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.	)	

DEPARTMENT OF THE INTERIOR'S RESPONSE TO THE SPECIAL REPORT OF THE COURT MONITOR ON POTENTIAL EVIDENCE REGARDING THE ALLEGED SUPPRESSION BY WHITE HOUSE AND DEPARTMENT OF JUSTICE ATTORNEYS OF THE WRITTEN TESTIMONY OF THE SPECIAL TRUSTEE PREPARED FOR THE SENATE COMMITTEE ON INDIAN AFFAIRS' JULY 25, 2002 HEARING REGARDING THE DEPARTMENT OF THE INTERIOR'S HISTORICAL ACCOUNTING

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this response to the Special Report of the Court Monitor on Potential Evidence Regarding the Alleged Suppression by White House and Department of Justice Attorneys of the Written Testimony of the Special Trustee Prepared for the Senate Committee on Indian Affairs' July 25, 2002 Hearing Regarding the Department of the Interior's Historical Accounting ("Special Report" or "Report"), filed August 8, 2002.

The Special Report provides the Court with undisclosed "potential evidence" ("Attachment C") in support of an unspecified, future "investigation" or "hearing." As Interior Defendants have been provided with neither with a copy of Attachment C nor a log identifying it, and further, as they have no notice of the particular investigation or hearing for which the Special

Report designates Attachment C as "potential evidence," they respectfully reserve the right to file a supplemental response at such time as they have received a copy of the document and/or notice of a particular proceeding for which it is proffered as "potential evidence." Furthermore, they ask that the Court refrain from taking any further action regarding the Special Report (including, but not limited to, unsealing or otherwise distributing Attachment C) until they have had the opportunity to receive and review a copy of Attachment C and to file substantive comments.

To the extent the Special Report provides any indication of the subject matter of the possible "investigation" or "hearing" in which Attachment C might be "potential evidence," this would seem to be subject matter confided by the Constitution to the exclusive discretion of the Executive Branch and therefore not appropriate for judicial inquiry–namely, the President's removal of the Special Trustee and the efforts of White House and Justice Department attorneys to review and approve the Special Trustee's prepared testimony before Congress. Because a judicial inquiry into these matters would be barred by the Constitution, Interior Defendants respectfully reserve the right to file a supplemental response in any proceeding in which Attachment C is proffered as potential evidence regarding these matters.

I. Interior Defendants Respectfully Reserve the Right to File a Supplemental Response to the Special Report at Such Time as They Have Received a Copy of Attachment C and/or Notice of a Particular Judicial Proceeding for Which it is Proffered as Potential Evidence

Pursuant to the Court's Order of August 8, 2002, the parties to this litigation have "10 days from [August 8] to submit any comments or objections to the [Special] [R]eport." Order, Aug. 8, 2002. In order not to waive their right to file comments and objections to the Special

Report, Interior Defendants file this Response. However, as the entire purpose of the Special Report is, as its title indicates, to bring "potential evidence" to the Court's attention, and as Interior Defendants do not know what this potential evidence is, they are at present severely and unfairly hampered in their ability "to submit . . . comments or objections to the report."

Interior Defendants have attempted to remedy this problem by requesting a copy of Attachment C. On August 12, 2002, Department of Justice counsel sent a letter to the Court Monitor asking that he "provide a copy of Attachment C . . . to permit us to evaluate the evidentiary issues and make an informed decision on whether to respond to the Special Report." Letter from John T. Stemplewicz, Esq. to Joseph S. Kieffer, III, Esq. at 1 (Aug. 12, 2002) ("Letter from Stemplewicz to Kieffer") (Ex. 1). The letter noted that, according to the Special Report, the Court Monitor filed Attachment C under seal "because it may be subject to a claim of attorney/client privilege or confidentiality under the work product doctrine." Id. However, the letter continued, the Special Report also suggested that Attachment C is a "government document," such that any claim of attorney/client privilege or work-product protection would be for Interior Defendants to assert. Id.; see also Special Report at 3 (stating that Attachment C "may support Mr. Slonaker's allegations of the involvement of White House and Department of Justice attorneys in review and suppression of the written testimony of the Special Trustee and, if it does support those allegations of attorney involvement, it may be subject to a claim (whether tenable or not) of attorney/client privilege or confidentiality under the work product doctrine"). Consequently, the Department of Justice's letter concluded that "providing a copy of the document to the Defendants, as opposed to the Plaintiffs, would be without prejudice to such a

claim [of attorney/client privilege or work/product protection] and would permit us to evaluate whether submitting comments to the Court on the [report] is warranted." Letter from Stemplewicz to Kieffer, at 1 (Ex. 1).

