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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

No. 1:96CV01285 (RCL)

DEFENDANTS' RESPONSE AND OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER-MONITOR ON SEQUESTRATION OF WITNESSES FOR PHASE 1.5 TRIAL DISCOVERY DEPOSITIONS

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Defendants") hereby submit their response and objections to the Report And Recommendation Of The Special Master-Monitor On Sequestration Of Witnesses For Phase 1.5 Trial Discovery Depositions ("Report" or "R&R"), filed on December 16, 2002. The Special Master-Monitor has recommended that the Court enter an order providing as follows:

> ORDERED, that Deputy Secretary J. Steven Griles, Associate Deputy Secretary James Cason, and Director of the Office of Indian Trust Transition Ross Swimmer shall not discuss the substance of their depositions with any person, including each other but excluding counsel, until the completion of their and all other depositions of government fact witnesses, and it is
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> FURTHER ORDERED, that the Griles, Cason and Swimmer deposition transcripts be placed under seal pending completion of all depositions of government fact witnesses.

Proposed Order (filed Dec. 16, 2002). The recommended order must be refused because the record is devoid of the requisite "good cause" necessary for entry of a protective order under Federal Rule of Civil Procedure 26(c).[1]

The Report recommends entry of the above protective order based on the patently flawed position that no "good cause" showing is required. Plaintiffs have made no showing of good cause, nor does the Report identify any good cause supporting the particular sequestration language found in the proposed order. The Report instead relies entirely on the unsupported assertion that "[w]hatever the law regarding the authority of a court or parties to *require the sequestration of witnesses* to depositions as oppose[d] to trials, those laws and procedures do not prevent *agreements to be reached between parties concerning such sequestration* or allow those agreements, authorized by a court or special master, to be broken on the whim of one party." Report at 24 (original emphasis). The stated premise is fatally defective, for it not only misinterprets the relevant facts but relies on a fundamentally erroneous application of the law.

As demonstrated below, there has been no breach of *any* so-called "agreement" on sequestration. No good cause exists to perpetuate sequestration of *any* witnesses, and Plaintiffs have failed to show, nor can they show, any prejudice whatsoever if the recommended order is not adopted. The act of "sequestering" witnesses, especially in the deposition context, is strongly disfavored. A sequestration order, as the name implies, does not merely affect counsel or actual litigants. It imposes additional, significant and onerous obligations on individual

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[1]/The Report also recommends against assessment of any sanctions against Defendants in connection with the sequestration issue. Defendants agree with this limited part of the Special Master-Monitor's recommendation for the reasons stated in his Report and for the additional reasons that sanctions are should be deemed moot because no order of sequestration of deposition witnesses is warranted or has ever been granted.

nonparties concerning what they may discuss and with whom, all under a threat of contempt for its violation. It is therefore axiomatic that the obligation of "sequestration" may come only in the form of a protective order duly entered by the Court pursuant to its authority under Federal Rule 26(c) to govern the conduct of discovery. Rule 26(c), in turn, requires that such discovery orders be based upon an express finding of good cause, which is unmistakably absent here.

The essential background facts relevant to the issue of sequestration are not in serious dispute. On September 17, 2002, the Court ordered that Defendants submit by January 6, 2003 a plan for "conducting a historical accounting of the IIM trust accounts" and a plan for "bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries. Order, Sept. 17, 2002, at 3. The Court also authorized discovery to be taken prior to a trial on the merits of the plans, set for May 2003.

At a discovery conference held by the Special Master-Monitor on October 3, 2002, Plaintiffs requested certain modifications to the Federal Rules. One modification Plaintiffs sought was "sequestration" of three witnesses, J. Steven Griles, James Cason and Ross Swimmer, each of whom is an official of the Department of the Interior involved in work on the plans ordered by the Court. Discovery Tr. at 229 (Oct. 3, 2002) [Excerpts from the Oct. 3, 2002 transcript are appended as Exhibit 1].[2] Defendants agreed only to consider such a proposal, and

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[2]Although the Report recommends a protective order limited to three witnesses, the Report suggests -- incorrectly – that the parties had agreed to sequestration that was "open-ended" in scope. See Report at 28. The facts prove otherwise. The record cited in the main text above clearly reveals that the only "sequestration" being debated involved upcoming depositions of three witnesses, Messrs. Griles, Cason and Swimmer. The Special Master-Monitor expressly acknowledged this limited scope in subsequent correspondence on the subject. See Letter from Special Master-Monitor Kieffer to counsel, dated October 14, 2002 at 4 ("All *three* deponents would be subject to a sequestration order to be agreed to by the parties to prevent their talking to each other about their individual depositions.") (emphasis added) (citing the Discovery

the Special Master-Monitor directed Plaintiffs to submit a proposed form of sequestration. Id. at 230.

The matter was discussed again during a second discovery conference on October 18, 2002. The Special Master-Monitor described a general understanding on "sequestration" with respect to the depositions of Messrs. Griles, Cason and Swimmer to be held during the month of November.

> MR. KIEFFER: Here's what he [Defendants' counsel] is going to do. There is going to be a deposition with Cason. Cason can talk to his counsel. Cason can't talk to Griles or anyone about that deposition. The counsel may [or may] not be the same counsel that Cason spoke to that then preps Swimmer in his deposition. In that prep, they can talk about a whole range of subjects, but they will not indicate that any particular subject was discussed at the deposition. And in that range, the subject is going to be larger than what was in that deposition, so there is going to be no knowledge on the part of Mr. Swimmer that the subjects they are prepping him on are just the subjects that were discussed in the deposition.

Discovery Conference Tr. at 19-20 (Oct. 18, 2002) [Excerpts from the Oct. 18, 2002 transcript are appended as Exhibit 2]. The full terms of "sequestration," however, were never specified and were not thereafter reduced to a formal written protective order. The Special Master-Monitor noted his anticipation that the "three deponents would be subject to a sequestration order to be agreed to by the parties to prevent their talking to each other about their individual depositions." Letter from Special Master-Monitor Kieffer to counsel, dated October 14, 2002 at 4 (emphasis added) [copy appended as Exhibit 3] (citing Discovery Conference Tr. at 229-230 (Oct. 3, 2002)). No protective order, however, was proposed, considered or adopted by the Special Master-Monitor or entered by the Court on the subject of sequestration. Likewise, the

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Conference Tr. at 229-230 (Oct. 3, 2002)).

Court made no independent determination that "good cause" existed for a protective order on sequestration.[3]

During November, Plaintiffs took depositions of Messrs. Griles, Cason and Swimmer. Initially, Plaintiffs asked for each of these witnesses to be produced for three days of deposition in November, with the possibility that these witnesses might be deposed again in January 2003, following the filing of the Defendants' plans with the Court. The Special Master-Monitor summarized as follows:

> MR. KIEFFER: Let's take *three days now* and see what's left over. I would rule that they have the right to take them *again* after the plan. But there's so much that they have to do with them, let's see how fast they finish the *first* three days. And I'll be there. I'm going to come to these depositions to make sure they progress fairly but rapidly. Then we'll address that issue later on.

Discovery Conference Tr. at 197 (Oct. 3, 2002) (emphasis added). As things proceeded, however, Plaintiffs took only one full day of deposition for each witness during November 2002.

Although no proposed form of protective order embodying the parties' discussions on sequestration had been presented, debated, or submitted to the Court, the Defendants permitted the three depositions of Messrs. Griles, Cason and Swimmer to go forward. The witnesses were "sequestered" throughout these depositions.

