

RECEIVED  
U.S. DISTRICT COURT  
DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

2003 SEP 24 PM 3: 10

NANCY M.  
MAYER-WHITTINGTON  
CLERK

\_\_\_\_\_  
ELOUISE PEPION COBELL, et al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
GALE A. NORTON, Secretary of the Interior, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. 1:96CV01285  
(Judge Lamberth)

**INTERIOR DEFENDANTS' MOTION FOR AN ORDER  
DIRECTING THE SPECIAL MASTER TO CONFORM HIS  
CONDUCT TO LIMITS STATED BY THE COURT OF APPEALS;  
TO VACATE OR CLARIFY EXISTING ORDERS AS APPROPRIATE;  
AND TO ACT ON THIS MOTION ON AN EXPEDITED BASIS**

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7.1, Interior Defendants move for an order directing the Special Master to conform his conduct to the limits stated by the Court of Appeals in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). To the extent that the Special Master has construed prior orders of this Court to authorize conduct outside these limits, we ask that they be vacated or clarified. We further request expedited consideration of this motion. We have conferred with plaintiffs' counsel, who stated that plaintiffs will oppose this motion.

**INTRODUCTION**

In its decision of July 18, 2003, the Court of Appeals clarified the limits on the role of a Special Master in this litigation. 334 F.3d 1128 (D.C. Cir. 2003). As the court explained, a master is not a "roving federal district court," id. at 1143, empowered to initiate inquiries into matters that he perceives to be of concern, assemble evidence outside the structure of adversary litigation, and present findings

and conclusions of law arrived at by procedures unknown to our judicial system.

Neither before nor after the decision has Special Master Balaran respected these limits on a special master's authority. In an "Interim Report" issued April 21, 2003,<sup>1</sup> the Special Master produced findings and conclusions based almost exclusively on ex parte evidence, and consulted and even employed a complaining witness and former officer of a financially interested corporation that has attempted to intervene as a party in this litigation. In his oversight of certain IT security matters, the Master took the position that he could perform penetration testing of government computer systems (i.e., "hacking") without the government's consent.<sup>2</sup>

His "Appraisal Report" of August 20, 2003<sup>3</sup> exemplifies the Special Master's continuing determination to assume an "investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system," 334 F.3d at 1342, even after the D.C. Circuit's decision. In that report, the Special Master, on his own initiative, examined a claimed disparity between rates earned by allottees on rights of way (ROWs) over their property, and those earned by tribes and private parties. The Special Master concluded that "As a Result of the Secretary's Appointment of Incompetent Appraisers Individual Indian Beneficiaries Do Not Receive 'Fair Market Value' for ROWs Running

---

<sup>1</sup> Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report (filed April 21, 2003) ("NAID Report") (dkt. # 1999).

<sup>2</sup> Letter from Alan L. Balaran, Special Master, to John Warshawsky, Trial Attorney, Department of Justice (November 22, 2002) (Exhibit 1); Letter from John Warshawsky, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (November 13, 2003) (Exhibit 2).

<sup>3</sup> Site Visit Report Of The Special Master To The Office Of Appraisal Services In Gallup, New Mexico And The Bureau Of Indian Affairs Navajo Realty Office In Window Rock, Arizona (Aug. 20, 2003) ("Appraisal Report") (dkt. #2219).

Across Their Land." Appraisal Report at 36. He made a finding that "the Secretary and her delegates have abrogated [their] responsibilities" to ensure "that the appraisal process is conducted in a manner both competent and beyond professional reproach." Id. at 38. He based these conclusions on documents and interviews that were not in the record, without giving the parties an opportunity to produce evidence or present arguments in response to his findings or conclusions. See id. at 7-39. Instead, as he has done with previous reports, the Master released the Appraisal Report at once, thereby producing predictable stigmatizing press coverage.

We have filed our objections to the Appraisal Report and do not repeat them here. The Master's conduct of the NAID investigation and IT security matters are also the subjects of separate pleadings.

This motion, by contrast, asks the Court to clarify immediately that the Special Master must conform his conduct to the limits outlined by the Court of Appeals. As discussed below, the type of activity in which the Master is engaging is not authorized by this Court's prior orders. To the extent that the orders can be construed to permit such conduct, they should be vacated or clarified.

Even if there were no question as to the Special Master's fitness to serve as a judicial officer in this case, the relief requested here would be essential. As the Court is aware, however, Interior Defendants on May 29, 2003 moved to disqualify Special Master Balaran. No special master in this case may assume the role that this special master has undertaken. That an improper role is being performed by an individual whose actions disqualify him from serving as a judicial officer in this case underscores the urgency of this motion and the need for expedition. It should be stressed, however, that this motion is independent of the motion to disqualify Mr. Balaran. The relief requested here would

be equally applicable to any other individual appointed as a special master in this case.

### **BACKGROUND**

This Court initially authorized the Special Master to oversee the discovery process. Order of February 24, 1999. Subsequently, the Court conferred four other grants of authority. The Special Master's interpretation and conduct of these grants have created concerns of the most serious kind.

On December 17, 2001, this Court entered its Consent Order Regarding Information Technology Security ("IT Security Order"). The IT Security Order directed the Special Master to review certain plans and conduct certain inquiries with regard to security of individual Indian trust data in computer systems. The Special Master moved well beyond the grant of authority contemplated in that order, however, and insisted that he was entitled to conduct penetration testing of government computer systems without prior consultation.<sup>4</sup> This Court has stayed the IT Security Order. Preliminary Injunction at 5 (July 28, 2003).

On September 17, 2002, the Court referred to the Special Master, for reports and recommendations, two of plaintiffs' motions seeking to hold "37 non-party individuals" in contempt and to hold Interior Defendants and their counsel in contempt for allegedly destroying e-mail. See Cobell v. Norton, 226 F. Supp. 2d 1, 162-63 (D.D.C. 2002). Petitions to recuse the Special Master are currently pending before the Court of Appeals.<sup>5</sup>

---

<sup>4</sup> Letter from Alan L. Balaran, Special Master, to John Warshawsky, Trial Attorney, Department of Justice (November 22, 2002) (Exhibit 1); Letter from John Warshawsky, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (November 13, 2003) (Exhibit 2).

<sup>5</sup> Objections concerning the contempt proceedings have been briefed separately from this motion by the government and the named individuals.

On November 5, 2002, the Court directed the Special Master to investigate allegations by NAID that Interior concealed certain information from the Court. The Special Master's extraordinary conduct in that investigation is the subject of our pending disqualification motion.

On August 12, 1999, the Court, with Defendants' consent, entered orders that authorized the Special Master to oversee Defendants' "retention and protection from destruction of IIM records through, among other things, on-site visits to any location where IIM Records are maintained." Order Regarding Interior Department IIM Records Retention (dkt. no. 370) at 2 (Aug. 12, 1999); Order Regarding Treasury Department IIM Records Retention (dkt. no. 369) at 2 (Aug. 12, 1999) (collectively "Document Preservation Orders").

These orders responded to a report issued June 7, 1999, in which the Special Master asserted inadequacies in Defendants' physical preservation of records regarding individual Indian trust matters.<sup>6</sup> The Document Preservation Orders, entered as docket numbers 369 and 370, each state:

Alan L. Balaran, Special Master ("Special Master"), is hereby authorized to oversee the [Interior or Treasury] Department's retention and protection from destruction of IIM Records through, among other things, on-site visits to any location where IIM Records are maintained.

---

<sup>6</sup> In his June 7, 1999 Report, the Special Master set forth his observations from site visits to IIM record locations that he conducted during April 1999, and noted what he viewed as the "substandard" nature of "storage conditions" at several sites based on conditions such as storage areas exposed to elements, open boxes, a lack of sprinkler systems, rodent infestation, and files labeled "ALLOTTED" designated for transport to a Federal Records Center. *Id.* at 8-9. The Special Master further noted "recent developments" of document shredding and the inadvertent overwrite of computer system backup tapes. *Id.* at 10. The Special Master concluded his report by recommending that "additional safeguards be implemented to insure that all relevant Indian trust documents are properly protected and retained." *Id.* at 19. The Special Master issued an additional report on August 5, 2003, recommending adoption of proposed orders negotiated by the parties, the terms of which were adopted in the Court's Order of August 12, 1999 (dkt. # 368).

In the event that the Special Master determines that IIM Records are not being protected from destruction or threatened destruction, he may recommend to the Department that it take reasonable steps to protect IIM Records found to be in jeopardy of destruction. He may also recommend to the Court such remedial action as he deems appropriate pursuant to Rule 53, Federal Rules of Civil Procedure.

Document Preservation Orders at 2.

Following entry of the August 12, 1999 orders, the Special Master initially conducted site visits and issued reports and recommendations that were appropriately confined to his authority to oversee "retention and protection from destruction of IIM Records."<sup>7</sup> Document Preservation Orders at 2. Thus, the Special Master's site visits and reports were initially consistent with the type of site visits and reports that were the subject of his June 7, 1999 Report, and with the types of activities authorized by the August 12, 1999 Document Preservation Orders.

The Special Master's site visit of March 6, 2003, and the report that resulted, were of a decidedly different nature. On March 6, the Special Master conducted site visits at both the Office of Appraisal Services in Gallup, New Mexico, and the Bureau of Indian Affairs Navajo Realty Office in Window Rock, Arizona. In his report entered on August 20, 2003, the Special Master not only

---

<sup>7</sup> See e.g., Report Of The Special Master Regarding Site Visits To Area And Agency Offices (filed October 29, 1999) (addressing whether records were stored in a fireproof manner and were vulnerable to destruction, and concluding that the sites visited lacked the necessary resources for infrastructure and employee training to ensure adequate records retention) (dkt. # 385); Third Report of The Special Master Regarding Site Visits To Area And Agency Offices (filed Nov. 12, 1999) (noting the location of records, whether they were protected from fire, water, or other potential damage or destruction and recommending immediate intervention to physically protect records) (dkt. # 389); Fourth Site Visit Report Of The Special Master To Area And Agency Offices (filed Nov. 29, 2000) (noting whether or not IIM records at various sites were vulnerable to destruction from fire or other disaster, climate controlled, awaiting transfer, or secured in a vault) (dkt. # 586).

examined the alleged loss of appraisal records, but also purported to investigate and pass judgment on the appraisal practices for ROWs over the allotments of Indian beneficiaries. The Master offered extensive findings and conclusions, declaring that "As a Result of the Secretary's Appointment of Incompetent Appraisers Individual Indian Beneficiaries Do Not Receive 'Fair Market Value' for ROWs Running Across Their Land." Appraisal Report at 36 (capitalization in original). The Master further concluded that the Secretary of the Interior had not acted in good faith and had "abrogated" her fiduciary duties in imposing an appraisal system that, he alleged, would not obtain full value for Indian land. Id. at 36-38. Immediately after making this purported finding, he noted that "even 'honest but imprudent' conduct is sufficient grounds for removing a fiduciary." Id. at 38 n.44.

