IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AS TO DISCOVERY BY THE SPECIAL MASTER-MONITOR AND AS TO THE RULE ANNOUNCED BY THE SPECIAL MASTER-MONITOR CONCERNING DEPOSITION QUESTIONING

The Secretary of the Interior and the Assistant Secretary-Indian Affairs (the "Interior Defendants") hereby move this Court, pursuant to Federal Rule of Civil Procedure 26(c), for an order that (1) discovery by the Special Master-Monitor to the Interior Defendants not be had; and (2) that the Special Master-Monitor not attempt to make dispositive substantive rulings at depositions and compel witnesses, under threat of potential disciplinary action against their counsel, to answer questions over the objections and instruction of their counsel. As set forth in the accompanying Memorandum of Points and Authorities, the discovery sought by the Special Master-Monitor is oppressive and unduly burdensome, and his attempt to issue substantive rulings on discovery disputes, rather than to submit them to the Court as required, is beyond his authority and improper.

Accordingly, the Interior Defendants request that the Court enter the proposed order attached hereto, granting the relief stated above, and such other and further relief to which the Interior

Defendants may be entitled.

Counsel for the Interior Defendants hereby certify, pursuant to the Local Rules of the District Court and Federal Rule of Civil Procedure 26(c), that they have conferred with plaintiffs' counsel, who state that they oppose this motion.

Dated: January 23, 2003

Respectfully submitted,

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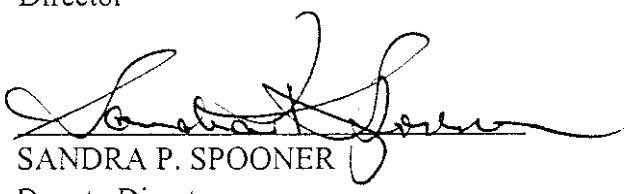
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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

PROTECTIVE ORDER AS TO DISCOVERY BY THE SPECIAL MASTER-MONITOR AND AS TO THE RULE ANNOUNCED BY THE SPECIAL MASTER-MONITOR CONCERNING DEPOSITION QUESTIONING

This matter coming before the Court on the motion of defendants the Secretary of the Interior and the Assistant Secretary-Indian Affairs (the "Interior Defendants"), and any responses thereto, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED THAT the Interior Defendants need not respond to any discovery requests propounded by the Special Master-Monitor and presently pending, and that the Special Master-Monitor shall not propound any further discovery on the Interior Defendants;

FURTHER ORDERED that any dispute concerning an instruction from counsel to a witness it represents that the witness not answer a question during an examination by deposition shall be submitted to the Court for resolution, and that the Special Master-Monitor shall not seek during the deposition to compel such witness to answer the question to which the objection was asserted, or threaten counsel making the objection or the witness with potential disciplinary or other adverse action.

SO ORDERED this _____ day of _____, 2003.

_____

ROYCE C. LAMBERTH
United States District Judge

cc:

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INTERIOR DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR A PROTECTIVE ORDER AS TO DISCOVERY BY THE SPECIAL MASTER-MONITOR AND AS TO THE RULE ANNOUNCED BY THE SPECIAL MASTER-MONITOR CONCERNING DEPOSITION QUESTIONING

The Secretary of the Interior and the Assistant Secretary-Indian Affairs (the "Interior Defendants") hereby submit this Memorandum of Points and Authorities in support of their motion, pursuant to Federal Rule of Civil Procedure 26(c), for a protective order that (1) relieves them of any obligation to respond to discovery propounded by the Special Master-Monitor, Joseph S. Kieffer, III; and (2) proscribes the Special Master-Monitor from implementing a rule he has announced that would enable him to make dispositive substantive rulings at depositions and to compel witnesses, under threat of potential disciplinary action against their counsel, to answer questions over the objections and instruction of their counsel. As is discussed in detail below, it is oppressive and unduly burdensome for the Interior Defendants to be required to respond to discovery requests from the Special Master-Monitor because (1) the Special Master-Monitor is making the Court a *de facto* litigant in the case,

independently creating its own record concerning issues that the Court has said it will adjudicate at trial; (2) the Special Master-Monitor's pursuit of evidence by propounding his own discovery demands conflicts with his responsibility to oversee discovery; and (3) it is unnecessary and unreasonable for the Interior Defendants to be required to respond to discovery demands from both the Plaintiffs and the Special Master-Monitor concerning the same general subject matter. The Special Master-Monitor's efforts to issue substantive rulings on discovery disputes arising during depositions, rather than submit such issues to the Court for resolution, is beyond his authority and wholly improper. For these reasons, the Court should issue an order that discovery by the Special Master-Monitor not be had, and that any discovery disputes arising during depositions, including those relating to objections and instructions not to answer, be submitted to the Court for resolution.

BACKGROUND

A. The Appointment Of The Special Master-Monitor

The Court appointed the Special Master-Monitor by Order dated September 17, 2002 (the "Appointment Order").[1] The Appointment Order grants the Special Master-Monitor the authority to, inter alia:

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[1] The Special Master-Monitor was initially appointed as a Court Monitor on April 16, 2001, for a term of at least one year. On April 15, 2002, after soliciting the parties' comments and suggestions, the Court extended this term as "Court Monitor" for one year. The Interior Defendants did not consent to the reappointment under the terms established by the Court. See Interior Defendants' Response to Court Order Dated April 3, 2002 Regarding Court Monitor (filed Apr. 11, 2002). In addition, Interior Defendants have appealed the Appointment Order. See Brief for the Appellants (filed Dec. 6, 2002).

- regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties;[2]

- monitor the status of trust reform and the Interior defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act; and

- oversee the discovery process in this case and administer document production -- except insofar as the issues raised by the parties relate to IT security, records preservation and retention, the Department of the Treasury, and Paragraph 19 documents -- to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure and the orders of this Court. The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties.

Appointment Order at ¶¶ 3, 4, 8. The Appointment Order includes no specific provision for discovery to be taken by the Special Master-Monitor.

B. Discovery Requests Issued By The Special Master-Monitor

The Special Master-Monitor has actively participated in the discovery process in this case from the inception of his involvement. As Court Monitor, he issued document requests for 42 categories of documents from the Interior Defendants. See Letter from Joseph S. Kieffer, III to Sandra P. Spooner (May 10, 2002) (requesting production of 25 categories of documents relating to the Office of Historical Trust Accounting) (a true copy of which is attached hereto as Exhibit A); Letter from Joseph S. Kieffer, III to Sandra P. Spooner (May 22, 2002) (requesting production of 17 categories of

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[2] In addition to the power to regulate proceedings before them, masters have the authority under Federal Rule of Civil Procedure 53(c) to, inter alia, examine witnesses and parties under oath and "require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto." A master's powers are generally subject to specification and limitation by the order of reference. See id.

documents relating to the Office of the Special Trustee) (a true copy of which is attached hereto as Exhibit B).[3]

The Special Master-Monitor has continued to issue document requests since assuming his present role, notwithstanding that the Appointment Order contemplates oversight and administrative discovery roles for the Special Master-Monitor. On December 22, 2002, the Special Master-Monitor requested the production, by December 31, 2002, of certain documents relating to judgment accounts identified by Bert Edwards, the Executive Director of the Office of Historical Trust Accounting ("OHTA"), during his December 18, 2002 deposition, as well as "any other correspondence between [former Special Trustee for American Indian Affairs] Mr. Slonaker and his staff and Mr. Edwards and his staff regarding the judgment accounts and the OHTA's personnel's [sic] request for the Special Trustee's opinion or comments about the judgment accounts' qualification as an historical accounting." Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Dec. 22, 2002) (a true copy of which is attached hereto as Exhibit D). On December 31, 2002, the Interior Defendants produced the documents that were specifically identified in the Special Master-Monitor's request, and informed him that they were in the process of ascertaining whether the Department of the Interior had any other documents that fell within the scope of his December 22, 2002 request. Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Dec. 31, 2002) (a true copy of which is attached hereto as Exhibit

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[3] The Special Master-Monitor ultimately withdrew these requests after acknowledging that the subject discovery would "most likely be, to some extent, addressed by plaintiffs in their own discovery regarding both the defendants' historical accounting and fixing the system activities in preparation for the Phase 1.5 trial." See Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Oct. 2, 2002) (a true copy of which is attached hereto as Exhibit C) at 1.

E). The Interior Defendants withheld two attachments to one of the documents produced on December 31st because they might be privileged, and informed the Special Master-Monitor that they would provide a supplemental response concerning those attachments after reviewing them in light of the Court's December 23, 2002 Order concerning privilege assertions.[4] Id.

The following day, the Special Master-Monitor rejected the notion that the Interior Defendants could withhold the subject attachments while considering whether they were privileged, and again demanded their production. Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Jan. 1, 2003) (a true copy of which is attached hereto as Exhibit F) at 1-3. He also expanded his initial request to include an initial reconciliation and update prepared by Chavarria, Dunne & Lamey LLC ("CDL"),[5] and opined that Mr. Edwards's deposition testimony concerning whether the judgment accounts constituted an historical accounting had been "thrown into question." Id. at 3. In that regard, the Special Master-Monitor made an additional request for documents or other information that assured Mr. Edwards that concerns raised by former Special Trustee Thomas Slonaker as to whether the judgment accounts constituted an historical accounting "had no basis in fact." Id. The Special Master-Monitor demanded production of all of the documents now covered by his request within 48 hours. Id. In response, the Interior Defendants reiterated their position concerning the documents requested, but challenged the

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[4] A factor necessarily a part of any consideration of the Special Master-Monitor's request was the need to protect the information from disclosure for purposes of preserving the Interior Defendants' rights with respect to appellate review of Court's privilege ruling. This concern is heightened here in light of the Special Master-Monitor's prior public disclosure of privileged documents.

[5] CDL is an accounting firm hired by OHTA to review the Department of the Interior's accounting systems, particularly with regard to the accuracy of judgment accounts and per capita accounts.

Special Master-Monitor's apparent assertion of authority to investigate the accuracy of Mr. Edwards's deposition testimony. Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Jan. 3, 2003) (a true copy of which is attached hereto as Exhibit G).

On January 6, 2003, the Special Master-Monitor defended his prior document requests, and also expanded his inquiry to include "other correspondence and documents, if they exist, including those that would support Mr. Edwards' statements and apparent belief that OHTA and its consultants have begun what amounts to an historical accounting." Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Jan. 6, 2003) (a true copy of which is attached hereto as Exhibit H) at 4. He again challenged the veracity of Mr. Edwards's testimony, and suggested that Plaintiffs' counsel would pursue the issue. Id. at 2 ("[i]t can be expected further discovery on the part of plaintiffs' counsel will deal with that matter if there is a legitimate question as to the truthfulness of his testimony."). In addition, he demanded that the Interior Defendants produce all the requested documents within 24 hours, and threatened to refer counsel for the Interior Defendants "to the District Court for appropriate personal disciplinary action" if his demands were not met. Id. at 4.

On January 7, 2003, the Interior Defendants produced additional documents to the Special Master-Monitor, but informed him that they needed additional time to consider his expanded request for additional documents. Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Jan. 7, 2003) (a true copy of which is attached hereto as Exhibit I). The following day, the Special Master-Monitor informed the Interior Defendants that if the two documents that the Interior Defendants were reviewing for privilege issues were not produced by the close of business that day, he would assume that the Interior Defendants had refused to produce them. Letter from Joseph S. Kieffer, III to Sandra P.

Spooner (Jan. 8, 2003) (a true copy of which is attached hereto as Exhibit J). The Interior Defendants advised by letter of even date that such an assumption would be incorrect, and that the requested production remained under active review. Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Jan. 8, 2003) (a true copy of which is attached hereto as Exhibit K).

On January 15, 2003, Mr. Kieffer notified counsel for the Interior Defendants that, unless certain documents he had requested (or a certification that such documents did not exist) were produced by 6:00 that evening, he would "proceed to address [the Interior Defendants'] failure to comply with [his] letter requests." Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Jan. 15, 2003) (a true copy of which is attached hereto as Exhibit L) at 1. In their response of the same date, the Interior Defendants reiterated that Mr. Kieffer's document demands required careful consideration, and advised him that they would provide a definitive response to his demands by the end of the week. Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Jan. 15, 2003) (a true copy of which is attached hereto as Exhibit M). Dissatisfied with that response, and apparently having already decided to recommend that the Court take adverse action against the Interior Defendants' counsel personally, the Special Master-Monitor informed counsel that, even if they produced the requested documents, he would consider such production to be "remedial" in nature. Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Jan. 16, 2003) (a true copy of which is attached hereto as Exhibit N). On January 17, 2003, the Interior Defendants advised the Special Master-Monitor that the disputed documents were privileged and could not be disclosed without risking waiver of those privileges. See Letter from Sandra P. Spooner to Joseph S. Kieffer, III (Jan. 17, 2003) (a true copy of which is attached hereto as Exhibit O).

In addition to the foregoing pursuit of evidence, the Special Master-Monitor has also commenced an investigation into whether the United States Government is required to provide Federally funded legal representation to former Special Trustee Thomas Slonaker. See Letter from Joseph S. Kieffer, III to Sandra P. Spooner (Jan. 2, 2003) (a true copy of which is attached hereto as Exhibit P). Despite the fact that he had no knowledge, personal or otherwise, concerning the procedures that are required to be followed by the Government in determining whether to afford a person taxpayer-funded legal representation, he opined that the Government's decision-making with respect thereto "smack[ed] of retaliation" and was motivated by "an effort to muzzle [Mr. Slonaker's] testimony should he be required to give it in an adversarial legal proceeding or otherwise." Id. at 2. Indeed, in announcing his investigation, the Special Master-Monitor made clear that he had already determined that the Government's actions with respect to Mr. Slonaker's request for Federal legal representation "can only be interpreted as retaliation against him," and announced that he would be deposing various Department of Interior officials concerning the alleged retaliation, including Deputy Secretary J. Steven Griles, Associate Deputy Secretary James Cason, Director of the Office of Indian Trust Transition Ross Swimmer, Solicitor William Myers, and Counselor to the Solicitor Laurence Jensen. Id. at 2-3.

In response to the Special Master-Monitor's demand that the Government provide representation to Mr. Slonaker and his related allegations of bad faith, Jeffrey S. Bucholtz, Deputy Assistant Attorney General for the Civil Division of the Department of Justice, with supervisory

authority over the Torts Branch,[6] provided the Special Master-Monitor with a lengthy description of the procedures that the United States must follow in addressing requests for Federally funded private representation, and also included a copy of the standard retention agreement required to be signed by individuals seeking Federal reimbursement for legal services. See Letter from Jeffrey S. Bucholtz to Joseph S. Kieffer, III (Jan. 10, 2003), attaching "Conditions of Private Counsel Retention by the Department of Justice for Representation of Current and Former Federal Employees" (a true copy of which is attached hereto as Exhibit Q). Mr. Bucholtz made clear that those procedures were followed to the letter, and left no question that decisions by the Torts Branch concerning Mr. Slonaker's entitlement to Government-funded representation are made without regard to any potential impact on this case. Id. (describing the private counsel program of the Torts Branch and the governing regulations, and explaining the Branch's decision as to Mr. Slonaker's request). Among other things, Mr. Bucholtz explained that the courts have clearly recognized that Justice Department decisions regarding personal representation are not reviewable. Id. at 2 (citing Falkowski v. Equal Employment Opportunity Commission, 764 F.2d 907, 911 (D.C. Cir.) (Justice Department's "decision not to provide [plaintiff] with counsel was within the agency's unreviewable discretion."), cert. denied, 478 U.S. 1014 (1986)). Mr. Bucholtz also offered to respond to any additional questions the Special Master-Monitor had.

By letter dated January 15, 2003, the Special Master-Monitor posed additional questions to the Deputy Assistant Attorney General that suggested his view that the process by which questions

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[6] The Torts Branch has authority over requests for individual-capacity representation at Federal expense.

relating to Mr. Slonaker's representation are resolved may be tainted by Mr. Slonaker's potentially adverse testimony. Letter from Joseph S. Kieffer, III to Jeffrey S. Bucholtz (Jan. 15, 2003) (a true copy of which is attached hereto as Exhibit R) at 2-3 ("If the interests of the United States - conceivably the Interior and Justice Departments - are not consistent with Mr. Slonaker's, it would appear that it would not be in the interests of the Attorney General to provide him representation if his testimony at future proceedings might not be positive regarding his knowledge of the Department of Interior's trust reform activities."). In connection therewith, the Special Master-Monitor requested information on how the Deputy Assistant Attorney General planned to address this "apparent conflict." Id. at 3.

