

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
REGARDING THE NOTICE OF DEPOSITION OF JAMES CASON AND
RELATED REQUEST FOR PRODUCTION OF DOCUMENTS**

On October 29, 2003, Plaintiffs noticed the deposition of James Cason, the Associate Deputy Secretary of the Department of the Interior ("Notice of Deposition"). The Notice of Deposition included two requests for production of documents. Defendants filed a Motion for Protective Order Regarding the Notice of Deposition and Request for Documents on November 26, 2003.¹ Plaintiffs filed a consolidated Opposition and Motion to Compel on December 10, 2003.² For the reasons set forth in Defendants' Motion for Protective Order, and Defendants'

¹ Because the Motion for Protective Order was not granted before the time under Federal Rule of Civil Procedure 34(b) to respond to the document requests expired, on December 1, 2003, Defendants served Responses and Objections to Plaintiffs' Request for Production of Documents Attached to the Notice of Deposition of James Cason (attached as Exhibit 1).

² Plaintiffs filed an unopposed Notice of Withdrawal of the Motion to Compel on December 16, 2003, accompanied by a proposed order. Because this proposed order has not yet been entered, Defendants are filing this Opposition to the Motion to Compel. If the Court orders the withdrawal of Plaintiffs' Motion, this Opposition obviously becomes moot.

Reply in Support of the Motion for Protective Order, filed concurrently with this Opposition, which are incorporated here by reference, Plaintiffs' Motion to Compel should be denied.³

Dated: December 18, 2003

Respectfully submitted,

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PETER D. KEISLER
Assistant Attorney General
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/s/ Sandra S. Spooner
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^{3/} 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).

CERTIFICATE OF SERVICE

I hereby certify that, on December 18, 2003 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Compel Regarding the Notice of Deposition of James Cason and Related Request for Production of Documents* 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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Case No. 1:96CV01285
(Judge Lamberth)

ORDER

This matter comes before the Court on *Plaintiffs' Motion to Compel Regarding Plaintiffs' Notice of Deposition of James Cason And Request For Production of Documents* (Dkt. # 2422).

Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs' Motion is DENIED; it is further

ORDERED that the Plaintiffs are precluded from deposing James Cason at this time;

ORDERED that Defendants need not respond to the document production requests included with the notice of deposition of Mr. Cason;

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

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ELOUISE PEPION COBELL, et al.,)
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Defendants.)

Case No. 1:96CV01285 (RCL)

**DEFENDANTS' RESPONSES AND OBJECTIONS TO
PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS
ATTACHED TO THE NOTICE OF DEPOSITION OF JAMES CASON**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Defendants provide this response ("Response") to the Request for Production of Documents attached to the Notice of Deposition of James Cason, dated October 29, 2003 ("Requests"). This Response reflects the Defendants' good faith diligent efforts to consider and investigate the subject matter covered by the Requests and to respond to each of the Requests within the allotted time. The statements made herein are based upon the information known as of the date of this response and are subject to correction, modification and supplementation if and when additional relevant information becomes known to Defendants.

The Requests as propounded seek production of documents responsive to two enumerated individual requests. These requests are subject to one or more objections, which are asserted below. General Objections are objections that apply to each and every one of these Requests and are to be read as forming an integral part of the response to each individual request.

GENERAL OBJECTIONS TO REQUEST FOR DOCUMENTS

1. The Requests violate Fed. R. Civ. P. 26(g)(2)(B) - (C), which rule provides that a signed discovery request, served by a party, constitutes a certification that the requests are "not interposed for any improper purpose, such as to harass" and that the requests are "not unreasonable or unduly burdensome or expensive" to fulfill. The Requests, however, violate these standards.

2. In their entirety, the Requests fail to comply with Rule 34(b), which provides, in pertinent part, "[w]ithout leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d)." Fed. R. Civ. P. 34(b). The Requests were propounded after trial of Phase 1.5 concluded and before any conference has been held to set a schedule for any discovery that will be permitted for any future trial phase in this case. Finally, there are currently no proceedings before the Court requiring discovery and, thus, it is impossible at this time to determine whether the requested documents, to the extent they exist, contain relevant information or are reasonably calculated to lead to the discovery of admissible evidence.

3. The Requests are over broad, vague and ambiguous. Thus, the Requests are patently "unreasonable" within the meaning of Rule 26 and "unduly burdensome and expensive" on their face.

4. To the extent the Requests seek discovery of irrelevant information not reasonably calculated to lead to the discovery of admissible evidence, notwithstanding the lack of an ongoing proceeding as stated above, they are patently unreasonable within the meaning of Rule 26 and therefore are "unduly burdensome and expensive" on their face. Plaintiffs' counsel should

have been aware of the unreasonable and burdensome character of the Requests prior to serving them.

5. The Requests seek information for the purpose of annoying and harassing Defendants and/or their employee(s).

6. The Requests are improper to the extent they seek, or could be construed as seeking, information or documents protected by the attorney-client privilege, work product doctrine, the governmental privileges, the right to privacy under applicable law, any joint defense, common interest or party communications privilege, or any other applicable privilege, doctrine or right that would make the information or documents immune from discovery. (Any inadvertent production of information protected by any of these privileges, doctrines, or rights shall not be deemed a waiver of the protections that those privileges, doctrines, or rights afford.)

