

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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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.	)	

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**DEFENDANTS' MOTION FOR A PROTECTIVE  
ORDER REGARDING PLAINTIFFS' NOTICE OF  
DEPOSITION OF DAVID L. BERNHARDT**

On November 4, 2003, without any prior communication to counsel for Defendants,<sup>1</sup> Plaintiffs noticed the deposition of David L. Bernhardt, Director, Office of Congressional and Legislative Affairs, Department of the Interior, for November 14, 2003 ("Notice of Deposition") (attached as Exhibit 1). Plaintiffs are not permitted to depose Mr. Bernhardt because they are not entitled to any discovery at this time. Moreover, discovery from Mr. Bernhardt would not be within the scope of permissible discovery under Fed. R. Civ. P. 26(b). Accordingly, pursuant to Fed. R. Civ. P. 26(c), Defendants move for a protective order preventing the noticed deposition of Mr. Bernhardt.<sup>2</sup>

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<sup>1</sup> In noticing Mr. Bernhardt's deposition without any prior communication regarding availability of the deponent or his counsel, Plaintiffs have ignored the Court's admonition that counsel should confer regarding the scheduling of depositions. See Order of May 8, 1998; Transcript of November 6, 1998 Hearing at 2 ("I don't know what's happened to the notion that I was trying to set forth in May about civility, but I don't think that the plaintiff should have noticed those depositions without a discussion about dates with the defendants first") (attached as Exhibit 2).

<sup>2</sup> As required by Fed. R. Civ. P. 26(c), and Local Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs on November 5, 2003 in an attempt to resolve this dispute without Court action. Plaintiffs expressed an intent to oppose the relief requested here.

## ARGUMENT

### **I. NO DISCOVERY IS PERMITTED AT THIS TIME**

Plaintiffs are not authorized to take any discovery at this time. Fact discovery for the Phase 1.5 trial closed on March 28, 2003, the trial itself was concluded over three months ago and the Court ruled upon the issues raised therein on September 25, 2003. Plaintiffs have not sought leave of Court to take discovery out of time, and there is no indication in the Court's October 17, 2002 Phase 1.5 Trial Discovery Order that the Plaintiffs were authorized to conduct roving discovery after Trial 1.5.

In addition, nothing in the structural injunction issued by the Court on September 25, 2003, provides for further discovery. The Court's injunction establishes a series of deadlines through September 30, 2007, for the Department of Interior to perform specific tasks. Under the schedules established by the Court's September 25, 2003 orders, a Phase II trial is likely, and it is possible that there will be discovery associated with it.<sup>3</sup> However, there is no discovery order setting a discovery schedule for a Phase II trial.

Nor are there other proceedings before the Court requiring discovery. Even if the noticed deposition of Mr. Bernhardt were purportedly related to some future proceeding in this case, the parties have not held a discovery planning conference pursuant to Federal Rule of Civil Procedure 26(f) and, therefore, Plaintiffs are not authorized to take discovery. Fed. R. Civ. P. 26(d), 30(a)(2)(C) and 34(b). Because no discovery is permitted at this time, the Court should issue a protective order to prevent the noticed deposition of Mr. Bernhardt.

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<sup>3</sup> Plaintiffs' attempted discovery is also improper under applicable Administrative Procedure Act principles. See, e.g., Defendants' Motion for Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior at 5-7 (November 10, 2003).

## **II. DISCOVERY FROM MR. BERNHARDT IS NOT WITHIN THE SCOPE OF PERMISSIBLE DISCOVERY UNDER RULE 26**

Even if discovery were otherwise permissible, Plaintiffs cannot show that the discovery sought from Mr. Bernhardt would be within the scope of the Federal Rules. Under Rule 26(b)(1), parties may only obtain discovery regarding matters that are “relevant to the claim or defense of any party . . . .” Fed. R. Civ. P. 26(b)(1). Although information need not be admissible at trial to be discoverable, it still must be “[r]elevant” information and must be “reasonably calculated to lead to the discovery of admissible evidence.” Id.

At the meet and confer discussion initiated by Defendants’ counsel on November 5, 2003, Plaintiffs’ counsel refused to identify any of the subject areas that they would cover during a deposition of Mr. Bernhardt. They claimed the right to explore all “relevant” information. Plaintiffs’ refusal to describe the information sought from Mr. Bernhardt makes it difficult for the Court, and Defendants, to assess claims of relevance. As discussed above, however, Defendants are unaware of any discoverable information at this time that would be relevant and reasonably calculated to lead to the discovery of admissible evidence. A deposition of Mr. Bernhardt could thus necessarily only cover topics outside the scope of permissible discovery. As such, a protective order is needed to prevent the deposition.

**CONCLUSION**

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

Dated: November 12, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on November 12, 2003 I served the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of David L. Bernhardt* was served by Electronic Case Filing, and on the following who are not registered for Electronic Case Filing in the manner indicated:

Per the Court's Order of April 17, 2003,  
by Facsimile

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
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(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 Interior Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of David L. Bernhardt. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants' Motion for a Protective Order is GRANTED; it is further

ORDERED that Plaintiffs are precluded from deposing Mr. Bernhardt at this time.