Without addressing the Department of Justice's argument that any claim for protection of Attachment C would appear to be Interior Defendants' to assert, the Court Monitor denied the request for a copy of the document. In so doing, he stated simply that he had "transferred the document . . . to the Court" without retaining a copy and that he has "provided it to neither party to the Cobell litigation."[1] Letter from Joseph S. Kieffer, III, Esq., to John T. Stemplewicz, Esq. (May 13 [sic], 2002) (Ex. 2).

As Interior Defendants tried and failed to obtain a copy of Attachment C, they file this Response to the Special Report in order to comply with the ten-day filing deadline imposed by the Court's order of August 8, 2002, but respectfully reserve the right to file further comments and objections upon receiving a copy of the sealed document.

In addition to not providing Interior Defendants with a copy of Attachment C or even, at a minimum, a log identifying it, the Special Report specifies no proceeding in which this document might serve as "potential evidence." The Special Report observes that "a number of parties have called for an investigation or hearings into the events and circumstances surrounding both the

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[1]Although the Court Monitor stated that he provided neither party with Attachment C, Plaintiffs, unlike Interior Defendants, apparently have either seen or have significant knowledge of the contents of this document–a fact they fail to explain. See Plaintiffs' Motion to Unseal Document Filed Under Seal By Court Monitor, at 3 (Aug. 12, 2002) (stating, inter alia, that "the Sealed Document is a report prepared by the Special Trustee (not counsel) in accordance with the Special Trustee's independent, statutory reporting responsibilities to Congress" and that "it relates to the accounting of Individual Indian Trust Funds").

resignation of the Special Trustee or the alleged suppression of his written testimony sought by the Senate Committee on Indian Affairs on the historical accounting, or both." Special Report at 2. No such investigation or hearing has been initiated, and as noted below, any such investigation or hearing would be constitutionally impermissible. See also id. at 3 (referring to unspecified, "putative investigations and hearings" to which Attachment C "may be relevant"). Thus, the Special Report proffers Attachment C as evidence to support charges and claims that have not been brought into this case. Because Interior Defendants lack knowledge of the claims in support of which Attachment C (itself unidentified) will allegedly serve as "potential evidence," they have no way of determining whether Attachment C has any relevance and respectfully reserve the right to file a supplemental response in any proceeding in which Attachment C is proffered as evidence. In addition, they ask that the Court refrain from taking any further action regarding the Special Report (including, but not limited to unsealing or otherwise distributing Attachment C) until they have had the opportunity to receive and review a copy of Attachment C and thus to file substantive comments.

II. Interior Defendants Respectfully Reserve the Right to File a Supplemental Response to the Special Report In Any Proceeding Concerning the President's Removal of the Special Trustee and/or the Efforts of White House and Justice Department Attorneys to Review and Approve the Special Trustee's Prepared Congressional Testimony, Because Such an Inquiry Would Raise Constitutional Concerns

To the extent the Special Report does provide some description of a proceeding in which Attachment C may serve as "potential evidence," such a proceeding would seem to be one barred by the Constitution.

The Special Report states that Attachment C "may be relevant . . . [to] any potential inquiry by this Court into . . . the actions of White House or DOJ attorneys regarding the alleged suppression of the Special Trustee's written testimony before the Senate Committee on Indian Affairs, and the potential reasons for the Secretary's alleged request for his resignation." Special Report at 3. A judicial inquiry into these matters would violate the constitutional doctrine of separation of powers, and related principles concerning the authority of a unified Executive Branch. See Defendants' Motion for Protective Order and to Quash Deposition Subpoenas (Aug. 21, 2002). Therefore, Interior Defendants respectfully reserve the right to file a supplemental response in any proceeding in which Attachment C is proffered as "potential evidence" regarding the President's removal of the Special Trustee and/or the efforts of White House and Justice Department attorneys to review and approve the Special Trustee's prepared Congressional testimony.

