regarding the relocation of records since January 1, 1999, to present; include source location, destination, record volumes and types and chain of custody information.

- how Indian trust records will be made accessible, from these locations, for various anticipated purposes such as historical accounting, land management, ownership & title deliberations, and research requests from agency or area offices.

- records management policies and procedures, records-related agreements between BIA & OST and any plans demonstrating goals, objectives, tasks and subtasks associated with records management. In addition, please provide documentation regarding the organizations and personnel having records management responsibilities at each location where relevant Indian trust records are held.

- the suitability of records storage facilities at each location and the security measures employed to ensure that no documents are lost, stolen or

destroyed.

Given the historical concerns about records retention and protection, I believe that it is imperative that we be extremely careful to ensure trust records are protected and preserved. I want to make sure that the Special Master is properly and timely informed and that he has every opportunity to resolve concerns prior to the Department taking irreversible actions.

Thank you for your time and effort to respond to these concerns. Please let me know if you have any questions or concerns about these records management issues.

********** -COMM. JOURNAL- ********** DATE APR-17-2002 ***** TIME 17:12 *** P.01

MODE = MEMORY TRANSMISSION START=APR-17 17:08 END=APR-17 17:12

FILE NO.= 111

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002	OK	g	98220068	005/005	00:01'33"

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Email: sandra.spooner@usdoj.gov

SENT BY: Sandra P. Spooner

TO: Alan L. Balaran, Esq. **FAX No.:** 202 986-8477
Keith Harper, Esq. 202-822-0068

DATE: April 17, 2002

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 5

SPECIAL INSTRUCTIONS:

A-5

FAX COVER SHEET

TO	
COMPANY	
FAX NUMBER	12025149163
FROM	Geoffrey Rempel
DATE	2002-04-17
RE	Fax from Geoffrey Rempel

COVER MESSAGE

FOR HARRY ROBACK, CHRIS KOHN, MARK NAGLE

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ATTACHMENT B