On June 5, 2003, the Special Master also announced his intention to investigate the "leasing files" of the Minerals Management Service ("MMS"), and on July 31, 2003, he propounded document production requests concerning MMS audit files.<sup>8</sup> Interior Defendants informed the Special Master that they would comply fully with relevant Court Orders,<sup>9</sup> but raised concerns with the Special Master about the nature and scope of his new investigation as well as his authority to request certain documents under the August 12, 1999 Document Preservation Orders.<sup>10</sup>

---

<sup>8</sup> Letter from Alan L. Balaran, Special Master, to Amalia D. Kessler, Trial Attorney, Department of Justice (June 5, 2003) (Exhibit 3); Letter from Alan L. Balaran, Special Master, to Amalia D. Kessler, Trial Attorney, Department of Justice (June 16, 2003) (Exhibit 4); Letter from Alan L. Balaran, Special Master, to John Siemietkowski, Trial Attorney, Department of Justice (July 31, 2003) (Exhibit 5).

<sup>9</sup> See Letter from Sandra P. Spooner, Deputy Director, Department of Justice to Alan L. Balaran, Special Master (Aug. 22, 2003) (Exhibit 6).

<sup>10</sup> See Letter from Amalia D. Kessler, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (June 16, 2003) (Exhibit 7); Letter from Timothy E. Curley, Trial Attorney,

## ARGUMENT

The decision of the Court of Appeals in Cobell v. Norton, 334 F.3d 1128, outlined the boundaries for activities of court-appointed officials such as special masters. The court observed that, under certain circumstances, a district court may appoint a special master to "superintend[] compliance with [a] district court's decree," as long as the master is precluded from "consider[ing] matters that go beyond" that limited task. Id., 334 F.3d at 1143 (quoting Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, reh'g denied in part on other grounds, 688 F.2d 266 (5th Cir. 1982)). The court explained that this limitation ensures that the special master would not be an "advocate" for the plaintiffs or a "roving federal district court." Id. (quoting Ruiz, 679 F.2d at 1162). The court stressed, however, that in this case, "there [is] no decree to enforce[.]" Cobell, 334 F.3d at 1143.

The Court thus held that the appointment of Special Master-Monitor Kieffer "entailed a license to intrude into the internal affairs of the Department" that "simply is not permissible under our adversarial system of justice." Id. The Court noted that the Master-Monitor's "portfolio was truly extraordinary; instead of resolving disputes brought to him by the parties, he became something like a party himself." Id. at 1142. The Court explained that such conduct constituted "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system," and that without consent of the parties, "the district court must confine itself (and its agents) to its accustomed judicial role." Id.

Special Master Balaran, like the Special Master-Monitor, has assumed "an investigative, quasi-

---

Department of Justice, to Alan L. Balaran, Special Master (Aug. 21, 2003) (Exhibit 8); Letter from Sandra P. Spooner, Deputy Director, Department of Justice to Alan L. Balaran, Special Master (Aug. 22, 2003) (Exhibit 6); Letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Alan L. Balaran, Special Master (Sep. 5, 2003) (Exhibit 9).



inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system.” Id. It is thus the duty of this Court to confine its agents to the “accustomed judicial role.” Id.

The Special Master’s interpretation and implementation of his several grants of authority have consistently demonstrated a disregard for the proper limits on his role. In investigating allegations brought to the Court’s attention by NAID, the Master relied on evidence procured “outside of normal channels,” NAID Report at 1 n.1, and put NAID’s complaining witness and former vice president on his payroll.

In his Appraisal Report, the Master, on his own initiative, engaged in extensive findings and conclusions regarding a host of issues regarding the conduct of appraisals. These include issues of policy, Appraisal Report at 25, 36, the legal standards and duties governing benefits due to allottees from leases, id. at 25, 36, 39, whether appraisal systems and methodologies comply with statutory and regulatory obligations and standards, id. at 31, 36-37, whether Interior's appraisers are "competent," id. at 36, and sufficiently "trained ... to negotiate with [Oil and Gas] companies," id. at 35, whether IIM beneficiaries receive fair market value on leases, and whether interests on allotted lands are valued less than on tribal and private lands, id. at 33. Moreover, echoing themes he has sounded before, the Master, based on his solitary perusal of evidence gathered without the benefit of an adversary process, felt qualified and authorized to announce the conclusion that the Secretary of the Interior had not acted in good faith and had "abrogated" her fiduciary responsibilities in imposing an appraisal system that, he alleges, would not obtain full value for Indian land, id. at 36-37. Indeed, the Master insinuated that the Secretary should be removed as a fiduciary. See id. at 38 n.44.

This extraordinary intrusion into the operation of an executive branch department constitutes

precisely the unprecedented role condemned by the Court of Appeals. The improper nature of the Master's report is compounded by the failure to provide the parties with the opportunity to address the evidence or reasoning of his Report. And the Master's action is made still more extraordinary by the fact that no claim of appraisal practices is even being litigated in this suit. The Special Master, "instead of resolving disputes brought to him by the parties [has become] something like a party himself." 334 F.3d at 1142.

Because of the manner in which the Special Master has assembled his evidence, it is unclear at this point whether the Special Master has again relied on evidence acquired "outside of normal channels and to which the parties may have no familiarity," as he admittedly did in his NAID Report. See NAID Report at 1 n.1. However, media reports released after the Appraisal Report indicate that, at some point, Mr. Balaran may have been contacted about an alleged appraisal issue by Kevin Gambrell, a former Interior employee and a purported whistle blower.<sup>11</sup> It is in the nature of self-generated reports based on evidence assembled and judged by one individual that the precise nature of contacts and influences cannot readily be ascertained. Even if the Special Master did not again rely on ex parte evidence and communications, his actions plainly exceed the scope of any authority that a Master could properly exercise.<sup>12</sup>

---

<sup>11</sup> See e.g., Jerry Reynolds, "Navajo Allottees Short-Changed States Special Cobell Report," Indian Country Today (Aug. 21, 2003) ("Balaran made investigative site visits to Gallup, N.M., and Window Rock, Ariz., following the 'whistle-blower' accusations of Kevin Gambrell[.]") (Exhibit 10). The Master does not state in his Appraisal Report whether he had ex parte conversations with Mr. Gambrell and, if he did, what facts he became privy to.

<sup>12</sup> Nor has the Special Master conducted his activities in the transparent manner required by Rule 53. He has ignored requests by Interior Defendants that he disclose the names and professional affiliations of assistants who, as indicated by his own invoices, assist him in drafting his reports and

The government has already filed its objections to the Appraisal Report. The issue here is not the proper treatment of that Report or the disposition of the motion to disqualify or the extent to which the Master overstepped his authority with regard to IT Security. The issue here is the need to cabin the Master's authority to ensure compliance with the Court of Appeals' ruling. Consistent with the Court of Appeals' decision, it should be clarified that the Master is not enforcing a decree, that he may not continue to perform an "investigative, quasi-inquisitorial, quasi-prosecutorial role," 334 F.3d at 1142, and that evidence on any issue asserted to be germane to this lawsuit may be presented only by the parties to the Court as fully consistent with the adversary process.

None of this Court's previous orders authorizes the Special Master to assume his present role. But to the extent that any are construed to confer such authority, they must be revoked or clarified in light of the Special Master's conduct and the decision of the Court of Appeals. As noted, this Court, with Interior Defendants' consent, authorized the Master to engage in oversight of the Department of the Interior's retention and protection from destruction of IIM Records. See Document Preservation Orders. Nothing in those Orders remotely suggests that the Master was authorized to pass judgment on appraisal procedures and the persons appointed to perform them. Nor did Defendants acquiesce to oversight that extended beyond site visits evaluating the physical conditions affecting document retention – the concern cited by the Special Master in the June 7, 1999 report that gave rise to the

---

recommendations. See Letter from Tracy L. Hilmer, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (June 6, 2003) (Exhibit 11); Letter from Tracy L. Hilmer, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (July 9, 2003) (Exhibit 12). The Special Master's unwillingness to disclose such information is of particular concern in light of his conduct in failing to disclose his employment of Mike Smith for his NAID Investigation.

Document Preservation Orders. Likewise, the general authority conferred by the Court's Order of February 24, 1999 to "oversee the discovery process in this case to ensure that discovery is conducted in the manner required by the Federal Rules of Civil Procedure" and to "do all acts and take all measures necessary or proper for the efficient performance of the master's duties, as set forth in this order," Order at 2, plainly furnishes no authority for independent investigations into issues of the Master's choosing.<sup>13</sup>

In short, the government did not consent to every type of investigation that the Master might later seek to fit within the terms of existing orders. And the Master cannot expand the terms of Interior Defendants' consent by peppering a report on appraisals with references to document destruction.<sup>14</sup> Moreover, Interior Defendants are fully entitled to revisit their agreement in light of the way in which the Master has actually implemented the Document Preservation Orders. And, of course, Interior Defendants can revisit their consent to oversight by an individual who has demonstrated his unfitness for a judicial role as described in Interior Defendants' motion for disqualification.

In sum, Interior Defendants respectfully ask the Court to issue an order directing the Special

---

<sup>13</sup> The Special Master's authority to oversee discovery was significantly limited by the Court's September 17, 2002 Order. See Cobell v. Norton, 226 F. Supp. 2d 1, 163.

<sup>14</sup> Indeed, the Appraisal Report frequently states a significant conclusion about a substantive matter having nothing to do with the Special Master's assigned duties, and then tacks on an allegation about missing records, almost as an afterthought, as though that will bring the extraneous conclusion within his purview. See, e.g., Appraisal Report at 33 ("Yet notwithstanding the foregoing body of precedent, ROWs running across Navajo allotted lands are valued at a rate 'much less' than ROWs crossing tribal and private lands. And there is no documentation in any of the files reviewed by the Special Master explaining this discrepancy." (emphasis added)); see also id. at 25 (asserting that a certain appraisal methodology "runs afoul of the Secretary's obligation to ensure that allottees are 'justly compensated,' [citation and quotation omitted], but also it is exacerbated by the fact that the valuations are undocumented and unsupported." (emphasis added) (citation and quotation omitted)).

