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.	)	
	)	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER REGARDING APPLICATION OF ATTORNEY-CLIENT PRIVILEGE AND WORK-PRODUCT DOCTRINE

In response to Plaintiffs' Opposition to Defendants' Motion for Protective Order Regarding Application of Attorney-Client Privilege and Work-Product Doctrine dated November 19, 2002 ("Opposition"), the Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Secretary of the Treasury ("Defendants") submit the following reply memorandum in further support of their November 5, 2002 motion.

ARGUMENT

As Defendants' counsel stated at oral argument of this motion on November 5, 2002: "the issue today is whether the defendants' fiduciary obligations to the plaintiffs require the defendants to forfeit their right to counsel, the right to speak to their counsel in confidence when the plaintiffs file suit against them. We believe the answer to that is no." Hearing Tr. 3:1-5 (Nov. 5, 2002) ("Hearing Tr."). Plaintiffs correctly characterize Defendants' position that they "have no duty to disclose to plaintiffs *all*

information material to the management and administration of the Individual Indian Trust." Plaintiffs' Opposition at 1 (emphasis added). As established in Defendants' initial memorandum and acknowledged by this Court at oral argument on November 5, defendants may withhold information related to management and administration of the trust in (1) litigation-driven attorney-client communications, (2) attorney work-product (which is by definition litigation-driven) and (3) deliberative process materials. The case law cited in Defendants' motion and that cited by the Special Master in his May 1999 Opinion and Order support Defendants' position that the privileges applying to litigation-related communications and work product are not overcome by the fiduciary relationship between the parties. Plaintiffs fail to cite a single case that rebuts Defendants' positions and fail to show that the Special Master's opinion holds any different.

1. Plaintiffs Make No Showing that Litigation-Related Communications and Work Product Must Be Disclosed.

Defendants brought this motion in response to Plaintiffs' counsel's specific question to Defendants' witness James Cason. That questioning sought answers that required disclosure of communications with Defendants' counsel concerning trust administration issues involved in this lawsuit. Hearing Tr. 15:16-18. Plaintiffs have written not a single word to rebut Defendants' position that the question sought privileged information and that Defendants' counsel correctly instructed Mr. Cason not to answer. As the Court advised Plaintiffs' counsel during oral argument, and contrary to Plaintiffs' contentions, the advice counsel has given to Defendants during this litigation is privileged. Moreover, Plaintiffs have failed to demonstrate why they need the information. See Hearing Tr. 14:1 - 18:24

The Court recognized and accepted Defendants' fundamental position that litigation-related information was privileged as attorney-client communications or work product:

> THE COURT: I did apply that in the contempt trial and said if it was in connection with the litigation, I would always recognize the privilege.
> MS. SPOONER: Right.
> THE COURT: If it was done in anticipation of testimony in court or in connection with testimony in the court proceedings, I would always recognize that.
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> * * * *
>
> MS. SPOONER: It is important to note, Your Honor, that your average trustee -- the non-sovereign trustee -- is also not required to forego their [sic] litigation privileges.
> THE COURT: I agree. I agree. I would never purport to forego the litigation privilege.

Hearing Tr. at 5:11-17; 8:7-11.

Citing no case law, Plaintiffs are flat wrong in arguing that the privileges are lost for litigation-related communications and work product of attorneys who also provide trust administration counsel to Defendants. Opposition at 4-5. As Defendants' counsel explained at oral argument, a close and careful reading of Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906, 910 (D.D.C. 1982), as well as subsequent decisions such as In re Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997), confirm that the identity of counsel does not affect whether a communication or document is privileged.[1] Long Island Lighting expressly addresses Plaintiffs' misconception of Washington Star, Hearing Tr. at 12:7 - 13:3, and puts the focus of the attorney-client analysis on the subject of the communication, not the lawyer. Long Island Lighting establishes that an in-house lawyer's litigation communications do not lose their privileged status simply because the lawyer also

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[1] In disregard of the Second Circuit's Long Island Lighting decision, Plaintiffs' counsel misrepresented the law at oral argument by stating that the Second Circuit – and this Circuit – require different counsel to protect these privileges. Hearing Tr. at 28:8-12.