7. The Requests are improper to the extent they seek information covered by the Privacy Act, but not within the scope of the Order entered November 27, 1996, or the scope of any other applicable statute or order. In addition, Defendants object to the Requests to the extent that they seek documents containing confidential business information belonging to third parties, tribes, contractors or the regulated community, or information that, if publicly released, could compromise Defendants' regulatory or enforcement activities.

8. Plaintiffs propounded these requests without providing sufficient instructions or definitions and fail to reference any other source of instructions and definitions for these Requests. Accordingly, Defendants object to each of the Requests to the extent the insufficiency of instructions renders them vague and ambiguous, and further object to the Requests to the extent that they employ, but fail to define, terms that are vague, ambiguous and/or could have

differing meanings in different contexts, professions, industries, academic disciplines or elsewhere.

9. To the extent the requests are vague, ambiguous and over broad, they impose an undue burden and/or expense on Defendants.

10. To the extent the Requests seek any electronic data, including e-mail records, that are stored on system back-up tapes, such back-up tapes are used for restoration of information in case of system failure and are not designed or used to archive or retrieve selected information.

11. The Requests are improper to the extent they seek to require any Defendant to contact and/or discuss issues in this litigation with class members contrary to Court order.

12. The Requests are improper as a whole because the *only* relief sought in this case is under the Administrative Procedure Act.

13. The Requests are improper to the extent they may be construed to seek documents in the possession, custody or control of a government official or employee other than in his or her official capacity. Documents in the personal possession, custody or control of such individuals – who are either not parties or are parties only in their official capacities – are not discoverable pursuant to these requests. Fed. R. Civ. P. 34.

14. To the extent Plaintiffs seek to impose on any Defendant the full cost of retrieving, producing and/or duplicating responsive documents, Defendants – as a prerequisite to producing or making available for inspection and copying responsive documents – may require Plaintiffs to advance their reasonable and fair share of the cost of that undertaking, in an amount and manner agreeable to both sides.

RESPONSES TO THE REQUEST FOR DOCUMENTS

Without waiving the foregoing objections and subject to them, Defendants respond to each individual request as follows:

Request 1:

All documents, including without limitation legal memoranda and opinions, memoranda, instructions, handwritten notes and marginalia, calendars, diaries, appointment books, schedulers, planners, Day-Timers, time records, voice mail, email, and the like, all hard copy documents, and electronic documents housed in, or created on, computers or personal digital assistants, whether the computers are owned or leased by the government, its agents, employees, Cason or any other individual, contractor, vendor, or any other entity, and any drafts thereof, that memorialize or were relied upon, considered (whether or not accepted or adopted), rejected, discarded, reviewed, or utilized in any way whatsoever in the preparation of, revision, amendment, modification, deletion, omission, or support for, each statement and representation made by Cason in his written and oral testimony before the Senate Committee on Indian Affairs on October 29, 2003 Declaration [sic] ("Cason Testimony").

Objections: Defendants incorporate by reference their General Objections above and further object to this request on the grounds that there are currently no proceedings before the Court requiring discovery and thus, it is impossible at this time to determine whether the requested documents, if they exist, are reasonably calculated to lead to the discovery of admissible evidence. Defendants also object to this request on the grounds that the request is vague and ambiguous and over broad; none of the terms contained in this request are defined. In addition to Defendants' general objection above concerning privileged documents and without waiving or limiting that objection, Defendants further object to this request because it specifically seeks production of documents "including . . . legal memoranda and opinions," that, if they exist, may be protected by the attorney-client and deliberative process privileges, and the work product doctrine. Finally, Defendants object to this request on the grounds that it seeks production of documents and information possessed by individuals other than in his or her official capacity or

contained in locations not within Defendants' possession, custody, or control, including but not limited to, documents and information contained on personal "computers" and "personal digital assistants." Documents in the personal possession, custody or control of such individuals – who are not parties – are not discoverable pursuant to these requests. Fed. R. Civ. P. 34.

Request 2:


A current resume or *curriculum vitae*, identifying and describing all licenses, and professional certifications, and bonuses, promotions, and performance awards held by, or granted to, Cason.

Objections: Defendants incorporate by reference their General Objections above and further object to this request on the grounds there are currently no proceedings before the Court requiring discovery and thus, it is impossible to determine whether a version of Mr. Cason's curriculum vitae which identifies the items listed in the request, if it exists, is reasonably calculated to lead to the discovery of admissible evidence. Defendants also object to this request to the extent it purports to require Defendants to create documents that may not already exist; if such documents already exist in some form, Defendants object to this request to the extent it purports to require Defendants to revise or update such documents in order to satisfy the request.

Dated: December 1, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on December 1, 2003 I served the foregoing *Defendants' Responses and Objections to Plaintiffs' Request for Production of Documents Attached to the Notice of Deposition of James Cason* by facsimile in accordance with their written request of October 31, 2001 upon:

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Richard A. Guest, Esq.
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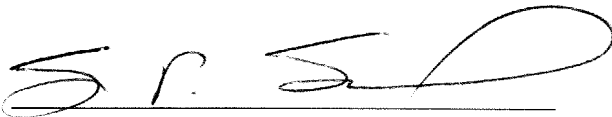
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Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

By U.S. Mail upon:

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