IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	No. 1:96CV01285 (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 LUCY QUERQUES DENETT

On November 6, 2003, without any prior communication to counsel for Defendants,[1] Plaintiffs noticed the deposition of Lucy Querques Denett, Associate Director for Minerals Revenue Management, Minerals Management Service, Department of the Interior, for November 19, 2003 ("Notice of Deposition") (attached as Exhibit 1). Plaintiffs are not permitted to depose Ms. Querques Denett because they are not entitled to any discovery at this time. Moreover, the lack of any proceedings makes it impossible to determine whether discovery from Ms. Querques Denett would be within the scope of permissible discovery under Fed. R. Civ. P. 26(b).

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[1] In noticing Ms. Querques Denett'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). 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 Gabriel Sneezy.

Accordingly, pursuant to Fed. R. Civ. P. 26(c), Defendants move for a protective order preventing the noticed deposition of Ms. Querques Denett.[2]

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.[3] However, there is no discovery order setting a discovery schedule for a Phase II trial.

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[2] As required by Fed. R. Civ. P. 26(c), and Local Rule 7(m), counsel for Defendants conferred with counsel for Plaintiffs on November 13, 2003 in an attempt to resolve this dispute without Court action. Plaintiffs expressed an intent to oppose the relief requested here.

[3] 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 Protective Order Regarding Plaintiffs' Notice of Deposition of the Secretary of Interior at pages 5-7 (November 10, 2003).

Nor are there other proceedings before the Court requiring discovery. Even if the noticed deposition of Ms. Querques Denett 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 Ms. Querques Denett.

II. DISCOVERY FROM MS. QUERQUES DENETT AT THIS TIME CANNOT BE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE

Since the scope of any future proceedings in this litigation remains undefined, it is impossible to determine, and Plaintiffs cannot show, that the discovery sought from Ms. Querques Denett 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.

The absence of any proceeding scheduled at this time containing triable issues of fact renders the determination of what would be "reasonably calculated to lead to the discovery of admissible evidence" premature, if not impossible. Under the circumstances, Plaintiffs' attempts to take discovery at this time amount to a roving fishing expedition with no discernible bounds. Indeed, during the meet and confer discussion initiated by Defendants' counsel on November 13, 2003, Plaintiffs' counsel indicated that Ms. Querques Denett's deposition would not necessarily be limited to any particular issue but claimed the right to take discovery at this time on any issues

that Plaintiffs consider related to "institutional reform" or an accounting.[4] A roving investigation, untethered to any proceeding for the adjudication claims and defenses, is not permissible discovery under Rule 26.[5]

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 needed 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.").

4/ During the meet and confer, Plaintiffs' counsel identified as one potential area of inquiry a November 5, 2003 press report regarding the results of a Minerals Management Service ("MMS") audit resulting in the recovery of underpayments of oil and gas royalties for tribal and allotted interests; Ms. Querques Denett was quoted in the press report. However, a press release concerning MMS' activities does not create any discovery rights that do not otherwise exist. Plaintiffs have not sought leave of court to take such discovery and, for the reasons stated above, Plaintiffs do not otherwise have the right to take discovery at this time.

5/ To the extent Plaintiffs have propounded this discovery for the purpose of investigating potential criminal contempt allegations, this Court's decision in Landmark Legal Foundation v. EPA, 272 F.Supp.2d 70, 76-77 (D.D.C. 2003), makes clear that the Plaintiffs cannot assume a prosecutorial role. See also Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 814 (1987) (reversible error to appoint the attorney for an interested private beneficiary as prosecutor of contempt allegations).

CONCLUSION

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

Dated: November 17, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 17, 2003 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Lucy Querques Denett* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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