SO ORDERED.

Date: \_\_\_\_\_

\_\_\_\_\_  
ROYCE C. LAMBERTH  
United States District Judge

cc:

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November 4, 2003

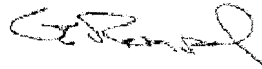
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF DEPOSITION was served on the following by facsimile, pursuant to agreement, on this day, November 4, 2003.

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\_\_\_\_\_  
Geoffrey M. Rempel

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Elouise Cobell	.	Docket No. CA 96-1285 RCL
	.	
Plaintiff,	.	
	.	Washington, D.C.
vs.	.	Friday, November 6, 1998
	.	2:07 p.m.
Bruce Babbitt,	.	
	.	
Defendant.	.	
.....	.	

Transcript of Hearing On Discovery Motions  
Before the Honorable Royce C. Lamberth  
United States District Judge

APPEARANCES:

For the Plaintiff:	Robert Peregoy, Esq.
	Dennis Gingold, Esq.
	Keith Harper, Esq.
	Lorna Babby, Esq.

For the Defendant:	Lewis Weiner, Esq.
	Edith Blackwell, Esq.
	Connie Lundgrin, Esq.

Court Reporter:	WILLIAM D. MC ALLISTER
	Official Court Reporter
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Proceedings reported by stenomask, transcript produced  
from dictation

Pages 1 through 29

## P R O C E E D I N G S

1  
2 THE CLERK: This is the case in the matter of  
3 Civil Action No. 96-1285, Cobell v. Bruce Babbitt, Mr. Peregoy  
4 and Mr. Gingold, Mr. Harper and Ms. Babby for the plaintiff. M.  
5 Weiner, Ms. Blackwell and Ms. Lundgrin for the defendant.

6 THE COURT: I have some initial comments I want to  
7 make and I do have some questions I want to ask counsel.

8 Regarding the last round of the discovery disputes, it  
9 appears to me the court now having ruled on the questions, a lot  
10 of that is moot. The one part of it that is not moot is this  
11 notion as to whether or not these individuals who were noticed  
12 for depositions have to appear as government employees in  
13 Washington, and I had two comments to make about that.

14 First, I don't know what's happened to the notion that  
15 I was trying to set forth in May about civility, but I don't  
16 think that the plaintiff should have noticed those depositions  
17 without a discussion about dates with the defendants first and  
18 perhaps this other question could have been surfaced at the same  
19 time about capacities, if there had been that kind of  
20 discussion.

21 In any event, I would expect that dates can be agreed  
22 upon. Both sides profess that they are willing to agree upon  
23 dates, and I would expect that dates could be agreed upon by a  
24 civil discussion between counsel.

25 As to the question of the depositions being noticed to

1 named the people without their titles, I think the defendants  
2 have the better of that argument, and I think there should be  
3 re-notices with the name of the individual, and their title which  
4 then makes it clear that they're appearing as an agent of the  
5 government. And under my prior order, then they would have to  
6 appear here in Washington as the agent of the government, and I  
7 would think that you ought to sit down and talk about those  
8 names and proper titles and dates, and within five days of  
9 today, try to come to some agreement on those so that the re-  
10 notices can be accepted and there can be no further debate about  
11 all of that.

12           If there is any further debate, my notion is to move  
13 the next scheduled status date from the November 17th probably  
14 to the 23rd at 2:00 if all counsel were available and any  
15 continuing dispute about this last round, I would then resolve  
16 it -- I'm sorry, November 23rd 2:00 p.m. status, would everyone  
17 be available then?

18           MR. WEINER: Yes, Your Honor.

19           MR. GINGOLD: Yes, Your Honor.

20           MR. WEINER: Your Honor, a point of clarification,  
21 five days, I assume you mean next Friday?

22           THE COURT: Right. Five business days.

23           Then, with that understanding, the Motion to Quash and  
24 for a Protective Order filed on the 26th, I guess, and the  
25 Motion for Protective Order on the 23rd are all denied without

1 prejudice to revisiting the issues if it becomes necessary at  
2 the November 23rd hearing.

3           Now, in terms of the other pending motions that relate  
4 to the prospective relief case, I have the motions filed in July  
5 that regard the third formal request for production of documents  
6 and the Motion for Protective Order that relates to that third  
7 formal request for production, and in connection with that, the  
8 argument as to whether or not the government needs to go through  
9 and make their formal claims of privilege as to any of those  
10 documents that it does not produce, and my determination is that  
11 I would want to see those privilege claims and privilege logs  
12 before I rule on those questions.

13           And so, I want to set a date, and I would think we  
14 could set a date of 30 days from today which would then be  
15 December 6th. It is a Sunday, so we would do it December 7th  
16 for that production and then anything that's not produced, be  
17 accompanied by a proper privilege log by December 7th which in  
18 effect gives the government the enlargement of time but denies  
19 the protective regarding the third formal request.

