IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER REGARDING PLAINTIFFS' NOTICE OF DEPOSITION OF THE SECRETARY OF INTERIOR

On November 4, 2003, Plaintiffs peremptorily noticed the deposition of the Secretary of the Interior for November 13, 2003. In a Motion for Protective Order ("Motion"), filed on November 10, 2003, Defendants demonstrated that good cause exists for an order preventing the deposition of the Secretary. In their Opposition to the Motion ("Opposition"), filed on November 24, 2003, Plaintiffs are unable to show a right to the deposition – or even a need for such a deposition at this time. Defendants' Motion should be granted.

ARGUMENT

I. NO DISCOVERY IS AUTHORIZED AT THIS TIME

Relying upon the Federal Rules of Civil Procedure and the Court's October 17, 2002 Phase 1.5 Trial Discovery Order, Defendants demonstrated that no discovery is appropriate or permissible at this stage of the litigation. In response, Plaintiffs rely exclusively upon the language of the Court's September 17, 2002 Order, restoring certain discovery rights that had been previously denied to them in this case. They contend that the September 17, 2002 Order

somehow conferred upon them "unfettered" discovery rights and surprisingly argue that Defendants have not identified any Order which restricts their discovery now that the Phase 1.5 trial has concluded. Opposition at 5. Plaintiffs have unaccountably chosen to ignore the language in the Federal Rules and the October 17, 2002 Order, discussed in the Motion at 2-3, that quite unambiguously impose "fetters" on Plaintiffs' discovery rights.

The September 17 Order merely restored the usual discovery rights that had been denied Plaintiffs by a previous order. After entry of the September 17 Order, Plaintiffs were in the same position as any other litigant with regard to their discovery rights. On October 17, 2002, the Court signed a Phase 1.5 discovery scheduling order. See Phase 1.5 Discovery Schedule Order (October 17, 2002). Pursuant to that Order, fact discovery closed on March 24, 2003,[1] and all discovery terminated on April 10, 2003. Plaintiffs do not, and cannot, explain how the September 17 Order granted them discovery rights that exceed the limits established by the Court's subsequent scheduling order. There is no other order granting Plaintiffs the right to take discovery and Plaintiffs cite none in their Opposition.

Plaintiffs are also bound by the Federal Rules, which forbid discovery prior to a Rule 26(f) planning conference, as described in the Motion for Protective Order.[2] See Fed. R. Civ. P. 26(d). The parties have not held a discovery planning conference on any post-Phase 1.5

[1/] The close of fact discovery was subsequently extended by the Special Master-Monitor until March 28, 2003.

[2/] One exception to this prohibition is that Rule 27(b) permits a district court to allow, upon motion that sets forth certain prescribed information, the taking of depositions of witnesses to perpetuate testimony "for use in the event of further proceedings in the district court," pending appeal of a judgment. Fed. R. Civ. P. 27(b). Plaintiffs have not filed any such motion to take the Secretary's deposition and therefore have obviously not met the requirements of Rule 27.

proceeding. Therefore, discovery has not commenced for any subsequent proceedings and Plaintiffs are precluded from requesting documents and noticing depositions without leave of Court. Id.; Fed. R. Civ. P. 30(a)(2)(C).[3]

II. PLAINTIFFS FAIL TO IDENTIFY ANY RELEVANT DISCOVERY THEY SEEK

Plaintiffs' Opposition also reveals a fundamental misunderstanding about the type of information that is discoverable in this case. Plaintiffs claim that they need a deposition of the Secretary of the Interior now because the Secretary is a "trustee-delegate" and thus holds "information relevant to a trust – a trust to which plaintiffs are beneficiaries and therefore have a right to all information related thereto." Opposition at 7-8 (emphasis in original).[4] Even if applicable restrictions on discovery in APA cases were disregarded,[5] Plaintiffs' attorneys are not entitled to use the Federal Rules of Civil Procedure to discover all information that might

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[3] To the extent Plaintiffs are seeking discovery for the purpose of investigating potential criminal contempt allegations, see, e.g., Opposition at 2, 5-6, this Court's decision in Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70, 76-77 (D.D.C. 2003), makes clear that the Plaintiffs cannot assume a prosecutorial role. See also Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 814 (1987) (reversible error to appoint the attorney for an interested private beneficiary as prosecutor of contempt allegations).

[4] Plaintiffs' contention that they are entitled to discover all information related to the IIM trust, regardless of its relevance to their claims in this case, is repeated in various forms throughout their Opposition. See, e.g., id. at 2 ("efforts to reform the Individual Indian Trust are subject areas that plaintiffs can properly probe"); id. at10 ("beneficiaries are entitled to all information in the possession of the trustee-delegate regarding her management and administration of the Individual Indian Trust").