Master to conform his conduct to the limits established by the Court of Appeals. No Master may, as Mr. Balaran has done, assume an “investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system.” 334 F.3d at 1142. To the extent that this Court’s prior orders are claimed by the Master as a source of authority to act in this fashion, they should be vacated or clarified.

Swift resolution of this motion is required. As noted, on June 5, 2003, the Special Master also announced his intention to investigate the "leasing files" of the Minerals Management Service ("MMS"), and on July 31, 2003 and September 10, 2003, he propounded document production requests concerning MMS audit files. Once more, the Master appears on the verge of investigating, prosecuting and judging matters of his own choosing outside the boundaries of the adversary system.<sup>15</sup>

---

<sup>15</sup> Because the Special Master's request for specific files regarding MMS is a departure from his site visit activities, Interior Defendants have asked that he provide a specific reason for requesting documents related to a particular corporation. See Letter from Timothy E. Curley, Trial Attorney, Department of Justice, to Alan L. Balaran, Special Master (August 21, 2003) (Exhibit 8); Letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Alan L. Balaran, Special Master (August 22, 2003) (Exhibit 6); Letter from Sandra P. Spooner, Deputy Director, Department of Justice, to Alan L. Balaran, Special Master (Sep. 5, 2003) (Exhibit 13). The Master has declined to provide any explanation other than purporting to oversee document retention and thus, claiming he is entitled to request the documents because the referenced corporation conducts business on allotted lands. See Letter from Alan L. Balaran, Special Master, to Timothy E. Curley, Trial Attorney, Department of Justice (Aug. 12, 2003) (Exhibit 14); Letter from Alan L. Balaran, Special Master, to Timothy E. Curley (Aug. 13, 2003) (Exhibit 15); Letter from Alan L. Balaran, Special Master, to Sandra P. Spooner, Deputy Director, Department of Justice (Aug. 29, 2003) (Exhibit 16); Letter from Alan L. Balaran, Special Master, to Sandra P. Spooner (Sep. 10, 2003) (Exhibit 17). The Master has asserted further that he is "under no obligation to inform [Interior Defendants] of [his] motives provided [his] requests fall within the authority set out in Court Orders," thereby adding to Interior Defendants' concerns that he indeed has other motives for requesting documents that do not relate to overseeing document retention and protection from destruction. See Letter from Alan L. Balaran, Special Master, to Sandra P. Spooner (Sep. 10, 2003) (Exhibit 17).

**Conclusion**

For these reasons, Interior Defendants respectfully request that the Court issue an order directing the Special Master to conform his conduct to limits stated by the Court of Appeals; to vacate or clarify existing orders as appropriate; and to act on this motion on an expedited basis.

Respectfully submitted,

ROBERT D. McCALLUM, JR.

Associate Attorney General

PETER D. KEISLER

Assistant Attorney General

STUART E. SCHIFFER

Deputy Assistant Attorney General

J. CHRISTOPHER KOHN

Director

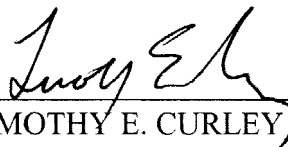
SANDRA P. SPOONER

Deputy Director

D.C. Bar No. 261495

JOHN T. STEMPLEWICZ

Senior Trial Attorney



---

TIMOTHY E. CURLEY

Trial Attorney

D.C. Bar No. 470450

Commercial Litigation Branch

Civil Division

P.O. Box 875

Ben Franklin Station

Washington, D.C. 20044-0875

(202) 514-7194

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER**

This matter comes before the Court on Interior Defendants' Motion for an Order Directing the Special Master to Conform his Conduct to Limits Stated by the Court of Appeals; To Vacate or Clarify Existing Orders as Appropriate; and to Act on this Motion on an Expedited Basis. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants' Motion for Expedited Consideration is GRANTED; and it is further

ORDERED that the Special Master shall at all times conform his conduct to the limits stated by the Court of Appeals in Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). The Special Master shall immediately cease performing any investigative, quasi-inquisitorial, or quasi-prosecutorial role in this litigation. Evidence on any issue asserted to be germane to this lawsuit may be presented only by the parties to the Court, consistent with the adversary process. It is further

ORDERED that the Special Master's authority to oversee Defendants' retention and protection from destruction of IIM records, granted by the Court in two orders (docket nos. 369

& 370) entered August 12, 1999, shall be limited to reporting on the physical conditions affecting the protection from destruction or threatened destruction of IIM records. It is further

ORDERED that the Special Master shall conduct future proceedings, if any are referred to him by the Court in accordance with Federal Rule of Civil Procedure 53, on the record, with evidence presented only by the parties. The Special Master shall not collect or present evidence. In any such proceeding, all parties shall be afforded notice and an opportunity to be heard, and shall be permitted to present evidence and respond to evidence presented by the opposing party or parties. The Special Master shall, in any such proceeding, conform his conduct to Federal Rule of Civil Procedure 53 and the Court of Appeals opinion.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge



cc:

Sandra P. Spooner  
John T. Stemplewicz  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
Fax (202) 514-9163

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

Mark Kester Brown, Esq.  
607 - 14th Street, NW  
Box 6  
Washington, DC 20005  
Fax (202) 318-2372

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

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

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Avenue, N.W.  
13th Floor  
Washington, D.C. 20006  
(202) 986-8477

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
(406) 338-7530

LAW OFFICE

ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
TWELFTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL abalaran@erols.com

November 22, 2002

**VIA FACSIMILE ONLY**John Warshawsky, Esq.  
United States Department of Justice  
Civil Division, Commercial Branch  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: Cobell v. Norton Civil Action No. 96-1285  
Rules of Engagement

Dear Mr. Warshawsky:

During our meeting of November 14, 2002, you assured me that you would submit for my review, no later than the beginning of this week, a revised "rules of engagement" that would guide USi's testing of Interior's computer systems. You indicated that you appreciated the urgency of producing such a document given the fact that USi has voluntarily consented, several months ago, to not go forward with the final phases of testing until a set of protocols was in place.

If I do not receive the requested documentation from you by close of business, Monday November 25, 2002, I will instruct USi to proceed notwithstanding the absence of a formal agreement.

Sincerely,

Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.



U.S. Department of Justice  
Civil Division, Commercial Branch  
1100 L Street, N.W., Room 10030  
Washington, D.C. 20005

*John Warshawsky*

*Telephone: (202) 307-0010 Facsimile: (202) 514-9163*

November 13, 2002

By Facsimile

Mr. Alan Balaran, Special Master  
1717 Pennsylvania Avenue, N.W.  
Twelfth Floor  
Washington, D.C. 20006

Re: Cobell v. Norton – Rules of Engagement for Testing by USinternetworking, Inc.  
(Network Discovery, Vulnerability/Penetration Testing, and Exploitation Limits Testing)

Dear Mr. Balaran:

As you are aware, during the past few months, we have undertaken to develop with you an agreed-upon protocol for you to conduct unilateral, unsponsored IT security testing in your capacity as Special Master in the Cobell litigation. Pursuant to such a protocol – referred to as the "Rules of Engagement" – your experts from USinternetworking, Inc. ("USi") would perform specified forms of IT security-related testing, with the consent of the Interior Department and in a fashion that would be deemed to be "authorized," in accordance with 18 U.S.C. § 1030.

To achieve the desired goal of agreeing upon the Rules of Engagement, the Interior Department, its experts from SAIC, and Government counsel have engaged in the following activities:

- We provided you, for discussion purposes, (a) a draft document entitled "Penetration Testing Rules of Engagement" setting forth our proposal for USi's testing and (b) a document entitled "Information Technology Controls Review, Security Vulnerability Assessment & Penetration Study Rules of Engagement for the United States Department of the Interior Departmental Offices" (May 29, 2002), which sets forth the protocol for testing performed at the direction of the Interior Department's Office of the Inspector General.
- We participated in a two-day demonstrative effort at USi's offices in Annapolis, Maryland, during which USi's representatives described their proposed approaches for testing and demonstrated some of their testing methods.
- We met with you and USi's representatives both before and after the two-day effort in Annapolis (a) to discuss the draft Rules of Engagement, (b) to listen to your concerns and the concerns of USi about the Interior Department's views about the proposed

testing, and (c) to express the Interior Department's concerns about the needs for sufficient documentation of testing, notice to one or more "trusted" individuals at the Interior Department regarding USi's plans for testing, and the opportunity to prevent or remediate any damage to the Interior Department's systems or data inadvertently resulting from USi's testing.

During our last meeting, on November 4, 2002, we discussed future steps needed for the development of the Rules of Engagement. The Interior Department has, in fact, investigated the possibility of making procedural changes that would, among other things, address your concerns about USi's testing being inhibited by the Interior Department's normal incident-reporting procedures.

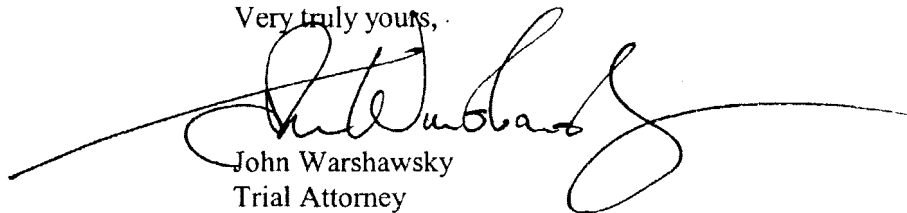
During the course of the November 4th meeting, you advised us that USi's testing was authorized by the Court and that you did not need any further authorization to proceed with the testing. You also stated that you wanted to go forward promptly with USi's testing program, with or without agreed-upon Rules of Engagement.

As I have advised you in the past, the Interior Department is fully willing to work with you and USi in an effort to develop a protocol that would both serve your concerns and would potentially provide the Interior Department with valuable information about IT security matters. The Interior Department, however, has an obvious and undeniable interest in ensuring that its IT systems are not damaged and that data contained on its IT systems are not corrupted or improperly disseminated, either inadvertently or deliberately.