20           MR. WEINER: Your Honor, with regard to the 30 days,  
21 given the voluminous nature of the documents that are requested  
22 and the exercise that is going to be required to go through each  
23 one to create a privilege log because they requested attorneys  
24 documents, 30 days, I've been advised is going to be an  
25 insufficient amount of time for my client to collect those

1 documents with the other discovery obligations that we have in  
2 this case.

3 THE COURT: Okay. A motion to further extend the time  
4 beyond December 7th, I will address at the November 23rd  
5 hearing, and whatever evidence you can give me about volume and  
6 that sort of stuff, you should be able to assess that by the  
7 23rd and give me some information that would let the court make  
8 an informed judgement about whether that should be extended  
9 beyond December 7th.

10 Now, the last remaining issue goes to the search for  
11 documents relating to the plaintiffs, the named plaintiffs and I  
12 take it that in one filing by the defendants they said  
13 defendants have waited until now to begin the statistical sample  
14 because we didn't want to bear the unreasonable burden of  
15 producing documents for two separate statistical samples. If we  
16 begin our physical sampling, then we can include the five named  
17 plaintiffs in the search for additional documents.

18 Since, obviously in light of my ruling, each side is  
19 going to have its own statistical sampling or whatever, I don't  
20 know how that impacts on the search for the remaining documents  
21 for the named plaintiffs.

22 But the first question is whether the court will  
23 modify its prior orders requiring those documents to be  
24 produced. The court will not and that motion is denied.

25 The second question is then when the government can

1 bring itself into compliance with the prior orders requiring the  
2 documents to be produced as to the named plaintiffs and again  
3 perhaps you can tell me more at the November 23rd hearing how  
4 you expect to go about bringing yourself into compliance.

5           And I think you have to figure out how you're going to  
6 go forward now that you're not going to have a joint sampling  
7 search. You'll have to figure out how you're going to go about  
8 doing the search and we can cover that at the November 23rd  
9 hearing as well, unless you want to say something further about  
10 that today. You're not required to, but you may, if you wish.

11           [Pause.]

12           THE COURT: All right. Then the last issue I have is  
13 this remaining issue on the retrospective relief in the  
14 defendant's Motion for Protective Order on the attorney's  
15 depositions and the other depositions where the plaintiffs were  
16 seeking information that would help in establishing a trial date  
17 for the bifurcated part of the case regarding retrospective  
18 relief.

19           It seemed to me that it would make more sense for the  
20 court to simply have the information about what sort of  
21 remaining production and discovery has to be done for the  
22 retrospective case in order to set a date and then the court can  
23 simply a date, so that I don't know that this kind of discovery  
24 is either all that helpful or all that useful, and I would think  
25 that I could simply have a hearing and we'll talk about how much



1 time it would take for everyone to explain their positions about  
2 what discovery we need, but I would think if I did a two- or a  
3 three-hour hearing on the 23rd, we might well be able to simply  
4 get the information and set the date, if the plaintiffs have in  
5 mind what information you need for the retrospective case and  
6 the government can have knowledgeable people here that can  
7 answer what kind of search time we're talking about to actually  
8 produce those.

9           My notion would be at the end of the 23rd to have  
10 enough information that I would just set a date for the second  
11 phase of the trial with some notion of what is going to be  
12 required to get all the production of documents and whatever  
13 else is necessary for both sides to go to that second phase of  
14 the trial.

15           Does that pose any problems for either side? And if  
16 you think it would take longer than a couple of hours, we could  
17 do these prospective things that day and do that the next day.  
18 I don't know what kind of time frame you would have in mind to  
19 educate the court about what we're talking about in terms of  
20 searches and so on.

21           MR. WEINER: Your Honor, given the fact that the 23rd  
22 is on a Monday and the type of hearing that you are talking  
23 about with respect to retrospective relief would require us to  
24 bring people in from out of town and we would prefer to do it on  
25 two separate days.

1 THE COURT: Okay.

2 MR. WEINER: We can marshal the resources that we need  
3 that are here in Washington for the hearing on the 23rd and have  
4 the other on the 24th.

5 THE COURT: Is that agreeable to the plaintiffs?

6 MR. GINGOLD: Yes, Your Honor.

7 THE COURT: If we do it that way, we do it on 10:00  
8 a.m. on the 24th for retrospective discovery issues and setting  
9 a date for that trial and we would go the 23rd at 2:00 p.m. on  
10 the prospective issues that we've talked about here today.

11 Then is there anything else we need to cover today?

12 MR. WEINER: Yes, Your Honor, there is.

13 As you know, Your Honor, we received a copy of the  
14 court's order yesterday and it is clear that order does give the  
15 parties some much needed direction on what to go and thank you  
16 for that.

17 The opinion does raise some questions in our mind  
18 about the scope of permissible discovery. It seems that the  
19 hearings on the 24th --

20 THE COURT: Oh, I'm sorry, that reminds me. You had  
21 one other point that I didn't specifically cover.

22 I did not intent, and one of the reasons for having  
23 monthly discovery conferences and statuses, I did not intend for  
24 any of the presumptive limits in our local rules to apply to  
25 this case. I understand the prior comment at a status only

1 dealt with interrogatories but I don't intend for any of those  
2 presumptive limits to apply. They're just presumptions for a  
3 court to tailor to the case and I'm doing the tailoring by being  
4 here every month and seeing you all every month.