On January 23, 2003, Mr. Bucholtz responded to the additional questions submitted by the Special Master-Monitor, and also reiterated that, to the extent the Special Master-Monitor planned "to review the propriety of the Justice Department's decision to deny Thomas Slonaker's request for reimbursement of private counsel fees relating to his testimony before Congress . . . the D.C. Circuit has held that decisions to deny representation under 28 C.F.R. ¶¶ 50.15 and .16 are committed to the Attorney General's discretion and are not reviewable." Letter from Jeffrey S. Bucholtz to Joseph S. Kieffer, III (Jan. 23, 2003) (a true copy of which is attached hereto as Exhibit S) (citing Falkowski).

C. The Rule Announced By The Special Master-Monitor To Compel The Testimony Of Interior Witnesses

By letter dated January 2, 2003, the Special Master-Monitor informed the parties of a new rule he was establishing concerning "deposition questioning." See Letter from Joseph S. Kieffer, III to Terrie M. Petrie, Michael Quinn, John Stemplewicz and Keith Harper (Jan. 2, 2003) (a true copy of which is attached hereto as Exhibit T). Specifically, after noting that during a recent deposition, counsel

for the Interior Defendants objected to a question and instructed the witness not to answer, notwithstanding the fact that the Special Master-Monitor viewed the question as proper, Mr. Kieffer announced that counsel for the Interior Defendants would face severe consequences if they asserted a similar position in any future deposition:

> Therefore, in future depositions, should counsel refuse to abide by my direction on discovery disputes that are unquestionably within my authority to resolve as granted to me by the Court in its September 17, 2002 Order, including but not limited to the regulation of deposition questioning, consideration will be given to terminating the deposition and filing a Report and Recommendation to the Court recommending an Order to Show Cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action pursuant to Rule 8.4(d) of the District of Columbia Rules of Professional Conduct and why his or her conduct does not warrant personal monetary sanctions pursuant to Federal Rule of Civil Procedure 37(A)(4) [sic].

Id. at 3. In his letter, the Special Master-Monitor did not explain the basis for the purported authority he was now claiming, other than to quote the provisions in the Appointment Order that grant him the power to "regulate all proceedings in every hearing before the master-monitor" and to "oversee the discovery process" in the litigation. See id. at 1, 3. The Special Master-Monitor also did not proffer any explanation as to how his assertion that such "discovery disputes . . . are unquestionably within my authority to resolve as granted to me by the Court in its September 17, 2002 Order," see id. at 3, could be reconciled with the Court's express direction that he "file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties." Appointment Order at ¶ 8 (emphasis added).

DISCUSSION

I. Relevant Legal Standard

Federal Rule of Civil Procedure 26(c) provides that, for good cause shown, a court may issue an order to protect a party from whom discovery is sought "from annoyance, embarrassment, oppression, or undue burden or expense." Such an order may provide that the discovery not be had, Fed. R. Civ. P. 26(c)(1); permit the discovery only upon specified terms and conditions, Fed. R. Civ. P. 26(c)(2); limit the methods by which the discovery may be taken, Fed. R. Civ. P. 26(c)(3); restrict the scope of the discovery, Fed. R. Civ. P. 26(c)(4); or restrict the extent of disclosure of the subject discovery, Fed. R. Civ. P. 26(c)(5-8).[7]

In assessing good cause, a court is required to weigh several different factors, including the need for the discovery by its proponent, the relevance to the litigation, the burden of production placed on the recipient of the request, and the harm that disclosure would cause to the party from which information is requested. Burka v. Dep't of Health and Human Services, 87 F.3d 508, 517 (D.C. Cir. 1996) (citing Federal Open Mkt. Comm'n of the Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 362-63 (1979)) (other citation omitted). Thus, the good cause inquiry is a flexible one requiring the court to weigh the various interests involved in the context of the relevant factual issues. United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C. Cir. 1999) ("Rule 26(c) is highly flexible, having been

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[7] The protections afforded litigants under Federal Rule 26(c) (and Rule 45(c) in the case of subpoenas) apply to all types of discovery. See 6 James W. Moore, Moore's Federal Practice § 26.101[2][a] (3d ed. 1997) (footnote omitted); see also Halderman v. Pennhurst State Sch. and Hosp., 559 F. Supp. 153 (E.D. Pa. 1982) (considering motion to quash subpoenas issued by master to state officials, and quashing as to one witness); Pathe Lab., Inc. v. Du Pont Film Mfg. Corp., 3 F.R.D. 11, 14 (S.D.N.Y. 1943) (considering motion to quash document subpoena issued by Special Master, and noting that "Rule 45 should be read in conjunction with Rule 53 . . . .").

designed to accommodate all relevant interests as they arise.") (citing 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2036, at 484-86 (1994) ("the existence of good cause for a protective order 'is a factual matter to be determined from the nature and character of the information sought . . . weighed in the balance of the factual issues involved in each action.'")) (other citations omitted); Tavoulareas v. Washington Post Co., 111 F.R.D. 653 (D.D.C. 1986) (district court must assess good cause in light of relevant facts and circumstances of the particular case).

II. A Protective Order Is Warranted With Respect To Discovery By The Special Master-Monitor

Discovery requests by the Special Master-Monitor in this case are inappropriate and have needlessly imposed a substantial burden on the Interior Defendants, as they have been required to simultaneously respond to arduous and at times overlapping discovery demands by Plaintiffs, prepare their plans and associated dispositive motions, and generally prepare for the Phase 1.5 trial,[8] which the Court has said will address the Interior Defendants' efforts as they relate to duties declared by the Court and prescribed in the 1994 Act. Rather than adhere to the discovery oversight and trust reform monitoring roles for which he was appointed, the Special Master-Monitor has become an active *participant* in the discovery process, thereby making the Court tantamount to a litigant in this case.[9]

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[8] Though Interior Defendants have been preparing for the Phase 1.5 trial, they continue to assert their longstanding objection to it (and to the injunctive relief with which the Court has said it will conclude, see Cobell v. Norton, 226 F. Supp.2d 1, 148, 152 (D.D.C. 2002)), as beyond the scope of the Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

[9] This development is even more troubling in light of the Court's statement, in its January 17, 2003 Memorandum and Order, that it meets regularly with the Special Master-Monitor to, inter alia, instruct "the Monitor which task he should perform next . . . ." Memorandum and Order (filed Jan. 17, 2003) at 34.

The Special Master-Monitor's actions have also created an irreconcilable conflict, because he is now a participant in the very process he was charged with overseeing. As a result, the Interior Defendants have been deprived of neutral oversight of the discovery process and a fair hearing on their objections to specific discovery. At the same time, the Interior Defendants are unreasonably being required to respond to both pretrial discovery from the Special Master-Monitor and extensive discovery demands from the Plaintiffs concerning the same general subject matter. This burden is especially unnecessary given that the trust reform issues that are subject to monitoring by the Special Master-Monitor are those the Court has said it will address during the Phase 1.5 trial in May. For these reasons, the Court should issue a Protective Order that discovery by the Special Master-Monitor not be had.[10]

A. The Special Master-Monitor Has Become A *De Facto* Litigant In The Case

The Appointment Order makes clear that the Special Master-Monitor's role in discovery is intended primarily to be supervisory. See Appointment Order at ¶ 8 (Special Master-Monitor directed to "oversee the discovery process in this case and administer document production . . ."). As to trust reform and the Interior Defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act, his role is strictly that of a monitor. See id. at ¶¶ 4-5. Yet, rather than focus on the oversight and monitoring roles set forth in the Appointment Order, the Special Master-Monitor has undertaken his own affirmative discovery campaign against the Interior

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[10] One commentator has warned of precisely the problems that now plague discovery in this case as a result of the role assumed by the Special Master-Monitor: "The use of special masters can also have a disruptive impact on the traditional adversarial system: the master might impose unnecessary requirements on the parties that tend to disturb their case plan and perceptions; the master might superimpose his or her own sense of the case when determining what and how particular evidence may be sought; and the actions of the master may invade or impede the attorney-client relationship." 9 James W. Moore, Moore's Federal Practice § 53.04[2][a] at 53-28 (3d ed. 1997).

Defendants. In so doing, he has transformed his position from a supervisory judicial officer to an active participant in the discovery process.

The nature of the discovery requests issued by the Special Master-Monitor to the Interior Defendants illustrates how far afield he has gone in interpreting his role. He has delved into such far-reaching areas as the adequacy of judgment accountings completed by OHTA, see Exh. F at 1-3 (requesting production of documents relating to whether judgment amounts that had been distributed to IIM beneficiaries were accurate), and the veracity of witness testimony, see id. at 3 & n.2 ("unless Mr. Edwards had documents or other information available to him that assured him Mr. Slonaker's concerns had no basis in fact, his deposition testimony is also thrown into question"; "Mr. Slonaker's final concern in his July 26, 2002 memorandum also puts into question the accuracy of Mr. Edwards' testimony . . ."). Such matters have no bearing on the Special Master-Monitor's responsibility to oversee discovery or, for that matter, his authority to monitor the status of trust reform. See Cobell v. Norton, 226 F. Supp.2d 1, 158 (D.D.C. 2002) ("the newly appointed special master monitor should not oversee or manage the Department's efforts to bring themselves into compliance with the obligations declared by the Court and enumerated in the 1994 Act.").

The Special Master-Monitor has now gone even further and embarked upon an investigation of the Government's regulations and policies concerning the provision of private legal representation at Federal expense as they have been applied to Mr. Slonaker. In so doing, he has broadened the reach of his discovery demands to now include a Deputy Assistant Attorney General who oversees a Government office with no responsibility for this litigation. Under even the most liberal reading of the Order appointing him, such matters are well outside the scope of his authority.

It is improper for the Special Master-Monitor (and by extension, the Court) to pursue wide-ranging avenues of inquiry through affirmative discovery, and to create for the Court its own independent evidentiary record. The Special Master-Monitor has, in essence, assumed the role of a roving investigator who identifies issues, seeks related discovery, and develops his own record with respect to those matters. Yet the Court did not -- and could not -- vest in the Special Master-Monitor the broad investigatory powers that he has assumed for himself. See Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 318-20 (3d Cir. 1944) (noting the "fundamental proposition . . . that a court's power is judicial only, not administrative nor investigative," and that a special master "has no wider scope of activity than the court itself."), cert. denied, 325 U.S. 867 (1945). The Special Master-Monitor's assumption of such authority is at odds with the judicial role a master is intended to play. See Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 34 (8th Cir. 1966) ("from the very nature of the judicial role, it is not given to a judge to engage in a prospecting quest for other evidence possibility [sic] to add to a record, nor counterpartly [sic] to appoint a master to make such a discovery pursuit for him."); see also Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982) (special master is not an "advocate or a roving federal district court"), cert. denied, 460 U.S. 1042 (1983). Such activities are improper and unnecessary, not relevant to the role for which he was appointed, and unduly burdensome to the Interior Defendants. Accordingly, discovery by the Special Master-Monitor should not be had.

B. The Special Master-Monitor's Active Participation In Discovery Conflicts With His Oversight Responsibility

The Special Master-Monitor's decision to pursue his own discovery has created an inherent conflict with his Court-ordered authority to oversee and administer the discovery process. If the

Special Master-Monitor is permitted to continue to develop his own evidence and create an independent record, he can no longer fill the oversight role the Court intended for him because his involvement is transformed into that of an interested party with a stake in the outcome of any dispute.

The inevitable quagmire resulting from the active participation of the Court in the discovery process has already come to fruition in this case. Although the Interior Defendants have produced some of the documents requested by the Special Master-Monitor, see Exhs. E, I, they have in good faith objected to other requests. See Exh. O; see generally Fed. R. Civ. P. 34(b) (generally permitting objections to document requests). Because the document requests originated with the Special Master-Monitor, however, the presence of a neutral court adjunct to consider the objections, at least in the first instance, has been frustrated. Indeed, the Special Master-Monitor's response to objections raised by the Interior Defendants has consisted of accusations of bad faith and threats of personal disciplinary or other adverse action against the attorneys representing the Interior Defendants:

> Further refusal by you to recognize the Court's authority to monitor the Interior defendants' compliance with its directives and augment your incomplete document production cannot be countenaced and may unfortunately result, among other potential recommendations by me, in the referral of your conduct to the District Court for appropriate personal disciplinary action should you again fail, as an officer of the Court, to honor this request.

Exh. H at 4 (footnote omitted).

> Therefore, your refusal to supply the additional documents I have requested is without foundation and constitutes obstruction of the legitimate inquiries of the Court pursuant to its September 17, 2002 Order.

Id. at 3.

> Your expressed confusion over your characterization of my 'expansion of (my) original request' is contrived.

Exh. J at 2.

> This letter is to notify you that I will proceed to address your failure to comply with my letter requests unless your document production is supplemented by close of business this evening (6 o'clock p.m.) or I receive an appropriate certification from you that no documents responsive to my requests exist and an explanation of your continued refusal to produce Attachments IV and V, should you fail to produce those attachments.

Exh. L at 1.

> Should you deem to honor my request and produce the responsive documents . . . explain your reasons for not producing them, or certify that none others exist, I will consider that response as remedial action in addressing your past conduct.

Exh. N. Such threats and accusations are wrong, the plain intent being to chill the performance of defense counsel's ethical obligation to represent the United States zealously. The choice Mr. Kieffer seeks to force Government attorneys to make -- abandon discovery objections they are ethically bound to assert on behalf of their clients, or face a recommendation for personal disciplinary action -- is intolerable and has no place in our system of jurisprudence.

The problems arising from the Special Master-Monitor's decision to develop his own evidentiary record have been compounded by the manner in which he has taken discovery. Aside from the chilling effect of accusations and threats against those who take issue with his legal positions, he has routinely failed to permit the Interior Defendants sufficient time to respond to his requests. See Exh. D (requesting documents within 9 days); Exh. F (expanding request and demanding production within 48 hours); Exh. H (expanding request and demanding production within 24 hours); Exh. J (if documents are not received "by close of business this evening, I will assume you have refused to

produce them."); Exh. L ("This letter is to notify you that I will proceed to address your failure to comply with my letter requests unless your document production is supplemented by close of business this evening . . . .").

As the foregoing makes clear, the Special Master-Monitor cannot objectively oversee discovery while he is an active participant therein and a party to disputes that inevitably arise during the process. The decision by the Special Master-Monitor to pursue his own evidence from the Interior Defendants, and to attempt to preclude objections to his demands by resort to accusations of bad faith and threats of personal disciplinary action, has created a discovery regime that makes it impossible for the Interior Defendants to be fairly represented. This intolerable burden should be cured by the issuance of a protective order.

C. It Is Unnecessary And Unduly Burdensome For The Interior Defendants To Be Required To Respond To Discovery Demands From Both The Special Master-Monitor And The Plaintiffs

To date, the Plaintiffs have served eight document requests, seeking 390 categories of documents bearing on every issue in this case. See Plaintiffs' First through Eighth Requests for Production of Documents. It is unnecessary, and unduly burdensome to the Interior Defendants, for the Special Master-Monitor to be conducting pretrial discovery into areas that were or could be the subject of discovery by the Plaintiffs, particularly given the magnitude of the document discovery conducted by Plaintiffs to date. Compare, e.g., Plaintiffs' Eighth Request for Production of Documents, Requests Nos. 155-162 (seeking documents relating to the work of CDL in reconciling judgment and per capita IIM accounts), and Exh. F at 3 (request by Special Master-Monitor for reconciliation and update documents prepared by CDL). See Van Wagenen v. Consolidated Rail

Corp., 170 F.R.D. 86, 87 (N.D.N.Y. 1997) (precluding unreasonably duplicative and cumulative discovery); Aramburu v. Boeing Co., 885 F. Supp. 1434, 1444 (D. Kan. 1995) (discovery of information that was cumulative and likely duplicative precluded despite likely relevance).

By affirmatively issuing his own discovery demands and seeking his own evidence from the Interior Defendants, the Special Master-Monitor has become, in essence, a discovery adjunct for Plaintiffs rather than a neutral discovery master. For example, after Mr. Edwards was deposed by *Plaintiffs*, it was the *Special Master-Monitor* who requested the production of documents that were identified by Mr. Edwards during his deposition, and who then engaged in protracted legal argument with counsel for the Interior Defendants concerning those and other documents. See Exhs. D, F, H, J, L and N. It is unnecessary and inappropriate for the Special Master-Monitor to attempt to fill in what he may perceive as discovery gaps in the Plaintiffs' case, or to create his own record independent of that of Plaintiffs. It is fundamental that, for litigants, "discovery has limits and . . . these limits grow more formidable as the showing of need decreases." United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.9 (D. Del. 1960). Given the Court's September 17, 2002 Order lifting restrictions on Plaintiffs' discovery, and the scheduling of a trial which the Court has said will address the status of trust reform and the Interior Defendants' compliance with the trust requirements ordered by the Court and prescribed by the 1994 Act, the need for discovery by the Special Master-Monitor is minimal, and limits thereon imperative.

