



United States Department of Justice  
Civil Division  
Commercial Litigation Branch

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May 22, 2002

BY FACSIMILE & FIRST CLASS MAIL

Joseph S. Kieffer, III, Esq.  
Court Monitor  
420 7th Street, NW, #705  
Washington, DC 20004

Re: Cobell v. Norton – Court Monitor Discovery Requests

Dear Mr. Kieffer:

This concerns your letters of May 6, 10, 15, and 22, 2002, regarding depositions you plan to take of Department of the Interior officials and documents you request be produced. These letters raise a number of issues surrounding the Order of April 16, 2001, appointing the Court Monitor (the "Appointing Order").

Until now, Interior has assisted the Court Monitor on the informal basis that the Appointing Order seemingly contemplates. As the Court Monitor embarks upon a formal information-gathering process, it is important to note that the Appointing Order does not authorize the Court Monitor to issue directives, such as orders to provide or permit discovery. This is not to intimate any intent to not cooperate. To the contrary, we stand ready to assist Interior to fulfill its duties under the Appointing Order. Nevertheless, the Government understands that the aforementioned letters constitute invitations, not orders, to cooperate in a formal discovery process.

We note that your letter of May 6th proposes a protocol for depositions, and we appreciate the opportunity to address your proposal in detail should the depositions go forward. However, as a preliminary matter, our voluntary participation in any formal discovery process that includes depositions raises serious concerns. For example, depositions connote investigatory proceedings, or evidence development, as opposed to the strictly fact-gathering function which the Appointing Order authorizes. Also, we could not consent to depositions without assurances that the Court

Monitor would not engage in the review of matters beyond the Court's jurisdiction, such as pre-decisional activities, or seek to probe the mental impressions and deliberations of Government officials and employees. Additionally, to proceed with depositions without a clear, prior understanding of the precise subject matter to be explored would be unfair to the witnesses and unduly interfere with the functioning of the agency. Accordingly, we cannot consent to the proposed depositions unless these issues are resolved or an appropriate order can be obtained.

In any event, we could not consent to the deposition of Mr. Edwards until after June 30, 2002, the planned completion date for the Comprehensive Plan for the Historical Accounting. We know you appreciate that efforts to complete the Comprehensive Plan are at a critical stage. The time spent on and distraction caused by the preparation for and conduct of depositions can only detract from these efforts and thereby do a disservice to individual Indian trust beneficiaries. Furthermore, we understand that the Office of Historical Trust Accounting ("OHTA") funding advances may be linked to completion of the Plan. Postponing the deposition would also lessen the jurisdictional complications caused by the premature insertion of the Judicial Branch into Interior's decision-making process.

As far as document production is concerned, your letters of May 10th and 22d request the production of forty-two categories of documents, many from OHTA, to begin by May 17th and be completed by May 31st. In the spirit of cooperation, Interior provided some responsive documents on May 17. However, Interior cannot complete production until the requests are processed in accordance with its standard procedures and without unduly interfering with the ongoing work of the Department – in particular, the important task of completing the Comprehensive Plan for the Historical Accounting by June 30th.

Under Interior's procedures, a document request is managed by the Document Management Unit ("DMU"). Upon receiving a request, the DMU identifies the offices likely to have responsive documents and circulates a set of instructions to them. The search is then conducted; the efforts of the various persons participating in the search are documented; the potentially responsive documents are scanned into an electronic database; a CD containing the database of all the documents is reviewed by the Solicitor's office for responsiveness and privilege; the Department of Justice independently conducts a responsiveness and privilege review; the DMU then creates a privilege log derived from the database and makes hard copies and/or CDs of the responsive and non-privileged documents; those documents, together with a draft privilege log and the privileged documents are then provided to the Department of Justice for final review and production. As you can surely appreciate, a system like this is necessary in a large government department like Interior and in a case as complex as this to insure a proper response to document requests.


We have not had time to review all of the Court Monitor's May 10th and 22d requests with Interior sufficiently to permit a point-by-point response in this letter. In producing some documents on May 17th, Interior did not waive any objections it may have to your document requests. Preliminarily, the following can be noted:

- \* A number of the requests appear to seek information relating to matters beyond the scope of the Court Monitor's duties and even beyond the Court's jurisdiction to review.
- \* Categories 5 and 6 of the May 10th request relate to the meeting of January 22, 2002, and the erroneous statement in Interior's Ninth Report that OHTA staff did not meet with the Court Monitor during the period covered by the Report. This error was corrected via the Notice of Erratum to Interior's Ninth Status Report, which was filed with the Court on May 14, 2002. We assume that the Erratum obviates the need to respond to the request for documents in these categories unless such documents would be responsive to some other request.
- \* We object to any request to produce privileged documents and for the production of documents by any entity other than the Department of the Interior.
- \* We object to application of Local Civil Rule 5.1, which can be expected to delay completion of responses to more comprehensive requests; however, we would certainly expect that those involved in searching for documents will use their best efforts to look for all responsive items.

I would be pleased to discuss these concerns with you further.

Thank you for your cooperation and assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra P. Spooner", written in a cursive style.

Sandra P. Spooner

cc: Dennis Gingold  
Keith Harper