U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

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NANCY M.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| 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. | ) | |
| | ) | |

**INTERIOR DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO INTERIOR DEFENDANTS' MOTION FOR RECONSIDERATION OF THAT PART OF THE COURT'S OCTOBER 18, 2002 ORDER GRANTING PLAINTIFFS' MOTION TO AWARD REASONABLE EXPENSES**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs (collectively, "Interior Defendants" or "Interior") file this Reply to Plaintiffs' Opposition to Interior Defendants' Motion for Reconsideration of that Part of the Court's October 18, 2002 Order Granting Plaintiffs' Motion to Award Reasonable Expenses ("Plaintiffs' Opposition")[1]. Plaintiffs do not not address - and therefore concede - Interior Defendants' argument that their Objections to the Special Master-Monitor's October 2, 2002 Report and Recommendation were timely filed. Plaintiffs also present an unsubstantiated argument that Federal Rule of Civil Procedure 53 contemplates the serving of objections only on the parties, not on the Court. Finally, despite Plaintiffs' protests to the contrary, the Court must hold a hearing before adopting or taking any action on the report of the Special Master-Monitor. Therefore, the Court should reconsider its

[1] Plaintiffs filed their Opposition on November 7, 2002.

October 18 Order, review Interior Defendants' Objections, and hold the hearing required in this matter before ruling on the motions at issue.

In their Opposition, Plaintiffs never address Interior Defendants' argument that the Court issued its October 18, 2002 Order before reviewing Interior's timely "Objections to the October 2, 2002 Report and Recommendation of the Special Master-Monitor" ("Interior Defendants' Objections"). As discussed on pages 2-3 of Interior Defendants' Motion for Reconsideration, Interior timely filed its Objections to the Special Master-Monitor's October 2, 2002 Report and Recommendation ("SMM Report and Recommendation"). Interior Defendants' Motion for Reconsideration at 2-3. Yet the Court issued its Order adopting the SMM Report and Recommendation before the time had elapsed for Interior Defendants to file their Objections. Because Plaintiffs do not challenge this timeliness argument, they concede Interior Defendants' timely filing of their Objections with the Court. Accordingly, the Court should have considered Interior Defendants' Objections before issuing its Order adopting the SMM Report and Recommendation.

Plaintiffs also present an unsubstantiated argument that Federal Rule of Civil Procedure 53 contemplates the serving of objections only on the parties, not on the Court. Plaintiffs' Opposition at 1. Plaintiffs go so far as to contradict themselves by arguing that there "is no provision for filing such objections with the court" and yet footnoting that statement with, "While a party may choose to file with the court an objection that they have served on opposing parties . . . ." Plaintiffs' Opposition at 1, n. 3.

Plaintiffs further argue that Federal Rule of Civil Procedure 53(e)(2) required Interior Defendants to use the word "motion" when filing their Objections with the Court. Plaintiffs'

Opposition at 1-2. This argument exalts form over substance. In fact, Plaintiffs themselves urged the Court to adopt the SMM Report and Recommendation in their "*Comments* in Support of October 2, 2002 Report and Recommendation of the Special Master-Monitor . . . ." (emphasis added).

Plaintiffs cite the Special Master's February 7, 2001 Order[2] for authority that Interior Defendants' have "failed to file the requisite motion." Plaintiffs' Opposition at 2, n. 4. The relevant part of that Order reads: "ORDERED that all requests seeking substantive relief from the Special Master shall conform to the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the District of Columbia . . . " Special Master's February 7, 2001 Order. Contrary to Plaintiffs' argument, this Order does not require Interior Defendants to style their Objections using the word "motion" when filing those Objections with the Court. The Order requires all parties to comply with the federal and local rules, which Interior Defendants have done.

Plaintiffs next argue that four cases cited by Interior Defendants in their Motion for Reconsideration stand "for nothing more than the proposition that courts often choose to conduct a hearing when timely requested" through a motion to the court. Plaintiffs' Opposition at 3 (Plaintiffs' emphasis). None of these four cases, however, require a party to file a "motion," rather than objections, with the court. In In Re Kosmadakes, 444 F.2d 999 (D.C. Cir. 1971), a "copy of the Auditor's report in the case at bar was duly received by [a party to the action], and she filed timely [sic] written *objection*." Id. at 1002 (emphasis added). In Kieffer v. Sears, Roebuck & Co., 873 F.2d 954 (6th Cir. 1989), the court held that "when a district court is

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[2] The Court has never adopted this Order.

presented with *objections* to the report of a special master, the objector has a right to a hearing . . . . " Id. at 956 (emphasis added).[3] In Hartman v. Duffey, 973 F. Supp. 189 (D.D.C. 1997), the parties had "filed numerous *objections* to the reports" of the Special Master and the court held a hearing "on *objections*" to six of those reports. Id. at 192 (emphasis added). In Walker v. NCNB Nat'l. Bank of Florida, 810 F. Supp. 11 (D.D.C. 1993), the defendant "filed a number of *objections* to the Report of the Special Master." Id. at 12 (emphasis added). The court adopted the Special Master's report "[a]fter a hearing and thorough review of the Defendant's *objections* . . . . " Id. (emphasis added.) See also Caruso Enters., Inc. v. A.J. Bumb (*In re* Wonderbowl, Inc.), 424 F.2d 178, 179-80 (9th Cir. 1970) (rejecting argument that district court was not required to hold a hearing because the arguments raised in opposition to the reports had been fully aired before the master and reflected in written objections filed with the court).

As stated in Interior's Motion for Reconsideration, all these cases echo Rule 53(e)(2)'s requirement that the Court may only rule on the Special Master-Monitor's Report and Recommendation "after a hearing." Interior Defendants' Motion for Reconsideration at 3-4.[4] Interior Defendants requested a hearing in their timely filed Objections to the SMM Report and Recommendation. Moreover, even if a motion was required to make such a request, Interior Defendants' Motion for Reconsideration expressly requested that the Court hold the hearing required in this matter before ruling on the motions at issue. Interior Defendants' Motion for

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[3] Though this citation makes clear that a court must consider "objections" filed with the court, plaintiff had styled her objections as a "motion for reconsideration of the magistrate's report and recommendation." Id. at 955.

[4] Contrary to Plaintiffs' assertions, Rule 53 does not require a motion "for action upon the report and upon objections thereto" to be filed within ten days.

Reconsideration at 2, 4. The Court must therefore review Interior Defendants' Objections and hold a hearing on those Objections before ruling on the Special Master-Monitor's Report and Recommendation.

Plaintiffs also ask the Court to award sanctions against Interior Defendants "for defendants' continuing admitted violation of the First Order for Production by refusing to complete their production of Paragraph 19 documents by the time of the depositions in question . . . . " Plaintiffs' Opposition at 5, n. 10. This argument does not address any of Interior's points in its Motion for Reconsideration and is wholly irrelevant to the Motion for Reconsideration.[5]

## CONCLUSION

For the reasons set forth above and in Interior Defendants' Motion for Reconsideration, the Court should reconsider its October 18 Order, review Interior Defendants' Objections, and hold the hearing required in this matter before ruling on the motions at issue.

Dated: November 18, 2002

Respectfully submitted,

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[5] Moreover, Plaintiffs have not properly presented a motion for sanctions to the Court.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 18, 2002 I served the foregoing *Interior Defendants' Reply to Plaintiffs' Opposition to Interior Defendants' Motion for Reconsideration of That Part of the Court's October 18, 2002 Order Granting Plaintiffs' Motion To Award Reasonable Expenses* by facsimile in accordance with their written request of October 31, 2002 upon:

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