III. The Special Master-Monitor's Claimed Authority To Resolve Discovery Disputes Arising During Depositions, Under Threat Of Disciplinary Action, Is Contrary To The Appointment Order And, In Any Event, Improper

The Special Master-Monitor's assertion of the authority to immediately resolve substantive discovery disputes as they arise during depositions is contrary to the express directive of the Court, set forth in the Appointment Order, requiring the Special Master-Monitor to submit any such issue to the Court for resolution. Rather than proceed in the manner set out in the Appointment Order, the Special Master-Monitor has announced his own rule for resolving disputes that arise during depositions relating to an objection and instruction by counsel for the Interior Defendants that a witness not answer a question. The manner in which the Special Master-Monitor has decided to deal with such issues is intended to be immediate, final and dispositive: the witness would be compelled to answer the question, over the objection and instruction of his or her counsel, and the Interior Defendants would be deprived of the opportunity to have the issue decided by the Court after an opportunity to be heard. Moreover, any subsequent review by the Court of the Special Master-Monitor's resolution would be pointless because any information sought to be protected will already have been disclosed. The Special Master-Monitor's rule, and the effect of its employment, is at war with the clear language of the Appointment Order and the intent expressed therein that the Court, not Mr. Kieffer, resolve discovery disputes.[11] As the Court recognized in its January 17, 2003 opinion, "although Article III judges may render dispositions on contested substantive issues, the ability to make such determinations

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[11] Nor is the Special Master-Monitor's rule supported by his authority to monitor the status of trust reform. See Appointment Order at ¶ 5 (directing Special Master-Monitor to file periodic reports with the Court regarding the status of trust reform or other pertinent matters, but instructing that the "Special Master-Monitor shall not, however, take any further action without prior approval of the Court.").

lies beyond the authority that may properly be referred to special masters."[12] Memorandum and Order (filed Jan. 17, 2003) at 16-17 (citing In re Bituminous Coal Operators' Ass'n, Inc., 949 F.2d 1165, 1169 (D.C. Cir. 1991); In re United States, 816 F.2d 1083, 1092 (6th Cir. 1987)).

The impropriety of the new rule announced by the Special Master-Monitor is exacerbated by the manner in which he intends to enforce it. Not only does he seek to deprive the Interior Defendants of having substantive disputes that arise during depositions decided by the Court after a fair hearing, he intends to punish counsel for the Interior Defendants for even taking a position that differs from his own. Exh. S at 3 ("should counsel refuse to abide by my direction on discovery disputes . . . including but not limited to the regulation of deposition questioning, consideration will be given to terminating the deposition and filing a Report and Recommendation to the Court recommending an Order to Show Cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action . . . and why his or her conduct does not warrant personal monetary sanctions . . ."). The troubling propensity the Special Master-Monitor has developed for pursuing his objectives by

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[12] The Special Master-Monitor's rule is also inconsistent with his recent report requesting that the Court "clarify" his role and explicitly grant him the authority to "resolve all disputes not involving dispositive issues of fact and law going to the ultimate question of the liability of defendants." Report and Recommendation of the Special Master-Monitor on the Extent of the Authority of the Special Master-Monitor to Regulate All Phase 1.5 Trial Discovery Proceedings and the Need for Clarification of the September 17, 2002 Order Appointing the Special Master-Monitor (Nov. 15, 2002) at 16. In his report, the Special Master-Monitor acknowledged that, even under his proposed interpretation of his authority, "genuine disputed dispositive issues of fact and law . . . will require the Special Master-Monitor to prepare a report and recommendation to the Court," and that attorney-client and deliberative process privilege claims "are one example of such a genuine question of fact and law that is dispositive in nature due to the potential release of attorney/client and deliberative process privileged information." Id. at 15.

threatening adverse actions personally against those who oppose him would lead, in this instance, to a result directly at odds with the process established by the Court. Rather than submit to the Court a Report and Recommendation describing the substantive discovery dispute at issue and making a recommendation with respect thereto, as he is required, the Special Master-Monitor would attempt to resolve the dispute without any involvement at all by the Court, and then submit a Report and Recommendation to the Court *solely* for the purpose of pursuing disciplinary action against the Government lawyer who asserted the objection. The obvious impropriety of such a result well-illustrates why the relief sought herein is necessary and appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant the Interior Defendants' Motion for a Protective Order that discovery by the Special Master-Monitor not be had, and that substantive discovery disputes arising during depositions, including those relating to an instruction that a witness not answer a question, be submitted to the Court for resolution.

Dated: January 23, 2003

Respectfully submitted,

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

SANDRA P. SPOONER
Deputy Director
DC Bar No. 261495

JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
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(202) 514-7194

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 23, 2003 I served the foregoing *Interior Defendants' Motion for a Protective Order as to Discovery by the Special Master-Monitor and as to the Rule Announced by the Special Master-Monitor Concerning Deposition Questioning And Interior Defendants' Memorandum of Points and Authorities in Support of its Motion for a Protective Order Concerning Discovery Propounded by the Special Master-Monitor* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

By U.S. Mail upon:

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

By facsimile and U.S. Mail upon:

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

By Hand upon:

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004
(202) 478-1958

Sean P. Schmergel

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

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

May 10, 2002

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

BY FACSIMILE AND FIRST CLASS MAIL

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285
(Judge Lamberth)
First Production of Documents Request-
The Office of Historical Trust
Accounting

Dear Ms. Spooner:

This is the first in a series of document requests that I informed you I would be making in my May 7, 2002 letter to you concerning my intention to take a series of depositions of the Interior Defendants' employees over the ensuing months. As addressed in that letter, I would like to receive all documents responsive to this request in one week; in this case, by May 17, 2002. In light of the extent of the document production that may be involved in responding to this request, I will accept production as timely up to and including May 24, 2002 as long as the production begins on May 17, 2002. The documents subject to this request should be delivered to the above address. Your office is familiar with the procedure for dropping off filings and other correspondence at this address. When a document production has been completed to any letter request, I would request that verification be provided by Defendants pursuant to Local Civil Rule 5.1 that all documents responsive to my request have been produced.

This request is considered to be continuing. If Defendants discover additional documents and correspondence responsive to this letter request following their initial document submission on May 17, 2002, those documents and correspondence should be produced

EXHIBIT A
Defendants' 01-23-03
Motion for Protective Order

pursuant to this letter request.

The time period covered by this request is from the date of the establishment of the Office of Historical Trust Accounting (OHTA), July 10, 2001 to the present date.

The terms used in this request and all subsequent document requests are to be interpreted broadly. For example, "documents" and "correspondence" are to include all forms of communication including e-mail, facsimiles, typewritten, printed or handwritten memoranda, letters, notes, journals, books, digests, diaries, PowerPoint or other overhead or video presentations, telephone logs, and other forms of recording the substance of relevant communications.

"Employee" or "staff" are to include employees working for or detailed to Defendants' offices, their agents, consultants, co-workers or other persons employed or retained in any manner by the Department of the Interior, Department of Justice, any Bureaus, Divisions, or offices of those agencies.

Should documents responsive to this request be considered privileged under any privilege including Executive, Attorney/Client, or Work Product Doctrine privileges, please so identify the documents and include a description of them in a privilege log identifying each document's date, the author(s) and recipient(s), its subject (unless considered privileged), its page length, location, office responsible for its retention, and the request to which it is responsive. Please include this privilege log with Defendants' response.

Separate copies of all responsive documents and correspondence should be provided to Plaintiffs' counsel within the time period specified above. Privileged documents should be submitted to me alone identified as such and sent separately from non-privileged documents.

Should you have any questions about this letter request or about the subject or extent of an individual request, please do not hesitate to contact me.

First Request For Documents - The Office of Historical Trust Accounting

1. Any and all documents and correspondence between the Executive Director, OHTA, Mr. Bert Edwards, and his staff, between Mr. Edwards, his staff, and consultants (including but not limited to attorneys and accountants, or other contractors), other Department of the Interior (DOI) Bureaus, offices, or their employees, DOI Solicitor's Office attorneys, and Department of Justice attorneys, that discuss or relate to the stated decision to limit the Comprehensive Plan as described in the "Status Report to the Court Number Nine" (Ninth Report) at page 71, specifically:

"The Comprehensive Plan will discuss the Department's approach towards account activity during the Twenty-first Century (i.e., the period from January 1, 2001, to the present).

Given the breadth of the accounting project, OHTA anticipates that the Comprehensive Plan will generally describe in what order the accountings will occur and the methodology that will be applied...."

2. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to the determination of issues identified at pages 70-71 if the Ninth Report, specifically:

"Several issues, however, have been determined:

(1) *The Historical Accounting:* OHTA expects that the historical accounting of the IIM accounts will consider the following:

- **Transactions in an IIM account from the opening balance to closure of the account, or through December 31, 2000, for active accounts (assuming that the scope is unaffected by limiting factors such as statutes of limitation, etc.)**
- **Revenue posted to an IIM account**
- **Interest credited to an disbursements from an IIM account**
- **Supporting documentation including references to ownership interest in allotment(s) that generate revenue, interest, and disbursement transactions in an IIM account**

3. Any and all documents and correspondence regarding, relating or responding to the oral presentations and recommendations provided by the OHTA consultants during and following the February 4-6, 2002 and March 18-20, 2002 conferences "on the operational aspects of the accounting methods to help facilitate the first series of accounting projects and subsequent historical accounting projects." Ninth Report at 71-72.

4. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding, relating or responding to the oral presentations and oral and written recommendations supplied by the consultants as described in request number 3.

5. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to the statement on page 78 of the Ninth Report over Mr. Edwards' signature that:

"The Court Monitor did not meet with OHTA staff during this reporting period."

6. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to the meeting held by the OHTA staff (including Mr. Edwards, Mr. Jeff Zippin, and Mr. Stephen Swanson) with the Court Monitor in OHTA offices on January 22, 2002.

7. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to the advice or recommendations made to OHTA by its consultants and contractors based on their work to date on the "OHTA Projects" as described in the Ninth Report at pages 73-78, regarding:

"... the effect of relevant statutes of limitations, the date an account was opened, the effect of probate proceedings for the estate of a predecessor, and prior settlements of IIM account holders' claims."[1]

8. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to the request for, the receipt of, and discussions about the April 19, 2002 letter from the General Counsel, General Accounting Office (GAO), Anthony H. Gamboa, to Bert Edwards submitted to the Court in "Notice of Filing of April 19, 2002 Letter From General Accounting Office General Counsel," filed April 23, 2002, to include the letters referred to in Mr. Gamboa's letter, namely:

- Letters from Bert Edwards to GAO dated July 10 and October 1, 2001 and any additional letters sent to GAO or Mr. Gamboa by Mr. Edwards.

- Correspondence sent under separate cover by GAO to Mr. Edwards or OHTA addressed by Mr. Gamboa in his April 19, 2002 letter:

"Under separate cover, we will provide you with copies of the written correspondence exchanged between GAO and Justice, Interior, and Treasury to which we refer in Enclosure II." *Id.* at 2.

9. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding and relating to the Letter of Transmittal, dated April 10, 2002 from Clara Clark, Senior Records Analyst, Millican and Associates, to Pat Gerald, Office of Trust Records, DOI, attaching a "Findings" page including the statement:

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[1] "Department of the Interior's Response to the Fifth Report of the Court Monitor," filed March 1, 2002, at 16.

"Office of Historical Trust Accounting (OHTA) is an OTR user. They are presently planning audit of IIM accounts (300,000 to 500,000 accounts dated back to 1897) to be completed by year 3000."

A copy of this transmittal letter and attachment are included with this request for your reference. This document request can be limited to those responsive documents and correspondence that regard any OHTA or DOI decision, or relate to discussions with Ms. Clark or other consultants or DOI personnel, about when OHTA or DOI expects to complete the historical accounting and/or an auditing of the IIM accounts and why.

10. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding and relating to and including any OHTA "periodic reports" provided the Secretary of the Interior to update her on the progress of the historical accounting as described to the Court in Defendants' "Notice" to the Court filed January 23, 2002 stating in part:

"Although no further reports are required by the Secretary, OHTA intends to update the Secretary on the progress of the historical accounting through periodic reports." *Id.* at 1.

11. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding and relating to any periodic status reports provided to the Director of the Office of Trust Transition, Mr. Ross Swimmer, the Associate Deputy Secretary of the Interior, Mr. James Cason, or the Deputy Secretary of the Interior, Mr. J. Steven Griles, to update them on the progress of the historical accounting.

12. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding and relating to any meetings, conversations, or briefings involving the Special Trustee and his staff with OHTA staff or other DOI or DOJ individuals or entities that led to the Special Trustee's Ninth Report Observations' statement that:

"Historical Accounting:

There is a need to outline clearly the actual account information that will be required to be presented to each tribal or individual holder (including owners of closed accounts). Further clarity is needed on how the various investigative aspects of the historical accounting project (including the numerous consultants) will be integrated into a process to accomplish the accounting. The timeframe is rapidly approaching for delivery of the Historical Accounting final plan to Congress."

13. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding and relating to meetings and/or

conversations with the Special Trustee and his staff about or referring to the Special Trustee's conclusion contained in his April 30, 2002 memorandum to the Secretary of the Interior, entitled, "Going Forward on Trust Reform,"[2] that:

> **"Because of the incomplete nature of the IIM records and the lack of security measures designed to protect the trust data in the numerous data systems employed within the Department over the years, I do not believe an accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed. Short of a settlement, the best that might be able to be accomplished is the identification of the gaps in the information. With that, the Department could, perhaps, seek some instructions from the Judge on how to proceed. I remain concerned, however, that I have not heard anyone in the Department define the characteristics of an accounting to include anything more than the funds actually collected by the Department. That, of course, is inadequate."** *Id.* at 3.

14. Any and all documents and correspondence between the above named individuals and entities listed in request number 1, with the addition of the Deputy Assistant Secretary of the Interior for Plans, Management and Budget, Robert Lamb, including correspondence to or from Congress regarding or relating to any discussions and/or meetings with the House Appropriations Committee staffers including but not limited to Mr. Joel Kaplan regarding actions taken or contemplated being taken by Defendants in preparing the Comprehensive Plan, to do the historical accounting, or in response to Congress' direction to DOI that:

> **"... the managers direct the Department to develop a detailed plan for the (accounting) methodology it adopts, its costs and benefits, and the degree of confidence that can be placed on the likely results."** Ninth Report at 70.

15. Any and all documents and correspondence between the above named individuals and entities listed in request number 1 regarding or relating to any request for a final decision on all or part of the methodology for, or the "temporal scope" of, the historical accounting submitted to the Secretary of the Interior or her staff, the Deputy Secretary, or his staff, or the Director, Office of Indian Trust Transition (OITT) and any response or direction from any of these officials regarding any limitations placed on the methodology or "temporal scope" of the accounting as those terms have been defined by OHTA in its submissions to the Court.

16. All document and correspondence regarding or relating to consultant or contractor responses to any Federal Register or Internet request by OHTA for bids for consultant or contractor contracts with OHTA on any phase of its historical accounting project including but not limited to the proposal of Lindquist Forensics & Partners, Inc., 2121 K

[2] See Seventh Report of the Court Monitor, Tab 11.

Street. N. W., Suite 800, Washington, D.C. 20037.

17. Copies of all contracts awarded to consultants and contractors by OHTA.

18. Copies of all status reports or other documents and correspondence concerning their activities furnished by OHTA consultants and contractors to DOI.

19. Any and all documents and correspondence regarding information or status reports supplied to the Director, Office of Indian Trust Transition or to the Associate Deputy Secretary by the OHTA staff regarding the progress of the historical accounting.

20. Any and all documents and correspondence regarding information or status reports supplied to the Executive Director, OHTA, by his staff.

21. Any and all documents and correspondence regarding or relating to any unused OHTA operational funds, the status of these funds, and the reasons why they have not been expended to include any reprogramming to other DOI activities.

22. Any and all documents and correspondence regarding or relating to the available OHTA headcount, unfilled positions, and the efforts of the Executive Director or his staff to advertise for and fill these positions.

23. Any and all documents and correspondence regarding any decision or direction by OHTA staff, the Executive Director, OHTA, the Director, OITT, the Solicitor's Office, the Associate Deputy Secretary of the Interior, the Deputy Secretary of the Interior, the Secretary of the Interior, or the Department of Justice, to limit the scope of the historical accounting by time period, records review, funding, or any other means, including decisions or direction that, although not intended to have the effect of limiting the accounting, have resulted in such limitation. This request addresses documents and correspondence not thought responsive by you to request number 15, and, by its terms, is broader than that request.

24. Any and all documents and correspondence from any source regarding any decision by the Secretary of the Interior to limit the scope of the historical accounting.

25. Any and all documents and correspondence from any source regarding a determination or estimation of the cost of the historical accounting or any part of that accounting.

