



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

March 29, 2002

By Facsimile

Larry Jensen, Esq.
Counselor to the Solicitor
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Cobell v. Norton

Dear Larry:

I enclose a March 28, 2002 letter from the Special Master in which he suggests that "responsive documents may have been withheld" from Interior's earlier productions in response to his request for IT-related documents. He states that documents we produced to him on March 27, 2002, should have been produced last fall in response to his original August 2001 request that the Office of the Special Trustee produce IT-related documents.

The March 28 letter is the third recent letter suggesting that the Special Master is concerned about the extent to which Interior complies with his document requests. In a March 6, 2002 letter to Peter Miller discussing the February 7, 2002 request for documents regarding the OIRM move from Albuquerque, New Mexico, to Reston, Virginia (enclosed), the Special Master requested that we supply "a list of those individuals from whom you requested documents." Working with the Special Master, we developed a supplemental search memorandum that we believe will address his concerns. In a March 19, 2002 letter to Amalia Kessler regarding the February 20, 2002 request for documents regarding OTR's possible move of records from Albuquerque, New Mexico to Lee's Summit, Missouri (enclosed), the Special Master notes that he "c[ame] into possession" of "clearly responsive" documents that were not included in Interior's March 8, 2002 production. The Special Master directed us to "explain how these documents were overlooked" and asked all "those who have already turned over responsive

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documents to verify . . . that they have produced all relevant documentation." Interior has now discovered that additional documents relating to the Lee's Summit Move do exist.

Because document requests from the Special Master are equivalent to an order to produce documents under Fed. R. Civ. P. 53(c), the Special Master's concerns must be addressed. We believe that the Special Master's recent letters mean that Interior will find itself subjected to increasingly intense scrutiny regarding its compliance with the Special Master's document requests and Plaintiff's discovery requests. If Interior or any of its personnel have failed to identify and provide responsive documents or, even worse, have affirmatively withheld documents, the consequences could be severe, ranging from sanctions for failing to comply with discovery to civil or criminal contempt for violating a court order.

Some of the concerns raised by the Special Master can be addressed by instituting a standardized approach for responding to document requests, which we previously recommended and will discuss briefly below, but a number of the concerns implicate organizational and management issues within Interior. Without a high-level commitment to and plan for addressing these issues, the current pattern of contempt allegations, court-ordered supervision, and litigation tasks that distract from Interior's other obligations will almost certainly continue.

We previously identified our concern that a very small number of people in the Office of the Solicitor are responsible for addressing the large number of issues relating to Cobell v. Norton (and, now, the tribal trust cases as well). We reiterate that we are not criticizing the ability, commitment, or performance of anyone in the Office of the Solicitor; rather, it appears that serious understaffing and competing considerations result in errors, omissions and delays that are jeopardizing our position in the litigation. By way of recent examples, the supplemental search for documents regarding the OIRM Move does not appear to be underway (see our March 25, 2002 letter, which is enclosed), Interior has not yet responded to the Special Master's March 20 request for a copy of a memo from the Solicitor's Office to the Special Trustee (see our March 20, 2002 letter, which is also enclosed), and it does not appear that Interior will be in a position today, as required, to satisfy fully the requests for information made by the Special Master in connection with the Lee's Summit move. I understand from our recent discussions that you agree that additional staffing is required and are moving in that direction.

Another management and organizational difficulty relates to the Office of the Special Trustee. The Special Master is clearly focused on OST's operations and on its prior and current document productions. Nevertheless, some portions of the Office of the Special Trustee appear disinclined to work with the Office of the Solicitor to address the Special Master's concerns, including those raised in his March 19 letter regarding the incomplete production of Lee's Summit documents. For example, we understand that, on March 27, 2002 - two days before its response and first supplemental production was due to the Special Master - the Office of the Special Trustee issued a memo (enclosed) that "supercedes the earlier note on this topic from Michele Singer of the Solicitor's Office received on or about March 22, 2002." To the extent that memo is inconsistent with the legal advice given by the Office of the Solicitor, fails to

address all of the relevant issues, or prevents or delays a response to the Special Master, Interior and the Office of the Special Trustee could suffer serious consequences. We also understand that the Office of the Special Trustee declined to ask its employees to comply with the Special Master's request that personnel who have previously turned over Lee's Summit documents "verify in accordance with Local Civil Rule 5.1 that they have produced all relevant documentation," or that they provide a biweekly update regarding whether they have additional documents not previously provided. We are concerned about the adverse effects these actions and inactions could have on the Department of the Interior and the government as a whole. The problem is given increased significance by our ethical obligations to the Court, including our duty of candor.

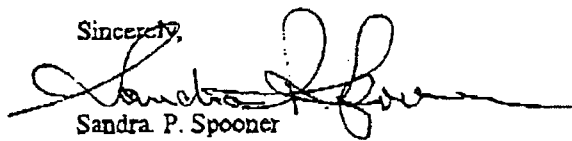
To address the issues raised in the Special Master's March 28, 2002 letter regarding IT-related documents, we believe that we should propose to the Special Master that Interior conduct a supplemental search for any IT-related documents that may have been overlooked earlier. That supplemental search would not begin until we worked with the Special Master to obtain clear parameters regarding the scope of the search and received his approval of the process for conducting the search. The Special Master recently participated in and approved a similar supplemental search procedure with regard to Interior's search for documents regarding the OIRM Move. We also tried to use a similar approach in responding to the Special Master's letter regarding the Lee's Summit issue, but the March 27 memorandum from the Office of the Special Trustee suggests that Interior still has some internal issues to resolve before any supplemental search can be fully undertaken.

We recommend that Interior immediately take the following initial steps:

1. Interior should immediately implement a centralized system for i) logging all discovery and Special Master requests for documents as soon as they come in, ii) recording the due date, and iii) assigning one attorney from the Office of the Solicitor -- not the same attorney for every request -- to be responsible for overall coordination of Interior's response and for communicating with Justice. As part of that overall coordination, the assigned attorney should be responsible not only for identifying the offices and bureaus necessary to respond to the request, but also for taking all steps necessary to resolve any issues that arise, not just those issues that are within the attorney's "normal" practice area at Interior.
2. Interior should make clear from the highest level that responding to document requests in Cobell v. Norton is a mandatory and high-priority item and that the assigned attorney in the Office of the Solicitor is the official point of contact for resolving any issues that arise.

Thank you for considering these matters. We would welcome the opportunity to discuss them with you and assist in any way.

Sincerely,



Sandra P. Spooner

cc: Deputy Secretary Griles