provides non-litigation advice to a trustee. 129 F.3d at 272. Plaintiffs wrongly argue that such a dual role would remove the privilege for Defendants' communications with attorneys in the Interior Department's Solicitor's Office and Treasury Counsel. Opposition at 4-5; Hearing Tr. at 28:8-24. "[B]y authorizing the employer to act as plan fiduciary in the first place, ERISA has surely absolved the employer of the lesser conflict of using a single lawyer (or its in-house consel) to advise it in both capacities." Long Island Lighting, 129 F.3d at 272 (citation omitted). Cf. Washington Star, 543 F. Supp. at 910; Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976). That quotation from Long Island Lighting also rebuts Plaintiffs' assertion at oral argument that such a conflict is grounds for disqualification and is unethical. Hearing Tr. 14:6-23.

In Washington Star, this Court was concerned with an ERISA plan employer's assertion of attorney-client privilege concerning "communications between the plan's trustees and the employer" about the plan. 543 F. Supp. at 910. The Court held that because the attorney was the plan's as well as the employer's attorney for those communications, the fiduciary exception applied. Id. Therefore, regardless of the attorney's purported dual role as employer and plan counsel, the dual-client status required disclosure to the beneficiaries. Id. Furthermore, Washington Star concerned pre-litigation communications only. In short, unlike here, that case was not about the same attorney providing different kinds of advice, but about the same attorney representing a trustee and non-trustee who were jointly seeking advice on plan administration. Had the employer – acting in its non-fiduciary role – sought advice from other counsel without involving the plan trustees, the attorney-client privilege would have protected those communications. See Id.

Under circumstances entirely different from Washington Star or this case, in Riggs Bank a Delaware chancery court rejected a trustee's assertion of work product and attorney-client privileges

against the beneficiaries because: (1) the work product involved litigation contemplated by the trustee on the beneficiaries' behalf against a third party; and (2) the attorney-client communications were to benefit the beneficiaries in that anticipated litigation. 355 A.2d at 713-17. Here, in contrast, Defendants do not seek to prevent disclosure of work product and communications concerning litigation the trustee brought against a third party on behalf of the beneficiaries, but information concerning this litigation that Plaintiff beneficiaries brought against the Defendant trustees. As shown in Defendants' initial memorandum, the latter information is privileged and Defendants have the right to preserve its confidentiality.

2. Plaintiffs Fail to Show That Crime-Fraud Exception Applies to Any Information Related to this Motion.

Plaintiffs also assert – again without reference to any case law – that the crime-fraud exception prevents Defendants from shielding otherwise-privileged material because "fraud has infected this litigation." Opposition at 3. But "infection" is not the legal standard. Alexander v. FBI, 193 F.R.D. 1, 5-6 (D.D.C. 2000) (Lamberth, J.). Plaintiffs bear the burden of showing that Defendants communicated with counsel in furtherance of a crime or fraud. In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997). "[I]t is only when a client seeks advice to further a crime or fraud that the societal interest in preventing that crime or fraud trumps the societal interests that underlie the attorney-client and work-product privileges." Nesse v. Shaw Pittman, 202 F.R.D. 344, 351 (D.D.C. 2001). "[S]omething more than 'some relationship' to the [misconduct] is required before the crime-fraud exception is applicable." United States v. Finotti, No. 88-0286, 1988 WL 129723 at *1 (D.D.C. 1988). The party seeking disclosure must prima facie show that a serious violation occurred. Id. "A prima facie violation is shown if it is established that the client was engaged in or planning a criminal or

fraudulent scheme when it sought the advice of counsel to further the scheme." In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). Hence, other advice and work product – unrelated to the crime or fraud communication – remains privileged. Id. at 402-03; Alexander, 193 F.R.D. at 9-10 (quoting In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982)).

In sum, Plaintiffs invoke the crime-fraud exception to the attorney-client and work product privileges, but offer nothing to show how it applies to Phase 1.5 discovery, much less the questions posed to Mr. Cason that prompted this motion.

