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 ROSS SWIMMER

On January 20, 2004, Plaintiffs noticed the deposition of Ross Swimmer, Special Trustee for American Indians, for January 28, 2004 ("Notice of Deposition"). In a Motion for Protective Order filed on January 26, 2004 ("Motion"), Defendants demonstrated that good cause exists for an order preventing the deposition of Mr. Swimmer. In their Opposition to the Motion ("Opposition"), filed on February 9, 2004, Plaintiffs are unable to show a right or 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 Schedule Order, Defendants demonstrated in the Motion that no discovery is appropriate or permissible at this stage of the litigation. In response, Plaintiffs rely upon the language of the Court's September 17, 2002 Order removing restrictions on discovery rights that had been imposed by a previous order. They contend that the September 17, 2002

Order somehow conferred upon them "unfettered" discovery rights and 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 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 removed the restrictions on Plaintiffs' discovery rights that had been imposed by a previous order. See December 21, 1999 Order, Dkt. No. 414. 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 Trial discovery scheduling order. See Phase 1.5 Trial 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.[2] See Fed. R. Civ. P. 26(d). The parties

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

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 noticing depositions without leave of Court. Id.; Fed. R. Civ. P. 30(a)(2)(C).

II. PLAINTIFFS SEEK TO CONDUCT A ROVING INVESTIGATION UNBOUNDED BY THE CLAIMS IN THIS LITIGATION

Defendants explain in their Motion that there is no way to determine at this time whether the discovery Plaintiffs seek is relevant and permissible within Rule 26 because there are currently no proceedings against which the scope of discovery has been defined. Motion at 3. Plaintiffs' Opposition ignores that problem and without identifying any particular area of inquiry, Plaintiffs claim the right to take discovery at this time into the "numerous and continuing matters central to individual Indian trust beneficiaries' interests in this litigation, including but not limited to the July 28, 2003 preliminary injunction and issues related to the historical accounting phase of this litigation." Opposition at 6 (emphasis added). The scope of the inquiry Plaintiffs are attempting to embark upon is boundless. Even if discovery were currently open and its scope were confined to Plaintiffs' accounting claims in this litigation, discovery related to any future historical accounting phase of this litigation is, at best, premature. The Court of Appeals stayed this Court's September 25, 2003 structural injunction and no Phase II trial has been scheduled. Under the circumstances, Plaintiffs cannot demonstrate how it would be possible at this time to determine the scope of such discovery into the performance of an accounting when the scope of the accounting itself is still being litigated.

Plaintiffs' other stated reason for taking Mr. Swimmer's deposition is to uncover "on-going deception and coverup." Opposition at 6. This attempt by Plaintiffs to appoint themselves

roving investigators should be rejected. Plaintiffs' argument assumes, without providing any factual basis, that Defendants are engaging in "on-going deception and coverup," of which Mr. Swimmer has knowledge. Plaintiffs theorize that filing their complaint authorizes them to search for evidence that might validate their unfounded assumptions. These assumptions cannot serve as the predicate for deposing Mr. Swimmer. Moreover, to the extent Plaintiffs are seeking discovery into alleged "on-going deception and coverup" for the purpose of potential criminal contempt allegations, 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).

III. THE RIGHT TO DISCOVERY IN THIS LITIGATION IS NOT COEXTENSIVE WITH PLAINTIFFS' RIGHT TO SEEK INFORMATION AS BENEFICIARIES

In their Opposition, Plaintiffs also claim a more general right to depose Mr. Swimmer, seemingly at any time, because they claim trust law requires that "a beneficiary have full access to all records relating to the trust," Opposition at 7, and that such information "is the property of the trust beneficiaries who have a right to such information irrespective of litigation as [sic] matter of law, " Opposition at 8. However, Plaintiffs' "full access to trust records" theory is negated by well-settled authority that enforcement of asserted rights against the United States requires a statutory or regulatory basis. See Cobell v. Babbitt, 91 F.Supp. 2d 1, 29-30 (D.D.C. 1999); see also United States v. Navajo Nation, 537 U.S. 488, 506 (2003) (action for damages to enforce trust duty not warranted by any relevant statute or regulation); Naganab v. Hitchcock,

202 U.S. 473, 476 (1906) (trust accounting not actionable without act of Congress). Plaintiffs identify no statute or regulation authorizing enforcement of a trust beneficiary's right to search for information.

Furthermore, even if applicable restrictions on discovery in APA cases were disregarded,[3] 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. For formal discovery, the requested information must be relevant to a current proceeding that requires discovery.

In their Opposition, Plaintiffs allege that Mr. Swimmer has personal knowledge of Interior's various trust reform efforts. See Opposition at 1-2. They do not even purport to limit the focus of their discovery to the accounting claims in this litigation. However, as Defendants

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[3/] 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 7-8. 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.

have discussed repeatedly, there are no current proceedings that require discovery. 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' Motion for a Protective Order should be granted.

Dated: February 20, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 20, 2004 the foregoing *Defendants' Reply in Support of Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Ross Swimmer* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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