5 MR. WEINER: Thank you.

6 THE COURT: So, you can forget all of those arguments  
7 about presumptive limits.

8 MR. WEINER: Thank you for that clarification, Your  
9 Honor.

10 The court's order of yesterday does address a great  
11 many issues. It also raises some questions in our mind about  
12 the scope of discovery going forward. What discovery is  
13 permissible in light of the fact there are APA claims, non-APA  
14 claims, whether in fact we have to and when we would have to  
15 submit an administrative record.

16 THE COURT: I agree.

17 MR. WEINER: And in that regard, it is unclear today,  
18 right now, what our obligations are with responding to  
19 plaintiff's oversized discovery requests that we received on the  
20 last day for discovery and so on.

21 THE COURT: I meant to say I would extend that date.  
22 You asked for an extension and I would extend that date to  
23 December 1st. And then if you think you have beyond December  
24 the 1st, on that date we can take that up as a Motion to Extend  
25 it again at that same hearing on the 23rd. So that gives you an

1 additional two weeks beyond your November 17th or whatever it  
2 was.

3 MR. WEINER: Thank you, Your Honor.

4 Within the scope of the discovery that was served on  
5 defendants, however, is a series of discovery requests relating  
6 solely to the government's High Level Implementation Plan.  
7 Among the questions we have and we can either address them I  
8 guess piecemeal today or have the opportunity to have more than  
9 an opportunity to read the decision once or twice and deal with  
10 them on the 23rd.

11 But, for example, now the court has defined the High  
12 Level Implementation Plan as final agency action, are plaintiffs  
13 entitled to extra record review of the HLIP, the High Level  
14 Implementation Plan. It would seem that extra record review  
15 would be inconsistent with the court's finding that that is  
16 final agency action and the court's review would not be de novo  
17 but rather on the record that would be submitted by the  
18 government.

19 THE COURT: If I reach the APA issue.

20 MR. WEINER: Right. Which would then leads me to the  
21 next question. We have an order in this case that bifurcates  
22 between what we have call prospective and retrospective. Among  
23 the options now could be that perhaps a more appropriate  
24 bifurcation, and I have not thought this through fully, would be  
25 between statutory and non-statutory claims. And I don't know if

1 the court anticipates that we will address all of these issues  
2 on the 23rd.

3 THE COURT: I think we can.

4 MR. WEINER: It also appears that the court in its  
5 November 5th order anticipates some Motion for Summary Judgment  
6 briefing, yet the existing scheduling order doesn't account for  
7 that.

8 THE COURT: I understand. I looked at the old orders  
9 to see if it did and it does not. I think we've got to get all  
10 of the discovery completed and then put that into the process, I  
11 agree, if the parties think that it would be fruitful.

12 MR. WEINER: Well, I think that perhaps one thing that  
13 might be fruitful is if let's say by the 17th which is the date  
14 the original scheduling order was held, that perhaps each party  
15 could submit a proposed scheduling order or a proposed  
16 management plan.

17 I know we've been down that road once before. But  
18 with the guidance offered by the November 5th hearing, perhaps  
19 that would give the court an anticipation of the 23rd, some idea  
20 as to (a) how the courts are interpreting the November 5th order  
21 which may require some additional elucidation. And second, what  
22 we are planning to do in light of that and we would submit that  
23 the 17th would give us enough time with the other things we have  
24 on our plate to do that.

25 THE COURT: I don't have any problem with that. Does

1 that sound all right to you?

2 MR. GINGOLD: Yes, Your Honor.

3 MR. WEINER: Your Honor, there are some other issues  
4 that I think need to be addressed at this point for purposes of  
5 efficiency. As the court may be aware, we have taken some  
6 depositions in this case. Those depositions have been thwarted  
7 to a great extent by plaintiff's conduct in those depositions in  
8 refusing to allow witnesses to answer questions without the  
9 assertion of privilege.

10 As you may recall in plaintiff's memorandum regarding  
11 the sampling approach, they announced to the court that  
12 plaintiff's had abandoned statistical sampling because it was  
13 unworkable and had adopted their own approach.

14 THE COURT: I thought they said they adopted joint?

15 MR. WEINER: No. They said, "The fact that the  
16 mathematical sampling approach hitherto investigated has proven  
17 unfeasible, of course, does not leave plaintiffs without a  
18 remedy. A remedy, accordingly we have gone back to the drawing  
19 board to develop with Price, Waterhouse, Coopers a different  
20 method of proving the corrections that should be applied to the  
21 account. We will apply this method in the traditional way of  
22 the adversary system."

