IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER REGARDING PLAINTIFFS' NOTICE OF DEPOSITION OF GABRIEL SNEEZY**

On November 4, 2003, without any prior communication to counsel for Defendants,[1] Plaintiffs noticed the deposition of Gabriel Sneezy, the Acting Director, Office of Appraisal Services, Office of the Special Trustee, Department of the Interior for November 17, 2003 ("Notice of Deposition") (attached as Exhibit 1). Plaintiffs are not permitted to depose Mr. Sneezy because they are not entitled to any discovery at this time. Further, even if some discovery were permitted now, Plaintiffs cannot demonstrate how discovery of Mr. Sneezy would be permitted under the principles of review for cases where jurisdiction is based upon the

[1] In noticing Mr. Sneezy's deposition without any effort to confer with Defendants about the availability of the deponent or 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). Plaintiffs similarly failed to heed the Court's admonition and, without prior communication with government counsel, have issued deposition notices for Secretary Norton, Associate Deputy Secretary James Cason, Michael Carr, Anson Baker, Deborah Gibbs Tschudy, Lonnie Kimball, Donna Erwin, David Bernhardt, Bert Edwards, Elouise Chicharello, and Lucy Querques Denett.

Administrative Procedure Act.[2] Finally, discovery from Mr. Sneezy 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. Sneezy.[3]

## ARGUMENT

### I. MR. SNEEZY'S DEPOSITION SHOULD NOT BE PERMITTED BECAUSE NO DISCOVERY IS ALLOWED 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 the Court's October 17, 2002 Phase 1.5 Trial Discovery Order did not authorize Plaintiffs 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. However, there currently is no order

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[2] Defendants note and reassert their continuing objection to discovery on the ground that such discovery is improper in an APA case. For that purpose, we incorporate by reference the arguments set forth in *Defendants' Motion For A Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior* at pages 5-7 (November 10, 2003).

[3] 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.

setting a discovery schedule for a Phase II trial, which would be years in the future given the structural injunction's timetable.

Nor are there other proceedings before the Court requiring discovery. Even if the noticed deposition of Mr. Sneezy were purportedly related to some future proceeding in this case,[4] 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. Sneezy.

## II. DISCOVERY FROM MR. SNEEZY 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. Sneezy 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 they would cover in a deposition beyond whatever is "relevant" to the litigation. Plaintiffs' refusal to describe the information sought from Mr. Sneezy makes it impossible for the Court and Defendants to assess claims of relevance. As discussed above, however, Defendants are unaware of any information in the

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[4] As explained in the next section, during the meet-and-confer discussion on November 5, 2003, Plaintiffs' counsel declined to articulate any specific reasons for deposing Mr. Sneezy.

possession of Mr. Sneezy at this time that would be relevant or reasonably calculated to lead to the discovery of admissible evidence. A deposition of Mr. Sneezy could thus necessarily only cover topics outside the scope of permissible discovery.

Moreover, the Defendants have filed a Notice of Appeal of the September 25, 2003 structural injunction, and the Court of Appeals issued an administrative stay of that injunction on November 12, 2003. Plaintiffs, therefore, have no basis for seeking to inquire about what Defendants are presently doing to comply with the structural injunction. As such, a protective order is warranted to prevent the deposition. Fed. R. Civ. P. 26(c) (protective order appropriate "to protect a party or person from annoyance, . . . oppression, or undue burden or expense.").

## CONCLUSION

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

Dated: November 14, 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/ John T. Stemplewicz

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(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on November 14, 2003 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Gabriel Sneezy* 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

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

**ORDER**

This matter comes before the Court on *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Gabriel Sneezy*. (Dkt. # _____). Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

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

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

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
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Civil Division
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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **ELOUISE PEPION COBELL, et al.,** | ) | |
| | ) | |
| **Plaintiffs** | ) | |
| | ) | |
| **v.** | ) | **Case No.1:96CV01285** |
| | ) | |
| **GALE NORTON, Secretary** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |
| | ) | |
| _____ | ) | |

