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 JAMES CASON AND 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, for December 4, 2003 ("Notice of Deposition").[1] The Notice of Deposition included two requests for production of documents. In a Motion for Protective Order filed on November 26, 2003 ("Motion"), Defendants demonstrated that good cause exists for an order preventing the deposition of Mr. Cason and relieving Defendants of any obligation to respond to the two related requests for production of documents.[2] In their Opposition to the Motion ("Opposition"), filed on December 10, 2003, Plaintiffs are

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[1] Although Defendants accurately noted in the Motion that Plaintiffs had noticed the deposition "without any prior communication to counsel for Defendants," Motion at 1, the quotation recited in Plaintiffs' Opposition relating to this Court's admonition to confer before a deposition is noticed appears nowhere in Defendants' Motion. See Opposition at 2 n.1.

[2] Because the Motion 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).

unable to show a right to the deposition – or even a need for such a deposition at this time.[3] 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 in the Motion 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 7. Plaintiffs have unaccountably chosen to ignore the language in the Federal Rules and the October 17, 2002 Order, discussed in the Motion, 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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[3] Plaintiffs' paper is styled as both an opposition and a motion to compel. On December 16, 2003, Plaintiffs filed an unopposed Notice of Withdrawal of the motion to compel, but because the proposed order accompanying the Notice has not been entered Defendants will file an opposition to the motion to compel in a separate paper.

(October 17, 2002). Pursuant to that Order, fact discovery closed on March 24, 2003,[4] 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.[5] 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.[6] Id.; Fed. R. Civ. P. 30(a)(2)(C).

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

[5] 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.

[6] To the extent Plaintiffs are seeking discovery for the purpose of investigating potential criminal contempt allegations, see, e.g., Opposition at 3, 7, 8, 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).

deposition of Mr. Cason because all information material to the management of the IIM trust "is the property of the trust beneficiaries who have a right to such information irrespective of litigation as [sic] matter of law." Opposition at 10; see also id. at 13 ("What is attainable by a beneficiary of a trust regarding the trust administration is far different from the ordinary litigant.") Even if applicable restrictions on discovery in APA cases were disregarded,[7] 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 represent the certified class of IIM beneficiaries only 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.[8]

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[7] 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 an APA case where discovery restrictions apply." Opposition at 10. Defendants are unaware of any 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.

[8] 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.

In their Opposition, Plaintiffs allege that Mr. Cason has personal knowledge of information related to the management and administration of the IIM trust. See Opposition at 2. However, Plaintiffs do not, and cannot, explain how any information they could possibly elicit from Mr. Cason 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.

III. PLAINTIFFS HAVE NOT MADE THE NECESSARY SHOWING TO DEPOSE THE ASSOCIATE DEPUTY SECRETARY OF THE DEPARTMENT OF THE INTERIOR

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 Associate Deputy Secretary of the Interior to try to obtain such information. As discussed in the Motion – and 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 contend that only cabinet officials and agency heads are protected from deposition by this rule. See Opposition at 12. They argue that Mr. Cason is not such an official and is therefore not high ranking enough to fall within the ambit of this rule because he is not the

ultimate "decision-maker."[9] See id. at 11-12. Plaintiffs have misconstrued the nature of the rule. "Although most cases apply to agency heads, the rationale applicable to the protection of agency heads is equally applicable" to other high ranking executive officials. Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998). The rule applies where "there is a substantial likelihood that depositions would significantly interfere with their ability to perform their governmental duties." Id.

As Associate Deputy Secretary, Mr. Cason shares authority and responsibility at the Secretarial level for the oversight and management of the Department of the Interior's Indian trust and associated reform efforts. As such, having his deposition taken every time Plaintiffs want to learn general information about the nature of the management and administration of the trust – without regard to whether such information is relevant to a particular claim in this lawsuit – would necessarily interfere with his ability to perform his governmental duties. As applied earlier in this case to the Interior Chief-of-Staff and Deputy Solicitor, before Plaintiffs may take the deposition of the Associate Deputy Secretary, they should first "be required to provide evidence demonstrating and proving: (A) that Plaintiffs have an extraordinary need for [this] particular [deposition]; and (B) that the precise information they seek from [this individual] is available from no other source."[10] Order of March 25, 1999.

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[9] Plaintiffs' attorneys also continue to pursue their regrettable policy of personal attack, eschewing persuasion in favor of insult, substituting *ad hominem* vitriol for legitimate argument. See Opposition at 11 (referring to the Associate Deputy Secretary of the Interior as a "munchkin"). Defendants remain hopeful that the Court will direct Plaintiffs' attorneys to end this disgraceful, demeaning, and unethical litigation stratagem.

[10] Plaintiffs also claim, without citation, that Mr. Cason somehow "waived" the right to apply this principle because he has previously testified in this case and before Congress. Opposition at 11 n.11. Plaintiffs' argument reveals that they do not understand the nature of the rule. The

CONCLUSION

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

Dated: December 18, 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

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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 deposition 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. An official's testifying once in a proceeding cannot "waive" Plaintiffs' obligation to meet this standard the next time, and every time, that they seek to obtain specific information from that official by taking his deposition.

CERTIFICATE OF SERVICE

I hereby certify that, on December 18, 2003 the foregoing *Defendants' Reply in Support of Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of James Cason and 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

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

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,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER

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

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:

Keith Harper, Esq.
Richard A. Guest, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M. Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(202) 318-2372

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

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

By U.S. Mail upon:

Elliott Levitas, Esq
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Sean P. Schmergel