III. Conclusion

Interior Defendants will supplement this Response to the Special Report at such time as they have received a copy of Attachment C and/or notice of a particular proceeding for which it is proffered as "potential evidence" and request that the Court refrain from taking any further action regarding the Special Report (including, but not limited to unsealing or otherwise distributing Attachment C) until such time. Likewise, they respectfully reserve the right to file a supplemental response in any proceeding in which Attachment C is proffered as "potential evidence" concerning the President's removal of the Special Trustee and/or the efforts of White

House and Justice Department attorneys to review and approve the Special Trustee's prepared Congressional testimony, as both these matters are beyond the scope of constitutionally permissible judicial inquiry.

Dated August 22, 2002.

Respectfully submitted,

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

SANDRA P. SPOONER
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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 22, 2002 I served the foregoing *Department of the Interior's Response to the Special Report of the Court Monitor on Potential Evidence Regarding the Alleged Suppression by White House and Department of Justice Attorneys of the Written Testimony of the Special Trustee Prepared for the Senate Committee on Indian Affairs' July 25, 2002 Hearing Regarding the Department of the Interior's Historical Accounting* by facsimile 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

and by U.S. Mail upon:

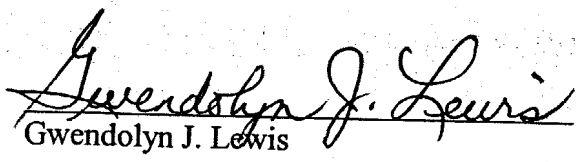
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Copy by Facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

by Hand upon:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004



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John T. Stemplewicz
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August 12, 2002

BY FACSIMILE

Joseph S. Kieffer, III, Esq.
Court Monitor
420 7th Street, NW, #705
Washington, DC 20004

Re: Cobell v. Norton – Court Monitor's August 8, 2002 Special Report

Dear Mr. Kieffer:

The Order entered August 8, 2002 allows the parties ten days to comment on or object to the Special Report of the Court Monitor on Evidence Regarding the Alleged Suppression by White House and Department of Justice Attorneys of the Written Testimony of the Special Trustee Prepared for the Senate Committee On Indian Affairs' July 25, 2002 Hearing Regarding the Department of the Interior's Historical Accounting ("Special Report").

The Special Report indicates that Attachment C thereto pertains to statements about the alleged actions of White House and Department of Justice attorneys in regard to written testimony prepared by Mr. Slonaker for submission to the Senate Committee on Indian Affairs. The Special Report further indicates that Attachment C is being filed under seal because it may be subject to a claim of attorney/client privilege or confidentiality under the work product doctrine.

From the discussion contained in the Special Report, we assume that Attachment C is a government document, and we appreciate the Court Monitor's concern to preserve any claim of privilege or confidentiality. However, if this assumption is correct, providing a copy of the document to the Defendants, as opposed to the Plaintiffs, would be without prejudice to such a claim and would permit us to evaluate whether submitting comments to the Court on the subject is warranted. Accordingly, this letter requests that you provide a copy of Attachment C by fax to the undersigned to permit us to evaluate the evidentiary issues and make an informed decision on whether to respond to the Special Report.

Exhibit 1
Dept. of Interior's Response to the
Special Report of the Court Monitor

Thank you for your cooperation and assistance.

Sincerely,

JOHN T. STEMPLEWICZ

cc: Dennis Gingold (By FAX)
Keith Harper (by FAX)

Joseph S. Kieffer, III.
420 7th Street, N.W. #705
Washington, D.C. 20004

Office: (202) 208-4078 **Facsimile: (202) 248-9543** **Mobile: (202) 321-6022**

May 13, 2002

John T. Stemplewicz
Senior Trial Counsel
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BY FACSIMILE

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

Dear Mr. Stemplewicz:

This letter is in response to your letter, dated August 12, 2002, entitled, "Cobell v. Norton – Court Monitor's August 8, 2002 Special Report" in which you request that I provide you with a copy of the document at Attachment C of the Special Report sent to the Court under seal.

As I indicated in the Special Report, I have transferred the document from my possession to the Court. I have provided it to neither party to the *Cobell* litigation and did not retain a copy.

Thank you for your inquiry.

Sincerely yours,

Joseph S. Kieffer, III.
Court Monitor

cc: Dennis M. Gingold, Esq. (by fax)
Keith Harper, Esq. (by fax)

Exhibit 2
Dept. of Interior's Response to the Special Report of the Court Monitor