Over the course of these depositions and the continuing confusion about the extent and meaning of sequestration, it became apparent to Defendants that the idea of sequestration was far more complicated than first perceived. Without a clearly delineated order in place, the

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[3]The Report and Recommendation now at issue marks the first time a proposed protective order on sequestering deposition witnesses has been presented.

parties differed over when any "sequestration" obligation should end, see generally Telephonic Discovery Conference Tr. at 32 (Nov. 13, 2002) [excerpt appended as Exhibit 4], whether the practice of sequestration should be extended to other witnesses, and whether use of sequestration made any sense at all when other witnesses (and the general public) could freely read transcripts of "sequestered" witnesses' testimony, see generally Deposition of James Cason at 304, 311-13 (Nov. 7, 2002) (discussion among counsel and the Special Master-Monitor about extension to other witnesses and public availability of transcripts) [excerpt appended as Exhibit 5]. Defendants ultimately concluded that the progress of discovery would be hindered, not helped, by further accommodation of Plaintiffs' request for sequestration. Therefore, after the three witnesses were deposed, Defendants duly notified Plaintiffs in writing that they did not intend further "sequestration" of these witnesses. Letter from Sandra P. Spooner to Keith M. Harper, dated November 25, 2002 [copy appended as Exhibit 6].

Upon receiving this notice Plaintiffs complained and the Special Master-Monitor asked Defendants to maintain the "status quo" – that is, that the three witnesses remain "sequestered" – until the issue could be resolved. Thus, at this time, there has been no change in the status of the three witnesses in question.

ARGUMENT

A. Sequestration Of Discovery Deponents Is Not Favored

The entire idea of "sequestering" witnesses is foreign to deposition discovery. The notion of "sequestering" a deposition witness is founded on an ill-advised extension of an *unwritten* expansion of a rule of evidence employed at trials. At trial, Rule of Evidence 615 authorizes a court to order trial witnesses excluded from the courtroom "so that they cannot hear

the testimony of other witnesses, and it may make the order on its own motion." Fed. R. Evid. 615 (emphasis added). This rule, by its own terms, does not authorize the type of restrictions Plaintiffs want to impose on Interior Department officials. It is silent about preventing witnesses from speaking to others; its only express prohibition merely prevents them from sitting in court and listening to other testimony. Thus, Rule 615 cannot be a basis for the broad "gag" order that the Special Master-Monitor has recommended.

Moreover, Rule of Evidence 615 simply does not apply to deposition discovery and cannot be a basis for authorizing restrictions on discovery deponents. Rule 30(c) of the Federal Rules of Civil Procedure, which governs the conduct of depositions, expressly provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at trial under the provisions of the Federal Rules of Evidence except Rules 103 [concerning the making of objections] and 615 [regarding the exclusion of witnesses]." Fed. R. Civ. P. 30(c) (emphasis added). The Advisory Committee notes to the 1993 amendments to this rule state that the "revision [adding an exception to Rule 615] provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate." Fed. R. Civ. P. 30(c) advisory committee note.

Such restrictions in depositions are disfavored. In Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998), the Court refused to impose witness restrictions that were far less onerous than the "gag" order recommended here by the Special Master-Monitor. In Alexander, the plaintiffs sought only to keep certain potential witnesses from sitting in on the deposition of other witnesses; the plaintiffs there were not seeking to "gag" witnesses, as Plaintiffs are here. Nevertheless, the Court, denied the motion, discussing Rule 615 as follows:

> Finally, plaintiffs request that this court prohibit Sally Paxton, Special Associate Counsel to the President, and David Cohen, attorney for Craig Livingstone, from appearing at any further depositions in this case. Plaintiffs make this request pursuant to Rule 615 of the Federal Rules of Evidence.
>
> Rule 615 states in relevant part that "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses ..." Fed. R. Evid. 615. Plaintiffs contend that Paxton and Cohen are material witnesses in this case and therefore, these individuals should be excluded from future depositions.
>
> *Plaintiffs' reliance on Rule 615 is misplaced.* Rule 30(c)of the Federal Rules of Civil Procedure governs the conduct of depositions and states that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence *except Rules 103 and 615."* Fed. R. Civ. P. 30(c). The Advisory Committee notes to Rule 30(c) add that "[t]he revision provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 26(c)(5) when appropriate." Id. (Advisory Committee Notes for Rule30(c), 1993 Amendments). Rule 26(c)(5) permits the court to enter a protective order ordering "that discovery be conducted with no one present except persons designated by the court." Fed. R. Civ. P. 26(c)(5).

186 F.R.D. at 53 (emphasis added). The decision in Alexander makes clear that Rule of Evidence 615 does not govern depositions; such issues are to be determined pursuant to Fed. R. Civ. P. 26(c).

Rule 26(c), however, only comes into play upon a "motion by a party . . . and *for good cause* shown." Fed. R. Civ. P. 26(c) (emphasis added). No motion for a protective order regarding sequestration was ever filed with either the Special Master-Monitor or the Court. More important, no showing of good cause has been made and no evidence of any "good cause" exists in the record. No basis, therefore, exists for the Court to adopt the Special Master-Monitor's recommended order.

The Report's recommendation rests entirely on the flawed proposition that "good cause" need not exist to support a formal order of sequestration, if the parties agree in any shape,

manner or form – no matter how tentatively, indefinitely or preliminarily – to sequestration. This bald assertion is plainly wrong, and the report cites no precedent for a Rule 26(c) order absent a finding of "good cause." The Report readily concedes that "[t]here was no written agreement finalized by the parties regarding the sequestration agreement," Report at 35, which necessarily means that no binding order regarding sequestration exists. The Report's recommendation instead seeks justification on the tenuous basis that "defendants' counsel abided by the terms of the [nonfinalized] oral agreement and plaintiffs' counsel relied upon it through the first day of the depositions of each of the three-named deponents."[4] Id. Past practice and unspecified "reliance" are not adequate bases for finding "good cause" for entry of a protective order under Rule 26(c).

B. Specific Findings Of "Good Cause" Are An Essential Prerequisite For A Protective Order, But No Good Cause Exists Here

1. There Must Be A Specific Finding Of Good Cause

The reasoning advanced in the Report ignores the plain prerequisite for proper entry of a protective order. Courts have held that even when parties have agreed to a protective order under Rule 26(c), and even when such stipulated orders are entered by the court, those orders are not enforceable unless: (1) the party seeking protection under the order has demonstrated "good cause" for the restriction and (2) the Court has made an independent determination that good cause exists warranting enforcement. See Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227-228 (6th Cir. 1996) ("good cause" determination needed even when protective

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[4] The Report also asserts that the Special Master-Monitor "relied" on the so-called sequestration arrangement in "regulating" discovery. Report at 35, n. 6. The stated reliance is not supported, and nowhere is there mention of any impact that sequestration had on the conduct of discovery.

order terms are stipulated); FTC v. Digital Interactive Associates, 1996 WL 912156, at *3 (D. Colo. 1996)("court in determining whether or not to enforce a confidentiality agreement which has not been entered by the court as a protective order [must consider] whether the party seeking to enforce its provisions can demonstrate 'good cause' for doing so under Fed. R. Civ. P. 26(c)") (denying enforcement). Neither condition is satisfied here.

Other courts in similar circumstances have held that it is error even to enter a *stipulated* protective order absent an independent determination that "good cause" exists for the order. Jepson, Inc. v. Makita Elec. Works, 30 F.3d 854, 858-59 (7th Cir. 1994) (overturning sanctions for violation of stipulated protective order where no "good cause" determination was made by magistrate); cf. United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky.1989), rev'd on other grounds, 927 F.2d 252 (6th Cir. 1991) (stipulated confidentiality orders should not be given binding effect even if they are entered by the court; court should balance the interests between privacy and public access at the time the motion to modify a protective order is made).

The Report unsuccessfully attempts to distinguish this entire line of precedent by implying that parties can "stipulate" to the sequestration of deposition witnesses under Rule 29 and that the cases requiring a specific good cause finding under Rule 26(c) are limited to cases involving confidentiality orders. See Report at 32 ("here no public body is seeking these depositions' release"), 37 n. 8. These distinctions, however, make no difference.