Thank you for your prompt attention to this request.

Sincerely yours,

Joseph S. Kieffer, III
Court Monitor

cc: Dennis M. Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.
Judge Royce C. Lamberth

LETTER OF TRANSMITTAL

April 10, 2002

Ms. Pat Gerard
Office of Trust Records
United States Department of the Interior
Office of the Special Trustee for American Indians
6301 Indian School Road, NE Suite 300
Albuquerque, New Mexico 87110

Dear Ms. Gerard:

In response to the request from Mr. Carl Hotubbee dated April 2, 2002 I am transmitting the following documentation that discuss the policies, procedures and/or methodologies by which the migration of records is too take place.

Quantity	Description	Created by	Dated
1 page	Listing of contacts/telephone numbers	Clara Clark	3/25/02
11 "	Notes	"	none
2 "	Findings	"	"
19 "	OTR Records Transfer Plan	"	4/8/02
4 "	Inventory Process Procedure	"	none

Should you have any questions, please do not hesitate to contact me.

Clara Clark

Clara Clark
Senior Records Analyst
Millican and Associates

Enclosures

SMREQ0002007

FINDINGS

OTR maintains three kinds of records: DATACOM Jacket File Folders (6200 boxes at Hawkins – presently being indexed; Ongoing-Mixed records which need to be sorted, reordered, reorganized, reboxed, and indexed (ABC locations are at Renaissance – 4,654 boxes, D-Z are at Hawkins – 10,594); Ongoing-Mixed at Iron Mountain that need same treatment – 3,013. The third kind of records is the FRC boxes located at 12th Street - approximately 6,000 boxes which were retrieved from FRC in Seattle (some of which were examined in the Cobell case). A reordering of these boxes was started but was stopped when it was realized that the provenance as originally submitted to FRC was being disturbed. This group is being reconstructed to the original provenance using the original SF-135 that transferred them to FRC in the first place. It is the opinion of the Records Center Chief that the so-called "FRC" boxes be the first step of the Records Transfer Project followed by the DATACOM Jacket File Folders.

When all of these boxes came in from the field the boxes had not been indexed as to contents. Markings on the outside of the box indicated the presumed prevalent box contents – though there may be other records in the box. This description of presumed contents has been keyed into an ACCESS database along with the OTR unique number (box number), the accession number assigned by OTR (which incorporates the Agency code), and the box count (Box 1 of 19 for example). These are the Ongoing-Mixed records indicated above.

Each Agency is filed on shelf in accession number order. There is no shelf location database showing box to shelf location.

Without indexing, a search for a subject will hit on every box in which the subject is located. This may suffice in the case of individual names or identification number, however, broader subjects may require additional indexing.

A contractor is searching for missing documents (birth certificate for example). OTFM tells them what is missing. This project should be completed prior to the Record Transfer Project.

(MORE NOTES TO FOLLOW)

Office of Historical Trust Accounting (OHTA) is an OTR user. They are presently planning audit of IIM accounts (300,000 to 500,000 accounts dated back to 1897) to be completed by year 3000. All Agency IIM records nationwide are being transferred to FRC where OHTA will perform the audit.

The parts of the NARA approved records schedule being used by OHT are "General Administrative", Finance – 2500; Trust Fund – IIM – 4100

OTFM operations records are sent directly to Hawkins.

(MORE NOTES TO FOLLOW)

IIM disbursement documentation originates in the field. They keep the record copy one year plus the current and send to Hawkins at the end of that period. They fax a copy to the OTFM office in Albuquerque where it is used as data input sheet though they may add other information to it. They store those in their records center in the basement for 2 years and then send to Hawkins. (Sarah Yepa, Quality Assurance Records Center).

There are independent auditors in-house at the OTFM office where audits are taking place almost constantly.

(MORE NOTES TO FOLLOW)

Versatile will be the master system into which all programs are being consolidated. The system is being installed presently. Although the records indexing data is being put on ACCESS presently, it will be

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

May 22, 2002

BY FACSIMILE AND FIRST CLASS MAIL

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285
(Judge Lamberth)
Second Production of Documents
Request – Office of Special Trustee

Dear Ms. Spooner:

This is the second in a series of document requests that I informed you I would be making in my May 7, 2002 letter to you concerning my intention to take a series of depositions of the Interior Defendants' employees over the ensuing months. As addressed in that letter, I would like to receive all documents responsive to this request in one week; in this case, by May 31, 2002. The documents subject to this request should be delivered to the above address. Your office is familiar with the procedure for dropping off filings and other correspondence at this address. When a document production has been completed to any letter request, I would request that verification be provided by Defendants pursuant to Local Civil Rule 5.1 that all documents responsive to my request have been produced.

This request is considered to be continuing. If Defendants discover additional documents and correspondence responsive to this letter request following their initial document submission on May 17, 2002, those documents and correspondence should be produced pursuant to this letter request.

EXHIBIT B
Defendants' 01-23-03
Motion for Protective Order

The terms used in this request and all subsequent document requests are to be interpreted broadly. For example, "documents" and "correspondence" are to include all forms of communication including e-mail, facsimiles, typewritten, printed or handwritten memoranda, letters, notes, journals, books, digests, diaries, PowerPoint or other overhead or video presentations, telephone logs, and other forms of recording the substance of relevant communications.

"Employee" or "staff" are to include employees working for or detailed to Defendants' offices, their agents, consultants, co-workers or other persons employed or retained in any manner by the Department of the Interior, Department of Justice, any Bureaus, Divisions, or offices of those agencies.

Should documents responsive to this request be considered privileged under any privilege including Executive, Attorney/Client, or Work Product Doctrine privileges, please so identify the documents and include a description of them in a privilege log identifying each document's date, the author(s) and recipient(s), its subject (unless considered privileged), its page length, location, office responsible for its retention, and the request to which it is responsive. Please include this privilege log with Defendants' response.

Separate copies of all responsive documents and correspondence should be provided to Plaintiffs' counsel within the time period specified above. Privileged documents should be submitted to me alone identified as such and sent separately from non-privileged documents.

Should you have any questions about this letter request or about the subject or extent of an individual request, please do not hesitate to contact me.

Second Request For Documents - The Office of Special Trustee

1. Any and all documents and correspondence maintained in the Office of Special Trustee (OST) or by the OST employees regarding or relating to the receipt and/or the preparation of the response to the Secretary of the Interior's (Secretary) memoranda dated April 17, 2002, entitled, "Trust Reform," and April 25, 2002, entitled, "Declaration in Support Regarding Response to the Special Master" addressed at pages 33-35 and 70-74 of the Seventh Report of the Court Monitor.

2. Any and all documents and correspondence maintained in the Office of the Secretary or Office of the Solicitor or by the employees of these offices regarding or relating to the preparation of the above described memoranda in Request Number 1.

3. Any and all memoranda, summaries of briefings, or other correspondence and

documents which the Secretary reviewed or relied on to prepare the memoranda described in Request Number 1.

4. Any and all lists or notes of meetings and/or other compilations of the attendees at those meetings regarding the preparation of the memoranda described in Request Number 1 including any at which the Secretary, the Deputy Secretary of the Interior (Deputy Secretary), the Associate Deputy Secretary, the Solicitor, or other DOI attorneys or employees attended.

5. Any and all correspondence and documents prepared, received, or maintained by any DOI office and employee regarding or relating to the statements of DOJ attorney Sandra Spooner in her March 29, 2002 memoranda, entitled, "Cobell v. Norton," sent to the Deputy Secretary and Counselor to the Solicitor, Larry Jensen, quoted at pages 67-68 of the Seventh Report.

6. Any and all correspondence and documents prepared, received or maintained by any employee and office within the Office of the Secretary, Deputy Secretary, Associate Deputy Secretary, Solicitor, or Office of the Special Trustee regarding or relating to the Principal Deputy Special Trustee's April 24, 2002 memorandum, endorsed by the Special Trustee, entitled, "Document Production," and discussed at pages 66-67 of the Seventh Report, and the statement quoted there that:

> **"I wish to know why the Solicitor and the Department of Justice (DOJ) did not share in a timely manner with the Office of Special Trustee (OST) the letter transmitted March 29, 2002 by Ms. Sandra P. Spooner of DOJ....**
>
> ....
>
> **Ms. Spooner's restatement of her duty of candor apparently does not extend to the Special Trustee. This situation is further aggravating because as late as Friday, April 19, 2002, senior officials in the Secretary's Office, and Ms. Spooner, denied the existence of this document."** *Id.* at 66-67.

7. Any and all documents and correspondence regarding the dates the Spooner letter, addressed in Request Number 5, was distributed and all recipients of that letter in addition to the Deputy Secretary and the Counselor to the Solicitor, Mr. Jensen.

8. Any and all documents and correspondence prepared, received, or maintained by any DOI employee regarding or relating to who denied to Mr. Thompson that the Spooner letter, addressed in Request Number 5, existed.

9. Any and all documents and correspondence regarding or relating to any request of the Secretary or Deputy Secretary to the Special Trustee or the Principal Deputy Special

Trustee to provide an explanation or list of the statutory authorities under which the Special Trustee believed he must operate and any documents or correspondence sent by the Special Trustee or Principal Deputy Special Trustee to any DOI official regarding any responses to any such requests.

10. Any and all documents and correspondence regarding or relating to any request of the Secretary or Deputy Secretary to the Interior Solicitor to provide either official a legal interpretation or opinion on the statutory responsibilities of the Special Trustee and any responses to the same or similar requests by attorneys within the Office of the Solicitor.

11. Any and all documents and correspondence regarding or relating to requests made to or answers received from the Special Trustee regarding his or his employees' agreement or disagreement with the substance and conclusions of the Seventh Report of the Court Monitor

12. Any and all documents and correspondence regarding or relating to any adverse personnel plans or actions taken or contemplated by any DOI official in the last six months from the date of this letter with respect to the Special Trustee or OST employees regarding their present or potential assignments, transfers, promotions, or dismissal. The term "adverse" should be interpreted broadly to include any actions or contemplated actions with which the subject employees would take exception such as a forced relocation, demotion, letter of censure, deficient performance report, or other actions for which a reasonable man would consider his career had or might be negatively impacted by such actions.

13. Any and all documents and correspondence regarding or relating to any meetings attended or briefings received by the Special Trustee or his staff regarding the Office of Historical Trust Accounting's (OHTA) work on conducting an historical accounting and/or the preparation of the Comprehensive Plan as described in Status Report to the Court Number Nine from the inception of OHTA in July 2001.

15. Any and all documents and correspondence between the Special Trustee and the Executive Director, OHTA, Mr. Bert Edwards, or between their staffs, regarding or relating to advice sought from or given by the Special Trustee on the manner of accomplishing the historical accounting or the preparation of the Comprehensive Plan and the Special Trustee's or his staff's opinions or conclusions about the historical accounting as conducted by Mr. Edwards and the OHTA staff.

16. Any and all documents and correspondence between the Special Trustee and the Executive Director, OHTA, or between the Special Trustee and the Director, Office of Indian Trust Transition, or between their staffs, regarding or relating to the Special Trustee's conclusion in his April 30, 2002 memorandum to the Secretary, entitled,

"Going Forward On Trust Reform," that:

> **"Because of the incomplete nature of the IIM records and the lack of any security measures designed to protect the trust data in the numerous data systems employed within the Department over the years, I do not believe an accounting, as that term is generally understood in the established trust scholarship, acceptable to either the beneficiaries or the Special Trustee can be constructed. Short of a settlement, the best that might be able to be accomplished is the identification of the gaps in the information. With that, the Department could, perhaps, seek some instructions from the Judge on how to proceed. I remain concerned, however, that I have not heard anyone in the Department define the characteristics of an accounting to include anything more than the funds actually collected by the Department. That, of course, is inadequate."** *Id.* at 3.

17. Any and all documents and correspondence regarding or relating to any actions taken, recommendations or decisions made by the Deputy Secretary or his staff regarding the Secretary's direction to him, discussed in her April 17, 2002 memorandum to the Special Trustee, entitled, "Trust Reform," that he review the "relative performance of OST."

Thank you for your prompt attention to this request.

Sincerely yours,

Joseph S. Kieffer, III
Court Monitor

cc: Dennis M. Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.
Judge Royce C. Lamberth

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October 2, 2002

BY FACSIMILE AND FIRST CLASS MAIL

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

This letter regards the discovery that I, as Court Monitor, propounded on the defendants beginning with my letter to you of May 28, 2002, requesting you consider a protocol for depositions of the defendants' employees. I stayed that discovery on May 28, 2002, pending review by the Court of your rejection of that protocol and your refusal to fully respond to the subsequent discovery requests that had been made by me.

In recognition of the Court's September 17, 2002 Memorandum Opinion and the Discovery Relief that Opinion and accompanying Order provided plaintiffs, my discovery is no longer necessary as it will most likely be, to some extent, addressed by plaintiffs in their own discovery regarding both the defendants' historical accounting and fixing the system activities in preparation for the Phase 1.5 trial. I hereby, therefore, withdraw all of the Court Monitor's discovery requests.

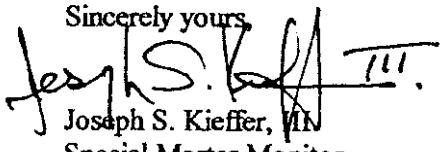
Please note that, depending on my monitoring of defendants' progress with their trust reform efforts, or lack of same, I will be filing additional discovery requests in support of future reports to the Court regarding the status of the Department of the Interior's trust reform efforts, to include examining any allegations made by defendants' employees regarding the Department's retaliation against them for their statements made to me or testimony to the Court about the status of defendants' efforts to comply with their Indian

EXHIBIT C
Defendants' 01-23-03
Motion for Protective Order

trust fiduciary obligations.

Thank you.

Sincerely yours,



Joseph S. Kieffer, III
Special Master Monitor

cc: Dennis Gingold, Esq.
Elliot Levitas, Esq.
Keith Harper, Esq.

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December 22, 2002

BY FACSIMILE AND FIRST CLASS MAIL

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

During the Edwards' deposition on December 18, 2002, Mr. Edwards made the following statements in answer to Mr. Gingold's questions:

"I've seen a letter from Mr. Slonaker that says an historical accounting was not possible. I believe that was May 5, but I'm not sure.

But on July 26th he said the judgment accounts that we did did constitute historical accounting." Edwards' Deposition Tr. at 219.

Mr. Edwards stated that he had a copy of that July 26th letter. *Id.* He also stated that the July 26th letter was in response to a memorandum that Mr. Edwards or his Office of Historical Trust Accounting ("OHTA") staff sent Mr. Slonaker requesting the Special Trustee's comments on the judgment accounts' work done under OHTA auspices. *See* e.g., Tr. at 221.

Pursuant to my authority under the September 17, 2002 Order appointing me Special Master-Monitor to, in part, "monitor the status of trust reform and the Interior defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act" *Id.* at 3, I request you provide me with copies of the above-cited letter and

EXHIBIT D
Defendants' 01-23-03
Motion for Protective Orde

memorandum and any other correspondence between Mr. Slonaker and his staff and Mr. Edwards and his staff regarding the judgment accounts and the OHTA's personnel's request for the Special Trustee's opinion or comments about the judgment accounts' qualification as an historical accounting.

I would appreciate receiving these documents by December 31, 2002.

Thank you.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq
Terry Petrie, Esq.
Michael Quinn, Esq.

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

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December 31, 2002

BY FACSIMILE
Joseph S. Kieffer, III
Special Master-Monitor
420 7th Street, N.W.
#705
Washington, D.C. 20004

Re: Cobell v. Norton

Dear Mr. Kieffer:

Your letter of December 22, 2002, requested the following documents:

(1) A copy of a July 26, 2002 letter from Mr. Slonaker to Mr. Edwards containing Mr. Slonaker's comments regarding accountings of judgment accounts, as referenced at page 219 of Mr. Edwards's deposition transcript;

(2) A copy of a memorandum sent by Mr. Edwards or the Office of Historical Trust Accounting ("OHTA") to Mr. Slonaker requesting his comments on accountings of judgment accounts, as referenced at page 221 of Mr. Edwards' deposition transcript; and

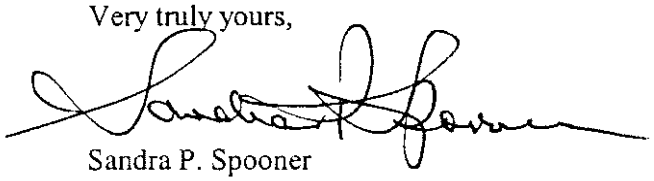
(3) "any other correspondence between Mr. Slonaker and his staff and Mr. Edwards and his staff regarding judgment accounts and the OHTA's personnel's request for the Special Trustee's opinion or comments about the judgment account's qualification as an historical accounting."