**NOTICE OF DEPOSITION**

To: Mark E. Nagle
Assistant U.S. Attorney
Judiciary Center Building
555 Fourth Street, NW, Room 10-403
Washington, DC 20001

J. Christopher Kohn
United States Department of Justice
Civil Division
1100 L Street, NW, Room 10036
Washington, DC 20005

Attorneys for Defendants

PLEASE TAKE NOTICE, that on November 17, 2003, at the offices of Dennis M. Gingold, ("Plaintiffs' Counsel"), 607 14th Street, N.W., 9th Floor, Washington, D.C. 20005, plaintiffs in this action will take the deposition of **Gabriel Sneezy** ("Sneezy")**,** Acting Director, Office of Appraisal Services, Office of the Special Trustee, Department of the Interior.

This deposition will commence at **10:00 a.m.** and will continue from day to day until completed. Testimony will be recorded by stenographic means.

EXHIBIT 1
Defendants' Motion for a Protective Order
Regarding Plaintiffs' Notice of Deposition
of Gabriel Sneezy

DENNIS M. GINGOLD
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202 824-1448

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Attorneys for Plaintiffs

OF COUNSEL:

JOHN ECHOHAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

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.

Mark E. Nagle
Assistant U.S. Attorney
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J. Christopher Kohn
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Civil Division
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Earl Old Person (*Pro se*)
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P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

Geoffrey M. Rempel

COPY



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| Elouise Cobell | Docket No. CA 96-1285 RCL |
| Plaintiff, | |
| vs. | Washington, D.C.<br>Friday, November 6, 1998<br>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
Room 4806-B, U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2803
(202) 371-6446

Proceedings reported by stenomask, transcript produced from dictation

Pages 1 through 29



EXHIBIT 2
Defendants' Motion for a Protective Order
Regarding Plaintiffs' Notice of Deposition
of Gabriel Sneezy

PROCEEDINGS

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

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

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

First, 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 and perhaps this other question could have been surfaced at the same time about capacities, if there had been that kind of discussion.

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

As to the question of the depositions being noticed to

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

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

MR. WEINER: Yes, Your Honor.

MR. GINGOLD: Yes, Your Honor.

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

THE COURT: Right. Five business days.

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

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

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

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

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

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

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

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

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

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

The second question is then when the government can

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

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

[Pause.]

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

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

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

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

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

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

THE COURT: Okay.

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

THE COURT: Is that agreeable to the plaintiffs?

MR. GINGOLD: Yes, Your Honor.

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

Then is there anything else we need to cover today?

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

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

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

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

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

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

MR. WEINER: Thank you.

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

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

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

THE COURT: I agree.

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

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

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

MR. WEINER: Thank you, Your Honor.

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

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

THE COURT: If I reach the APA issue.

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

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

THE COURT: I think we can.

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

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

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

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

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

that sound all right to you?

MR. GINGOLD: Yes, Your Honor.

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

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

THE COURT: I thought they said they adopted joint?

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

THE COURT: Meaning they picked their own samples.

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

THE COURT: All right.

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

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

THE COURT: Okay.

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

THE COURT: Who is the witness?

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that's what's happening here.

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

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

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

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

THE COURT: She is not a party.

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

party, she is within our control.

THE COURT: I understand.

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

THE COURT: I understand.

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

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

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

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

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

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

THE COURT: All right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I agree.

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

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

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

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

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the government doesn't have --

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

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

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

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

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

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

THE COURT: What is her name?

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

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

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

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

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

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

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

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

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

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

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

MR. GINGOLD: Thank you, Your Honor.

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

MR. GINGOLD: Thank you, Your Honor.

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

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

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

MR. WEINER: Yes, Your Honor.

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

We know nothing about plaintiff's proposed plan. They

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

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

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

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

THE COURT: Any other issue you want to raise?

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

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

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

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

for any recommendation.

I'll see you all on the 23rd.

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

CERTIFICATE OF REPORTER

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

WILLIAM D. MCALLISTER
OFFICIAL COURT REPORTER