By its very nature, an order of sequestration – just like a confidentiality order – is fundamentally different from and wholly unlike other discovery matters on which litigants may stipulate. For example, the Report cites a case in which there was agreement between litigants about what subjects may be probed, see Report at 38 (citing Alexander v FBI, 186 F.R.D. 144,

147 (D.D.C. 1999), and a case involving the issue of where depositions may be held, see Report at 36-37 (citing In Re Vitamins Antitrust Litigation, 2001 U.S. Dist. Lexis 24025 (D.D.C. 2001)), but such matters involve simple case administration or housekeeping that have no real import beyond the litigants themselves. Such simple matters can be resolved under Rule 29 because they do not require anyone's conduct beyond counsel or the immediate parties to be compelled. A sequestration or "gag" order on the other hand – just like a confidentiality order for documents – is substantively different. It imposes material limitations and restrictions reaching beyond the parties themselves to witnesses, nonparties and potentially others as well. Parties may not by themselves simply "agree" to subject witnesses and other nonparties to a continuing admonition restricting their freedom of speech without the Court also determining independently that "good cause" exists to impose such a restriction.[5]

2. Perfunctory Presumptions Of "Good Cause" Are Insufficient

No evidence of "good cause" exists here. In submissions to the Special Master-Monitor, Plaintiffs sole argument regarding "good cause" was a wholly unsubstantiated assertion that with sequestration "plaintiffs have been more willing to delve into certain subject matters with less fear that testimony would be orchestrated or manipulated." See Report at 28 (quoting a letter from Plaintiffs' counsel). No testimony is cited. No "sensitive" questions are identified. Plaintiffs make no proffer of how their discovery would be adversely affected – nothing. Even the Report, although at one point postulating that this unspecified "fear" poses "irreparable

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[5]Indeed, because the proposed order recommended by the Report would place deposition transcripts under seal, it is a matter of confidentiality indisputably falling under Rule 26(c), even according to the analysis in the Special Master-Monitor's Report. Thus, good cause is an absent but essential prerequisite.

harm" to Plaintiffs, see id., ultimately concedes that Plaintiffs have done no more than "allude[] to that reliance" on sequestration. Report at 32. "Allusion" does not constitute proof, and unspecified and unsubstantiated "fear" does not constitute good cause.

When considering a much more limited request for the exclusion of certain material witnesses in Alexander v. FBI, this Court refused to prohibit certain witnesses from attending others' depositions because "[p]laintiffs have failed to identify any compelling or extraordinary circumstances warranting the exclusion of these witnesses from future depositions."[6] 186 F.R.D. at 53. Here, by contrast, no circumstances exist beyond mere speculation based on allusions to an unsubstantiated fear.

Such a perfunctory showing does not satisfy Rule 26(c). This rule provides in pertinent part(s):

> Upon motion by a party or by the person from whom discovery is sought, . . .for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from *annoyance, embarrassment, oppression, or undue burden or expense,* including one or more of the following:
> . . .
> (5) that discovery be conducted with no one present except persons designated by the court . . . .

Fed. R. Civ. P. 26(c) (emphasis added). Before an order can be properly entered under Rule 26(c), there must be proof of specific "annoyance, embarrassment, oppression, or undue burden or expense" that requires intervention. The Report does not even address these factors, and no

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[6]Plaintiffs contended before the Special Master-Monitor that Alexander's language requiring "compelling or extraordinary circumstances" applies only when one seeks to exclude named parties. However, the witnesses mentioned in Alexander – two attorneys -- do not appear to have been named "parties" any more than the Department of the Interior officials who are targets of the recommended order here. Nevertheless, there has been no showing of any basis at all in this case for the far more burdensome sequestration recommended in the Report.

evidence of good cause exists in the record.

To the contrary, Plaintiffs have done no more than insinuate generally that Defendants (and, by implication, their employees) cannot be trusted. Generic, boilerplate claims are plainly insufficient. Courts require specific facts that establish serious, well-founded concern that coercion or collusion will, in fact, occur absent restrictions. "Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that '[t]he burden is upon the movant to show the necessity of its issuance, which contemplates *a particular and specific demonstration of fact* as distinguished from stereotyped and conclusory statements.'" In re Terra Int'l, Inc., 134 F.3d 302, 306 (5th Cir. 1998) (per curiam) (quoting United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)) (emphasis added). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987); Tuszkiewicz v. Allen Bradley Co., 170 F.R.D. 15, 16-17 (E.D. Wisc. 1996) (protective order denied where there were no "distinct facts that would lead the court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other's depositions will otherwise affect their testimony"); see also 8 C. Wright & R. Marcus, FEDERAL PRACTICE AND PROCEDURE §2035 (1994) ("The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory allegations.").

C. The Report And Recommendation Also Ignores The Substantial Public Policy And Practical Concerns Militating Against Sequestration

Several substantial reasons exist for setting the threshold for witness restrictions so high. First, Federal Rule of Civil Procedure 30, by its own terms, does not contemplate such restrictions as a matter of course. Without a specific showing of *real* harm, almost every

deposition could qualify for some kind of witness restriction. In one case, the Fifth Circuit granted mandamus in order to vacate a district court's sequestration order. In re Terra Int'l, 134 F.3d at 306-07. The order was based on a "conclusory allegation that a substantial majority of the fact witnesses . . . are employees of Terra [a party] and that they will therefore be subject to Terra's influence and will be inclined to protect each other through a sense of 'camaraderie.'" Id. at 306. The court held that no good cause for sequestration existed and "[t]o conclude otherwise would indicate that good cause exists for granting a protective order any time fact witnesses in a case are employed by the same employer or are employed by a party in the case." Id. The court noted that such a low threshold would be "inconsistent with this court's admonition that a district court may not grant a protective order solely on the basis of 'stereotyped and conclusory statements.'" Id.; see also Jones v. Circle K Stores, Inc., 185 F.R.D. 223, 224 (M.D.N.C. 1999) (denying protective order where facts alleged did not appear "as being anything more than ordinary garden variety or boilerplate 'good cause' facts which will exist in most litigation") (quoting BCI Comm. Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 160 (N.D. Ala. 1986)); Tuszkiewicz, 170 F.R.D. at 17 (protective order sought because witnesses were employees of a party did not prove "good cause"; to grant the order "would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result").

Second, the process of deposition discovery is such that restrictions on witnesses are wholly unnecessary. Opposing parties can explore at length the contacts one witness has had with another, the transcripts or documents a witness reviewed before being deposed, whether the witness discussed previous depositions with other witnesses, and what the content and purpose

of those discussions were. All of these avenues are open to examination and permit the examiner to ferret out collusion or, more innocently, a polluted recollection based on conversations with others. By contrast, a "gag" on deposition witnesses is no guarantee against collusion or pollution (both can still take place prior to the first deposition) and promises no real improvement over effective deposition questioning.[7]

Third, a "gag" restriction places onerous burdens on witnesses and other litigants that should be avoided absent the presence of truly exceptional circumstances. See Conrad v. Board of Comm'rs, No. 00-207, 2001 WL 1155298, at *2 (D. Kan. Sept. 17, 2001) ("Sequestration of deponents should be the exception rather than the rule."). The sequestration sought in this case would require three top officials of the Department of the Interior – the Deputy Secretary, the Associate Deputy Secretary and the Director of the Office of Indian Trust Transition – to conscientiously refrain from mentioning anything relating to their deposition questioning or testimony for as long as another four months, until discovery closes. These three officials are presently working day to day on matters of trust reform, which involves topics inextricably tied to the subjects covered in deposition. These gentlemen must also communicate and converse with one another so that the plans ordered by the Court can be timely submitted on January 6, 2003 and the matter readied for trial. These circumstances place an enormous – and wholly unnecessary – burden on these witnesses to watch every word they say, so that some trivial revelation or recollection of some deposition moment is not unthinkingly spoken.