We have no objection to providing the documents described in item numbers 1 and 2, and

EXHIBIT E
Defendants' 01-23-03
Motion for Protective Order

they are enclosed (SMMREQ 0000001-0000045). Please note, however, that item No. 2 (the July 16, 2002 memorandum) references five attachments. Attachments I through III are enclosed. Attachment III contains material subject to the Court's November 27, 1996 Protective Order and therefore, may be examined or used only pursuant to the terms of that Order. Attachments IV and V may be privileged; we will provide a supplemental response upon further review of this material.[1] We will also ascertain whether Interior possesses any other documents fitting the description set out in item number 3, and provide a further response to that request.

Very truly yours,



Sandra P. Spooner

Enclosures

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

[1] We have received the Court's December 23, 2002 Order concerning assertions of privilege and we are considering our options in light of that order.

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January 1, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

Yesterday, I received your response to my December 22, 2002 letter request for documents associated with the testimony of Bert Edwards, Executive Director, Office of Historical Trust Accounting ("OHTA") at his December 18, 2002 deposition. However, the information identified either in your accompanying letter or in the documents provided by you was not provided to me in full. Specifically:

1) Attachments IV and V to the July 16, 2002 Edwards' memorandum to Thomas Slonaker, Special Trustee for American Indians, entitled "Historical Accounting for 7,903 IIM Judgment Accounts," were not released by you. Mr. Edwards described Attachment IV in his memorandum as "OHTA asked its legal trust advisory firm to review the historical accounting work and its letter is Attachment 4 hereto." He describes Attachment V as "OHTA also asked its Legal Advisor to review the relevant legal authorities on appropriate reporting to trust beneficiaries, and the results of this review are summarized in Attachment 5 hereto." *Id.* at 2.

You state these attachments may be privileged and that you "will provide a supplemental response upon further review of the material." You also note that the Court has issued a December 23, 2002 Order concerning assertions of privilege and that you are "considering our options in light of that order."

EXHIBIT F
Defendants' 01-23-03
Motion for Protective Order

The Court's December 23, 2002 Order specifically addressed communications between trustees and their attorneys regarding the administration of a trust in consideration of the Interior defendants' motion for a protective order over attorney-client communications and held the following:

> **"Accordingly, where communications between trustees and their attorneys exclusively concern the administration of the trust, no attorney-client privilege is involved because the trust beneficiaries are the attorneys' clients."** *Id.* at 6.

Further, the Court held that even if the communications between the trustees and their attorneys involved a combination of administrative and litigation matters, the attorney-client privilege would still not protect the communications:

> **"The Court will, consistent with logic and prevailing authority, recognize the existence of an attorney-client privilege where a trustee seeks legal advice solely in his own personal interest or where the discovery material has been shown to relate exclusively to non-fiduciary matters. But the Court will not immunize every communication with counsel simply because it involved some incidental interest, or benefit distinguishable from, but ancillary to, that of the trust beneficiaries. With regard to litigation-related communications, the Court will not recognize the existence of an attorney-client privilege except where a trustee obtained legal advice solely to protect himself personally or the government from civil or criminal liability, an objective that is inherently inconsistent with his or her fiduciary capacity."** *Id.* at 10, footnotes and citations omitted, emphasis in original.

OHTA's requests to either its legal trust advisory firm or its Legal Advisor are described by Mr. Edwards as requests to review "*the historical accounting* work" and "*the relevant legal authorities on appropriate reporting to trust beneficiaries.*" These requests and the responses included in the memorandum's fourth and fifth attachments involve in whole the examination of the fiduciary duties of the Secretary – the Trustee delegate – to her IIM account holder trust beneficiaries. Because the requests were made to attorneys working for the Secretary and Mr. Edwards does not make the communications privileged as the Court has now clearly held.[1] Nor would the attorneys' responses to these requests if they, in part, discussed litigation-related matters involving the judgment accounts' "historical accounting."

2) While you have indicated that you plan to provide a supplemental response to my

[1] I would expect that you would not attempt to claim these two documents are covered by the deliberative process privilege having released not only the CD&L's review of the "historical accounting" of the judgment accounts but also Mr. Edwards' July 16, 2002 memorandum which discussed and enclosed these letters. Both of these documents were prepared to address the "historical accounting" or to receive advice about that accounting. The subject letters are contextually for the same purpose.

request following your ascertaining whether Interior possesses any other documents fitting the document description provided by me, you have not provided documents that exist regarding what Mr. Edwards or Mr. Slonaker identified and addressed in their memoranda of July 16, and July 26, 2002. Specifically, both Messrs. Edwards and Slonaker identify the Chavarria, Dunne & Larney LLC ("CD&L") "initial reconciliation and its update."

3) Finally, Mr. Edwards testified at his December 18, 2002 deposition that Mr. Slonaker said on July 26, 2002, "the judgment accounts we did did constitute historical accounting." However, in reviewing Mr. Slonaker's July 26, 2002 memorandum to Mr. Edwards in response to Mr. Edwards' July 16, 2002 request to the Special Trustee for suggestions on the judgment account "historical accounting," Mr. Slonaker stated:

> "***Subject to comments noted below*, I have no issue with your assessment that the initial 7,903 IIM judgment accounts comply with the definition of a historical accounting for these particular accounts."** *Id.* at 1, emphasis added.

Mr. Slonaker's referenced comments were concerns expressed by him about whether the judgment accounts' accounting could qualify as an historical accounting because of two missing pieces of information. First, he could find no indication that CD&L had verified that the judgment amount distributed on a per capita basis to the IIM account holder beneficiaries was the proper amount and, second, the tables included in the Grant Thornton report seemed to indicate that the per capita payments were made in differing amounts to various members of the Tribe which threw into question whether the trustee delegate had dealt impartially with the IIM account holder beneficiaries. *Id.*

Thus, unless Mr. Edwards had documents or other information available to him that assured him Mr. Slonaker's concerns had no basis in fact, his deposition testimony is also thrown into question.[2] Those documents, if they exist, would be subject to release pursuant to my December 22, 2002 letter request.

In light of the lack of any attorney-client privilege over Attachments IV and V and that other documents, as described above, are readily identifiable and are directly covered by my December 22, 2002 letter request to you, please provide those documents to me by close of business Friday, January 3, 2003 in order to comply with my request.[3]

---

[2] Mr. Slonaker's final concern in his July 26, 2002 memorandum also puts into question the accuracy of Mr. Edwards' testimony about Mr. Slonaker's affirming the judgment accounts' "historical accounting:" "Given the acknowledged fact that the Department cannot say with total confidence that it knows everything it should about every account, I have concerns about our ability to correctly identify every beneficiary of these accounts." *Id.* at 2.

[3] I am extending the original suspense date for responding to my December 22, 2002 letter request because you received the Court's December 23, 2002 Order on the attorney-client privilege decision one day after

Thank you.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.

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my request. However, you have now had over a week's opportunity to consider your options regarding Attachments IV and V in light of that Order.

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

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January 3, 2003

BY FACSIMILE

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

Re: Cobell v. Norton

Dear Mr. Kieffer:

On December 22, 2002, you asked us to provide you (1) a copy of a July 26, 2002 letter from Thomas Slonaker to Bert Edwards containing Mr. Slonaker's comments regarding accounting of judgment accounts; (2) a copy of a memorandum from Mr. Edwards or the Office of Historical Trust Accounting ("OHTA") to Mr. Slonaker requesting his comments on accountings of judgment accounts; and (3) "any other correspondence between Mr. Slonaker and his staff and Mr. Edwards and his staff regarding the judgment accounts and the OHTA's personnel's [sic] request for the Special Trustee's opinion or comments about the judgment accounts' qualification as an historical accounting."

On December 31, 2002, we provided the two documents you identified,[1] and stated that we would ascertain whether the Department of the Interior possesses any other documents responsive to your requests.

[1] We also provided three of five attachments to the second document, and stated that the remaining two attachments may be privileged. We stated that we would provide a supplemental response upon further review of the material.

EXHIBIT G
Defendants' 01-23-03
Motion for Protective Order

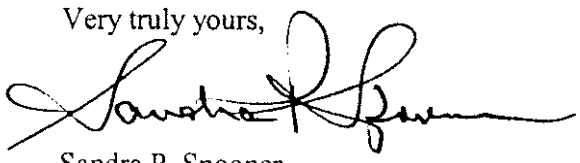
On January 1, 2003, you responded that we "have not provided documents that exist regarding what Mr. Edwards or Mr. Slonaker identified and addressed in their memoranda of July 16, and July 26, 2002," notwithstanding that your December 22 letter did not make any such request. Your January 1 letter further expands your initial request to include documents "available to [Mr. Edwards] that assured him Mr. Slonaker's concerns had no basis in fact."

To the extent you have now assumed the authority to investigate the accuracy of Mr. Edwards's deposition testimony, or the adequacy of the judgment accountings, we believe your actions exceed those that have been (or could be) authorized by the Court. First, we do not see the connection between your proposed inquiry into the accuracy of Mr. Edwards's testimony or the adequacy of the judgment accountings and your court-ordered authority to "monitor trust reform." Second, we do not believe your authority to monitor trust reform entitles you to serve as a roving investigator. The judicial role in our system simply does not include investigative authority. See, e.g., Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 34 (8th Cir. 1966) ("[F]rom the very nature of the judicial role, it is not given to a judge to engage in a prospecting quest for other evidence . . . to add to a record, nor . . . to appoint a master to make such a discovery pursuit for him."); Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 318-20 (3d Cir. 1944) (noting the "fundamental proposition . . . that a court's power is judicial only, not administrative nor investigative," and "limited to deciding controversies," and that a special master "has no wider scope of activity than the court itself"). Accordingly, "a special master is not a[] [plaintiffs'] advocate or a roving federal district court." Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, vacated in part by 688 F.2d 266 (5th Cir. 1982).

We attempted to accommodate your December 22 request because it was not obviously inconsistent with your authority and it sought specific documents that were readily accessible. As your subsequent request suggests that you intend to undertake an inquiry that may be improper, and to which we therefore cannot consent, we request that you provide us (1) notice of the precise scope of the inquiry you intend to undertake; and (2) an explanation of exactly how this inquiry is authorized by the court order appointing you.

Thank you.

Very truly yours,



Sandra P. Spooner

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

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Special Master - Monitor
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January 6, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
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P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

This letter responds to your letter of January 3, 2003, refusing to honor my January 1, 2003 letter request for the production of additional documents identified in your document production in response to my letter request of December 22, 2002.

You have mischaracterized the intent of my letter requests, characterizing my request for the Edwards' documents as an "investigation of the accuracy of Mr. Edwards' deposition testimony." Though it would appear unnecessary, let me state for the record that my initial December 22, 2002 request for the Edwards and Slonaker correspondence was not to investigate the accuracy of Mr. Edwards' statement that Mr. Slonaker had agreed that the judgment accounts' accounting performed by the Office of Historical Trust Accounting ("OHTA"), under Mr. Edwards' guidance, was an "historical accounting," but, as part of my monitoring responsibilities, to determine if the defendants had actually begun an accounting that would qualify, at least in the professional opinion of the Special Trustee, as an historical accounting.

My January 1, 2003 letter request for the additional documents identifiable from the documents produced to me on December 31, 2002 was to continue that inquiry. That request was necessary, in part, in light of the fact that the documents produced by you cast doubt on whether the judgment account's accounting could qualify as a start, however nascent, to an historical accounting. My request for documents that would

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support Mr. Edwards' testimony at his December 18, 2002 deposition that Mr. Slonaker had provided him a letter on July 26, 2002 in which he "said the judgment accounts that we did did constitute historical accounting." was to determine if Mr. Slonaker's concerns in that same July 26, 2002 letter – that the accounting could not qualify as an historical accounting – had been resolved. My interest was and is whether defendants have begun an accounting that can qualify as an historical accounting so that I may make a report to the Court, upon the conclusion of my inquiry, as to the status of the first of many parts of the requisite Interior Department's trust reform obligations. Mr. Edwards' truthfulness at his December 18, 2002, deposition, while expectedly of interest to the plaintiffs' counsel and, if found lacking, the Court, is only of tertiary importance to my monitoring inquiries regarding the status of trust reform and the status of the historical accounting.

Thus, I am not mainly concerned with the accuracy of Mr. Edwards' deposition testimony. It can be expected further discovery on the part of plaintiffs' counsel will deal with that matter if there is a legitimate question as to the truthfulness of his testimony. Neither have I "assumed the authority to investigate ... the adequacy of the judgment accountings" as you have alleged. The Court has already granted me the authority to monitor and report on the status of the Interior defendants' trust reform efforts in complying with the Court's direction in its September 17, 2002 Order appointing me as Special Master-Monitor, to wit:

> **"4. The Special Master-Monitor shall monitor the status of trust reform and the Interior defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act.**
>
> **5. The Special Master-Monitor is directed to periodically file reports with the Court to ensure that the Court and the plaintiffs receive complete and accurate information regarding the matters mentioned in paragraph 4."** *Id.* at 3.

That this monitoring direction included reporting on the status of the historical accounting is obvious by the continuing language in the Order in Paragraph 7 that states:

> **"The Special Master-Monitor shall file a final report with the Court when the defendants have brought themselves into compliance with their fiduciary duties as declared by the Court and prescribed in the 1994 Act. This report shall certify that there is no longer a need for a Special Master-Monitor to monitor the status of trust reform and the Interior defendants' efforts as they relate to the duties declared by the Court and prescribed in the 1994 Act."** *Id.*

I doubt that even the Department of Justice would claim at this late date in this litigation that the Interior defendants' duties do not include coming into compliance with the 1994 Act's requirement for an accounting of all funds owed the IIM account holders, plaintiffs

in this litigation. That documents revealing the extent of the Interior defendants' compliance with the Court's Orders regarding the historical accounting are clearly subject to my review and reporting authority under the Court's September 17, 2002 Order directing me to monitor the defendants' trust reform efforts is beyond dispute.

The balance of your letter can only be viewed as a manifestation of your continued attempts to obstruct the authority of the Court to determine the status of defendants' trust reform efforts and regulate the Phase 1.5 trial discovery.[1] Your characterization of the Court as "a plaintiffs' advocate" or "roving federal district court," is unconscionable. Your citation to and quotations of dicta in the case law that would seem to support your position that a court cannot appoint a special master to oversee and monitor a party's compliance with its directives are flawed and rely on cases that are not on point or hold to the opposite position. In fact, in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), cited by you, the appellate court *affirmed* the district court's decision to appoint a special master to observe and report on a party's compliance with its directives. In a case on all fours with this Court's appointment of a Special Master-Monitor, the Fifth Circuit stated in upholding that appointment:

"The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established.

....

(w)e have previously approved the appointment of such agents to oversee compliance with continuing court orders. Insofar as the special master is to report on TDC's compliance with the district court's decree and to help implement the decree, he assumes one of the plaintiffs' traditional roles, except that, because he is the court's agent, he can and should perform his duties objectively." *Id.* at 1161-62, footnotes omitted.[2]

Therefore, your refusal to supply the additional documents I have requested is without foundation and constitutes obstruction of the legitimate inquiries of the Court pursuant to its September 17, 2002 Order. You tacitly recognized the authority of the Court to

[1] I refer to my January 2, 2003 letter entitled, "Special Master-Monitor's Deposition Regulation" regarding your refusal to accept the Court's direction appointing a Special Master-Monitor to regulate the discovery proceedings for the Phase 1.5 trial.

[2] The Fifth Circuit only found fault with the district court's appointment order in that it did not require the special master to submit his reports based on formal hearings. *Id.* at 1162-63. Before I file any trust reform status report to the Court on the Interior defendants' compliance with the Court's directives regarding implementation of an historical accounting, Mr. Edwards and other Interior officials and consultants will have had ample opportunity at hearings before me, at which the parties will be able to attend and cross-examine witnesses, to buttress his testimony regarding the adequacy of his judgment account's accounting.

oversee the Interior defendants' compliance with its directives on December 31, 2002 by supplying me with the initial correspondence and documents I requested. I now have requested additional relevant documents clearly identified in that production and have offered the opportunity to you to provide other correspondence and documents, if they exist, including those that would support Mr. Edwards' statements and apparent belief that OHTA and its consultants have begun what amounts to an historical accounting. In light of the Special Trustee's expressed concerns regarding that judgment accounts' accounting in his July 26, 2002 memorandum, cited by Mr. Edwards during his deposition for the proposition that the Special Trustee had affirmed the historical accounting status of that accounting, this request goes directly to the extent of the Interior defendants' compliance with the Court's directives.

