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.	)	

INTERIOR DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO UNSEAL DOCUMENT FILED UNDER SEAL BY COURT MONITOR
AND
CROSS-MOTION AND MEMORANDUM REGARDING INTERIOR DEFENDANTS' ACCESS TO DOCUMENT FILED UNDER SEAL BY COURT MONITOR

The Secretary of the Interior ("Secretary") and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") submit this Opposition to Plaintiffs' Motion to Unseal Document Filed Under Seal by Court Monitor ("Motion to Unseal"), filed August 12, 2002, and this Cross-Motion and Memorandum Regarding Interior Defendants' Access to Document Filed Under Seal by Court Monitor.

I. The Court Should Deny Plaintiffs' Motion to Unseal Attachment C Because Interior Defendants Have Not Had the Opportunity to Receive and Review a Copy of This Document

Plaintiffs ask the Court to unseal the document filed by the Court Monitor as Attachment C to the August 8, 2002 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"). Because Interior Defendants do not know what Attachment C is and because the Court Monitor has indicated that claims of attorney/client privilege and/or work-product protection may attach to this document, the Court should deny Plaintiffs' Motion to Unseal, at least until Interior Defendants have received a copy of Attachment C and have had the opportunity to assert any privilege claims that may be applicable.

The Special Report files "Attachment C" under seal, stating that it might serve as "potential evidence" in support of an unspecified, future "investigation" or "hearing." According to the Special Report, Attachment C "pertain[s] to Mr. Slonaker's statements surrounding the alleged actions of the White House and Department of Justice attorneys in striking and suppressing the written testimony of the Special Trustee prepared by him for submission to the Senate Committee on Indian Affairs containing his opinions about the DOI's planned historical accounting as addressed in their Report." Special Report at 3. Aside from this statement of the general topic to which Attachment C "pertain[s]," the Special Report provides no information about the nature and content of this sealed document. The Report explains, however, that Attachment C is filed under seal because it "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." Id.

On August 12, 2002, Department of Justice counsel sent a letter to the Court Monitor asking for a copy of Attachment C, so that counsel could "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 Court Monitor") (Ex. 1); see also 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 (Aug. 22, 2002) ("Interior Defendants' Response to the Special Report") (discussing this correspondence between Mr. Stemplewicz and the Court Monitor). In requesting a copy of the sealed document, counsel for Interior Defendants observed that: (1) the Special Report indicates that Attachment C appears to be a government document, and (2) to the extent this is so, any claim of attorney/client privilege or work-product protection would be for Interior Defendants to assert. For this reason, counsel concluded, "[no] prejudice to such a claim" would arise from providing a copy of Attachment C to Interior Defendants. Letter from Stemplewicz to Court Monitor, at 1 (Ex. 1); see also Interior Defendants' Response to the Special Report, at 3-4.

The Court Monitor denied counsel's request for a copy of Attachment C, stating that he had "transferred the document . . . to the Court" and had "not retain[ed] a copy." Letter from Joseph S. Kieffer, III, Esq., to John T. Stemplewicz, Esq. (May 13 [sic], 2002) ("Letter from Court Monitor to Stemplewicz") (Ex. 2); see also Interior Defendants' Response to the Special

Report, at 4. In addition, he emphasized that he had "provided it [Attachment C] to neither party to the *Cobell* litigation." Letter from Court Monitor to Stemplewicz" (Ex. 2).

Like the Court Monitor himself, Plaintiffs acknowledge in their Motion to Unseal that, in his Special Report, "Mr. Kieffer does not disclose the information contained" in Attachment C. Motion to Unseal at 1-2. Remarkably, however, a mere paragraph after making this statement, Plaintiffs go on to identify the type of document that Attachment C is, the person who wrote it, and the purpose for which it was written. According to Plaintiffs, "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." Id. at 3. In sum, Plaintiffs claim to have discovered that Attachment C is (1) a report, (2) prepared by the Special Trustee himself (not counsel), (3) pursuant to his statutory duty to report to Congress. Although Plaintiffs acknowledge that the Court Monitor reported that he did not provide a copy of Attachment C to either party to this litigation, they offer no explanation whatsoever of how they obtained knowledge of this sealed document.

As the Court Monitor denied Interior Defendants' request for a copy of Attachment C, and as they lack Plaintiffs' (undisclosed) means of accessing this document, Interior Defendants do not know what Attachment C is and have no basis for determining whether they object to the Court's unsealing of the document at this time. Indeed, to this day, the only official information about Attachment C available to Interior Defendants is that provided in the Special Report itself, and according to the Special Report, claims of attorney/client privilege and work-product protection may attach to this document. Under these circumstances, the Court should deny

Plaintiffs' Motion to Unseal, at least until Interior Defendants have received a copy of Attachment C and have had the opportunity to assert any privilege claims that may be applicable.[1]

II. Interior Defendants Hereby Move That the Court Provide Them With A Copy of Attachment C and That It Take No Further Action Regarding the Special Report Until Such Time As They Have Received a Copy of Attachment C and Have Had an Opportunity to Assert Any Applicable Privileges

