IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' CONSOLIDATED REPLY IN SUPPORT OF MOTIONS FOR A PROTECTIVE ORDER REGARDING PLAINTIFFS' NOTICES OF DEPOSITION OF DAVID L. BERNHARDT, LUCY QUERQUES DENETT AND GABRIEL SNEEZY
and
OPPOSITION TO MOTION TO COMPEL

Plaintiffs have noticed the depositions of David Bernhardt, the Department of the Interior's Director for the Office of Congressional and Legislative Affairs, Gabriel Sneezy, the Acting Director of the Office of Appraisal Services, and Lucy Querques Denett, the Associate Director for Minerals Revenue Management. Defendants filed individual Motions for Protective Order ("Motions") for each of these noticed depositions. On November 25, 2003, Plaintiffs filed a consolidated Opposition to the Motions and a Motion to Compel ("Opposition"). In the Motions, Defendants demonstrated that good cause exists for an order preventing these depositions. In their Opposition, Plaintiffs are unable to show a right to the depositions – or even a need for the depositions at this time. Defendants' Motions should be granted and Plaintiffs' Motion to Compel should be denied.[1]

[1/] Although their paper is styled as both an opposition and a motion to compel, Plaintiffs do not explain why a motion to compel is necessary. Indeed, Plaintiffs do not even discuss the standards for such a motion as set forth in Federal Rule of Civil Procedure 37(a)(2)(B), or

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 in the Motions 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 Motions, that unambiguously restricts 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

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whether they can meet their burden under those standards, but rather focus solely on their Opposition to Defendants' Motions. In addition, any motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." Fed. R. Civ. P. 37(a)(2)(B). Plaintiffs' Motion to Compel does not include this required certification and also does not comply with Local Rule 7(m). In any event, for the reasons discussed in the Motions and in this Reply, Plaintiffs' Motion to Compel should be denied.

(October 17, 2002). Pursuant to that Order, fact discovery closed on March 24, 2003,[2] 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 Motions.[3] See Fed. R. Civ. P. 26(d). The parties have not held a discovery planning conference on any post-Phase 1.5 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).[4]

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 the noticed

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

[3] 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 depositions noticed here and therefore have obviously not met the requirements of Rule 27.

[4] To the extent Plaintiffs are seeking discovery for the purpose of investigating potential criminal contempt allegations, see, e.g., Opposition at 7, 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).

depositions because "all information of this trust belongs to the plaintiffs and they have a right to such information irrespective of litigation but by right as beneficiaries." Opposition at 9. 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 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. 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.[6]

In their Opposition, Plaintiffs identify the position and some of the responsibilities of each of the noticed deponents, and allege that each has personal knowledge of information

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[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 a conventional APA case where discovery restrictions apply." Opposition at 9. 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.

[6] Plaintiffs are surely aware of the relevancy requirement because they quote the appropriate language from Rule 26(b) in their Opposition. Opposition at 5. 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.

related to the IIM trust. See Opposition at 2-4. However, Plaintiffs do not, and cannot, explain how any information they could possibly elicit from the proposed deponents would be relevant to a claim that is being litigated in any current proceeding requiring discovery.

As Defendants have 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.

CONCLUSION

For these reasons, Defendants' Motions for a Protective Order should be granted and Plaintiffs' Motion to Compel should be denied.

Dated: December 8, 2003

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

/s/ Sandra P. Spooner
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on December 8, 2003 the foregoing *Defendants' Consolidated Reply in Support of Motions for a Protective Order Regarding Plaintiffs' Notices of Deposition of David L. Bernhardt, Lucy Querques Denett and Gabriel Sneezy and Opposition to Motion to Compel* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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

/s/ Kevin P. Kingston
Kevin P. Kingston

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Defendants.	)	
	)	

ORDER

This matter comes before the Court on Defendants' Motions for a Protective Order Regarding Plaintiffs' Notices of Deposition of David Bernhardt, Gabriel Sneezy, and Lucy Querques Denett, and Plaintiffs' Motion to Compel these depositions. Upon consideration of the Motions, the responses thereto, and the record in this case, it is hereby

ORDERED that *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of David Bernhardt* (Dkt. # 2372) is GRANTED; it is further

ORDERED that the Plaintiffs are precluded from deposing David Bernhardt at this time;

ORDERED that *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Gabriel Sneezy* (Dkt. # 2375) is GRANTED;

ORDERED that the Plaintiffs are precluded from deposing Gabriel Sneezy at this time;

ORDERED that *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Lucy Querques Denett* (Dkt. # 2380) is GRANTED;

ORDERED that the Plaintiffs are precluded from deposing Lucy Querques Denett at this time;

ORDERED that *Plaintiffs' Motion to Compel the depositions of David Bernhardt, Lucy Querques Denett, and Gabriel Sneezy* (Dkt. # 2398) is DENIED;

SO ORDERED.

Date: _____

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

Keith Harper, Esq.
Richard A. Guest, 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

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