All the effort required to abide such a restriction is of no real value any way. The

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[7]Indeed, another material defect in the Report is the noted absence of any principled determination that these ordinary "checks" on the deposition process – used in every other case – are somehow inadequate here.

transcripts of these depositions were never under seal, so any other employee at the Department of the Interior or any member of the public has been free to read the verbatim testimony of Messrs. Griles, Cason and Swimmer, even though these witnesses have been told not to discuss their own testimony. This circumstance alone demonstrates that Plaintiffs suffer no "detriment" by the absence of further sequestration.[8]

These officials should not be subjected to such a long, drawn out duty when they need to be free to put all their energy into trust reform efforts and trial preparation. As one court observed in the context of a criminal trial, "[i]t is somewhat unrealistic to expect policemen, agents, experts and witnesses who have known each other for years and who have worked together in preparing a case to sit for hours together in a witness room or a hall without carrying on some conversation." United States v. Scharstein, 531 F. Supp. 460, 464 (E.D. Ky. 1982) (denying new trial based on court's refusal to issue a "gag" order for witnesses). Indeed, sequestration in this circumstance would also burden the court, by plunging it into a "myriad of enforcement problems and a plethora of collateral issues," id., where no real need exists in the first instance.

Finally, such restrictions could, if imposed, deny Defendants fundamental fairness. By unnecessarily restricting how Defendants can prepare their witnesses and investigate the case in

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[8]The Report seeks to close the door after the horse has left by placing the transcripts under seal, but this recommendation is also flawed, for no good cause has been asserted and the parties did not stipulate to sealing these depositions. Placing the transcripts under seal would also interfere with Defendants' ability to prepare for trial, such as through consultation with outside experts regarding the testimony.

preparation for trial, a sequestration order can run afoul of the Constitution. As at least one court explains:

> In the view of this court, absolute adherence to the more stringent view [i.e., ordering witnesses not to discuss their testimony] involves such practical difficulties as to be for the most part unworkable. In any hard-fought case the parties adjust and revise their strategies as the trial proceeds. As the Supreme Court of the United States has pointed out:
>
> > "It is common practice during such (overnight) recesses for an accused and counsel to discuss the events of the day's trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without lawyer's guidance." [Quoting Geders v. United States, 425 U.S. 80, 88 (1976).]
>
> It is also common practice and an essential part of trying a case for the trial attorney to confer with his experts and other prospective witnesses during such recesses, as well as before trial. *It has been held that to deprive a party, even a corporate party in a civil case, of the right to consult with counsel as the trial proceeds is to infringe its right to due process of law. This court believes that similar considerations apply to the right of a party to have his counsel free to discuss with prospective witnesses developments in the case, including the testimony of other witnesses.*
>
> > If counsel can relate to a witness what another witness has said, it would seem to be an exercise in futility for the court to try to prohibit one witness from talking to another about the case outside the courtroom. Although the United States in a criminal prosecution may not technically have a right to due process of law, this court believes that fairness requires that it be afforded the same latitude in the interpretation of Rule 615 that due process would afford a corporate defendant.

Scharstein, 531 F. Supp. at 463-64 (emphasis added) (footnotes omitted). No less concern exists here.

CONCLUSION

For the foregoing reasons, the referenced Report and Recommendation of the Special Master-Monitor should not be adopted to the extent it recommends entry of a protective order sequestering any deposition witnesses or placing any transcripts under seal.

Dated: December 31, 2002

Respectfully submitted,

ROBERT D. McCALLUM, JR.
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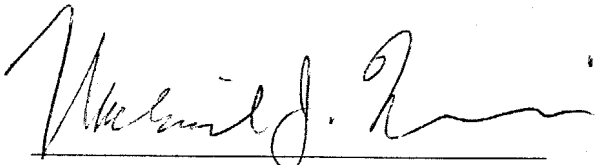

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 31, 2002 I served the foregoing *Defendants' Response and Objections to the Report and Recommendation of the Special Master-Monitor on Sequestration of Witnesses for Phase 1.5 Trial Discovery Depositions* by facsimile in accordance with their written request of October 31, 2001 upon:

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By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
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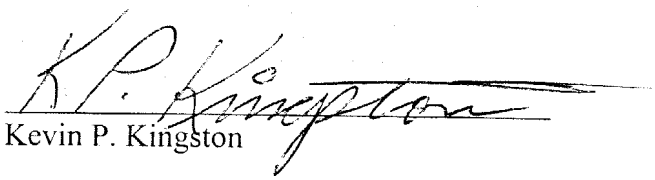
(202) 478-1958



Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - - x
ELOUISE PEPION COBELL, et al., :
Plaintiffs, :
v. : Civil Action
GALE A. NORTON, Secretary of : Number 96-1285
the Interior, et al., : (RCL)
Defendants. :
- - - - - - - - - - - - - - - - - - - x

SCHEDULING CONFERENCE

Department of Justice
1100 L Street, N.W.
Washington, D.C.
Thursday, October 3, 2002
10:05 a.m.

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Special Trustee under him, so they are very important witnesses. And I think we should identify when in the plaintiffs' time period they can be available for, I would say, up to three days of discovery. It may not take that long.

MR. QUINN: You're saying three days in total for each witness?

MR. KIEFFER: Yes. They've got such a breadth of knowledge and responsibility for what will go into the plans and how the people were handled under those plans, where the people are going to come from. I spent nine months meeting with those three gentlemen, so they have a great deal of knowledge.

MR. HARPER: We would agree that we would both need to take those depositions extensively prior to the development of our plans in order to properly develop our plan both on historical accounting and on Trust reform. But since they would likely also be involved in developing defendants' plan, we would likely need the opportunity to depose them after the plans are submitted, as well. So we would submit that it is appropriate, as you have just stated, to depose them both before and have that continuing

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until after.

MR. STEMPLEWICZ: Our concern with these individuals is, particularly with Mr. Griles and Mr. Cason, is they have many other responsibilities in addition to Trust responsibilities, even though -- and I can attest that they spend a very substantial portion of their time on their Trust responsibilities.

We would like to minimize the time that they are required to spend in deposition because of their other responsibilities, if we can do that at all.

MR. KIEFFER: Let me just answer the question right there. I have sat also with these gentlemen at least three, if not four, days out of the month either in Alaska, California or North Dakota with the tribes. All three of them stayed for three or four days every month on Trust reform issue with the tribes to try to get a plan here. If they can put that amount of time into that, they can put three days initially in the deposition.

MR. STEMPLEWICZ: Because they do things like that and being in a deposition reduces the time, that perhaps is important for

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them to spend on things.

MR. KIEFFER: This trial is more important for them to spend some time on what they've been doing there. You can file a motion or whatever else if you want to on this, but I think the plaintiffs are entitled to them. I think they're entitled to at least have three days. I'm not sure they're going to take that. Because, frankly, they're so high up in some cases that they may not have any knowledge about some of on these issues. But they certainly are very knowledgeable when they go out to talk to the tribes.

So that you agree to three days within this period and continue their depositions. It may not be necessary later on, and I think they may not be, because there will be a lot of other people doing the work that these gentlemen want to talk to. But there are so many other issues that relate to those plans, you have to find out where things are on Trust reform that are going to impact on those plans and whether those plans are even possible that they need to get their testimony.

MR. STEMPLEWICZ: Given their

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responsibilities and the level of detail that they're at, I think three days, total, including any on the back end that might be necessary later on is a reasonable limit.