Insofar as you have advised us of your desire to proceed with USi's testing promptly, based upon the authority that you state you already possess, it is essential that we have a full understanding of the basis for your assertion that USi's testing is "authorized." As you are aware, we respectfully disagree that such testing is authorized, based upon the information that has been provided to us to date. Accordingly, to assist us in understanding your position fully and, where appropriate, to incorporate such an understanding into the Rules of Engagement, we respectfully request that you advise us of the basis for your asserted authority to direct USi to conduct its testing program on the Interior Department's IT systems.

We look forward to working with you to resolve the remaining issues related to Rules of Engagement and USi's testing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'John Warshawsky', with a long horizontal flourish extending to the right.

John Warshawsky  
Trial Attorney  
Commercial Litigation Branch  
Civil Division

cc: Mr. Dennis Gingold (by facsimile)  
Mr. Keith Harper (by facsimile)

MODE = MEMORY TRANSMISSION

START=NOV-13 16:01

END=NOV-13 16:05

FILE NO.=096

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	#	99868477	003/003	00:00:58
002	OK	#	93182372	003/003	00:01:11
003	OK	#	98220068	003/003	00:00:39

-DOJ CORP FIN LIT -

\*\*\*\*\* - \*\*\*\*\* - 202 307 0494- \*\*\*\*\*

FACSIMILE TRANSMITTAL

To: Mr. Alan L. Balaran [Facsimile number (202) 986-8477]  
Mr. Dennis M. Gingold [Facsimile number (202) 318-2372]  
Mr. Keith Harper [Facsimile number (202) 822-0068]

From: John Warshawsky, Trial Attorney  
United States Department of Justice  
Commercial Litigation Branch, Civil Division  
1100 L Street, N.W., Room 10030  
Washington D.C. 20005

Office telephone: (202) 307-0010  
Facsimile number: (202) 514-9163

Pages (including cover page): 3

Comments:

Date of transmission: Wednesday, November 13, 2002

---

NOTE: THIS FACSIMILE IS INTENDED ONLY FOR THE ABOVE-DESIGNATED ADDRESSEE. IT MAY CONTAIN INFORMATION WHICH IS PRIVILEGED, CONFIDENTIAL, OR OTHERWISE PROTECTED FROM DISCLOSURE TO ANYONE OTHER THAN THE ADDRESSEE

IF YOU ARE NOT THE ADDRESSEE AND HAVE RECEIVED THIS FACSIMILE IN ERROR:

- (1) PLEASE DO NOT REVIEW, DISSEMINATE, OR OTHERWISE USE ANY OF THE TRANSMISSION, AND
  - (2) PLEASE ADVISE THE SENDER OF THIS FACSIMILE IMMEDIATELY.
-

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL abalaran@erols.com

June 5, 2003

**VIA FACSIMILE**Amalia Kessler  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division  
Commercial Litigation Branch  
P. O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: **Cobell v. Norton Civil Action No. 96-1285**  
**Audit of the Minerals Management Service Audit**  
**Offices (No. 2003-I-0023) March 2003**

Dear Ms. Kessler:

In March 2003, the Department of the Interior Office of the Inspector General ("OIG") issued its Audit of the Minerals Management Service Audit Offices ("MMS Audit Report"). (An electronic copy of the MMS Audit Report will be transmitted for your review.) The stated objective of that report "was to determine whether MMS' internal quality control system provides reasonable assurance that MMS audits are performed in accordance with established policies, procedures, and the Government Auditing Standards (Standards)." See Memorandum from Anne Richards, Regional Audit Manager, Central Region to the Assistant Secretary for Land and Minerals Management.

Since MMS is responsible for the annual collection of \$6 billion in royalties and fees for minerals produced from federal, tribal and allotted lands, I became concerned upon reading a section of the MMS Audit entitled "Professionalism," where the OIG reported that it selected for review an audit involving Navajo Indian leases. According to the MMS Audit Report,

[w]hen MMS officials could not locate this audit file, instead of informing [the OIG] of that fact, they recreated and backdated the working papers. The recreated papers were dated to when MMS believed the work had been done rather than when the replacement working papers were actually created.

MMS Audit Report at 8. The OIG also reported that MMS "then granted a cash award, citing 'creativity,' to the auditor who reconstructed the working papers." Id. At 8.

The MMS Audit Report mentions two other instances of missing files pertaining to Indian leases; a statistical possibility that working papers for as many as 62 audits are missing; the existence of "incomplete files" for the audits performed by the same employees responsible for recreating and backdating the Navajo leases file; and 30 "incomplete sets" of files (lacking working papers or master indices). Id. at 9.<sup>1</sup>

Aside from the violation of Court orders implicated by the loss of Navajo leasing files containing trust information, MMS failed to inform the Court, the plaintiffs (or, I suspect, the Navajo allottees) that trust documentation was missing and/or that files containing IIM information were "incomplete."<sup>2</sup> Instead, MMS auditors "recreated" and "backdated" the records in an attempt to deceive the OIG. And one was awarded a cash bonus for his duplicity. Beyond this, trust information missing from these incomplete files and work papers are germane to the underlying litigation and thus discoverable by plaintiffs. Given the findings of the OIG, plaintiffs can not determine whether documents produced by the agency are "originals" or "recreations" generated by "creative" employees awaiting cash bonuses.

I am confident that had the OIG not uncovered this problem in the course of performing its audit, the loss of the Navajo trust information would not have come to light. I am therefore informing you of my intention to investigate MMS' leasing files to determine whether individual Indian trust information is properly maintained and safeguarded.

Thank you.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

Electronic attachment

cc: Dennis Gingold, Esq. (w/attachment)

---

<sup>1</sup> These figures were based on statistical and judgment samples and not an exhaustive review of each file. Id. at 8-9.

<sup>2</sup> As the MMS Audit Report is dated March 2003, I suspect that the agency was aware that trust documentation was missing at the time the audit was undertaken in 2001.

LAW OFFICE

ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-5477  
E-MAIL abalaran@croh.com

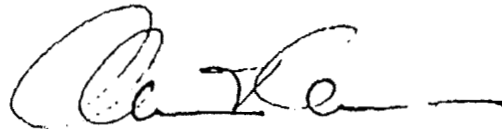
June 16, 2003

**VIA FACSIMILE**Amalia Kessler  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division  
Commercial Litigation Branch  
P. O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: **Cobell v. Norton Civil Action No. 96-1285**  
**March 2003 OIG Audit of MMS**

Dear Ms. Kessler:

Thank you for your letter this date in which you seek clarification of my June 5, 2003 correspondence concerning the March 2003 Department of the Interior Office of the Inspector General Audit Report. To be precise, it is my intention to ensure that all documents relevant to the Minerals Management Service's duties to IIM beneficiaries are retained and preserved in accordance with the agency's fiduciary duties. To the extent that some of those documents, such as those contained in leasing files, are maintained by organizations such as the Bureau of Indian Affairs or the Bureau of Land Management, they will be inspected as well.

Sincerely,

Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq. (w/attachment)



LAW OFFICE

ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL abalaran@erob.com

July 31, 2003

**VIA FACSIMILE**John J. Siemietkowski, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

CORRECTED

RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285  
MMS-Request for Documents

Dear Mr. Siemietkowski:

On June 5 and 16, 2003, I informed Justice Attorney Amalia Kessler that, in view of the findings contained in the March 2003 Audit of the Minerals Management Service Audit Offices ("MMS Audit Report") generated by the Office of the Inspector General ("OIG"), it was my intention to examine MMS' audit files (as well as similar files in the custody and control of other agencies) to determine whether individual Indian trust information was being properly maintained and safeguarded. The MMS Audit Report, as you may recall, exposed an incident involving the loss of an audit file involving Navajo allotted leases; the subsequent attempt by MMS employees to "recreate" and "backdate" information contained in that file; and the subsequent cash incentive award given to one of those employees.

Accordingly, and pursuant to the August 12, 1999 consent order authorizing me to ensure that trust information is properly maintained and safeguarded, I am requesting production of the following documents no later than Monday, August 11, 2003:

1. A list of all oil and gas companies that have operated on Indian allotted lands since 1982; and
2. A complete set of compliance audit files ("audit files") generated by the Minerals Management of the Dugan Production Corporation including, but not limited to, audit requests or proposals; workplans; workpapers; correspondence; internal and external exhibits; and reports of findings, conclusions, and recommendations.

Thank you in advance for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alan L. Balaran', with a long horizontal line extending to the right.

Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.



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) 514-7194  
Fax: (202) 307-0494  
Email: sandra.spooner@usdoj.gov

August 22, 2003

**BY FACSIMILE**

Alan Balaran, Esq.  
1717 Pennsylvania Avenue, N.W.  
Thirteenth Floor  
Washington, DC 20006

Re: Cobell v. Norton

Dear Mr. Balaran:

On August 21, 2003, we requested that you explain how your July 31, 2003 request for information and documents concerning MMS audit files relates to your authority to oversee retention and protection from destruction of IIM records. We also asked that you identify for conflict purposes any individuals who would assist you in reviewing any records provided.

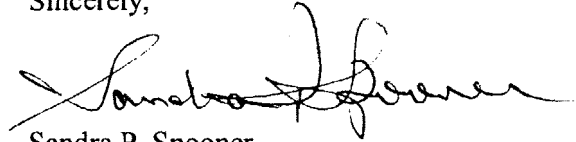
Because this is the date by which you requested production of the requested material, I am writing to advise that we will comply fully with relevant court orders. If your July 31, 2003 requests prove consistent with your authority, and we are provided with information allowing us to make conflict determinations for any individuals who will assist you, we will make responsive documents available. The documents described in request number 2 in your July 31, 2003 letter have been identified and collected, and will be reviewed for privilege and other forms of protection while we await your response to our August 21 letter. As noted in our letter, your request number 1 seeks a document that does not exist.

Please note that Interior Defendants object, and do not consent, to any review, investigation, findings or conclusions concerning these documents that does not directly pertain

to retention and protection from destruction of IIM records, as set forth in the Court's August 12, 1999 Order.

Thank you.