3. Plaintiffs Make No Showing that Defendants May Not Invoke Deliberative Process Privilege in Phase 1.5.

This case is in Phase 1.5 now, not in a contempt proceeding. Because neither fraud nor intent is part of Plaintiffs' claims, Defendants may invoke the deliberative process privilege. In re Subpoena Duces Tecum, 145 F.3d 1422, 1424 (D.C. Cir. 1998). Although deliberative process is an important right held by Defendants as a government agency, without a factual record on specific discovery requested by Plaintiffs and opposed by Defendants, this Court has neither a basis nor a reason to rule on the application of the deliberative process privilege to this phase of the case.[2] Note, since oral argument of this motion, Defendants have asserted the privilege in the course of Phase 1.5 depositions

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[2] Defendants recognize that the Special Master's May 1999 Opinion and Order held that "the disclosure requirements applicable to fiduciary relations in general require that pre-decisional and deliberative documents and information germane to the administration of the IIM trust must be made available to the beneficiaries of the trust." Opinion and Order at 16-17. However, as established in Defendants' initial memorandum, the legal conclusions of the Opinion and Order must be reviewed de novo by this Court, regardless of whether a party served objections to it. Defendants' Motion and Memorandum at 8-9. Particularly in light of the Special Master's conclusion that this is not "an action in which the subjective motivation of agency official is a central issue," Opinion and Order at 16, his holding is incorrect as a matter of law and should not be adopted by this Court.

and Plaintiffs to date have not sought to have this Court or the Special Master-Monitor override the privilege. At oral argument, the Court confirmed that it has not decided the issue:

> MR. GINGOLD: Then we're dealing with the White House issues, too. That goes into the deliberative process issues which, by the way, the special master explicitly found is irrelevant in the context of a trust because there is an affirmative obligation.
> THE COURT: If I find that – how did [Defendants' counsel] put it – the sovereign trustee is treated differently than the regular trustee, then I guess that will resolve that question, too.
> MR. GINGOLD: Your Honor, there is no case that says that.
> THE COURT: I understand. There is no case. But I'm going to have to decide the question, and I have not.

Hearing Tr. at 20:19 - 21:5.

Plaintiffs in their opposition still broadly and wrongly argue that this Court's rejection of the deliberative process for specific documents during the second contempt trial means that the privilege is unavailable for any other purpose. Opposition at 3 and n.6. Plaintiffs make this argument despite being rebuffed by the Court on this point at oral argument:

> MR. GINGOLD: One last point. You stated the deliberative process privilege disappears altogether -- and this is not in a trust context -- when there is any reason to believe the government misconduct has occurred. Your Honor, we have gone through two contempt trials. If there isn't a reason to believe that government misconduct has occurred in this case, plaintiffs suggest --
> THE COURT: Well, that misconduct I'm talking about there, that is a crime fraud exception though where there was a violation of a criminal privacy act statute isn't it?
> MR. GINGOLD: Yes, it is.
> THE COURT: I don't think that's the same question as here.
> MR. GINGOLD: It is not the same question, but it is certainly analogous because --
> THE COURT: It may be analogous, but I found that the President violated a criminal provision of the privacy act. . . . [I]t is not the same question.
> MR. GINGOLD: Well, but that goes -- you did say the deliberative process privilege, even outside the trust, is not absolute.
> THE COURT: I agree with that, too.

Hearing Tr. at 22:6 - 23:3. At the second contempt trial, Defendants raised the privilege in seeking to protect e-mail concerning the first quarterly report to the Court on trust reform. Trial Tr. 942:22 -

943:12 (Dec. 17, 2001). The Court ruled then that "[t]he allegations of fraud in the preparation of the first quarterly report are sufficient that I will not allow [deliberative process] privilege or attorney-client privilege to hide any of these documents from public viewing as to whether the defendants were committing contempt by fraudulently misleading the Court." Trial Tr. 946:4-9.