MR. KIEFFER: Let's take three days now and see what's left over. I would rule that they have the right to take them again after the plan. But there's so much that they have to do with them, let's see how fast they finish the first three days. And I'll be there. I'm going to come to these depositions to make sure they progress fairly but rapidly. Then we'll address that issue later on.

MR. HARPER: A point of clarification.

Will the defendants then get back to us on specific dates of availability for the three? I guess the last couple weeks of this month.

MR. BROWN: The end of paragraph 12.

MR. HARPER: I think those have to be adjusted a little bit in order to ensure that we have sufficient time to get all the information that may be necessary. So somewhere between the 21st of October to November.

MR. KIEFFER: I would tell you right now Mr. Griles is planning to be out at the ITMA

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with it.
MR. KIEFFER: Just do the same thing you did back here in 4. State you can't produce and why.
MR. BROWN: And, hopefully, it will be, like the protective order, as soon as it's known, within the first week or something.
MR. KIEFFER: Did you hear that, Mr. Stemplewicz?
MR. STEMPLEWICZ: I'm sorry. I didn't.
MR. KIEFFER: As soon as you know that Ernst & Young will not produce the 30(b)(6) witness, you let the Special Master monitor and the plaintiffs know.
MR. BROWN: Can we say it will be within the first 5 days after notice, so that everyone has an obligation to go to their witnesses and find that out.
MR. KIEFFER: Yes. Don't wait until the last minute to say Ernst & Young, we need one of you and they say no, we want a subpoena and all that.
All right. Next.
MR. STEMPLEWICZ: I had one other

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point on 6.
As far as all depositions being taken in Washington, D.C., there may be circumstances where a particular individual is unable to travel or it may be more practicable if there's going to be three or four witnesses in some location like St. Louis or wherever, just as an example, or --
MR. KIEFFER: How about this? Unless the Special Master decides otherwise --
MR. HARPER: Just for one contextual issue on that, this is actually something that the Court had already accepted prior and in preparation for Phase I trial that all depositions would occur here in Washington, D.C. And that is because obviously the counsel is here. Both counsel is in Washington. You are in Washington. There weren't any circumstances in which that rule could not be followed.
We do not object, if the defendants can make a showing that it's impossible to do that, that they state so and be able to have some mechanism to be granted relief from the Special Master-Monitor. But I think the strong presumption should be that these depositions occur in Washington, as it did in preparation for

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the Phase I trial.
MR. KIEFFER: Unless defendants produce reason acceptable to Special Master, depositions will be in Washington.
MR. STEMPLEWICZ: That ruling you're referring to, was that a reciprocal ruling?
MR. HARPER: It was.
MR. STEMPLEWICZ: Then it should be reciprocal.
MR. KIEFFER: Go ahead.
I think we're through most everything. We have covered the other things already.
MR. QUINN: I think we have addressed most everything else already.
MR. KIEFFER: If there is something that comes up while I'm typing this up, please feel free to call me and I'll call the other party and get you together, if necessary, or whatever else.
MR. HARPER: One point of clarification.
Since defendants did suggest presumptive limits on hours of depositions, I presume that's rejected.
MR. KIEFFER: I don't want to put any

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limitations. If there's a problem, I'll address it as we go along.
MR. HARPER: We have two more issues. One is in the depositions of Mr. Griles, Cason and Swimmer, we would like to request a sequestration rule that they not be able to confer with one another between the time that they -- regarding what is discussed after the deposition, between the time that they begin those depositions and the end of the last day of the last of those three depositions.
MR. BROWN: Which may well be after the first of the year.
MR. STEMPLEWICZ: That can possibly make the deposition nine days long, effectively, in terms of taking them out of ability to work on the plans.
MR. KIEFFER: No. He's not saying that. He's saying you're not going to talk about what was discussed with you or asked of you in the deposition.
MR. STEMPLEWICZ: That's fine. As long as we're not talking about subject matter of the questioning. Because their work involves the subject matter.

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MR. KIEFFER: For instance, I can see a situation where in the deposition he's asked something about have you ever talked to so and so about such and such, and later on he says no or whatever. And then -- well, that's not such a good example, but later on the one person does ask him about that. He can't say, oh, yes, I just was talking about that at the deposition. But he certainly can talk about whatever the issue is.

Is this, on the record, good enough for that, or do you want to propose writing up something?

MR. HARPER: We'll prepare a sequestration language.

MR. STEMPLEWICZ: That we can look at before.

MR. KIEFFER: Send it to them, send it to me, and you respond and send it to me and to them.

MR. HARPER: The other issue that we had is sort of broader. Just as a point of clarification and I think in part a request, on a number of occasions, Your Honor, you've asked for us to supply a response to you of one sort or

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another. We think in order to expedite that process, it would be helpful to have those generally, as was done with the discovery plans, a specific date in which we have simultaneous submissions and then responses at a particular date. That way, we don't go with sort of continual back and forth, back and forth ad infinitum.

MR. KIEFFER: If I say I want something on this issue, how many days do you both want to get it in to me?

MR. BROWN: I think we'll leave it to your discretion.

MR. KIEFFER: You're the ones that are going to be working awful hard here.

Five days, three days?

MR. QUINN: I don't know if this helps with this particular issue. It's a little bit different. But I had proposed sort of a modified version of what's filed in the rocket docket in the Eastern District of Virginia for discovery disputes, and that is you just have a regular schedule. Any brief, discovery issue, dispute presented to the Court, I think I proposed on a Tuesday, has to be responded to by Thursday with

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a hearing before the Master on a Friday. So you've got a regular routine set up.

I had proposed that, not aware that Special Master was anticipating sitting in on several of these depositions, so I don't know how feasible that is.

MR. KIEFFER: You had it that if your were in a deposition and you got in a dispute.

MR. QUINN: Telephonic. Right. But if you're there, that's not an issue.

MR. KIEFFER: I may not be on all of them, and that's fine for that.

MR. QUINN: But I'm thinking in terms of we get into a dispute over whether some particular docket request is overbroad. They want to compel the production. We're saying we can't produce that huge volume of documents. I think it would help everyone.

MR. KIEFFER: And you've talked to me on the phone and I've said okay, I can't resolve this on the phone. I can't get you to agree to anything. File your positions with me. What do you say then? Three days?

MR. QUINN: I think it would be safer for everyone concerned, rather than try to keep a

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running tab on it, that we have a filing day, a response day and a hearing day so that there's a regular schedule every week. I don't know if that works.

MR. BROWN: We've got our own private judge here. I defer to his discretion and his flexibility.

MR. KIEFFER: I don't like to try to lock us into a schedule that will apply, because I'm going to be out of town and you all will be out of town and I'm one person without a secretary. So let's just say you're going to call me up on the issue. I'll say I can't resolve it. Try your motions. Three days, two days for response. Three business days for the motions. Two business days to respond.

MR. BROWN: And subject to your adjustment at that hearing; correct?

MR. KIEFFER: And subject to my adjustment.

While we're talking about that, if I want to call a hearing to have argument on it, how many days between when I ask for it and we have it? Three?

MR. BROWN: You don't know when the

UNITED STATES DEPARTMENT OF JUSTICE

- - - - - - - - - - - - - - - - - - X

ELOUISE PEPION COBELL, et al., :

Plaintiffs, :

v. : No. 96-1285

GALE NORTON, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - X

Washington, D.C.

Friday, October 18, 2002

Discovery Conference before Special Master-Monitor Joseph S. Kieffer in the above-entitled matter, taken at the offices of Native American Rights Fund, 1712 N Street, N.W., Washington, D.C., at 10:05 a.m., Friday, October 18, 2002, and the proceedings being taken down by Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and transcribed under her direction.

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three topics that were covered in that deposition, and they were covered in this order. I don't think that in any way is coaching or preparing or somehow steering that witness to somehow conform their testimony because they have no clue and won't as to what the witness actually said in deposition one.