Further refusal by you to recognize the Court's authority to monitor the Interior defendants' compliance with its directives and augment your incomplete document production cannot be countenanced and may unfortunately result, among other potential recommendations by me, in the referral of your conduct to the District Court for appropriate personal disciplinary action should you again fail, as an officer of the Court, to honor this request.[3] The listed documents addressed in my January 1, 2003 letter to you and any other correspondence and documents that are responsive to that request and my December 22, 2002 letter request should be provided to me by close of business January 7, 2003 and timely supplemented thereafter as further documents are located.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.

[3] "The Special Master-Monitor shall have and shall exercise the power to regulate all proceedings in every hearing before the master-monitor *and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties*, as set forth in this order. *Id.*, September 17, 2002 appointment Order at 3, emphasis added.

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

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January 7, 2003

BY FACSIMILE

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

Re: Cobell v. Norton

Dear Mr. Kieffer:

This replies to your letter of January 6, 2003. We indicated in our letter of December 31, 2002 (which initially responded to your request and provided you with the two specific documents you identified) that we would respond further once we had ascertained whether the Department of the Interior possessed additional documents responsive to your request. Your January 1, 2003 and January 2, 2003 letters expanded the scope of your request to include not only "correspondence" as initially requested in your December 22, 2002 letter, but also "documents or other information available to [Mr. Edwards] that assured him Mr. Slonaker's concerns had no basis in fact[.]" Letter from Special Master-Monitor to Sandra P. Spooner, January 1, 2003, at 3. This, coupled with your reference to Mr. Edwards' testimony, caused for us a concern that your inquiry was no longer limited to your monitoring trust reform but now included an investigation into Mr. Edwards' credibility, which we maintain is beyond the scope of your powers as Special Master-Monitor.

Your January 1, 2003 letter twice questioned Mr. Edwards' truthfulness and then placed the burden on Interior Defendants to produce documents to demonstrate otherwise:

> Thus, unless Mr. Edwards had documents or other information available to him that assured him Mr. Slonaker's concerns had no

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> basis in fact, his deposition testimony is also thrown into question. Those documents, if they exist, would be subject to release pursuant to my December 22, 2002 letter request.

Id. (emphasis added).

> Mr. Slonaker's final concern in his July 26, 2002 memorandum also puts into question the accuracy of Mr. Edward' testimony about Mr. Slonaker's affirming the judgment accounts' "historical accounting[.]"

Id. at 3 n.2 (emphasis added). As you point out in your most recent letter, to the extent his credibility ever becomes an issue, "plaintiffs' counsel will deal with that matter." Letter from Special Master-Monitor to Sandra P. Spooner, Jan. 6, 2003, at 2.

To the extent that your letters have identified specific additional documents relevant to trust reform, such as the Chavarria, Dunne & Lamey LLC ("CD&L") initial reconciliation and its update, they are attached (SMMREQ 0000046-70). Please note that these documents contain materials that are subject to the Court's November 27, 1996 Protective Order and therefore may be examined or used only pursuant to the terms of that Order. Notwithstanding the manner in which your January 1, 2003 request is framed, this release of documents should not be construed as a supplement to or explanation of Mr. Edwards' deposition testimony.

Your January 6, 2003 letter appears to expand your request even further than your January 1, 2003 expansion of your December 22, 2002 request. Your January 6 letter states that you have now "offered the opportunity to [us] to provide other correspondence and documents, if they exist, including those that would support Mr. Edwards' statements and apparent belief that OHTA and its consultants have begun what amounts to an historical accounting." Letter from Special Master-Monitor to Sandra P. Spooner, Jan. 6, 2003, at 4. You asked us to respond to your January 6 letter within one business day. We need additional time to consider this further expansion of your original request.

Very truly yours,

Sandra P. Spooner/CLA

Sandra P. Spooner

[Enclosures]

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

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January 8, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

Your January 7, 2003 letter to me forwarding the Chavarria, Dunne & Lamey initial reconciliation and its update states that "(t)o the extent your letters have identified specific additional documents relevant to trust reform . . . they are attached." I beg to differ.

My letters have clearly indicated since December 22, 2003 what I have requested from you and your letters in response have addressed those documents. The first set of documents I requested in my January 1, 2003 letter to you were "Attachments IV and V to the July 16, 2002 Edwards' memorandum to Thomas Slonaker, Special Trustee for American Indians...." You specifically addressed these two attachments in your December 31, 2002 letter to me in which you enclosed two of the documents I had requested in my December 22, 2002 letter. You have failed to produce Attachments IV and V.

My requests, in addition to seeking the documents you have released and the two noted above that you have not released, have consistently addressed any other documents that might be responsive to and explain further Mr. Edwards' apparent belief that the judgment accounts' accounting can qualify as an historical accounting even in light of Mr. Slonaker's concerns regarding the accuracy of those accounts' accounting. As I stated in my December 22, 2002 initial letter request, "I request you provide me with

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copies of the above-cited letter and memorandum *and any other correspondence between Mr. Slonaker and his staff and Mr. Edwards and his staff regarding the judgment accounts and the OHTA's personnel's request for the Special Trustee's opinion or comments about the judgment accounts' qualification as an historical accounting."*

You have been aware since January 1, 2003 of my request for Attachments IV and V to Mr. Edwards July 16, 2002 memorandum to Mr. Slonaker. Your expressed confusion over your characterization of my "expansion of (my) original request" is contrived. You continue to withhold documents that I have clearly requested you provide me.

If I do not receive Attachments IV and V by close of business this evening, I will assume you have refused to produce them. As I stated in my January 6, 2003 letter, you may provide whatever other documents you find are relevant to my letter requests in a timely manner.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.

United States Department of Justice
Civil Division
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January 8, 2003

BY FACSIMILE

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

Re: Cobell v. Norton

Dear Mr. Kieffer:

This replies to your letter of today, January 8, 2003, in which you state, among other things, "If I do not receive attachments IV and IV [to the July 26, 2002 Memorandum] by the close of business this evening, I will assume you have refused to produce them." That assumption would be incorrect. Whether we will produce or not produce those documents is still a matter under consideration and we will provide a supplemental response as soon as possible.

Very truly yours,

Sandra P. Spooner

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

EXHIBIT K
Defendants' 01-23-03
Motion for Protective Order

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January 15, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

Your January 8, 2003 letter response to my January 7, 2003 letter (again requesting that you complete your production of at least the documents responsive to my January 1, 2003 letter request) stated in part: "Whether we will produce or not produce those documents is still a matter under consideration and we will provide a supplemental response as soon as possible." You also stated that I should not presume that, should I not receive any response from you by the close of business on January 8, 2003, you had not refused to produce them.

It is now January 15, 2003, and I have had no response from you either providing me with Attachments IV and V to the July 16, 2002 Bert Edwards memorandum to Thomas Slonaker or any other documents responsive to my earlier December 22, 2002 initial letter request. Nor have you informed me that defendants have no other responsive documents or that, for whatever reason, you will not provide me with the requested documents.

This letter is to notify you that I will proceed to address your failure to comply with my letter requests unless your document production is supplemented by close of business this evening (6 o'clock p.m.) or I receive an appropriate certification from you that no documents responsive to my requests exist and an explanation of your continued refusal to produce Attachments IV and V, should you fail to produce those attachments.

EXHIBIT L
Defendants' 01-23-03
Motion for Protective Orde

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.

United States Department of Justice
Civil Division
Commercial Litigation Branch

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January 15, 2003

BY FACSIMILE
Joseph S. Kieffer, III
Special Master-Monitor
420 7th Street, N.W, #705
Washington, D.C. 20004

Re: Cobell v. Norton

Dear Mr. Kieffer:

Your letter of this date states that we have not provided you with "any other responsive documents to [your] earlier December 22, 2002 initial letter request." We respectfully disagree. In fact, on December 31, 2002, we provided you with the July 26, 2002 memorandum from Mr. Slonaker to Mr. Edwards and the July 16, 2002 memorandum from Mr. Edwards to Mr. Slonaker [SMMREQ0000001-0000045], which were directly responsive to your request for correspondence. In response to your subsequent expanded request, on January 7, 2003, we also provided you with the CD&L initial reconciliation and update [SMMREQ0000046-0000070].

For the reasons set out in our previous letters on this subject, your demands raise issues that require careful consideration. Your decision to supplement plaintiffs' discovery with your own, for example, places us in an untenable position. As our foremost duty is to represent the United States to our utmost ability, we state again that we have not had sufficient time to resolve the issues raised by your requests. As for your request for Attachments IV and V to the July 16, 2002 Edwards Memorandum, we believe that we will be able to respond definitively by the end of this week.

Very truly yours,

Sandra P. Spooner

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

EXHIBIT M
Defendants' 01-23-03
Motion for Protective Order

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January 16, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

In light of your January 15, 2003 letter's renewed refusal to comply with my letter request of the same date, and its mischaracterization of the substance of my correspondence addressing your failure to comply with my document production requests, I will proceed as indicated in my letter.

Should you deem to honor my request and produce the responsive documents including Attachments IV and V, explain your reasons for not producing them, or certify that none others exist, I will consider that response as remedial action in addressing your past conduct.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.

EXHIBIT N
Defendants' 01-23-03
Motion for Protective Order

United States Department of Justice
Civil Division
Commercial Litigation Branch

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Deputy Director

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January 17, 2003

BY FACSIMILE

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

Re: Cobell v. Norton

Dear Mr. Kieffer:

We are unable to comply with your request for copies of Attachments IV and V to the July 16, 2002 Edwards Memorandum because they are protected by the attorney client privilege, the deliberative process privilege and the work product doctrine. These documents are described in the Memorandum.

As you know, the Court issued an opinion on the attorney client privilege on December 23, 2002. The Department of Justice has not yet made a final decision as to whether the Defendants will appeal from that order. Until that decision is made, we cannot disclose matters protected by the attorney client privilege because we must avoid taking action that would waive the privilege. Plaintiffs have recently sought a ruling by the Court on the applicability of the deliberative process and the matter is now awaiting the Court's ruling. Until it is finally resolved, we cannot waive the privilege by disclosing deliberative information.

Very truly yours,

Sandra P. Spooner

cc: Dennis Gingold, Esq.
Keith Harper, Esq.

EXHIBIT O
Defendants' 01-23-03
Motion for Protective Order

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January 2, 2003

Sandra P. Spooner
Deputy Director
Commercial Litigation Branch
Washington, D.C. 20036-2976
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Ms. Spooner:

It has been brought to my attention that you have informed Mr. Tom Slonaker, the former Special Trustee for American Indians, that the Torts Branch of the Civil Division has resolved his requests for representation and that any further request for legal representation by him must be submitted anew to the Department of the Interior. I specifically refer to your letter of December 20, 2002, in response to his December 13, 2002 letter to you advising you of his continued requirement for legal representation in light of the Department of Justice's refusal to provide that representation.

Apparently, the Department of Justice has seen fit to narrow reimbursement for his legal representation to the Special Master's deposition during last summer. This would seem to overlook the fact that plaintiffs' counsel have the right under the procedures established by the Special Master to continue the deposition of Mr. Slonaker at which defendants' attorneys may cross-examine him on matters addressed by the Special Master or plaintiffs' counsel.

His initial request for representation was based on your letter to him dated May 20, 2002, in which you stated: "Accordingly, because it appears that your interests may not be entirely consistent with those of the United States, you may wish to obtain your own counsel." Whatever you exactly meant by that statement, it clearly indicated that Mr.

EXHIBIT P
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Slonaker's conduct or statements, or both, during his government service were in some manner inconsistent with what was expected of him by his superiors including, potentially, the President of the United States. His subsequent dismissal by the Secretary of the Interior on behalf of the President would indicate that his further participation in the *Cobell v. Norton* litigation, at the request of any party or judicial official, would, as you informed him, require counsel to represent him.

It is highly unlikely that Mr. Slonaker's participation in the instant litigation is at an end. It is much more likely that either plaintiffs or I will need to depose Mr. Slonaker in the course of Phase 1.5 trial preparations or trust reform monitoring, respectively. For that matter, others may desire his testimony in one or more forums that will require legal representation. The Senate Committee on Indian Affairs requested his testimony this summer for which counsel represented him and for whom reimbursement was denied by the Department of Justice following preparation and delivery of that written and oral testimony.

The juxtaposition of your inference to Mr. Slonaker as a Department of Justice attorney that counsel was required to protect his interests which were at odds with those of the government, – supposedly the Department of Interior – Justice Department counsel's recent refusal to continue to pay for that legal representation, and your present position that he must reapply to the Department of Interior if he desires further representation, smacks of retaliation and an attempt to control Mr. Slonaker's potential testimony through withholding or limiting that legal representation.

I wrote to you on October 2, 2002 in conjunction with my withdrawal of my outstanding discovery requests to the Department of the Interior that I would be "examining any allegations made by defendants' employees regarding the Department's retaliation against them for their statements made to me or testimony to the Court about the status of defendants' efforts to comply with their Indian trust fiduciary obligations." Mr. Slonaker, in his December 13, 2002 letter to you, has now indicated his belief that the government's position on his legal representation and the range of issues, in addition to the Special Master's deposition, that he has addressed and may likely need to address through testimony "underline the fact that it is both punitive and non-productive to hobble my contributions by limiting legal representation to a single deposition."

Denying previously authorized legal representation to Mr. Slonaker by initially limiting that representation to a single deposition and now requiring him to reapply for legal representation to the agency for whom he worked and with whom he has been told by you he has inconsistent interests can only be interpreted as retaliation against him. It also is clearly an effort to muzzle his testimony should he be required to give it in an adversarial legal proceeding or otherwise. Any deposition of Mr. Slonaker – plaintiffs, defendants or mine – will enable both the defendants' and plaintiffs' counsel to attend

and cross-examine Mr. Slonaker. The Department of Justice's denial to the former Special Trustee of legal representation, conditioning further representation on the approval of the Department of Interior's Solicitor's office, which is under the supervision by one of the named defendants in the *Cobell* litigation – the Secretary of the Interior – can only be viewed as a patent attempt to limit his ability to receive legal guidance and representation to his potential legal and financial detriment. This action on your part, or that of the defendants in this litigation, is not only retaliation against him but interferes with the Court's and plaintiffs' ability to obtain his unfettered testimony about the defendants' trust reform efforts during his tenure at the Department of Interior.[1]

If you would care to comment on your and the Department of Justice attorneys' and Interior defendants' employees and attorneys' past actions regarding Mr. Slonaker's legal representation and your position regarding providing him reimbursement for his attorneys' past legal representation and future reimbursement for that representation please do so prior to close of business January 10, 2003. Following that date, and depending on your response, I will begin my investigation of defendants' employees' and attorneys' possible retaliation against the former Special Trustee and that retaliation's impact on the Court and plaintiffs' ability to receive his full and complete cooperation and testimony.

In that regard, please provide me with alternate dates in January and February 2003 when the following officials will be available for deposition by me on this issue and other related issues: Deputy Secretary of the Interior J. Steven Griles, Associate Deputy Secretary of the Interior James Cason, Director of the Office of Indian Trust Transition Ross Swimmer, Interior Solicitor William Myers, and Counselor to the Solicitor Laurence Jensen. I will schedule one day of deposition for each deponent. Plaintiffs and defendants' counsel will be allowed to attend and cross-examine each deponent.

Sincerely yours,

Joseph S. Kieffer, III
Special Master – Monitor

[1] Denying Mr. Slonaker reimbursement for his attorneys' legal fees will require him to pay those fees himself for his counsel's past representation and any future legal advice and representation he made require regarding the *Cobell* litigation. The Hobson's choice left him by the Departments of Justice and Interior is to either suffer significant financial loss or go without legal representation for future legal proceedings at which he is required to testify. The obvious solution for him would be to avoid where possible such proceedings and to limit his testimony to ensure he would not later be subject to further costly legal proceedings based on that testimony. This solution and the choices given him by you are unacceptable in the context of the *Cobell* litigation and the Court's and plaintiffs' potential need for his testimony about his professional and personal knowledge of the key trust reform issues in that litigation.

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.
James Schaller, Esq.
Benjamin Jacewicz, Esq.

U. S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

January 10, 2003

Joseph S. Kieffer, III
Special Master - Monitor
420 Seventh Street, N.W. # 705
Washington, DC 20004-2213

Re: *Elouise Pepion Cobell v. Gale Norton, et al,*
C.A. No. 96CV1285 RCL (D.D.C.)

Dear Mr. Kieffer:

Your letter to Sandra Spooner of January 2, 2003, concerning decisions related to the private representation at federal expense of Thomas Slonaker in the Cobell litigation was forwarded to me for response in my capacity as the Deputy Assistant Attorney General with supervisory authority over the Torts Branch in the Civil Division. The Torts Branch has responsibility for considering requests for individual-capacity representation submitted by federal employees in legal proceedings arising from conduct performed within the scope of their federal employment and for reviewing billings whenever private representation is afforded to an employee at federal expense. All issues regarding the approval and federal reimbursement of private counsel for representation of Mr. Slonaker in the Cobell litigation were addressed by the Torts Branch.