23 THE COURT: Meaning they picked their own samples.

24 MR. WEINER: Right. When we asked -- No. They have  
25 said they're not going to use statistical sampling.

1 THE COURT: All right.

2 MR. WEINER: But when we asked plaintiff's expert  
3 about their plan, they were instructed by their attorney not to  
4 answer the question, not on any assertion of any privilege. I'm  
5 flabbergasted that they would instruct a witness without the  
6 assertion of privilege not to answer a question relating to a  
7 plan that they have alleged in a pleading before this court they  
8 have adopted. The witness first said we haven't adopted a plan,  
9 which led me to believe, well, did you mislead the court or are  
10 you misleading me now. And then when I pressed the issue, they  
11 were instructed by their attorneys not to answer the question.  
12 That is highly improper, Your Honor.

13 We are entitled to know what their plan is for  
14 purposes of, if nothing else, recommending a trial date to the  
15 court. They've told the court they could go to trial in six  
16 months, based upon this plan. They won't let me find out what  
17 this plan is. That's improper.

18 THE COURT: Okay.

19 MR. WEINER: We asked plaintiffs questions regarding  
20 their funding sources.

21 THE COURT: Who is the witness?

22 MR. WEINER: The witness was Jessica Pollner, P-O-L-L-  
23 N-E-R.

24 THE COURT: Okay.

25 MR. WEINER: We asked the same witness, the funding

1 sources of plaintiff's funds for the litigation. They  
2 instructed the witness not to answer, not based on the assertion  
3 of any privilege. When we asked what the basis of the objection  
4 was, we were told because plaintiff's fear that that funding  
5 source or foundation may be subject of some harassment by some  
6 source.

7           Your Honor, we're entitled to find out that  
8 information to find out who the real party in interest in the  
9 case is. Again, there was no assertion of privilege that would  
10 otherwise properly frame an instruction to a witness not to  
11 answer. These instructions to have witnesses not to answer the  
12 question without foundation of privilege have continued.

13           Yesterday, we were trying to take the deposition of  
14 another Price, Waterhouse employee. Plaintiff on the record  
15 said that they would refuse to allow the witness to answer any  
16 questions about plaintiff's statistical sampling plan.

17           Your Honor, it's relevant. It's discoverable. It's  
18 not privileged. It relates to matters that have been put before  
19 the court and that we need in order to make recommendations to  
20 the court. Plaintiff's instructions are improper and are  
21 unnecessarily delaying these depositions. They refuse to allow  
22 the witness to answer any questions in which he was expressing  
23 an opinion.

24           Your Honor, when plaintiffs have submitted to the  
25 court a witness list of 120 witnesses, when we asked two of



1 these witnesses if the subject matter they were going to testify  
2 about is what is indicated in the witness list, they said, I  
3 don't know. We don't know what we're going to testify about.  
4 No one asked us. We haven't decided yet.

5           And we said, what else will you testify. They were  
6 instructed not to answer. It was premature. When we asked them  
7 their opinion about things, they were instructed not to answer.

8           THE COURT: I don't know that you can ask the witness  
9 what they expect to testify about. You're talking about a  
10 nonexpert?

11           MR. WEINER: Both the experts and the non-experts,  
12 they were instructed not to answer.

13           THE COURT: Well, it may be different for the expert.  
14 But I mean, you can ask a witness what they know.

15           MR. WEINER: I certainly can, Your Honor. I'm also  
16 entitled to ask the witness about his opinions, even if it's a  
17 fact witness.

18           THE COURT: I agree. But I don't think you can ask a  
19 witness what they expect to testify about.

20           MR. WEINER: Your Honor, we were trying to understand  
21 what the source of the identification of the subject matter was  
22 in the witness list.

23           THE COURT: Well, wouldn't that normally be posed by  
24 interrogatory to a party?

25           MR. WEINER: It could be, Your Honor, but we were

1 doing it through deposition. But in any event, it was a proper  
2 question. The witness was instructed not to answer the  
3 question. I cannot explain any justification nor could  
4 plaintiffs counsel.

5 THE COURT: Well, how could the witness answer that  
6 question without getting into attorney work product?

7 MR. WEINER: Well, I'm trying to find out what facts  
8 the witness has about things that they could testify about.

9 THE COURT: I understand. You can ask that, but when  
10 you ask them what they expect to testify about, wouldn't that  
11 necessarily involve their discussion with the attorney?

12 MR. WEINER: Possibly, Your Honor, but that wasn't the  
13 basis upon they were instructed not to answer.

14 But again, I asked the witness, one witness, an  
15 alleged fact witness, he said he was testifying based upon  
16 documents he had reviewed.

17 In a sense and there is case law to support this  
18 proposition, that witness is a limited expert with respect to  
19 the documents. We're entitled to ask the witness about his  
20 opinions of the relevance of the documents, the documents he has  
21 reviewed and he hasn't reviewed. Again, those questions were  
22 blocked.

23 I know of no foundation or no basis to instruct a  
24 witness in a deposition not to answer a question because  
25 plaintiffs don't like the questions that are being asked if

1 that's what's happening here.

2           There is another issue that has arisen, Your Honor,  
3 that I must bring up at this point that is not in any of the  
4 materials that we've filed with the court.