MR. KIEFFER: That gives me a little problem. Why do you need to mention what was discussed in the deposition? You can prepare them, in general, about all their knowledge about any subject that has to do with the Phase 1.5 trial.

MR. PETRIE: I see it as just simply saying these are the kind of things that you can anticipate questioning upon. It's not suggesting. It's not giving any indication as to what deposition or deponent number one said, nor is it coaching them or suggesting what their answers should be.

MR. KIEFFER: It can't be limited, though to what was covered in the deposition.

MR. PETRIE: That's right. It's got to be broader.

MR. KIEFFER: If you hit on something that was discussed in the deposition, that's not a problem. You prepare the witness any way, even if there hadn't been any deposition.

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MR. BROWN: I think you are clearly coaching a witness if you tell him these are the three topics that were discussed in detail.

MR. KIEFFER: I just said they are not going to do that. They are going to talk about a range of subjects because it might be included in the deposition. But they are not going to say, this is in the deposition.

MR. BROWN: Just to be clear, he is retracting his earlier position that going through and saying the following three topics were discussed in the deposition in the following order is not a form of coaching, or is a form of coaching.

MR. KIEFFER: He is retracting that.

MR. PETRIE: If that is uncertain, then as it has now been discussed and stated, that is the way I intend it to mean.

MR. BROWN: I'm sorry. He is retracting.

MR. KIEFFER: Here's what he is going to do. There is going to be a deposition with Cason. Cason can talk to his counsel. Cason can't talk to Griles or anyone about that deposition. The counsel may not be the same counsel that Cason spoke to that then preps Swimmer in his deposition.

In that prep, they can talk about a whole

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range of subjects, but they will not indicate that any particular subject was discussed at the deposition. And in that range, the subject is going to be larger than what was in that deposition, so there is going to be no knowledge on the part of Mr. Swimmer that the subjects they are prepping him on are just the subjects that were discussed in the deposition.

MR. PETRIE: That's correct.

MR. KIEFFER: You agree to that, Mr. Brown?

MR. BROWN: I do.

MR. PETRIE: Sir, may I ask about a further matter with regards to the sequestration?

MR. KIEFFER: Sure.

MR. PETRIE: As I understand Mr. Brown's letter, he is proposing that solely to be applied to defendants' witnesses.

MR. KIEFFER: I think it should be applied to everybody.

MR. PETRIE: That's correct. I want to make sure they have the same understanding.

MR. KIEFFER: Do you have a problem with that, Mr. Brown?

MR. BROWN: I don't, no. I don't have a

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problem with that.

MR. PETRIE: If I may, sir, one other matter, sir, please. The dates they have indicated that they would like to take the depositions Mr. Cason, Swimmer and Griles, are you able to tell us if at this time it's your intention to do three days consecutively or day-to-day at that point or is it one day only just for planning purposes, please.

MR. BROWN: It will be one day only. Let's start with one day and see where we go.

MR. PETRIE: Thank you.

MR. BROWN: Just so it's clear, those are going to be continuing so that we can reschedule them.

MR. KIEFFER: Three, plaintiffs were to submit all motions regarding -- okay. This is an issue that I don't want to address anymore. I think I made my position clear on it, and we can skip that for now.

Four, defendants' document productions will be at the offices of plaintiffs unless the Special Master-Monitor determines by inspection of the documents and site that they are so voluminous, fragile or otherwise unsusceptible to production in that manner that a different procedure will be

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October 14, 2002

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Michael Quinn, Esquire
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P. O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Keith Harper, Esquire
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

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

Gentlemen: Re: Discovery Schedule and Agreements

Reading the parties' correspondence this weekend upon my return to Washington, D.C. brought two old sayings to mind. The first begins with "You can lead a horse to water..." The second, a slightly altered version of the actual verse: "No good deed goes unpunished."

I had hoped, by offering the parties an informal method of communication with the Special Master-Monitor through *ex parte* communication and other informal means, such as by letter, to avoid or resolve time-consuming disputes on procedural and administrative issues regarding the present Phase 1.5 trial discovery. Also, in light of the short time available for that discovery, to avoid the necessity of relying totally on the sometimes Byzantine process of discovery under the auspices of the Federal Rules of Civil Procedure (FRCP).

Exhibit 3
Defendants' Objections to
SM-M's Report on Sequestration

It was also my intention to attempt to "wipe the slate clean" and give both parties the opportunity to proceed with this new discovery process for the Phase 1.5 trial on an equal basis – a level playing field so to speak – without the necessity of taking into account the government counsel's past conduct referred to in the Court's most recent September 17, 2002 Memorandum Opinion and related opinions regarding the government and its counsel's efforts to restrict or eliminate the Court Monitor's oversight.[1] Plaintiffs were willing to support the Special Master-Monitor's interest in reaching an agreement on an informal procedural process, however much effort it took for them to suspend their apparent disbelief in the possibilities to what they must have silently considered was a quixotic quest. Even the Department of Justice attorneys who participated in the discovery conference and in their *ex parte* communications with the Special Master-Monitor at or after the conference gave the impression that they were at least willing to try to make a good faith effort under the agreement. I believe they were – pending addressing the agreement they made with their supervising attorney.

However, lead government counsel has now taken the position in contravention of what was agreed to at the October 3, 2002 conference by the government's counsel that defendants will not agree to any *ex parte* contact with the Special Master monitor. This position is taken again regardless of the Department of Justice's history of making past agreements with special masters to this effect in cases such as the AT&T litigation. Also, it completely ignores the precedent set by the government attorneys' prior and present contacts with court officials including the Special Master-Monitor in the present litigation.[2] So be it.

It is obvious from the substance of the last two weeks' correspondence between the parties that, regardless of the merits of an informal procedure, the use of the *ex parte* and correspondence communications procedures has not been and will not be helpful to the discovery effort. The attempt to persuade the government to agree to these procedures and their concomitant attempt to avoid any such commitment to streamlining the discovery process has been and will continue to be harmful to achieving that objective. Their objections to the plaintiffs' right to broad discovery based on the Court's decisions, and to the Court's oversight, most recently displayed in their comments about its jurisdiction, will continue to interfere with the conduct of this litigation in general and

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[1] *See* September 17, 2002 Memorandum and Opinion at 4 and September 30, 2002 Memorandum and Order at 7.

[2] The government's position that its counsel did not agree with plaintiffs' counsel and the Special Master-Monitor to continuing limited *ex parte* communications addressed at the October 3, 2002 discovery conference and only agreed to those procedures until the draft agreement was provided to the parties for review is no more credible than its earlier position that there were not similar contacts between the Special Master and government counsel. However, in light of the discovery communication procedures established in this letter, the issue is moot.

this discovery in particular.[3] Therefore, the following procedures will be placed in effect immediately upon both parties' receipt of this letter.

1. Neither party will contact the Special Master-Monitor by telephone, in person, or by written communications of any sort regarding discovery issues except in the following manner.
2. All communication with the Special Master-Monitor and the parties will be in accordance and compliance with the Federal Rules of Civil Procedure unless amended by direction of the Special Master-Monitor on request of one or both parties. Motions, oppositions, and replies on any discovery dispute will be filed with the Special Master-Monitor and the Court. Rule 11, FRCP, will be strictly adhered to. There will be no further legal argument made or positions taken by letter by the parties.
3. Status conferences will be held by the Special Master-Monitor with a court reporter present at the direction of the Special Master-Monitor on his own initiative, on agreement by the parties, or on notice from counsel that one party desires a conference and the other has refused to agree to it – if the Special Master-Monitor believes that the course of discovery can be advanced by such a hearing.[4] The Special Master-Monitor will set the time, subjects, and place for these status conferences.
4. Communications to both parties by the Special Master-Monitor will be by facsimile and first class mail. No answer of the parties will be authorized unless one or both parties are specifically directed to answer a particular communication.