Plaintiffs complain that "defendants [sic] assertion must fail because they have not met their burden of showing that the documents that they seek to shield are **both** 'predicisional' **and** 'deliberative.'" Opposition at 3 (emphasis in original). Defendants do not know to what "documents" Plaintiffs are referring. Defendants' counsel brought the deliberative process privilege to the Court's attention as a matter of general concern, particularly in light of the Special Master's Opinion and Order of May 1999. Hearing Tr. 2:16-19; 7:10-25. However, Defendants are unaware of specific documents – other than "Attachment C" (discussed below) – that are being litigated over this privilege.

4. Special Master's May 1999 Opinion & Order Does Not Preclude Court from Upholding Defendants' Privileges.

Defendants' initial legal memorandum addressed not only many of the questions the Court raised at oral argument regarding attorney-client communications and the work-product doctrine, but also the status of the Special Master's May 1999 Opinion and Order. As the Court pointed out at oral argument, neither party objected to the Opinion and Order when it was filed on May 12, 1999. Yet, as explained in Defendants' initial memorandum, a fair reading of that opinion is consistent with Defendants' position here concerning the attorney-client and work product privileges, primarily because the Special Master's opinion concerned documents that were not litigation-related, as both sides then acknowledged and understood. Nevertheless, the Opinion and Order is a Rule 53 report and

recommendation, which this Court may not adopt without de novo review. Plaintiffs' offer no argument to the contrary.

Concerning attorney-client privilege, the Special Master held that Defendants must disclose documents "created or maintained *in the course of the fiduciary activity of trust administration.*" Opinion and Order at 10 (emphasis added). This conclusion is consistent with the law. Further, he opined that Defendants may withhold work product "prepared and created solely for use by counsel in anticipation of *or in the course of this litigation.*" Opinion and Order at 13 (emphasis added). Even if "solely" modifies the latter alternative ("in the course of litigation"), that pronouncement draws a temporal line that cuts off the beneficiaries' rights once they sue their trustees. Finally, the Special Master recognized what Defendants' counsel emphasized at oral argument – the intertwined nature of this trust litigation and trust administration issues, Hearing Tr. 8:23 - 9:11 – in restating his holding:

> [D]ocuments . . . need not be produced . . . [which] are those prepared for use in this or other pending litigation . . . – not as to legal compliance generally, but rather as to specific matters arising in this litigation. *Such documents do not relate to trust administration* except in the very broadest sense (i.e., in the sense that responding to litigation involving a trust is one of the functions of a trustee).

Opinion and Order at 13-14 (emphasis added).

Therefore, in context, the Special Master's May 1999 Opinion and Order is consistent with and largely supports Defendants' positions on the attorney-client and work product privileges in this motion. In addition, although Defendants submit that the Special Master's analysis and holding concerning the deliberative process privilege is contrary to the law, his Opinion and Order does address relevant case law of this Circuit. Lastly, Defendants' conduct, in conjunction with the limited application and force of the Special Master's "holdings," does not amount to a waiver of their rights to assert these privileges here.

5. Plaintiffs Arguments Relating to "Attachment C" Are Inappropriate and Should Be Stricken.

As Plaintiffs did at oral argument, in their Opposition they inappropriately argue issues related to "Attachment C." Opposition at 3-4 and n.7; Hearing Tr. at 18:25 - 20:9. This motion and the deposition that prompted this motion have nothing to do with that document or the motion practice that directly concerns Attachment C. Plaintiffs' arguments should be stricken.

CONCLUSION

For the reasons set forth above, the Court should enter a Protective Order to prevent the disclosure of attorney-client communications made and attorney work product created from a date no later than the onset of this litigation, whether it involved Defendants' counsel at the Department of the Interior, Department of the Treasury or the Department of Justice.

November 27, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 27, 2002, I served the foregoing *Defendants' Reply Memorandum in Support of Motion for Protective Order Regarding Application of Attorney-Client Privilege and Work-Product Doctrine* by facsimile, in accordance with their written request of October 31, 2001 upon:

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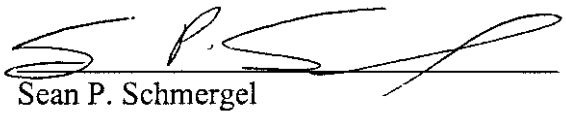

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