Before discussing Mr. Slonaker, it may be helpful to describe briefly the private counsel program implemented by the Torts Branch. All requests for the retention and payment of private counsel to represent federal employees in their individual capacities are governed by 28 C.F.R. §§ 50.15 & .16. To obtain representation under these regulations, an employee or former employee must submit a written request to the employing agency, which must forward the request to the Civil Division with an accompanying "recommendation for or against providing representation." § 50.15(a)(1). The agency's "statement should be accompanied by all available factual information." Id. Although receipt of the employing agency's recommendation is an integral part of the Justice Department's procedure for considering representation requests under these regulations, the Justice Department is not bound by the employing agency's recommendation and may grant a request for representation even if the employing agency recommends against doing so.

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Pursuant to the regulations, the Justice Department may approve the retention of private counsel to represent a federal employee in an individual-capacity matter "subject to the availability of funds" and only when "the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States." §§ 50.15(a) and .16(a). When an employee is authorized to retain private counsel, federal reimbursement for services rendered is limited "to fees incurred for legal work that is determined to be in the interest of the United States. Reimbursement is not available for legal work that advances only the individual interests of the employee." § 50.16(d)(1).

The critical determination under the regulations of when it serves the interests of the United States to afford representation is a matter committed to the discretion of the Attorney General. The regulations do not define or set forth any controlling standards for this determination. Accordingly, the D.C. Circuit held in Falkowski v. Equal Employment Opportunity Commission, 764 F.2d 907, 911 (D.C. Cir.), cert. denied, 478 U.S. 1014 (1986), that the Justice Department's "decision not to provide [the plaintiff] with counsel was within the agency's unreviewable discretion." The Court emphasized that "Congress gave DoJ broad, discretionary authority to provide federal employees with private counsel," and that decisions concerning whether and how to provide individual-capacity representation to federal employees "involve the allocation of an agency's scarce legal resources" and thus are "better left to the expertise of the agency than of the courts." Id.

In all cases in which retention of private counsel is approved, the attorney retained by the employee must sign a standard retention agreement in order to receive federal reimbursement for legal services. This agreement, entitled "Conditions of Private Counsel Retention by the Department of Justice for Representation of Current and Former Federal Employees," in each case defines and limits the representation for which payment is authorized. The agreement warns that "[t]he Department will not honor bills for services that the Department determines were not directly related to the defense of issues presented" by the authorized representation (see attached copy of the standard agreement at p. 1); the Department will not pay for "any legal work that advances only the individual interests of the employee" (id.); and the Department "will not reimburse services deemed reasonably necessary to the defense of an employee if they are not in the interests of the United States." Id. at p. 2. The agreement also instructs counsel that "[t]o avoid confusion over whether the retained attorney may bill the Department for a particular service under this retention agreement, the retained attorney should consult the Justice Department attorney assigned to the case . . . before undertaking the service." Id.

In addition to the referenced restrictions and warnings, the standard agreement contains many limitations on reimbursement of legal expenses, including caps on hourly rates and billable hours and restrictions on a wide range of common charges. Id. at pp. 2-3. When private counsel bills are received by the Torts Branch, they are carefully scrutinized to ensure compliance with all provisions of the agreement. Although the review process may be time-consuming and many of the caps and limitations may not comport with the going rate in the private sector in some areas of the country, they

were implemented by the Civil Division as reasonable measures to monitor and control private counsel expenditures. Without tight controls and strict enforcement of the retention agreement, the scarce funds available to the Justice Department for the retention of private counsel for federal employees could prove inadequate to meet the extensive demands presented each year in a wide array of litigation throughout the Nation.

As your letter notes, Mr. Slonaker made a representation request to the Solicitor of the Department of Interior. After reviewing the submitted information in accordance with 28 C.F.R. §§ 50.15 and .16, the Department of Justice approved Mr. Slonaker's request for private counsel at government expense to represent him with regard to the Special Master's deposition subpoena to him in Cobell. Your letter suggests that Mr. Slonaker must submit a new representation request to the Interior Department in the event his deposition in Cobell is continued or reopened. This is not the case. Because private counsel at government expense was approved for Mr. Slonaker for his deposition before the Special Master, the authorization and retention agreement in his case covers representation directly related to that deposition, including any continuation of it, though it does not cover other matters. An employee or former employee who wishes to receive representation for testimony before a congressional committee must submit a request for the same to his employing agency, which the agency will consider and then forward with its non-binding recommendation to the Justice Department in accordance with 28 C.F.R. § 50.15(a)(1).

Your letter incorrectly suggests that a decision regarding reimbursement was made in an effort to retaliate against or punish Mr. Slonaker for some position he took in the Cobell litigation or in an attempt to control or restrict his future testimony or cooperation. The Torts Branch does not have any responsibility for or involvement in the substantive defense of the Cobell litigation, and any potential impact on that litigation played no role in the decision to provide Mr. Slonaker private counsel at government expense for representation at his deposition or to deny his request for reimbursement of attorney's fees relating to his congressional appearance.

To the extent that your letter requests that the Justice Department provide you with additional information relating to its deliberations and decision-making process concerning the representation decision made in regard to Mr. Slonaker, 28 C.F.R. § 50.15(a)(3) prohibits the Justice Department from providing this information. It states: "Attorneys employed by any component of the Department of Justice who participate in any process utilized for the purpose of determining whether the Department should provide representation to a federal employee, undertake a full and traditional attorney-client relationship with the employee with respect to the application of the attorney-client privilege." Additionally, a detailed discussion of this matter would not be appropriate in light of the D.C. Circuit's holding in Falkowski that decisions denying individual-capacity representation under 28 C.F.R. §§ 50.15 and .16 are committed to the Attorney General's discretion and are not reviewable.

I hope this letter has addressed your concerns about this matter. Please contact me if you have additional questions.

Sincerely,

Jeffrey S. Bucholtz

cc: James Schaller
Dennis Gingold
Keith Harper
Elliot Levitas
Benjamin Jacewicz
Sandra Spooner

CONDITIONS OF PRIVATE COUNSEL RETENTION
BY THE DEPARTMENT OF JUSTICE FOR REPRESENTATION OF
CURRENT AND FORMER FEDERAL EMPLOYEES

The following items and conditions shall apply to the retention of a private attorney's legal services by the Department of Justice to represent current and former federal employees in civil, congressional, or criminal proceedings.

1. NATURE OF RETENTION

Subject to the availability of funds, the Department of Justice agrees to pay an attorney, or other members of his or her firm, for those legal services reasonably necessitated by the defense of a current or former federal employee (hereinafter "client") in civil, congressional, or criminal proceedings.

The Department will not honor bills for services that the Department determines were not directly related to the defense of issues presented by such matters. Examples of services for which the Department will not pay include, but are not limited to:

a. administrative claims, civil actions, or any indemnification proceedings against the United States on behalf of the client for any adverse monetary judgment, whether before or after the entry of such an adverse judgment;

b. cross claims against co-defendants or counterclaims against plaintiff, unless the Department of Justice determines in advance of its filing that a counterclaim is essential to the defense of the employee and the employee agrees that any recovery on the counterclaim will be paid to the United States as a reimbursement for the costs of the defense of the employee;

c. requests made under the Freedom of Information or Privacy Acts or civil suits against the United States under the Freedom of Information or Privacy Acts, or on any other basis, to secure documents for use in the defense of the client;

d. any legal work that advances only the individual interests of the employee; and

e. certain administrative expenses noted in paragraph number 4 below.

The retained attorney is free to undertake such actions as set forth above, but must negotiate any charges with the client and may not pass those charges on to the Department of Justice.

THE ABOVE LIST IS NOT EXHAUSTIVE. The Department of Justice will not reimburse services deemed reasonably necessary to the defense of an employee if they are not in the interests of the United States.

To avoid confusion over whether the retained attorney may bill the Department for a particular service under this retention agreement, the retained attorney should consult the Justice Department attorney assigned to the case, mentioned in the accompanying letter before undertaking the service.

2. BILLABLE HOURS

The Department of Justice agrees to pay the retained attorney for any amount of time not exceeding 120 billable hours per month for services performed in the defense of the client. The retained attorney may use the services of any number of attorneys, paralegals, or legal assistants in his or her firm so long as the aggregate number of billable hours in any given month does not exceed 120 hours. The client is free, however, to retain the attorney, or members of the firm, to perform work in excess of 120 hours per month so long as the firm does not bill the excess charge to the Department of Justice.

The Department will consider paying for services in excess of 120 hours in any given month if the press of litigation (e.g., trial preparation) clearly necessitates the expenditure of more time. The retained attorney must make requests for additional compensation to the Department in writing in advance of such expenditures.

3. LEGAL FEES

The Department agrees to pay the retained attorney up to $200.00 per lawyer hour, plus expenses as described in paragraph 4 below. The charge for any services should not exceed the retained attorney's ordinary and customary charge for such services. This fee is based on the consideration that the retained attorney has been practicing law in excess

of 5 years.

In the event the retained attorney uses the services of other lawyers in his or her firm, or the services of a paralegal or legal assistant, the Department agrees to pay the following fees.

a. Lawyer with more than 5 years practicing experience: $200.00 per lawyer hour

b. Lawyer with 3 - 5 years of practicing experience: $160.00 per lawyer hour

c. Lawyer with 0 - 3 years of practicing experience: $133.00 per lawyer hour

d. Paralegal or legal assistant (or equivalent): $78.00 per hour.

The Department of Justice periodically reviews the hourly rates paid to attorneys retained to defend federal employees under 28 C.F.R. § 50.16. If, during the period of this agreement, the Department revises the schedule of hourly rates payable in such cases, the Department will pay revised rates for services rendered after the effective date of the revision in rates.

4. EXPENSES

While the Department will pay normal overhead expenses actually incurred (e.g., postage, telephone tolls, travel, transcripts), the retained attorney must itemize these charges. The Department will not accept for payment a bill that shows only a standard fee or percentage as "overhead". The retained attorney must describe, justify, and clear IN ADVANCE unusual or exceptionally high expenses.

In addition, the retained attorney must describe, justify, and clear in advance any consultations with or retention of experts or expert witnesses.

The retained attorney must secure advance approval to use computer-assisted research that involves charges in excess of $500.00 in a given month.

The retained attorney must separately justify and obtain

advance approval for services such as printing, graphic reproduction, or preparation of demonstrative evidence or explanatory exhibits.

The retained attorney must itemize and justify in-house copying costs exceeding $150.00 in a given month. The Department will pay up to a per page copying cost of $.15 per page.

The retained attorney must itemize and justify facsimile transmission costs exceeding $150.00 in a given month.

The Department will pay expenses such as secretarial overtime or the purchase of books only in exceptional situations. The retained attorney must obtain advance approval for such expenditures.

Travel expenses may not include first class service or deluxe accommodations. The retained attorney may not bill time spent in travel unless it is used to accomplish tasks related to the litigation. The retained attorney must specifically identify
such tasks.

The Department will not pay for meal charges not related to out-of-town travel.

The Department will not provide compensation for client or other entertainment.

The Department will not pay expenses for meals incidental to overtime.

The Department will not pay for expenses that can normally be absorbed as clerical overhead, such as time spent in preparing legal bills and filing papers with the Court. The retained attorney must separately list and justify messenger services.

The retained attorney must enumerate the expenses incurred for hiring local counsel by rate, hour, and kind of service. These hours must fall within the 120-hour monthly maximum. The hourly rates paid to local counsel may not exceed the rates listed in paragraph 3 above.

5. FORMAT OF BILLS

The retained attorney must submit bills on a monthly basis, stating the date of each service performed; the name of the attorney or legal assistant performing the service; a description of the service; and the time in tenths, sixths, or quarters of an hour, required to perform the service. Because of the limitation on reimbursable hours, a bill must include all services rendered in a given month. The Department will not consider subsequent bills for services rendered in a month for which it has already received a bill.

In describing the nature of the service performed, the itemization must reflect each litigation activity for which reimbursement is claimed.

The retained attorney must attach copies of airline tickets, hotel bills, and bills for deposition and hearing transcripts to the billing statement.

The retained attorney must itemize local mileage costs (e.g., purpose of travel and number of miles). The Department will pay the standard government cost per mile rate for the use of privately owned vehicles.

Before the Department of Justice will pay a bill, Department attorneys with substantive knowledge of the litigation will review it. If the retained attorney believes that the detail of the legal bill would compromise litigation tactics if disclosed to Department attorneys assigned to the case, the retained attorney should list those particular billing items on a separate sheet of paper with an indication of the specific concern. Department attorneys uninvolved with this case will independently review the separated, sensitive portion of the bill solely to determine if payment is appropriate under applicable standards. The individuals reviewing the bills will not discuss these items with the Department of Justice attorneys having responsibility for the case, nor will those responsible attorneys review the items in question.

After Department attorneys complete the review of a bill, the Department will notify the billing counsel if the Department deems any item or items nonreimbursable or if any item or items require further explanation. When further

information or explanation is needed, the Department will hold the entire bill until the retained attorney responds. Only after the Department receives and reviews the response will the Department certify the bill in whole or in part for payment. For that reason, the retained attorney must respond promptly.

Should the Department determine that any items are not reimbursable under this agreement, the billing counsel may request further review of the Department's determination. The retained attorney shall make such a written request to the appropriate Branch director at the address indicated in the forwarding letter. The billing counsel must submit such requests for further review within 30 days, unless additional time is specifically requested and approved. Thereafter, the Department will not reconsider its determination.

6. BILLING ADDRESS

The retained attorney should submit all bills to:

Director, Office of Planning,
Budget and Evaluation
Civil Division
United States Department of Justice
Washington, D.C. 20530
Attn: Room 9042, L Street Building

7. PROMPT PAYMENT

The Prompt Payment Act is applicable to payments under this agreement and requires the payment of interest on overdue payments. Determinations of interest due will be made in accordance with provisions of the Prompt Payment Act and Office of Management and Budget Circular A-125.

8. GAO REVIEW

Periodically, the Department of Justice may ask the retained attorney to submit copies of time sheets to the General Accounting Office (GAO) for purposes of auditing the accuracy of corresponding monthly bills, copies of which the

Department will forward directly to GAO.

9. TERMINATION

The Department of Justice reserves the right to terminate its retention agreement with the retained attorney at any time for reasons set forth in 28 C.F.R. § 50.16.

ACCEPTANCE

I agree that my retention by the Department of Justice to represent --- in connection with the civil action — - - will be in accordance with the applicable statutes, regulations, and the foregoing terms and conditions. This written instrument, together with the applicable statutes and regulations, represents the entire agreement between the Department of Justice and the undersigned, any past or future oral agreements notwithstanding.

Signature: _____

_____

Date: _____

Tax Identification Number:

_____

Joseph S. Kieffer, III.
Special Master - Monitor
420 7th Street, N.W. #705
Washington, D.C. 20004
(202) 248-9543

Interior Office: (202) 208-4078 Facsimile: (202) 478-1958 Cellular: (202) 321-6022

January 15, 2003

Jeffrey S. Bucholtz, Esquire
Deputy Assistant Attorney General
U.S. Department of Justice
Civil Division
Washington, D.C. 20530

Re: Cobell et al. v. Norton et al.
Civil Action No. 1:96 CV 01285

Dear Mr. Bucholtz:

Thank you for your letter dated January 10, 2003, responding to my January 2, 2003 letter to Sandra Spooner concerning the Department of Justice's denial of the request of the former Special Trustee for American Indians, Thomas Slonaker, for legal representation and compensation for past representation. I understand you are the responsible official over the Torts Branch's consideration of requests for individual-capacity representation submitted by federal employees in legal proceedings arising from conduct performed within the scope of their federal employment. I appreciate your offer to answer questions I might have concerning Mr. Slonaker's reimbursement for his legal representation in proceedings regarding the *Cobell v. Norton* Indian Trust litigation.[1]

I also found your description to be helpful regarding the private counsel program and the decision of your department concerning Mr. Slonaker's request for legal representation. That description indicated that Mr. Slonaker's representation, authorized by your staff, extended only to the Special Master's deposition and representation "directly related to that deposition." Thus, apparently, his representation is based on the nature of the proceeding covered by the request and not the content of the deposition or the conduct, communications, or opinions of Mr. Slonaker addressed during that deposition which might be of interest to adverse parties in later proceedings not covered by the limited representation provided to him by the Department of Justice. I take it that for any proceeding in the past, such as the Senate Committee on Indian Affairs' request for his

[1] Excluding the Department of Justice's deliberations and decision-making process concerning Mr. Slonaker's legal representation request.

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testimony, or the future, such as my potential deposition of him, Ms. Spooner's direction to him is correct. He would have to submit individual requests to the Department of the Interior to obtain that further representation for each such proceeding. If I am incorrect in this interpretation, please provide me with the correct interpretation.