The most recent correspondence by the parties about their efforts to confer and agree to the procedures discussed at the October 3, 2002 discovery conference indicate that they only agreed that they made an agreement on the schedule of dates for the Phase 1.5 discovery. Those scheduled dates, changed as requested by the parties, will be supplied to the Court for its consideration and amendment if necessary. The other procedures addressed at the discovery conference and, in my opinion, where clear agreement was reached by the parties or signified by their acquiescence to the Special Master-Monitor's decisions – and to which agreements I will hold the parties (barring the parties' agreement that other procedures should replace them) – are the following:

[3] *See*, for example, Hearing transcript at 124: "Mr. Stemplewicz: ...It would be an exceptional APA case to have discovery, in the first place. And we object to the plaintiffs having discovery on that basis because the normal APA case involves a judicial review of an administrative record. And it is also exceptional in this case from a typical APA case to have the sort of agency action that's being reviewed by the Court. In this case, these two plans that are part of Trial 1.5. To have in a case like this the challenging party being afforded the opportunity to submit its own idea of what the agency action ought to be. The Court here is really pressing the APA envelope about as far as it can. We are going to take the position it's too far."

[4] Requests for status conferences will be limited to a statement of the issues requested to be addressed by the Special Master-Monitor and that the opposing party does not agree to the conference.

1. Discovery by both parties began on October 7, 2002. The issue of whether the defendants had the right to discovery or, if so, to what extent, was taken under advisement. However, I specifically directed the defendants to prepare and file their discovery. *See* Hearing Tr. at 248-249. The parties should expect that I will recommend a position on defendants' discovery to the Court prior to plaintiffs' requirement to respond to it.[5] The Report and Recommendation will also address the outstanding discovery requested by defendants.
2. Defendants agreed to provide dates for the availability of Interior employees Griles, Cason, and Spooner and not to object to their depositions: "Mr. Stemplewicz: No. We don't oppose their right to take their depositions." *Id.* at 191. Defendants were to provide those dates, which would be within the period October 21st to three weeks thereafter, to plaintiffs by last week. Plaintiffs would give defendants at least five days notice on when they would depose these individuals. *Id.* at 198-200. The initial depositions of these three officials would be limited to three days each. However, the depositions would be continued and the Special Master-Monitor would authorize additional time to plaintiffs, if necessary in his opinion, to further question the deponents about defendants' two plans after their submission to the Court on January 6, 2003. *Id.* at 196-197. All three deponents would be subject to a sequestration order to be agreed to by the parties to prevent their talking to each other about their individual depositions. *Id.* at 229-230.
3. Plaintiffs were to submit all motions regarding both the Treasury Department and the Paragraph 19 production requests to the appropriate court official regarding the outstanding discovery pending before the Special Master or the Court. Due to the limitations on the Special Master-Monitor's jurisdiction concerning these issues, the Special Master-Monitor will not address that discovery even if some of it is found relevant to the Phase 1.5 trial. *Id.* at 71-88; 42-46 and 203-210. Also, *see* Special Master – Monitor letter regarding this discovery in the October 4, 2002 letter (typo date October 2nd), entitled, "Scheduling Order – Production of Documents at 1-2.
4. Defendants' document productions will be at the offices of plaintiffs unless the Special Master-Monitor determines by inspection of the documents and site that they are so voluminous, fragile or otherwise unsusceptible to production in that manner that a different procedure will be required. To avoid delay, notice by defendants of this type of a situation will be given to plaintiffs' as early as possible after receiving plaintiffs' document production request. *Id.* at 221-222.
5. Defendants will offer government officials and government contractors and

[5] This pending recommendation should not deter plaintiffs from raising any other proper objection under the FRCP regarding defendants' propounded discovery. Also, either party will be able to respond to the Report and Recommendation on defendants' discovery rights if they so choose.

agents for deposition as 30(b)(6) deponents without need for the plaintiffs to subpoena them unless the defendants provide the Special Master-Monitor with proof of their inability to produce the witnesses without service of such a subpoena. These and all depositions are to occur in Washington D.C. unless the Special Master-Monitor determines otherwise based on a parties' showing of reasonable circumstances why a deposition should be held elsewhere. *Id.* at 225-228.

6. Plaintiffs addressed their need to depose Ernst & Young officials concerning the "accounting" by the company of the five named officials' trust funds. The parties agreed that it was possible to conduct those confidential depositions and place the transcripts under seal. Also, that the depositions should go forward. Plaintiffs were to file the appropriate motions for those depositions. *Id.* at 214-215.
7. The Special Master-Monitor will address any requests for depositions filed after the cut-off for depositions if the publication of the parties' witness lists on April 11, 2002 includes new witnesses that have not been deposed by the other party. *Id.* at 188-189.
8. The government agreed that it would not raise any arguments about limitations to plaintiffs' discovery under the APA in opposition to that discovery. Id. at 124-126.

This concludes my list of recognizable agreements that the parties made with each other and the Special Master-Monitor at the October 3, 2002 discovery scheduling conference.[6]

I will state once again what I said at the beginning of the discovery conference as my objective for discovery and ask that the parties rededicate themselves to it and that the government counsel take particular note of it:

"...we're here to try to streamline a process that has to be accomplished, at least for the summary judgment motions, in about 80 days until the 31st of January and not much long after that until the Phase 1 (sic – 1.5) trial.

I understand the frustrations I see in the motions filed between the parties, in the letters that I have received in the last two weeks.

[6] It this list missed recognizing any agreement between the parties made at the October 3, 2002 discovery conference or a party objects to the interpretation of an agreement, these issues can be raised at the status conference to be held this Friday, October 18, 2002. *See* infra, page 6. I do not believe there can be much dispute about these agreements found in the Hearing Transcript record. However, I did not expect that there would be a total rejection by the government of the *ex parte* agreement made by the parties that has prompted, in part, this letter. Again, I will watch closely the future interpretations by the parties of this and any further discovery conferences' agreements with an eye to preventing any further delay in the discovery process.

....

But I want to quote one other thing the judge had to say.... I think it's appropriate for all of us to listen to his words very closely.

Quote on page 6. "The four motions presently before the Court, which represent a continued campaign against an official of this Court, *seem designed as part of a concerted effort to interfere with the Court's oversight function.* It is certainly understandable that defendants might behave in this manner. The Court Monitor's reports, after all, have proved embarrassing to defendants, documenting as they do their many falsehoods and attempts to mislead this Court. *But it is time for such behavior to end.*" *Id* at 25, emphasis added.

In order to answer any questions the parties may have regarding the procedures established in this letter and to allow both parties the opportunity to provide me with a status report on their discovery activities and raise any additional agreements they would like to reach with my help, I am setting a status conference for this Friday, October 18, 2002 at 10:00 a.m. Plaintiffs will provide the conference room, defendants the court reporter. Plaintiffs will give notice by letter and facsimile by Wednesday, October 16, 2002, close of business (six o'clock p.m.), where the conference will be held. *I expect that Mr. Petrie will attend this status conference.* In light of this scheduled status conference and the procedures implemented in this letter, I do not expect Mr. Petrie to respond to my letter of October 9, 2002 as I had asked him to do.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

Mark Brown, Esquire
Dennis Gingold, Esquire
Elliot Levitas, Esquire

Attention: **Michael Quinn**

Date: 10/14/2002

Company:

Number of Pages: 7

Fax Number: 5149163

Voice Number:

From:

Company:

Fax Number:

Voice Number:

Subject: Cobell v. Norton

Comments:

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Joseph S. Kieffer, III.
Special Master-Monitor

UNITED STATES DEPARTMENT OF JUSTICE

ELOUISE PEPION COBELL, et al.,	:	
Plaintiffs,	:	
v.	:	No. 96-1285
GALE NORTON, et al.,	:	
Defendants.	:	

Washington, D.C.
Wednesday, November 13, 2002

Telephonic Discovery Conference before Special Master-Monitor Joseph S. Kieffer in the above-entitled matter, at 4:15 p.m., Wednesday, November 13, 2002.