5           We have been advised that one of plaintiff's counsel,  
6 Bob Peregoy called Donna Irwin, who is the Director of the  
7 Office of Trust Funds Management, and asked her about discovery  
8 issues.

9           Plaintiffs know that Ms. Irwin is the Director of the  
10 Office of Trust Funds Management. They have disposed her and  
11 they know that she is represented by counsel in this case and  
12 they called her for the specific reason of asking her if they  
13 asked for certain documents in discovery, would she know what  
14 they were asking for.

15           Your Honor, that is as clear a violation of the ethics  
16 rules as I can imagine. I recognize that there are exceptions  
17 to Rule 4.2 that cover contact by people who know another is  
18 represented by counsel, but this contact is clearly outside the  
19 scope of that exception. This falls within the purview of, I  
20 believe subparagraph 7 of Rule 4.2, that precludes discussions  
21 with someone an attorney knows to be represented by counsel for  
22 purposes of litigation. That's why the conduct was done. Your  
23 Honor, we request, to the extent we can now --

24           THE COURT: She is not a party.

25           MR. WEINER: Your Honor, under your definition of a

1 party, she is within our control.

2 THE COURT: I understand.

3 MR. WEINER: She is the Director of the of Trust Funds  
4 Management.

5 THE COURT: I understand.

6 MR. WEINER: She is not named as a party, but they  
7 know her in this litigation in her capacity as the Director of  
8 Trust Funds Management to be represented by us. If plaintiffs  
9 had any questions about what discovery they wanted, they're  
10 obligated to go through us. They contacted her for the express  
11 purpose of saying, if we ask for a document, will you know what  
12 it is, can you start gathering those documents. That is highly  
13 improper, Your Honor, and we request that the specific -- a  
14 request for production of documents that plaintiffs requested  
15 and got through this impermissible be struck. This is  
16 effectively fruit of the poison tree.

17 THE COURT: I'm not striking anything without a  
18 written motion.

19 MR. WEINER: We will then file a written motion, but I  
20 think the plaintiffs need to be accountable to the court for  
21 their actions, especially when they rise to the level of  
22 egregiousness such as is this.

23 THE COURT: Okay. Any other issues you want to raise?

24 MR. WEINER: Not at this time, Your Honor. We will  
25 work with plaintiff's counsel to get new notices out to the

1 individuals. We will make the individuals available for  
2 deposition in Washington assuming that they are here in their  
3 official capacity.

4 THE COURT: All right.

5 MR. GINGOLD: Your Honor, Mr. Weiner has raised  
6 several issues which I think we need to address, in addition to  
7 a couple of other additional issues.

8 With regard to the last which has been characterize as  
9 an egregious violation of D.C. Bar Rules, I would like to point  
10 out that first, Ms. Irwin requested through another Native-  
11 American Rights Fund attorney that Mr. Peregoy give her a call  
12 with regard to obtaining certain public information.

13 Mr. Peregoy contacted the D.C. Bar office, discussed  
14 with them the issues with regard to contacting employees of the  
15 Department of Interior under circumstances identical to this and  
16 was given clearance to discuss with the Department of Interior  
17 employees this information, and after thoroughly review the  
18 issues, the telephone call was made in response to the request  
19 by Ms. Irwin.

20 So to characterize this as egregious, we think is  
21 unfortunately consistent with this litigation as jumping the gun  
22 without understanding all of the facts.

23 THE COURT: Well, you know, I understand because I  
24 have some familiarity with the issue that government officials  
25 are still government officials and the public can talk to

1 government officials. But, you know, when there's litigation  
2 ongoing, I would hope that counsel could talk to each other  
3 about these kinds of matters before calling bar counsel and  
4 seeing if bar counsel says, no, you won't be disciplined if you  
5 do it.

6           Something is degenerating here when you all can't talk  
7 to each other and I don't know how to get that back on track,  
8 but we're going to have a trial here. The government now knows  
9 it from my opinion yesterday. So, I mean, you all need to get  
10 back on track that there has to be a way to work together to get  
11 this case tried without charges and countercharges and claims of  
12 bar violations and you all running to see whether or not it  
13 would be a bar violation. You've got to work together some way  
14 or we're never going to get this case tried.

15           And it's in the plaintiff's interest to get it tried  
16 promptly. It's in the government's interest to try to work with  
17 you and they're going to have to work with you. They've been on  
18 some pipe dream about this case was going to go away, but they  
19 now know it's not going to go away after my ruling yesterday.  
20 So you all are going to have to figure out how to work together  
21 in this case.

22           And all of this stuff about calling up the bar and  
23 seeing if it would be unethical and I agree it's not, and then  
24 they're making charges of ethical violations aren't going to  
25 lead anywhere except side tracking with a lot of paper on

1 extraneous issues like all of this stuff I read last night. You  
2 all have to got to figure how to work together, both sides do,  
3 because this case is going to trial.

4 And cooperatively, it will go to trial sooner from the  
5 plaintiff's point of view. Uncooperatively, I agree the trial  
6 will be delayed, but, you know, the government doesn't want to  
7 head down that road with me and the government knows me. They  
8 know they don't want to head down that road with me.