Sincerely,



Sandra P. Spooner

cc: Dennis M. Gingold, Esq. (by facsimile)  
Keith M. Harper, Esq. (by facsimile)

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
\*\*\*\*\*

TX/RX NO 2198  
PGS. 3  
TX/RX INCOMPLETE -----  
TRANSACTION OK (1) 99868477  
(2) 93182372  
(3) 98220068  
ERROR INFORMATION -----



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) 514-7194  
Fax: (202) 307-0494  
Email: sandra.spooner@usdoj.gov

**FAX COVER SHEET**

**TO:** Alan L. Balaran, Special Master 202-986-8477  
**cc:** Dennis M. Gingold, Esq. 202-318-2372  
Keith M. Harper, Esq. 202-822-0068  
**DATE:** August 22, 2003

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 3**

**SPECIAL INSTRUCTIONS:**

Cobell v. Norton - MMS Audit

**IMPORTANT:** This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient of the transmission, please do not disseminate, distribute, or copy this information. If you have received this transmission in error, please notify the sender immediately by telephone or return fax.



U.S. Department of Justice  
Civil Division

**Regular Mail:**  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

**Express Delivery:**  
1100 L Street, N.W.  
Room 10048  
Washington, DC 20005

Amalia D. Kessler  
Trial Attorney

Tel.: (202) 305-1759  
Facsimile: (202) 514-9163  
E-mail: amalia.kessler@usdoj.gov

June 16, 2003

**BY FACSIMILE**

Alan L. Balaran, Special Master  
1717 Pennsylvania Ave., N.W., 13th Floor  
Washington, DC 20006

Re: Your June 5, 2003 Letter Regarding the March 2003 OIG Audit of MMS

Dear Mr. Balaran:


I write in regard to your June 5, 2003 letter ("Letter") concerning the March 2003 Department of the Interior Office of the Inspector General Audit of the Minerals Management Service Audit Offices ("MMS Audit Report"), wherein you state that you "inten[d] to investigate MMS' leasing files to determine whether individual Indian trust information is properly maintained and safeguarded." Letter at 2.

As MMS does not maintain leasing files, we take it that by "MMS' leasing files" you are referring to the MMS audit files discussed in the MMS Audit Report, some of which, as stated in that Report, "pertain[] to Indian leases." MMS Audit Report at 9. In addition, we presume that your investigation will be limited to "the Interior Department's retention and protection," Order Regarding Interior Department IIM Records Destruction (Aug. 12, 1999) at 2, of these MMS audit files and will not extend to the other matters, such as auditing procedures, discussed in the MMS Audit Report.

We would appreciate it if you would please confirm that our understanding of the investigation you contemplate is correct.

Thank you.

Sincerely,

  
Amalia D. Kessler  
Trial Attorney  
Commercial Litigation Branch

cc: Dennis M. Gingold, Esq.  
Keith M. Harper, Esq.  
James E. Cason, Associate Deputy Secretary  
Abraham E. Haspel, Assistant Deputy Secretary  
Brenda Riel, Esq.

MODE = MEMORY TRANSMISSION START=JUN-16 17:28 END=JUN-16 17:54

FILE NO.=699

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	2	99868477	003/003	00:00:51
002	OK	2	93182372	003/003	00:00:58
003	BUSY	2	98220068	000/003	00:00:00
004	OK	2	92081873	003/003	00:00:26
005	OK	2	92085567	003/003	00:00:32
006	OK	2	92190559	003/003	00:00:43

-DOJ/CIVIL DIVISION -

\*\*\*\*\* - \*\*\*\*\* - 202 514 9163- \*\*\*\*\*



**U.S. Department of Justice  
Commercial Litigation Branch**

**Regular Mail:**  
P.O. Box 875  
Bcn Franklin Station  
Washington, DC 20044-0875

**Express Delivery:**  
1100 L Street, N.W.  
Room 10048  
Washington, DC 20005

Amalia D. Kessler  
Trial Attorney

Tel.: (202) 305-1759  
Fax: (202) 514-9163  
E-mail: amalia.kessler@usdoj.gov  
June 16, 2003

To: Alan L. Balaran, Esq.	Fax: (202) 986-8477
Organization: Special Master	Tel.: (202) 466-5019
To: Dennis M. Gingold, Esq.	Fax: (202) 318-2372
Organization:	Tel.: (202) 661-6380
To: Keith M. Harper, Esq.	Fax: (202) 822-0068
Organization:	Tel.: (202) 785-4166
To: James E. Cason, Associate Deputy Secretary	Fax: (202) 208-1873
Organization:	Tel.: (202) 208-6291
To: Abraham E. Haspel, Assistant Deputy Secretary	Fax: (202) 208-5567
Organization:	Tel.: (202) 208-7471
To: Brenda Riel, Esq.	Fax: (202) 219-0559
Organization:	Tel.: (202) 208-3714

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 3

REMARKS:



\*\*\*\*\* -COMM. JOURNAL- \*\*\*\*\* DATE JUN-16-2003 \*\*\*\*\* TIME 18:27 \*\*\*\*\*

MODE - MEMORY TRANSMISSION START=JUN-16 18:26 END=JUN-16 18:27

FILE NO. =705

STN NO.	COMM.	ONE-TOUCH/ ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	*	98220068	003/003	00:00:44

-DOJ/CIVIL DIVISION -

\*\*\*\*\* - \*\*\*\*\* - 202 514 9163- \*\*\*\*\*



**U.S. Department of Justice  
Commercial Litigation Branch**

**Regular Mail:**  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

**Express Delivery:**  
1100 L Street, N.W.  
Room 10048  
Washington, DC 20005

Amalia D. Kessler  
Trial Attorney

Tel.: (202) 305-1759  
Fax: (202) 514-9163  
E-mail: amalia.kessler@usdoj.gov  
June 16, 2003

To: Alan L. Balaran, Esq.	Fax: (202) 986-8477
Organization: Special Master	Tel.: (202) 466-5019

To: Dennis M. Gingold, Esq.	Fax: (202) 318-2372
Organization:	Tel.: (202) 661-6380

To: Keith M. Harper, Esq.	Fax: (202) 822-0068
Organization:	Tel.: (202) 785-4166

To: James E. Cason, Associate Deputy Secretary	Fax: (202) 208-1873
Organization:	Tel.: (202) 208-6291

To: Abraham E. Haspel, Assistant Deputy Secretary	Fax: (202) 208-5567
Organization:	Tel.: (202) 208-7471

To: Brenda Riel, Esq.	Fax: (202) 219-0559
Organization:	Tel.: (202) 208-3714

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 3

REMARKS:



**U.S. Department of Justice**

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

*Timothy E. Curley*  
*Trial Attorney*

*Tel: (202) 514-9038 Fax: (202) 514-9163*

August 21, 2003

**BY FACSIMILE**

Mr. Alan Balaran, Special Master  
1717 Pennsylvania Avenue, N.W.  
Thirteenth Floor  
Washington, DC 20006

Re: Cobell v. Norton

Dear Mr. Balaran:

This letter responds to your letter of July 31, 2003, requesting information and documents concerning MMS audit files. Pursuant to the Court's August 12, 1999 Order, you are "authorized to oversee the Interior Department's retention and protection from destruction of IIM Records through, among other things, on site visits to any location where IIM Records are maintained." Order at 2 (Aug. 12, 1999) ("August 12, 1999 Order"). In addition, the "Final Draft Memorandum" attached as Exhibit A to the August 12, 1999 Order further states that you are "authorized to oversee and independently verify [Interior Defendants'] compliance with [Interior Defendants'] document retention responsibilities" and "may exercise [your] responsibilities by visiting any location where IIM records are maintained and inspecting the IIM records at that location." *Id.* at Exhibit A.

Your request number 1, that Interior Defendants create and provide "[a] list of all oil and gas companies that have operated on Indian allotted lands since 1982[.]" does not appear to be related to retention and protection from destruction of IIM records. In addition, it would require Interior Defendants to conduct research, compile data and create a list, which is not contemplated by the August 12, 1999 Order. Please advise us of the relevance of this request to retention and protection of IIM records and the source of authority to require data compilations.

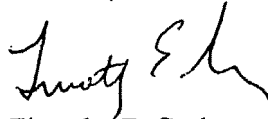
Your request number 2 is for "a complete set of compliance audit files ("audit files") generated by the Minerals Management [Service] of the Dugan Production Corporation[.]" Please advise us as to why you have requested documents related to this particular corporation and how such a request relates to your authority to oversee retention and protection from destruction of records related to Interior's obligation to perform an accounting of IIM trust accounts.

In order to address any conflict concerns, we also respectfully request that you provide us with the names and other relevant conflict information for any individuals who will be assisting

you in reviewing or working with any documents Interior Defendants produce in response to these requests.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy E. Curley". The signature is written in a cursive style with a large, stylized initial "T".

Timothy E. Curley

cc: Dennis M. Gingold, Esq. (by facsimile)  
Keith M. Harper, Esq. (by facsimile)

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
\*\*\*\*\*

TX/RX NO                    2192  
PGS.                            3  
TX/RX INCOMPLETE        -----  
TRANSACTION OK            (1)    99868477  
                                  (2)    98220068  
                                  (3)    93182372  
ERROR INFORMATION        -----



**FROM:** Department of Justice  
Civil Division

Fax No.            (202) 353-3565  
Voice No.        (202) 616-9668

**SENT BY:** Kevin Kingston  
Law Clerk  
Labat-Anderson, Inc.

**DATE:** August 21, 2003

**TO:** Allan Balaran    Keith Harper    Dennis M. Gingold  
**FAX No.** (202) 986-8477    (202) 822-0068    (202) 318-2372

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 3**

*Curley 08-21-03 to Balaran re July 31, 2002 Request for MMS Audit Files*

**IMPORTANT:** This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of



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) 514-7194  
Fax: (202) 307-0494  
Email: sandra.spooner@usdoj.gov

September 5, 2003

**BY FACSIMILE**

Alan Balaran, Esq.  
1717 Pennsylvania Avenue, N.W.  
Thirteenth Floor  
Washington, DC 20006

Re: Cobell v. Norton

Dear Mr. Balaran,

This letter is in response to your letter of August 29, 2003, concerning your July 31, 2003 document request.

In your July 31 document request and in your subsequent letters, you refer to your authority to oversee document retention and protection from destruction in accordance with the August 12, 1999 Order. The August 12, 1999 Order states that the Special Master is "authorized to oversee the Interior Department's retention and protection from destruction of IIM Records, through, among other things, on-site visits to any location where IIM Records are maintained." August 12, 1999 Order at 2.