BEFORE:

Special Master-Monitor:

JOSEPH S. KIEFFER III, ESQ.
420 Seventh Street, N.W., Suite 705
Washington, D.C. 20004
(202) 248-9543

APPEARANCES:

On behalf of the Plaintiffs:

MARK KESTER BROWN, ESQ.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

Exhibit 4
Defendants' Objections to
SM-M's Report on Sequestration

future deponents being briefed by anybody on what the depositions of a past deponent involved, period.

MR. BROWN: Mr. Quinn said a little while ago that we thought this wouldn't be more of a burden than a week that the trial--Mr. Swimmer's deposition would be done in a week, and that was a minimal burden. This is a revisionist notion of history. Both of those--from the very first, Your Honor, you made it clear that we had three days with each of those people, and that specifically one of those or more of those days could be after the first of the year.

SPECIAL MASTER-MONITOR KIEFFER: That's correct.

MR. BROWN: So there's absolutely no notion that this was going to be a one-week sequestration order, no matter what it--

MR. QUINN: I respectfully disagree. I would view that as two separate--I mean, while he makes the testimony later, that they be released from any obligation of sequestration--

SPECIAL MASTER-MONITOR KIEFFER: No. That was a continuation of the same deposition.

MR. QUINN: Then I misunderstood that, and I would find that to be--

SPECIAL MASTER-MONITOR KIEFFER: Who is this that's talking?

MR. QUINN: Sorry. This is Mr. Quinn.

SPECIAL MASTER-MONITOR KIEFFER: Well, I want to hear what Mr. Petrie, who was there and who's lead counsel, has to say.

MR. PETRIE: My understanding is that the sequestration, the effect of the sequestration would continue until that individual had completed their deposition, be it at two consecutive days or, say, two days over an interval of time in between the two--

SPECIAL MASTER-MONITOR KIEFFER: That's correct.

MR. PETRIE: But if I may, Mr.--may I ask just a clarification? I thought I heard you state earlier that the fact of the sequestration would go all the way through trial, that--

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

- - - - - - - - - - - - - - - - - - X
ELOISE PEPION COBELL, et al., :
Plaintiffs, :
v. : No. 96-1285
GALE NORTON, et al., :
Defendants. :
- - - - - - - - - - - - - - - - - - X

Washington, D.C.
Thursday, November 7, 2002

Continued deposition of JAMES E. CASON, a witness herein, called for further examination by Plaintiffs in the above-entitled matter, the witness having been previously duly sworn, taken at the offices of Native American Rights Fund, 1712 N Street, NW, Washington D.C., at 10:09 a.m., Thursday, November 7, 2002, and the proceedings being taken down by Stenotype by PENNY M. DEAN, RPR, and transcribed under her direction.

Exhibit 5
Defendants' Objections to
SM-M's Report on Sequestration

MS. SPOONER: I don't think that's our agreement.

MR. KIEFFER: Oh boy. What do you think the agreement is? You weren't at those conferences where we came to an agreement about this. Have you read the transcript?

MS. SPOONER: I have.

MR. KIEFFER: Okay, what do you think that --

MS. SPOONER: I think the agreement extends to the three witnesses that have been named by the plaintiffs. If it extends to everyone, then it also extends to the plaintiffs and the plaintiffs' witnesses. I don't think it does extend to everyone, I've never known of an exclusionary -- invoking an exclusionary --

MR. KIEFFER: I don't know what you mean by everyone. You think Mr. Cason can go back and talk to Mr. -- Ms. Erwin about what he's testified here today?

MS. SPOONER: Yes, I do and I think the deposition transcripts are public, it simply can't be shown to the witnesses.

MR. KIEFFER: I don't believe that was the intent.

not watch the testimony of a defendant's witness and vice versa.

So it seems to me if we are all are analogizing to that rule, there is no basis for what Mr. Harper is proposing. I don't say it is a bad proposal or made in bad faith, but it certainly not -- has no basis in any --

MR. KIEFFER: What do you understand he's proposing?

MS. SPOONER: Well, I -- it's a little bit hard for me to understand it because I think the way I understand it, it would be completely unworkable. I think what he's saying is that no one who is employed by the Department of the Interior or is a contractor of the Department of the Interior may know about the substance of Mr. Cason's testimony or any, I guess, deposition testimony taken in this case at all. And no -- none of the five named plaintiffs or any of plaintiffs' experts, which is a little bizarre I think, because the exclusionary rule doesn't apply to experts. But nonetheless, he didn't mention other potential witnesses, but I presume he would agree that that would apply, that none of the government's -- no employee of the government and no contractor of the government may know about what any

of the witnesses in discovery of phase 1.5 testified to, and essentially the same thing on the other side. And that is something we can't agree to.

MR. KIEFFER: Is that what you were saying?

MR. HARPER: Something similar, but I think that one way for us to sort of -- to further the process here is perhaps if -- because I think -- I'll note that the reason we wanted this and I will agree with Ms. Spooner that this is not the routine for depositions, but I think this case is not the routine either and this is a case where two secretaries are been held in contempt and the second one for fraud. That preeminates why we wanted the rule, the sequestration order under the circumstance because of the conversations that have gone on, and how testimony has been given in this case in prior circumstances. So it is relevant to that extent.

But to further the ball in the circumstances, we would propose that we identify the witnesses that we would depose or would seek to depose as we prepare for the 1.5 trial, and the defendants will have an opportunity to identify those fact witnesses and we can leave experts out of that, we're not concerned about that. And say within a

couple of days -- and then those would be the witnesses that could not have conversations or be prepped by prior testimony.

MR. KIEFFER: Okay. And then if for some reason you added another witness later on, like we have set up, if they have happened to give the transcript to one of those, that's no harm, no foul; is that right?

MR. HARPER: That's right.

MS. SPOONER: We can't agree to that.

MR. KIEFFER: If they give you their list of witnesses they want to depose, barring that they say everybody within the Department of the Interior, they give you a finite list of witnesses they most likely will depose, you will not agree that Mr. Mr. Cason can't talk to those people or they can't be shown his transcript?

MS. SPOONER: Well, it would actually depend upon who they named, so I guess I would be willing to look at the list. It needs to be -- before we could agree to it, it would have to be a short list. It is highly irregular and obviously without -- I agree with you, Mr. Kieffer, that we should not get into the past so I'm not going to respond right now to Mr. Kieffer's comments, but we

United States Department of Justice
Civil Division
Commercial Litigation Branch

SANDRA P. SPOONER
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November 25, 2002

BY FACSIMILE

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Re: Cobell v. Norton

Dear Mr. Harper:

Now that the first round of depositions for Messrs. Griles, Cason, and Swimmer has concluded, we see no reason for these individuals to be "sequestered" pending potential future depositions. We are aware of no precedent in the Federal Rules of Civil Procedure or elsewhere for sequestering deponents during discovery, and although we agreed to a form of sequestration for the first round of depositions, we will not extend that agreement into the future. These individuals necessarily must speak to each other on a regular basis about a wide range of trust reform issues, and imposing unnecessary restrictions on their ability to communicate about these matters can only hinder their progress. Accordingly, we intend to advise these individuals that they are no longer subject to any form of sequestration.

Sincerely,

Sandra P. Spooner

cc by FAX: Special Master Monitor Joseph S. Kieffer, III
Mr. Dennis Gingold

Exhibit 6
Defendants' Objections to
SM-M's Report on Sequestration