9 MR. GINGOLD: Thank you, Your Honor. We will endeavor  
10 to do everything possible to work cooperatively with the  
11 government going forward. There has been some problems.

12 THE COURT: I think maybe both sides need to rethink  
13 where you are and have a good meeting next week and talk about  
14 where you are, because there needs to be a dose of realism and I  
15 think my 50 pages yesterday should engender a dose of realism  
16 about where this case is headed.

17 MR. GINGOLD: Thank you. With regard to a couple of  
18 issues in addition that Mr. Weiner has raised. The issues with  
19 regard to the witnesses in the depositions are understood by us  
20 a bit differently than understood by Mr. Weiner.

21 We had a situation where we have been trying to comply  
22 with the court's scheduling order. We have noticed our  
23 depositions, that's correct, prior to discussing the time and  
24 dates with the government. In every single deposition notice  
25 that we've issued in the past, we have worked with the

1 government and accommodated every possibility of an  
2 inconvenience either for counsel or for the witnesses.

3 THE COURT: I agree.

4 MR. GINGOLD: That is what we were fully intending to  
5 do with regard to these notices.

6 THE COURT: But the more civil way to practice is to  
7 call first and that is what I encourage lawyers to do. That's  
8 why I made my initial comments.

9 MR. GINGOLD: Your Honor, we will do that, Your Honor.  
10 We do not want to get into all of other squabbles in that regard  
11 which are too numerous to mention and burden this court.

12 However, there is a serious issue with regard to the  
13 witnesses' depositions, we need some guidance on.

14 THE COURT: Okay.

15 MR. GINGOLD: There were Price, Waterhouse witnesses  
16 that were deposed this week. One is Jessica Pollner, who is the  
17 principal statistical expert of Price, Waterhouse, Coopers. The  
18 other is Jeffrey Rampel (Ph), who is a third year professional  
19 staff member at Price, Waterhouse, Coopers.

20 We understood the scheduling order because of the time  
21 constraints to focus on obtaining information relative to the  
22 first component of the case which is fixing the system.

23 We have not endeavored to obtain additional  
24 information in this regard with regard to the second component  
25 of the case because of the fact we have a trial scheduled for



1 March 15th. Tight schedule, we all know that and we're trying  
2 to stick to it.

3 As of right now, the government has even provided us  
4 with a witness list.

5 Now, the government hasn't seemed to pay much  
6 attention to the requirements of the scheduling orders. The  
7 government, as I understood their briefs that were recently  
8 filed, indicated that the burdens that have been placed on them  
9 based on our discovery requests have made it difficult for them  
10 to comply within the time periods established.

11 In the course of the last two depositions this week,  
12 in the first deposition there were seven government lawyers  
13 there. Second deposition, there were six government lawyers.

14 Out of approximately seven to seven and a half hours  
15 of the first deposition, Ms. Pollner was asked probably five to  
16 six hours of questions unrelated to fixing the system or related  
17 to the expert opinion that is to be prepared relative to fixing  
18 the system and provided to the Department of Justice on or  
19 before December the 15th.

20 In the context of the difficulty we have had, number  
21 one, we have no expert opinion written yet. We are preparing  
22 it. To provide information with regard to an expert opinion on  
23 fixing the system from a statistician who stated repeatedly that  
24 she was not an expert on fixing the system did not seem  
25 reasonable at that point in time for her to answer.

1           Number one, she claimed she wasn't competent to answer  
2 the question, and number two, without regard to whatever Price,  
3 Waterhouse, Coopers is doing, they have not prepared it yet.  
4 They are considering various things and we have not even met  
5 with Price, Waterhouse, Coopers with regard to that report.

6           So we felt after hours and hours of questioning with  
7 that regard, with the continuation of Ms. Pollner's deposition  
8 on Monday with regard to the statistical analysis which is  
9 unrelated to the first part of the case, we think it's highly  
10 inappropriate at this point in time, Your Honor.

11           With regard to Mr. Rampel, Mr. Rampel has no authority  
12 on behalf Price, Waterhouse, and he stated it repeatedly, to  
13 offer any opinions with regard to any of the issues he's working  
14 on.

15           Numerous questions were asked as late as five minutes  
16 after 6:00 last night about Mr. Rampel's understanding or  
17 involvement in the statistical sampling issues in this case.

18           While we did have a break for lunch and we did have a  
19 lunch for us all to review your opinion yesterday, Your Honor,  
20 nevertheless the deposition from 9:00 or 9:20 in the morning  
21 until 6:05 in the evening on questions that he has no authority  
22 to answer, on questions that he is not an expert on, we think is  
23 inappropriate to say the least, and at a certain point in time  
24 we had to step in and stop this.

25           If the government doesn't have --

1 THE COURT: The problem with that is, if the answer to  
2 the question at a noted deposition is not privileged, then the  
3 way to stop is to ask the court, which you can do orally by  
4 contacting my chambers, for a protective order and I'll schedule  
5 a prompt hearing on it.