As you know, the parties consented to the August 12, 1999 Order after you issued your Recommendation and Report of the Special Master Regarding Document Preservation and Protection (dated June 7, 1999) ("June 7, 1999 Report") reporting on site visits you conducted during April 1999. The nature of those site visits, as described by you in your June 7, 1999 Report, included noting the type of records stored at a particular location and then reporting on whether the documents were being retained, were properly indexed, were adequately safeguarded from dangers such as fire, water, and rodent infestation, and the potential for loss during records transfers. Consistent with the events leading up to the August 12, 1999 Order and the language of that Order, your subsequent site visits conducted in October and November 1999 were similar in nature. Interior Defendants do not dispute your authority to conduct site visits of that nature, which in this instance may include a site visit to Minerals Management Service offices or other

locations where the type of documents you requested are maintained, to determine whether they are being retained and protected from the destruction.<sup>1</sup> Interior Defendants object, and do not consent to, a roving factual investigation by the Special Master into how particular documents bear on issues that may or may not be relevant to this litigation. It is the law of this Circuit and this case that for a master to assume an "investigative, quasi-inquisitorial, quasi-prosecutorial role [] is unknown to our adversarial legal system." Cobell v. Norton, 334 F.3d 1128, 1142 (2003).

The reason Interior Defendants have asked why you are requesting specific documents related to the Dugan Corporation is that such a request is different in character from a site visit. Whereas a site visit to the locations where the documents are kept would, consistent with the August 12, 1999 Order and your previous site visits, enable you to inspect the facilities, production to you of specified files would not. In addition, the documents you have requested – audit files and related papers – are not obviously related to whether particular sites are properly retaining documents and safeguarding them from destruction.

Interior Defendants object, and do not consent to, investigations into the contents of particular files where there is no basis to believe those documents contain evidence that documents are not being retained or protected. To interpret the August 12, 1999 Order to permit you to require the production of IIM records without any nexus to document retention, would permit you to conduct roving investigations that do not relate to your referenced authority to oversee document retention. Interior Defendants do not consent to any such activities.<sup>2</sup> Moreover, if the basis of your requests is ex parte contacts, Interior Defendants object to the request on that basis.

The stated basis for your document request is that the Dugan Corporation conducts business on allotted lands and that the Minerals Management Service (MMS) is responsible for auditing Dugan's compliance with federal regulations. Neither of those facts suggest that the documents you request relate to your oversight of document retention or that any deviation from the prior practice of conducting general site visits is warranted. Your reference to the MMS Audit Report prepared by the Office of the Inspector General does not provide a basis for your request of documents related to the Dugan Corporation. There is no reference to the Dugan Corporation in that report and our understanding is that the referenced audit workpapers involved

---

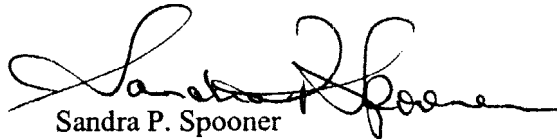
<sup>1</sup> As you know, Interior Defendants continue to object to your presiding over any matters in this litigation, as set forth Interior Defendant's Motion to Disqualify Special Master Balaran (filed May 29, 2003).

<sup>2</sup> Consistent with Interior's position, Interior Defendants' objections to your March 6, 2003 site visits and resulting report are set forth in Interior Defendants' 1) Response And Objections To Special Master's Site Visit Report To The Office Of Appraisal Services In Gallup, New Mexico And The Bureau Of Indian Affairs Navajo Realty Office In Window Rock, Arizona ("Site Visit Report") And 2) Opposition To Plaintiffs' Motion To Adopt Site Visit Report (filed Sept. 4, 2003).

a different corporation. Please advise us how documents related to the Dugan Corporation have specific relevance to your oversight of document retention and protection.

Thank you.

Sincerely,



Sandra P. Spooner

cc: Dennis M. Gingold, Esq. (by facsimile)  
Keith M. Harper, Esq. (by facsimile)

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
\*\*\*\*\*

TX/RX NO                    2246  
PGS.                         4  
TX/RX INCOMPLETE        -----  
TRANSACTION OK            (1)    99868477  
                                  (2)    93182372  
                                  (3)    98220068  
ERROR INFORMATION        -----



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) 514-7194  
Fax: (202) 307-0494  
Email: [sandra.spooner@usdoj.gov](mailto:sandra.spooner@usdoj.gov)

**FAX COVER SHEET**

**TO:**            Alan L. Balaran, Special Master    202-986-8477  
  
**cc:**            Dennis M. Gingold, Esq.            202-318-2372  
                  Keith M. Harper, Esq.            202-822-0068  
  
**DATE:**        September 5, 2003

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 4**

**SPECIAL INSTRUCTIONS:**

Cobell v. Norton





## Navajo allottees short-changed states special Cobell report

Posted: August 22, 2003 - 11:24am EST

by: Jerry Reynolds / Washington D.C. correspondent / Indian Country Today

WASHINGTON, D.C. - A special report to the court in the Cobell litigation over federal mismanagement of Indian trust funds charges that Navajo land allottees are being short-changed by undervalued rights-of-way appraisals.

Alan L. Balaran, appointed by U.S. District Court Judge Royce C. Lamberth as a special master in the long-running case, did not quantify the losses he alleged. But he provided a handful of examples showing that tribes and private landowners have obtained up to \$575 per rod for permitting oil and gas pipelines to traverse their land. By contrast, individual Navajo allottees may have received \$25 to \$40 per rod for permitting similar rights-of-way on similarly situated land. (A rod is a traditional unit of measure equaling 5.5 yards.)

"The potential range of loss to Trust beneficiaries is as much as \$170-\$550 per rod," Balaran writes.

Balaran made investigative site visits to Gallup, N.M., and Window Rock, Ariz., following the "whistle-blower" accusations of Kevin Gambrell, director of the federal Farmington Indian Minerals Office. Gambrell warned superiors at Interior and the BIA of longstanding discrepancies in rights-of-way appraisal valuations between individual Indian lands and similar privately owned lands.

Gambrell's remarks echoed the assertions of allottee associations, especially in the eastern Navajo reservation. These associations have claimed for some years now that Interior and the BIA customarily accept oil and gas industry valuations of rights-of-way on allottee land.

Gambrell too got no adequate response from federal agencies in his view. Eventually he got in touch with Balaran. Interior has placed him on paid leave.

Because most individual Indian land allotments are held in trust by the federal government, the Interior Department and its lead agency on Indian issues, the Bureau of Indian Affairs, are responsible for individual allottee rights-of-way appraisals and pricing negotiations based on them.

The Balaran report was immediately seized upon by interested parties. President Joe Shirley of the Navajo Nation called the rights-of-way devaluations tantamount to swindling, and part of a recurring pattern of federal control over tribal resources. Attorneys for the plaintiff class of Individual Indian Monies accountholders in the Cobell lawsuit termed it further evidence of Interior mismanagement, and repeated their charge that Interior Secretary Gale Norton is "unfit" for her position. Dan Dubray, communications director for Interior's office of the BIA, repeated the department's charges that Balaran is biased against Interior, and added that Balaran has no expertise in the complex field of appraisal.

Interior has 10 court days to file a response to the latest Balaran report. Dubray said it will do so in great detail.

Among the points that will be discussed in the Interior response, Dubray said, are cost factors. Allottee trust lands may have multiple owners due to the "fractionation" of landholdings among heirs, and this might raise the cost to a company of rights-of-way on such land (every heir must be contacted), compared with adjacent single-owner land. In addition, allottee land, usually held in trust by the federal government, might be encumbered by regulatory requirements that adjacent privately owned land is free of, further raising the cost to a company of rights-of-way on such lands.

In theory then, this higher cost to companies of doing business might be thought to justify their paying a

lower fee to allottees.

Interior and BIA officials readily admitted to Balaran that allottee land rights-of-way appraisals are discounted compared with the same on private lands. Balaran acknowledges cost factors at several points in the report, mentioning Interior's claim of inadequate funding for detailed assessment of individual allottee tracts, as well as footnoting Interior's current special trustee on trust funds, Ross Swimmer, at some length.

Rights-of-way prices are always negotiated, and the private sector oil and gas companies that lay natural gas pipeline always seek a price advantage where they can find it. Pipelines run for many rods, and rights-of-way prices are a significant cost factor in their construction. The San Juan Basin, where approximately 1,000 Navajo have allotments and which Balaran depicted as a "spider web" of pipelines, provides 10 percent of the nation's natural gas.

Balaran was appointed in part to give the court some handle on document management pertaining to Interior's trust-related functions. The court has leveled withering criticism at Interior for faulty document management in the past, and Balaran finds occasion for more of the same in his Aug. 20 report.

Balaran states that Anson Baker, a former chief appraiser in the Navajo regional office of Interior's Office of Appraisal Services, erased computer files that contained information on his appraisal evaluation methods, misplaced two important memoranda that guided his appraisal methodology, did not maintain documents in support of the "market rate" he arrived at in his appraisal process, and perhaps never generated working papers that could not be located.

Balaran found "no documentary evidence in the appraisal file substantiating that ... research was actually conducted, confirming past and present market conditions."

Elsewhere he notes, "One possibility is that these documents were never generated in the first place."

The lack of such documents makes it impossible for Navajo trust beneficiaries to challenge Interior appraisals of the rights-of-way prices they assign, Balaran reports.



U.S. Department of Justice

Civil Division

MFH:THilmer  
DJ: 145-7-1468

Atty: Tracy L. Hilmer  
Tel: (202) 307-0474  
Post Office Box 261  
Benjamin Franklin Station  
Washington, D.C. 20044

June 6, 2003

**By Facsimile (202)986-8477**

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Ave., NW  
12th Floor  
Washington, DC 20006

**Re: Cobell v. Norton, Civ. Action No. 96-1285 (RCL) (D.D.C.)**

Dear Mr. Balaran:

In reviewing the compensation request attached as Exhibit 5 to your May 2003 Report, we noted that you seek payment for work performed by individuals identified only as "JW" and "AW." These individuals are apparently assisting you with the backup tape contempt matter that was argued before you on April 23 and 25, 2003. As you know, the government has in the past raised objections to proposals to "subcontract" work on the contempt matters that the Court has referred to you as the Special Master. In order that we may determine whether the employment of "JW" and "AW" raises any conflict of interest issues or is otherwise objectionable, we request that you inform us of the identities of these individuals, their legal qualifications and any affiliations they may have other than their employment by you in this matter.