The additional questions that I have regarding the Department of Justice's decision process are: what role does the Department of the Interior play, if any, in the determination of whether Mr. Slonaker's requests for legal representation at future proceedings are approved by the Department of Justice? Do any counsel or managers at the Department of the Interior, or, for that matter, any government office receiving such a request from a former employee, merely act as a conduit and deliver the request to your office for decision? Or do they offer advice to the Department of Justice as to the appropriateness of granting the representation? If the latter procedure is the case, must the Department of Justice deny a request that is not supported by the forwarding agency? Does the Department of Justice seek the opinion of the agency on the appropriateness of the representation and any potential conflicts of interest in their taking part in the decision due to the employee's expected testimony? How are any conflicts of interest resolved by the Department of Justice if a government agency's legal interests would be harmed by the testimony of its employee at the proceeding for which he or she is requesting legal representation?

The reason I address these questions to you, Mr. Bucholtz, is that you stated in your letter that "(t)he critical determination under the regulations of when it *serves the interests of the United States* to afford representation is a matter committed to the discretion of the Attorney General." In Mr. Slonaker's case, due possibly to his testimony before the Senate and House committees with responsibility over Indian affairs and related appropriations and his testimony before the *Cobell* court, Ms. Spooner, a Department of Justice attorney and lead counsel for the *Cobell* defendants, including the Secretary of the Interior, informed Mr. Slonaker in a May 20, 2002 letter that "...because it appears that your interests may not be entirely consistent with those of the United States, you may wish to obtain your own counsel." I have attached a copy of Ms. Spooner's letter.

Thus, the source of my concern, expressed in my letter to Ms. Spooner that you have addressed in part, that the position of the Department of Justice on his legal representation "smacks of retaliation and an attempt to control his potential testimony," can be put into context.[2] If the interests of the United States – conceivably the Interior and Justice Departments – are not consistent with Mr. Slonaker's, it would appear that it would not be in the interests of the Attorney General to provide him representation if his

[2] "Retaliation" regarding the potential refusal of reimbursed legal representation in which case Mr. Slonaker would have to pay for that representation himself to his *financial* detriment. "Control" in that denial of legal representation could redound to his potential *legal* detriment if he did not avoid testifying.

testimony at future proceedings might not be positive regarding his knowledge of the Department of Interior's trust reform activities.

I make no inferences in this discussion regarding you or your staff's conduct in deciding to place limitations on Mr. Slonaker's legal representation in the past. However, the history of the *Cobell* litigation and its contempt citations regarding the conduct of government counsel and employees does not augur well for fair and impartial treatment of those present or former Interior Department employees who have testified or will be required to testify before the *Cobell* court. Their honest but critical opinions regarding the Interior defendants' trust reform activities or conduct has been a source of reprisals against them in the past as the Court has documented.

It would appear that the Departments of Justice and Interior face a conflict of interest in addressing Mr. Slonaker's future request(s) for legal representation at proceedings such as depositions that others or I may take regarding his knowledge of the Interior defendants' trust reform activities. How you propose to address this conflict other than to provide him legal representation on a continuing basis rather than require him to make a request anew to the Interior defendants every time he receives a summons is of interest to me.

Your response to me regarding my questions and perceptions regarding this apparent conflict and how you will deal with it in the future would be helpful in my continued review of the past denial of Mr. Slonaker's legal representation fees and his ability to receive a fair decision on legal representation for potential future proceedings in connection with this litigation. You may assume for your consideration and response that I will be deposing Mr. Slonaker and that he will be subject to cross-examination by the parties to the *Cobell* litigation who will be knowledgeable of his past trial, legislative, and deposition testimony.

Again, thank you for your courtesy in addressing my questions.

Sincerely yours,

Joseph S. Kieffer, III.
Special Master – Monitor

cc: Dennis Gingold, Esq.
Keith Harper, Esq.
Elliot Levitas, Esq.
Sandra Spooner
James Shaller, Esq.
Benjamin Jacewicz, Esq.

Enclosure

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

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

Tel: (202) 514-7156
Fax: (202) 307-0494
Email: sandra.spooner@usdoj.gov

May 20, 2002

Approval for Counsel
dates
Tim Harlan - DOJ
202-616-4171

By Facsimile and First Class Mail

Mr. Thomas N. Slonaker
Department of the Interior
1849 C Street, NW
Mail Stop 5140
Washington, DC 20040

Re: Cobell v. Norton – Temporary Restraining Order

Dear Mr. Slonaker:

The Court Monitor has advised us that he intends to depose you on June 10, 2002. His letter is enclosed. The Special Master has advised us orally that he intends to depose you on June 24-26, 2002. We will be in touch to provide you with additional information about these depositions as we receive it.

Justice Department counsel will be present at the deposition to represent the United States. As you know, Justice Department counsel do not represent you, personally. Accordingly, because it appears that your interests may not be entirely consistent with those of the United States, you may wish to obtain your own counsel. If you have any questions about this, please do not hesitate to contact me or someone in the Department of the Interior's Office of the Solicitor.

Sincerely,

Sandra P. Spooner

Encl.

cc: Larry Jensen

U. S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington D.C. 20530

January 23, 2003

Joseph S. Kieffer, III
Special Master - Monitor
420 Seventh Street, N.W. # 705
Washington, DC 20004-2213

Re: *Elouise Pepion Cobell v. Gale Norton, et al,*
C.A. No. 96CV1285 RCL (D.D.C.)

Dear Mr. Kieffer:

This responds to your letter of January 15, 2003, in which you raise several questions regarding the private counsel program implemented by the Torts Branch. As a preliminary matter, to the extent that your letter may be read to suggest that you plan to review the propriety of the Justice Department's decision to deny Thomas Slonaker's request for reimbursement of private counsel fees relating to his testimony before Congress, I should point out that, as my letter of January 10, 2003 explained, the D.C. Circuit has held that decisions to deny representation under 28 C.F.R. §§ 50.15 and .16 are committed to the Attorney General's discretion and are not reviewable. See Falkowski v. Equal Employment Opportunity Commission, 764 F.2d 907, 911 (D.C. Cir. 1985), adhered to on reh'g, 783 F.2d 252 (D.C. Cir. 1986), cert. denied, 478 U.S. 1014 (1986). Nonetheless, we are pleased to attempt to clarify the process employed by the Justice Department to consider a request from a federal employee or a former federal employee for individual-capacity representation at federal expense.

First, you ask whether Mr. Slonaker is required to submit a separate request for representation if he desires individual-capacity representation at federal expense for any future proceedings in or related to the Cobell litigation.

As noted in your letter, in response to Mr. Slonaker's request, the Justice Department has authorized payment of private counsel for Mr. Slonaker in regard to matters directly related to the Special Master's deposition subpoena to him in Cobell. As I stated in my January 10 letter, that approval would cover private counsel representation for any continuation of the Special Master's deposition of Mr. Slonaker, and Mr. Slonaker would not need to submit a new request for representation, either to the Interior Department or to the Justice Department, with respect to any such continuation of the Special Master's deposition. On the other hand, because the Justice Department's existing authorization of counsel for Mr. Slonaker does not cover matters that are not directly related to the Special Master's deposition (such as congressional investigations

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related to Cobell or other proceedings in the Cobell litigation), Mr. Slonaker should submit a new request for representation pursuant to 28 C.F.R. § 50.15(a)(1) if he desires private counsel representation at federal expense for such a matter.

In particular, you state that you may wish to depose Mr. Slonaker and you seek confirmation of your understanding that Mr. Slonaker should submit a new representation request for your potential deposition of him. We would encourage Mr. Slonaker to submit a new request if you seek to depose him and if he desires private counsel representation at federal expense with respect to your deposition of him. Unless your potential deposition of Mr. Slonaker were to be so closely related to the Special Master's deposition of Mr. Slonaker as to constitute a reopening of the Special Master's deposition, Mr. Slonaker should submit a new request.

Your letter suggests that if Mr. Slonaker desired representation with respect to multiple proceedings, he would need to submit a separate request for representation with respect to each such proceeding. We do not believe that Mr. Slonaker would need to submit separate requests; it would be sufficient for Mr. Slonaker to submit a single request that identified each proceeding with respect to which he sought representation under 28 C.F.R. §§ 50.15 and .16. If Mr. Slonaker were to submit a new request and if representation were approved, the Torts Branch would forward another retention agreement to Mr. Slonaker's counsel specifically describing the matter or matters for which reimbursement of his private counsel's fees was authorized.

You also question the process that Mr. Slonaker should follow to request private counsel representation at federal expense for matters other than the Cobell Special Master's deposition. Under § 50.15(a)(1), a current or former federal employee requesting representation must submit a written representation request to his employing agency. Submission of such a request to the employing agency is an integral part of the procedure specified by the regulations, and the regulations do not provide for an employee or former employee to omit this step due to perceived conflicts of interest with the agency. Accordingly, if Mr. Slonaker desires private counsel representation at federal expense for a matter or matters not directly related to the Cobell Special Master's deposition, Mr. Slonaker should submit a request for the same to the Department of the Interior.

When a federal agency receives a representation request from an employee, the regulations require the agency to forward the request to the Civil Division with a "statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information." 28 C.F.R. § 50.15(a)(1). This statement logically would encompass the views of the agency as to whether the individual representation of the employee would conflict with the interests of the agency or the United States. Under this provision, an employing agency should not act merely as conduit and forward the employee's request without comment. Nonetheless, as I explained in my January 10 letter, the agency's recommendation is not controlling; it is merely a factor considered by the Justice Department. The ultimate decision of whether to authorize representation is an independent

determination made by the Justice Department on a case-by-case basis.

You also question how an employing agency and the Justice Department may fairly address a representation request from an employee who is asserting conflicting positions with the United States in litigation. Your inquiry in this regard appears premised on the assumption that an employee may be entitled to private representation at federal expense under 28 C.F.R. §§ 50.15 and .16 even to pursue legal interests that conflict with those of the United States. In fact, the regulations do not authorize the expenditure of federal funds for such a purpose. The regulations specifically state that "[r]epresentation is not available to a federal employee whenever . . . [i]t is . . . determined by the [Justice] Department that it is not in the interest of the United States to provide representation to the employee." 28 C.F.R. § 50.15(b)(2). Also, as mentioned in my prior letter, the standard retention agreement makes clear that the Justice Department will not pay for "any legal work that advances only the individual interests of the employee," and will not pay for services that "are not in the interests of the United States" even where such services are "deemed reasonably necessary to the defense of an employee." See standard retention agreement at pp. 1-2.

This is not to suggest that private representation at federal expense necessarily will be denied to an employee merely because the employee has offered testimony that is inconsistent with the factual position taken by the United States in a case or because it is anticipated that the employee may do so. To the contrary, it is understood that federal employees often have a wide range of opinions and perceptions about many complex issues they must address in the course of their employment. The United States has an important interest in litigation in supporting a full airing of all relevant views. The United States also has a very strong interest in the morale of the federal workforce, and it attempts to safeguard that interest by endeavoring to ensure that all its employees are treated fairly in litigation that arises from the performance of their jobs. The Justice Department considers these factors in each case in making the discretionary determination of whether it is in the interest of the United States to provide representation at federal expense.

I hope that this letter has clarified these matters.

Sincerely,

Jeffrey S. Bucholtz

cc: James Schaller
Dennis Gingold
Keith Harper
Elliot Levitas
Benjamin Jacewicz
Sandra Spooner

Joseph S. Kieffer, III.
Special Master - Monitor
420 7th Street, N.W. #705
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Interior Office: (202) 208-4078 Facsimile: (202) 478-1958 Cellular: (202) 321-6022

January 2, 2003

Terry M. Petrie, Esquire
Michael Quinn, Esquire
John Stemplewicz, Esquire
Civil Division
U.S. Department Of Justice
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)

Dear Counsel:

Re: Special Master-Monitor's Deposition Regulation

Over the holidays, I conducted a review of the depositions that I have overseen pursuant to the Court's direction in its September 17, 2002 Order appointing me Special Master-Monitor. That direction included the following language:

"The Special-Master-Monitor shall have and shall exercise the power to regulate all proceedings in every hearing before the master-monitor and to do all acts and take all measures necessary or proper for the efficient performance of the master-monitor's duties, as set forth in this order. *Id.* at 3.

And further:

"The Special Master-Monitor shall also oversee the discovery process in this case and administer document production ... to ensure that discovery is conducted in the

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manner required by the Federal Rules of Civil Procedure and the orders of this Court. The Special Master-Monitor shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation as to any discovery dispute that arises which cannot be resolved by the parties" *Id.*

Before and during the series of depositions that have been taken to date of both defendants' and plaintiffs' witnesses, defendants' counsel have repeatedly asserted in correspondence and on the deposition record that the Court's direction, specifically the last phrase quoted above, limits the authority of the Special Master-Monitor. Mr. Petrie first asserted this position in a discovery status teleconference on November 13, 2002 in which the following dialogued took place:

"Special Master-Monitor Kieffer ("SMM Kieffer"): **Okay. Now, let me give you another example. During the deposition, when you're still asking good questions, if you ask a harassing question, and the plaintiffs object to it, same situation –**

Mr. Petrie: Yes, sir.

SMM Kieffer: - and I say, yeah, that's harassing, go on, don't ask that question, you say, oh, but we want to, we don't think it's harassing, is that a dispute?

Mr. Petrie: Yes, sir.

SMM Kieffer: In other words, everything that there's a disagreement on in your concept is a dispute?

Mr. Petrie: That's correct." Transcript at 8.

Defendants' counsel have held to this interpretation with few exceptions throughout the course of the Phase 1.5 trail depositions. They have continued to assert that any dispute so identified by defendants will require a Report and Recommendation of the Special Master-Monitor and that I cannot resolve any disputes during a deposition even regarding the appropriateness of a question in a deposition posed by either defendants' or plaintiffs' counsel.

Ms. Spooner has most recently refused to permit the Acting Special Trustee to answer plaintiffs' counsel's questions even following my ruling on the appropriateness of the questions and direction that the witness answer them.[1]

[1] *See* December 20, 2002 Erwin Deposition Transcript at 286-287: "By Mr. Brown: You've sat in that courtroom. You heard what was represented to the Court by your attorneys. Were those representations accurate? Ms. Spooner: I'm going to object on the ground that you are now harassing the witness that I've instructed not to - Mr. Kieffer: He's not harassing the witness. And she may answer the question. Because

The result of defendants' counsel's refusal to accept the authority of the Special Master-Monitor to regulate the depositions, in my opinion, has been to put plaintiffs' counsel at a severe disadvantage due to plaintiffs' counsel's acceptance of the direction of the Special Master-Monitor even in the presence of the defendants' counsel's active objection to and refusal to follow it. This conduct cannot continue without further erosion of the Court's authority and the resultant inability of plaintiffs to conduct effective Phase 1.5 trial discovery.[2]

Therefore, in future depositions, should counsel refuse to abide by my direction on discovery disputes that are unquestionably within my authority to resolve as granted to me by the Court in its September 17, 2002 Order, including but not limited to the regulation of deposition questioning, consideration will be given to terminating the deposition and filing a Report and Recommendation to the Court recommending an Order to Show Cause be issued requiring counsel to answer why his or her conduct should not be referred to the Disciplinary Panel of the U.S. District Court for the District of Columbia for review and appropriate action pursuant to Rule 8.4 (d) of the District of Columbia Rules of Professional Conduct and why his or her conduct does not warrant personal monetary sanctions pursuant to Federal Rule of Civil Procedure 37(A)(4).[3]

Sincerely yours,

Joseph S. Kieffer, III
Special Master – Monitor

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

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it was in public Court. Ms. Spooner: I am instructing you not to answer that question. Harassment, Mr. Kieffer, is one of the grounds on which an attorney can instruct the witness not to answer. Mr. Kieffer: I just said he asked a legitimate question to Ms. Erwin. Ms. Spooner: I understand that. Mr. Kieffer: And I want Ms. Erwin to answer the question. Ms. Spooner: And I am instructing her not to answer."

[2] On November 15, 2002 and November 21, 2002, the Special Master-Monitor provided two Reports to the Court addressing the defendants' position and recommending expedited consideration of the recommendation to clarify the Court's September 17, 2002 Order. Defendants' opposed the interpretation of the Special Master-Monitor of his authority and argued that the Court did not have jurisdiction to modify the Order while the Order was pending appeal. The Court has not acted on the Special Master-Monitor's recommendation to clarify the Order regarding the authority of the Special Master-Monitor.

[3] Rule 8.4(d) states: "It is professional misconduct for a lawyer to: engage in conduct that seriously interferes with the administration of Justice." Failure to obey court orders may constitute misconduct under paragraph (d). *See In re Whitlock*, 441 A.2d 989 at 989-991 (D.C. 1982)