6 It's really not to just instruct the witness not to  
7 answer. On a matter not privileged, you've got to either recess  
8 the deposition and maybe you can agree on when you'll present  
9 the question to me or if you can't agree, contact my chambers  
10 and ask for an oral hearing on the Motion for Protective Order.  
11 But on non-privileged matters, that's the only option you really  
12 have opened to you.

13 I take it from your comments here today, you would  
14 like a protective order about continuing the deposition of  
15 Pollner and Rampel?

16 MR. GINGOLD: That's correct, Your Honor.

17 THE COURT: And I'll give you that until I can hear  
18 the matter and I can either hear it the 23rd or the 24th.

19 MR. GINGOLD: Thank you, Your Honor. We also have  
20 depositions scheduled of another Price, Waterhouse witness, Ms.  
21 Gooding, on Monday. My expectation is the same approach is  
22 going to be needed in her regard, and we would request --

23 THE COURT: What is her name?

24 MR. GINGOLD: Laura Gooding. G-O-O-D-I-N-G. And it's  
25 important in this regard when we provided the defendants with

1 our witness list, we identified Ms. Pollner and Mr. Rampel and  
2 Ms. Gooding as fact witnesses with regard to fixing the system,  
3 not expert witnesses and only fact witnesses with regard to  
4 their observations made during the site visits. The way the  
5 language of the witness list is written, it is with regard to  
6 agency or area office trust practices essentially and it's only  
7 with regard to their observations there.

8           In fact there has been no discussions with Price,  
9 Waterhouse about the scope of their testimony, the nature of the  
10 testimony. The witnesses specifically stated that if they were  
11 to testified they were expected to testify on what they  
12 observed.

13           Nevertheless, after six or seven or eight hours of  
14 questioning, much of which was substantially beyond that -- we  
15 probably should have called you, Your Honor, but nevertheless we  
16 terminated the deposition. We will endeavor to call your honor  
17 in the future.

18           THE COURT: I will temporarily stay those until the  
19 November 23rd hearing then.

20           MR. GINGOLD: Thank you, Your Honor. In that regard,  
21 there's one more point. We have provided or will provide Ms.  
22 Cobell, the named plaintiff in the case, for deposition on the  
23 16th based on an agreement with counsel.

24           The issue with regard to the name foundations that  
25 have provided funding for this case was asked of these fact

1 witnesses, and in addition we expect that same question to be  
2 asked of Ms. Cobell, and we would like the court to consider  
3 this issue specifically.

4 THE COURT: Do you need a Motion for Protective Order  
5 which ought to be in writing as to that kind of an issue.

6 MR. GINGOLD: We will do that, Your Honor.

7 THE COURT: As soon as you get it filed, then you can  
8 rely on having filed the Motion for Protective Order to protect  
9 her from answering those questions on the 16th.

10 MR. GINGOLD: Thank you, Your Honor.

11 THE COURT: Until I rule on the question of whether  
12 that's an appropriate line of questions.

13 MR. GINGOLD: Thank you, Your Honor.

14 THE COURT: But you need your written Motion for  
15 Protective Order filed before that deposition on the 16th. And  
16 in this instance, having discussed, I won't insist that it  
17 granted but just be filed.

18 MR. GINGOLD: Thank you very much, Your Honor.

19 THE COURT: All right. Any other issues you want to  
20 raise, Mr. Weiner?

21 MR. WEINER: Yes, Your Honor.

22 Your Honor, in the context of the protective orders  
23 that you've just described to regarding Ms. Pollner's  
24 deposition, the government is prejudiced by that significantly.

25 We know nothing about plaintiff's proposed plan. They

1 refused to allow the witness, their expert who testified that  
2 she is the statistical expert who will testify about their plan,  
3 to tell us what it is, what it anticipates.

4           We're now expected to show up on the 24th for a  
5 hearing on dates setting the retrospective relief that  
6 incorporates their plan, and yet when we try to take discovery  
7 from their witness who can tell us what their plan was, they  
8 refused to allow her to testify, and now, we're not going --

9           THE COURT: Well, you're in the same position then  
10 where you wouldn't let any of your people testify and they came  
11 in and moved on that.

12           MR. WEINER: Your Honor, they have the discovery.  
13 They know everything there is to know about our system.

14           THE COURT: Any other issue you want to raise?

15           MR. WEINER: Yes, Your Honor. I do think that  
16 plaintiffs' characterization of our depositions is terribly  
17 misleading and we would like to set the straight on that.

18           THE COURT: File them with me. Anything else you want  
19 to raise?

20           MR. WEINER: Again, Your Honor, we would request an  
21 opportunity to have the opportunity to find out what their  
22 statistical plan is before we have to recommend a trial date to  
23 this court on the 24th.

24           THE COURT: You don't have to recommend any date. I'm  
25 going to ask facts and I'll decide the date. I'm not asking you

1 for any recommendation.

2 I'll see you all on the 23rd.

3 (Proceedings concluded at 2:46 p.m.)

4 CERTIFICATE OF REPORTER

5 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT  
6 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

WILLIAM D. MCALLISTER  
OFFICIAL COURT REPORTER

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