Thank you for your attention to this matter.

Sincerely,

Tracy L. Hilmer  
Trial Attorney

Commercial Litigation Branch

cc: Attached service list

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
\*\*\*\*\*

TX/RX NO 1641  
PGS. 6  
TX/RX INCOMPLETE -----  
TRANSACTION OK [ 71]93182372  
[ 72]98220068  
ERROR INFORMATION -----

DENNIS GINGOLD  
KEITH HARPER

**FROM:** Department of Justice  
Civil Division  
Cobell Litigation Support

**Fax No.** (202)353-3303  
**Voice No.** (202)307-3013



**SENT BY:** John O'Connor

**TO:** Dennis M. Gingold Keith Harper

**FAX No.** 202.318.2372 202.822.0068

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE):** 6

**SPECIAL INSTRUCTIONS:** Tracy Hilmer letter of 06/06/03 re: May report

**IMPORTANT:** This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this transmission or its contents is strictly prohibited. If you have received this transmission in error, please notify us by telephoning and return the original transmission to us at the address given below.



U.S. Department of Justice

Civil Division

MFH:THilmer  
DJ: 145-7-1468

Atty: Tracy L. Hilmer  
Tel: (202) 307-0474

Post Office Box 261  
Benjamin Franklin Station  
Washington, D.C. 20044

July 9, 2003

**By Facsimile (202)986-8477**

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Ave., NW  
12th Floor  
Washington, DC 20006

**Re: *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL) (D.D.C.)**

Dear Mr. Balaran:

On June 6, 2003, I sent you a letter requesting information about two individuals identified only by the initials "JW" and "AW" who were listed in the invoice included in your May 2003 Report as having assisted you with the backup tape contempt matter. Possibly, my letter went astray in the press of other business. I am attaching a copy of it to this letter. We noted that "AW" was listed again in the invoice included in your June 2003 Report. At this time, we again request the information sought in my June 6, 2003 letter.

Thank you for your attention to this matter.

Sincerely,

Tracy L. Hilmer  
Trial Attorney

Commercial Litigation Branch

cc: Attached service list

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

TRANSMISSION OK

TX/RX NO	1720	
CONNECTION TEL		99868477
CONNECTION ID	ALAN BALARAN	
ST. TIME	07/09 16:42	
USAGE T	01'35	
PGS. SENT	6	
RESULT	OK	



U.S. Department of Justice

Civil Division

MFH:THilmer  
DJ: 145-7-1468

Atty: Tracy L. Hilmer  
Tel: (202) 307-0474

Post Office Box 261  
Benjamin Franklin Station  
Washington, D.C. 20044

July 9, 2003

By Facsimile (202)986-8477

Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Ave., NW  
12th Floor  
Washington, DC 20006

Re: *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL) (D.D.C.)

Dear Mr. Balaran:

On June 6, 2003, I sent you a letter requesting information about two individuals identified only by the initials "JW" and "AW" who were listed in the invoice included in your May 2003 Report as having assisted you with the backup tape contempt matter. Possibly, my letter went astray in the press of other business. I am attaching a copy of it to this letter. We noted that "AW" was listed again in the invoice included in your June 2003 Report. At this time, we again request the information sought in my June 6, 2003 letter.

Thank you for your attention to this matter.

Sincerely,



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) 514-7194  
Fax: (202) 307-0494  
Email: sandra.spooner@usdoj.gov

September 5, 2003

**BY FACSIMILE**

Alan Balaran, Esq.  
1717 Pennsylvania Avenue, N.W.  
Thirteenth Floor  
Washington, DC 20006

Re: Cobell v. Norton

Dear Mr. Balaran,

This letter is in response to your letter of August 29, 2003, concerning your July 31, 2003 document request.

In your July 31 document request and in your subsequent letters, you refer to your authority to oversee document retention and protection from destruction in accordance with the August 12, 1999 Order. The August 12, 1999 Order states that the Special Master is "authorized to oversee the Interior Department's retention and protection from destruction of IIM Records, through, among other things, on-site visits to any location where IIM Records are maintained." August 12, 1999 Order at 2.

As you know, the parties consented to the August 12, 1999 Order after you issued your Recommendation and Report of the Special Master Regarding Document Preservation and Protection (dated June 7, 1999) ("June 7, 1999 Report") reporting on site visits you conducted during April 1999. The nature of those site visits, as described by you in your June 7, 1999 Report, included noting the type of records stored at a particular location and then reporting on whether the documents were being retained, were properly indexed, were adequately safeguarded from dangers such as fire, water, and rodent infestation, and the potential for loss during records transfers. Consistent with the events leading up to the August 12, 1999 Order and the language of that Order, your subsequent site visits conducted in October and November 1999 were similar in nature. Interior Defendants do not dispute your authority to conduct site visits of that nature, which in this instance may include a site visit to Minerals Management Service offices or other

locations where the type of documents you requested are maintained, to determine whether they are being retained and protected from the destruction.<sup>1</sup> Interior Defendants object, and do not consent to, a roving factual investigation by the Special Master into how particular documents bear on issues that may or may not be relevant to this litigation. It is the law of this Circuit and this case that for a master to assume an "investigative, quasi-inquisitorial, quasi-prosecutorial role [] is unknown to our adversarial legal system." Cobell v. Norton, 334 F.3d 1128, 1142 (2003).

The reason Interior Defendants have asked why you are requesting specific documents related to the Dugan Corporation is that such a request is different in character from a site visit. Whereas a site visit to the locations where the documents are kept would, consistent with the August 12, 1999 Order and your previous site visits, enable you to inspect the facilities, production to you of specified files would not. In addition, the documents you have requested – audit files and related papers – are not obviously related to whether particular sites are properly retaining documents and safeguarding them from destruction.

Interior Defendants object, and do not consent to, investigations into the contents of particular files where there is no basis to believe those documents contain evidence that documents are not being retained or protected. To interpret the August 12, 1999 Order to permit you to require the production of IIM records without any nexus to document retention, would permit you to conduct roving investigations that do not relate to your referenced authority to oversee document retention. Interior Defendants do not consent to any such activities.<sup>2</sup> Moreover, if the basis of your requests is ex parte contacts, Interior Defendants object to the request on that basis.

The stated basis for your document request is that the Dugan Corporation conducts business on allotted lands and that the Minerals Management Service (MMS) is responsible for auditing Dugan's compliance with federal regulations. Neither of those facts suggest that the documents you request relate to your oversight of document retention or that any deviation from the prior practice of conducting general site visits is warranted. Your reference to the MMS Audit Report prepared by the Office of the Inspector General does not provide a basis for your request of documents related to the Dugan Corporation. There is no reference to the Dugan Corporation in that report and our understanding is that the referenced audit workpapers involved

---

<sup>1</sup> As you know, Interior Defendants continue to object to your presiding over any matters in this litigation, as set forth Interior Defendant's Motion to Disqualify Special Master Balaran (filed May 29, 2003).

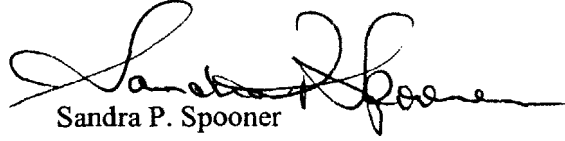
<sup>2</sup> Consistent with Interior's position, Interior Defendants' objections to your March 6, 2003 site visits and resulting report are set forth in Interior Defendants' 1) Response And Objections To Special Master's Site Visit Report To The Office Of Appraisal Services In Gallup, New Mexico And The Bureau Of Indian Affairs Navajo Realty Office In Window Rock, Arizona ("Site Visit Report") And 2) Opposition To Plaintiffs' Motion To Adopt Site Visit Report (filed Sept. 4, 2003).



a different corporation. Please advise us how documents related to the Dugan Corporation have specific relevance to your oversight of document retention and protection.

Thank you.

Sincerely,



Sandra P. Spooner

cc: Dennis M. Gingold, Esq. (by facsimile)  
Keith M. Harper, Esq. (by facsimile)

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
\*\*\*\*\*

TX/RX NO                    2246  
PGS.                            4  
TX/RX INCOMPLETE        -----  
TRANSACTION OK            (1)    99868477  
                                  (2)    93182372  
                                  (3)    98220068  
  
ERROR INFORMATION        -----



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) 514-7194  
Fax: (202) 307-0494  
Email: [sandra.spooner@usdoj.gov](mailto:sandra.spooner@usdoj.gov)

**FAX COVER SHEET**

**TO:**            Alan L. Balaran, Special Master    202-986-8477  
  
**cc:**            Dennis M. Gingold, Esq.            202-318-2372  
                  Keith M. Harper, Esq.            202-822-0068  
  
**DATE:**        September 5, 2003

**NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 4**

**SPECIAL INSTRUCTIONS:**

Cobell v. Norton

**IMPORTANT:** This facsimile is intended only for the use of the individual or entity to which it is addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL abalaran@croh.com

August 12, 2003

**VIA FACSIMILE**

Timothy Curley, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

RE: **Cobell et al. v. Norton et al., Civil Action No. 96-1285**  
MMS-Request for Documents

Dear Mr. Curley:

I have received your letter dated August 7, 2003 responding to my July 31, 2003 request for documents related to the auditing functions of the Minerals Management Service ("MMS"). This request, as you know, was a follow up to my letters of June 5 and 16, 2003 to Amalia Kessler stating my intention to examine MMS' audit files. Your letter seeks additional time to consider my requests and an extension until Friday, August 22, 2003 to respond.

By telephone conference this date, I granted your request for an extension of time. To avoid any misunderstanding, the extension I granted was to allow additional time to gather responsive documents – not to decide whether you would comply with my request in the first instance. My right to inspect MMS' audit files is squarely grounded in the August 12, 1999 Order which states, in pertinent part: "It is further ORDERED, that Alan L. Balaran, Special Master ("Special Master"), is hereby authorized to oversee the Interior Department's retention and protection from destruction of IIM Records . . . ." This order was explicitly consented to by the Department of Justice, the Department of the Interior and the Department of the Treasury and, to my knowledge, has not been amended.<sup>1</sup>

---

<sup>1</sup> See August 5, 1999 Recommendation and Report of the Special Master Regarding Document Preservation and Protection (adopted by the Court on August 12, 1999) ("During the past month, the parties have engaged in extensive negotiations aimed at defining the respective obligations of the Department of the Interior and the Department of the Treasury vis a vis HIM-related records . . . . These negotiations have resulted in an agreement between the parties, the terms of which are set out in the Order Regarding Interior Department HIM Records Retention and the Order Regarding Treasury Department HIM Records Retention to which is appended a final list of the predecessors in interest ('Proposed Orders')).