Interior Defendant hereby move that the Court provide them with a copy of Attachment C, filed under seal by the Court Monitor in his Special Report, and that the Court take no further action regarding the Special Report (including, but not limited to, unsealing or otherwise distributing Attachment C) until they have received a copy of this sealed document and have had the opportunity to assert any applicable privilege claims.[2]

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[1]Plaintiffs argue that Attachment C should be unsealed because it falls within the categories of documents for which, pursuant to the Special Master's Opinion and Order of May 11, 1999, Interior Defendants may not assert claims of attorney/client privilege, work-production protection, and/or deliberative process privilege. Motion to Unseal at 2. They then conclude that because Attachment C is "material to the management and administration of the Individual Indian Trust" and because Interior Defendants are obligated to disclose all such material information, any effort on the part of Interior Defendants to "conceal such information from plaintiffs on its face is unethical." Id. at 7. As Interior Defendants have never received a copy of Attachment C–in spite of their efforts to obtain one–they are incapable at this time of assessing the merit of Plaintiffs' argument that any claims of attorney/client privilege, work-product protection, and/or deliberative process privilege would fail. Nor can they now assess whether other privileges, such as a presidential communications privilege and/or a protection arising from the constitutional doctrine of separation of powers would apply. See Defendants' Motion for Protective Order and To Quash Deposition Subpoenas (Aug. 21, 2002).

[2]Counsel for Interior Defendants conferred with counsel for Plaintiffs, Dennis M. Gingold, about this Cross-Motion, and Mr. Gingold stated that Plaintiffs oppose it.

As noted above, the Special Report states that Attachment C is filed under seal because it "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." Special Report at 3. In other words, the Special Report states that Attachment C must be filed under seal in order not to prejudice any claims of attorney/client privilege and/or work-product protection arising from the fact that this document concerns activities of White House and Department of Justice attorneys.

As discussed above, the Department of Justice requested a copy of Attachment C from the Court Monitor, but the Court Monitor denied the request and stated that he gave his only copy of this document to the Court. For this reason, Interior Defendants ask that the Court provide them with a copy. Furthermore, because they do not know what Attachment C is–and because Plaintiffs, in contrast, do not appear to share this hindrance–Interior Defendants move 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 received a copy of this sealed document and have had the opportunity to assert any applicable privilege claims.

III. Conclusion

Interior Defendants oppose Plaintiffs' Motion to Unseal because they have not had the opportunity to receive and review a copy of Attachment C. Furthermore, they move that the

Court provide them with a copy of Attachment C, filed under seal by the Court Monitor in his Special Report, and that it take no further action regarding the Special Report (including, but not limited to, unsealing or otherwise distributing Attachment C) until they have received a copy of this sealed document and have had the opportunity to assert any privilege claims that may be applicable.

August 26, 2002

Respectfully submitted,

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STUART E. SCHIFFER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter coming before the Court on Interior Defendants' Cross Motion Regarding Interior Defendants' Access to Document Filed Under Seal by Court Monitor, any responses thereto, and the record in this case, the Court finds that the Cross Motion should be GRANTED.

IT IS THEREFORE ORDERED that the clerk of this Court provide Interior Defendants with a copy of Attachment C, filed under seal by the Court Monitor in his Special Report, and that no further action will be taken regarding the Special Report (including, but not limited to, unsealing or otherwise distributing Attachment C) until ten days after Interior Defendants have received a copy of this sealed document.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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John T. Stemplewicz
Cynthia L. Alexander
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Joseph S. Kieffer, III
Court Monitor
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Washington, D.C. 20004

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 26, 2002 I served the foregoing *Interior Defendants' Opposition to Plaintiffs' Motion to Unseal Document Filed under Seal by Court Monitor and Cross-Motion and Memorandum Regarding Interior Defendants' Access to Document Filed Under Seal by Court Monitor* by facsimile upon:

Keith Harper, Esq.
Native American Rights Fund
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(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
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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
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12th Floor
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by Hand upon:

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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").

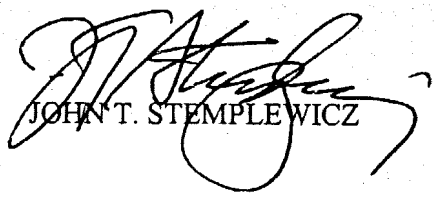
The Special Report indicates that Attachment C thereto pertains to statements about the alleged actions of White House and Department of Justice attorneys in regard to written testimony prepared by Mr. Slonaker for submission to the Senate Committee on Indian Affairs. The Special Report further indicates 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
Interior Def.s' Opposition to Pltf.s' Motion to Unseal Document Filed by Court Monitor and Cross Motion

Thank you for your cooperation and assistance.

Sincerely,



JOHN T. STEMPLEWICZ

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

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

May 13, 2002

John T. Stemplewicz
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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
Interior Def.s' Opposition to Pltf.s' Motion to Unseal Document Filed by Court Monitor and Cross Motion