[5] Plaintiffs acknowledge in their Opposition that discovery is impermissible in APA cases, but argue that such a restriction should not apply here because this case is "not the conventional APA case where discovery restrictions apply." Opposition at 7. Defendants are unaware of a uniqueness exception in the APA that would permit otherwise unauthorized discovery in any APA case that a plaintiff designates as special. In short, the restrictions on discovery in all APA cases apply with equal force to this APA case, notwithstanding its supposedly unconventional status.

otherwise be obtainable by an IIM trust beneficiary. They only represent the certified class of IIM beneficiaries with respect to the issues and claims in this lawsuit. Simply alleging that a beneficiary has a right to certain information about the IIM trust is not enough to make that information relevant to this lawsuit, and thus discoverable under the Federal Rules. If beneficiaries believe that they have a right under trust law to certain information they should ask the appropriate Interior official for that information in the ordinary course of business.[6] The Plaintiffs in this class action, however, are not entitled to use the formal discovery mechanisms in the Federal Rules to gather information that beneficiaries would merely like to obtain. The requested information must be relevant to an issue in this litigation.[7]

As Interior has discussed repeatedly, there are no current proceedings that require discovery. However, even if this changes, Plaintiffs would only be entitled to the discovery of information related to the claims at issue in such a proceeding. They are not entitled to discover any information they seek merely because it has some relation to the IIM trust.

III. PLAINTIFFS ARE NOT ENTITLED TO DEPOSE A CABINET OFFICIAL

In any event, even if the requested beneficiary information were somehow relevant to an issue in this lawsuit, Plaintiffs do not explain why they need to start with a deposition of the Secretary of the Interior to try to obtain such information. As discussed in the Motion – and

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[6] As should be obvious, in most situations the Secretary of the Interior is probably not the appropriate official for a beneficiary to contact first to obtain requested IIM trust information.

[7] Plaintiffs are surely aware of the relevancy requirement because they quote the appropriate language from Rule 26(b) in their Opposition. Opposition at 3. They are also surely aware of the issues in this case because they were framed in the Complaint filed by Plaintiffs. It is therefore puzzling that at this late date Plaintiffs are apparently still unaware that information relevant to the IIM trust is not coextensive with information relevant to the issues in this case.

applied in an earlier order of this Court – before Plaintiffs may take the deposition of a high ranking government official they are required to identify the specific information that they would seek in such a deposition and show that they unsuccessfully tried to obtain this information from some other source. See Motion at 3-5.

Plaintiffs begin their discussion with the untenable contention that "[c]ontrary to defendants' overbroad assertion, there is no general principle that high-ranking government officials – like the Secretary of the Interior – should not be subject to deposition." Opposition at 8 n.8. In Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998), this Court identified the general principle relied upon by Defendants here:

> There is substantial case law standing for the proposition that high ranking government officials are generally not subject to depositions unless they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere.

Id. (citing cases) (emphasis in original).

Plaintiffs next claim that even if such a principle exists it does not apply in this case. Opposition at 9.[8] Plaintiffs contradict this argument themselves, however, when they

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[8] Plaintiffs also claim, without citation, that the Secretary somehow "waived" the right to apply this principle because she has previously testified in this case. Opposition at 8 n.7. Plaintiffs' argument reveals that they do not understand the nature of the rule. The principle that high government officials should not testify is not an absolute shield but rather is dependent upon the circumstances under which the testimony is sought. It is not an argument that plaintiffs could never get the testimony, but rather that each time they try to get testimony from a highly ranked government official they have to meet the prerequisites, i.e. (1) identify the specific information they wish to elicit, and of which the official could reasonably be expected to have personal knowledge, and (2) show that the information was unobtainable from some other source. Testifying once in a proceeding cannot "waive" Plaintiffs' obligation to meet this standard the next time, and every time, that they try to obtain specific information from that official.

acknowledge that the Court previously applied this principle in this case to other Interior officials. Opposition at 9 n.9.

Because Plaintiffs refuse to identify the specific information they seek to elicit in a deposition of the Secretary, Defendants, and the Court, are unable to evaluate whether the Secretary would have personal knowledge of such information and whether it is relevant to an issue in this case. In any event, under the principle identified and applied by this Court, until Plaintiffs show that they first tried – and failed – to get specific information from some other source, Plaintiffs may not take the deposition of the Secretary of the Interior.

CONCLUSION

For these reasons, Interior's Motion for a Protective Order should be granted.

Dated: December 4, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2003 the foregoing *Defendants' Reply in Support of Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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