Amplifying the August 12, 1999 Order, the Chief of Staff, Department of the Interior generated a memorandum which stated:

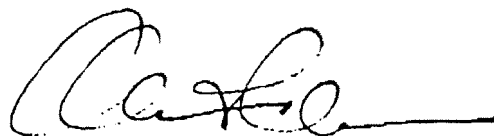
As the Order of July \_\_, 1999 directs, the Special Master appointed by the Court, Alan Balaran, is authorized to oversee and independently verify our compliance with our document retention responsibilities. Mr. Balaran may exercise his responsibilities by visiting any location where HIM records are maintained and inspecting the HIM records at that location. These inspections may occur with no advance notice. Please provide full cooperation should Mr. Balaran visit your office.

Memorandum Re: Retention of Documents and Data Relating to Individual Indian Money (IIM) Accounts Identified in Attachment A, at 2.

The March 2003 MMS Audit Report, which precipitated my request to examine MMS audit files, uncovered a missing file involving Navajo allotted leases that was subsequently "recreated." Pursuant to the above-cited August 12, 1999 Consent Order and attached memorandum, it is my intention to conduct a thorough examination to determine whether similar MMS documents have been lost or fabricated. If your request for an extension of time is to dispute my right to proceed, it is denied.

If your request for additional time is to secure responsive documents, then, as stated, you may have until close-of-business August 22, 2003.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL abalaran@erols.com

August 13, 2003

**VIA FACSIMILE**

Timothy Curley, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875

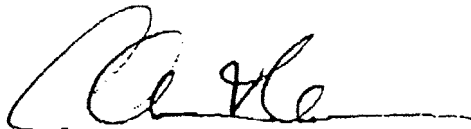
RE: **Cobell et al. v. Norton et al.**, Civil Action No. 96-1285  
MMS-Request for Documents

Dear Mr. Curley:

Thank you for your letter this date responding to mine of yesterday. As I have not been previously apprised in writing of the Department of Justice's formal policy concerning contact with the Special Master, I initiated yesterday's call. I will respect your wishes and, henceforth, cease all informal communications with your office. I naturally ask that you instruct your colleagues to abide by the same restriction.

On a more substantive note, I am denying your petition to "consider" the requests set out in my letter of July 31, 2003 and granting you until August 22, 2003 to provide the requested documents. It is my intention to take whatever steps necessary, in keeping with the letter and spirit of the consent order of August 12, 1999, and examine MMS' audit files wherever they may be located.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.

LAW OFFICE

**ALAN L. BALARAN, P.L.L.C.**

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5610  
FAX (202) 986-8477  
E-MAIL abalaran@erob.com

August 29, 2003

**VIA FACSIMILE**Sandra Spooner, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division - Commercial Litigation Branch  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: **Cobell et al. v. Norton et al.**, Civil Action No. 96-1285  
**MMS Document Request**

Dear Ms. Spooner:

This letter is in response to Timothy Curley's letter dated August 21, 2003 and yours of August 22, 2003. Both letters concern my July 31, 2003 request for MMS audit files.

Mr. Curley questions the relevance of my request for a list of oil and gas companies that have operated on Indian allotted lands since 1982 and the source of my authority for making such a request. Your response of August 22, 2003 that such a list does not exist renders my request moot and obviates the need for me to address Mr. Curley's inquiry into the "source of [my] authority to require data compilations."


Mr. Curley next questions why I have requested documents related to the Dugan Production Corporation ("Dugan"). Dugan conducts business on allotted lands. MMS is responsible for auditing Dugan's compliance with federal regulations. Documents related to Dugan audits contain individual Indian trust information entitled to protection pursuant to the consent order of August 12, 1999. As to Mr. Curley's query how MMS audit files of the Dugan Production Corporation "relates to my authority to oversee retention and protection from destruction of records related to Interior's obligation to perform an accounting of IIM trust accounts," the answer is contained in Mr. Curley's own August 21, 2003 letter wherein he acknowledges that I am "authorized to oversee the Interior Department's retention and protection from destruction of IIM Records through, among other things, on site visits to any location where IIM Records are maintained."

Finally, both Mr. Curley and you request that I "identify for conflict purposes any individuals who would assist me in reviewing any records provided." I do not anticipate sharing the Dugan files with anyone beyond my immediate administrative staff. Should I need outside assistance, however, I will identify all individuals I intend to consult in advance of disclosure so you may file objections with the Court.

On June 5 and 16, 2003, I conveyed to Amalia Kessler my intention to examine MMS' audit files. On July 31, 2003, I requested of John Siemietkowski specific information and documentation related to those files. It was not until August 21, 2003 that you expressed concerns about potential conflicts and questioned my authority to receive and review these documents. I trust this letter has addressed these concerns and there will be no further delay in producing the requested files.

I ask that you produce these files no later than close-of-business, Friday, September 5, 2003.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alan L. Balaran', with a long horizontal line extending to the right.

Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.

LAW OFFICE

ALAN L. BALARAN, P.L.L.C.

ADMITTED IN DC AND MD

1717 PENNSYLVANIA AVE., N.W.  
THIRTEENTH FLOOR  
WASHINGTON, D.C. 20006  
TELEPHONE (202) 466-5010  
FAX (202) 986-8477  
E-MAIL [abalaran@esolc.com](mailto:abalaran@esolc.com)

September 10, 2003

**VIA FACSIMILE**Sandra Spooner, Esq.  
UNITED STATES DEPARTMENT OF JUSTICE  
Civil Division - Commercial Litigation Branch  
P.O. Box 875  
Ben Franklin Station  
Washington, DC 20044-0875RE: Cobell et al. v. Norton et al., Civil Action No. 96-1285  
MMS Document Request

Dear Ms. Spooner:

I have read your September 5, 2003 letter refusing to turn over the Dugan Production Company (Dugan) files I requested on July 31, 2003. I offer the following response.

Your letter indicates you believe my request exceeds my authority and my reasons for making it unsatisfactory. It is clear you have no knowledge of, or have chosen to ignore, the events leading to issuance of the February 22 and 24, 1999 Orders of Reference and the August 12, 1999 Consent Order. As you did not attend any of the conferences or Court hearings leading to the issuance of these Orders, and apparently have not consulted those who did, allow me to respectfully enlighten you as to what transpired.

On February 22 and 24, 1999, in accordance with the Department of Justice's request for "a tough" Special Master, the Court appointed and authorized me to "do all acts and take all measures necessary or proper for the efficient performance of the master's duties." Six months later, in response to Justice's insistence that the Special Master assume responsibility for overseeing the preservation and retention of trust records, the Court entered the August 12, 1999 Consent Order - the terms of which were drafted jointly by Justice and plaintiffs. The Consent Order authorizes the Special Master to discharge his obligations "through, among other things, site visits."

The Department of Justice, at no time, sought to limit the Special Master's oversight of trust information. Indeed, had your predecessors intended to restrict those duties, as you now suggest, to "reporting on whether documents were being retained, were properly indexed, were adequately safeguarded from dangers such as fire, water, and rodent infestation, and the potential for loss during records transfers," they would have included language to that effect in the order. They did not.



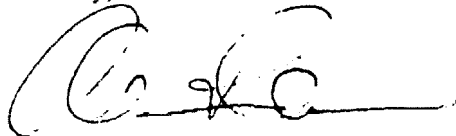
Your selective interpretation violates the letter and spirit of the Orders of Reference and Consent Order. Notwithstanding any regret you may have with respect to the actions of your predecessors who entered into these agreements, you may not revise the terms of these Orders and ignore those portions that ill suit your present purposes.

In accordance with these Orders, on July 31, 2003, I requested that you produce the MMS Dugan audit files so I could report to the Court whether documents containing trust information were missing, lost, misplaced, or destroyed. You recently produced similar files in response to my request for Office of Appraisal Services records. In that instance, my request followed a March 6, 2003 site visit. In this instance, I wish to first review the Dugan files in my office and then, if necessary, visit the locations where these records are stored and interview those responsible for their maintenance. I am optimistic these files are complete and site visits and interviews will be unnecessary. Your inquiries, protestations, requests for extensions of time to "consider" my request, and last-minute refusal, however, suggest otherwise.

Let me be clear. I am under no obligation to inform you of my motives provided my production requests fall within the authority set out in Court Orders. The explicit terms of the February and August Orders of Reference affirm that authority – notwithstanding your attempt to reinvent their terms four years later and obstruct my ability to discharge my responsibilities.

Finally, you correctly point out that the Office of the Inspector General (OIG) did not review files pertaining to the Dugan Production Company. I am therefore directing that you also produce, forthwith, all MMS audit files related to J.K. Edwards and Associates leases on allotted lands. It was a missing J.K. Edwards file, as you know, that led to the OIG investigation and the issuance of its March 2003 report.

Sincerely,



Alan L. Balaran  
SPECIAL MASTER

cc: Dennis Gingold, Esq.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 24, 2003 I served the foregoing *Interior Defendants' Motion for an Order Directing the Special Master to Conform His Conduct to Limits Stated by the Court of Appeals; to Vacate or Clarify Existing Orders as Appropriate; And to Act on this Motion on an Expedited Basis* 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.  
607 - 14th Street, NW, Box 6  
Washington, D.C. 20005  
(202) 318-2372

By Facsimile and U.S. Mail upon:

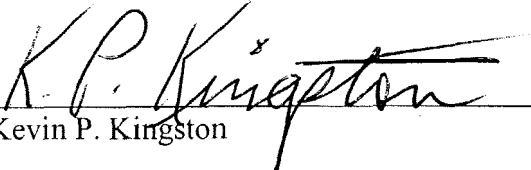
Alan L. Balaran, Esq.  
Special Master  
1717 Pennsylvania Avenue, N.W., 13th Floor  
Washington, D.C. 20006  
(202) 986-8477

Per the Court's Order of April 17, 2003,  
by Facsimile and by U.S. Mail upon:

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
(406) 338-7530

By U.S. Mail upon:

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

  
Kevin P. Kingston