

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 JAMES CASON  
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

On October 29, 2003, without any prior communication to counsel for Defendants, Plaintiffs noticed the deposition of James Cason, the Associate Deputy Secretary of the Department of the Interior, for December 4, 2003 ("Notice of Deposition") (attached as Exhibit 1). The Notice of Deposition also included two requests for production of documents. Notice of Deposition at 2. Plaintiffs are not permitted to depose Mr. Cason, or formally request production of documents, because they are not entitled to any discovery at this time. Even if discovery were appropriate now, Plaintiffs cannot show the requisite extraordinary circumstances that would justify the deposition of a high government official. Moreover, the lack of any proceedings makes it impossible to determine whether the requested discovery would be within the scope of permissible discovery under Rule 26(b). Accordingly, pursuant to Rule 26(c), Defendants move for a protective order preventing the noticed deposition of Mr. Cason and relieving Defendants of the responsibility of responding to the document requests.<sup>1</sup>

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<sup>1</sup> As required by Rule 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

## ARGUMENT

### **I. NO DISCOVERY IS AUTHORIZED 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 the Phase 1.5 trial.

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 the Interior to perform specific tasks.<sup>2</sup> Under the schedules established by the Court's September 25, 2003 orders, a Phase 2 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 2 trial.

Finally, there are no other proceedings before the Court requiring discovery. Even if the noticed deposition of Mr. Cason, and the accompanying document requests, were purportedly

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action. Plaintiffs expressed an intent to oppose the relief requested here.

<sup>2</sup> 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.

<sup>3</sup> 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).

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 requested discovery.

**II. MR. CASON’S DEPOSITION SHOULD NOT BE PERMITTED BECAUSE HIGH-RANKING GOVERNMENT OFFICIALS CANNOT BE DEPOSED ABSENT EXTRAORDINARY CIRCUMSTANCES**

Even if discovery were appropriate at this time, Plaintiffs would not be permitted to take the deposition of Mr. Cason, the Associate Deputy Secretary of the Department of the Interior. As the D.C. Circuit has made clear, “top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” Simplex Time-Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (citing United States v. Morgan, 313 U.S. 409, 422 (1941)); see also In re United States, 197 F.3d 310, 313-14 (8th Cir. 1999) (same); In re United States, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam) (“the practice of calling high officials as witnesses should be discouraged”); In re Office of Inspector Gen., 933 F.2d 276, 278 (5th Cir. 1991) (“exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted”).

The primary basis for this rule was explained in Capitol Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.D.C. 1964):

If the head of a government agency were subject to having his deposition taken concerning any litigation affecting his agency or any litigation between private parties which may indirectly involve some activity of the agency, we would find that the heads of government departments and members of the President’s Cabinet would be spending their time giving depositions and would have no opportunity to perform their functions.

See also Community Fed. Sav. & Loan v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983) (“Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants’ access to responsible governmental officials as sources of routine pre-trial discovery would result in a severe disruption of the government’s primary function.”).

The Court has applied this rule previously in this case. In a March 25, 1999 Order, the Court ruled that before Plaintiffs could take the depositions of high government officials they “shall be required to provide evidence demonstrating and proving: (A) that Plaintiffs have an extraordinary need for these particular depositions; and (B) that the precise information they seek from these individuals is available from no other source.” March 25, 1999 Order Granting Consolidated Motion for Protective Order at 1-2.

Plaintiffs cannot make the requisite showing of extraordinary need here. At the meet and confer discussion initiated by Defendants’ counsel on November 5, 2003, Plaintiffs’ counsel refused to identify the precise subject areas that they would cover during a deposition of Mr. Cason. They claimed the right to explore all “relevant” information.

If the document requests in the Notice of Deposition are any indication, it appears that at least one of the topics that Plaintiffs wish to explore in a deposition of Mr. Cason involves his testimony before Congress on October 29, 2003. See Request No. 1, Notice of Deposition at 2. Plaintiffs’ desire to appoint themselves as roving investigators does not qualify for the exceptional circumstances permitting a deposition of the Associate Deputy Secretary.<sup>4</sup> As the

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<sup>4</sup> As Associate Deputy Secretary, Mr. Cason shares authority and responsibility at the Secretarial level for the oversight and management of the Department’s Indian trust and associated reform efforts.

Eighth Circuit has explained, “[a]llegations that a high government official acted improperly are insufficient to justify the subpoena of that official unless the party seeking discovery provides compelling evidence of improper behavior and can show that he is entitled to relief as a result.” In re United States, 197 F.3d at 314. “[A]t a minimum,” Plaintiffs must demonstrate that the witness sought to be deposed would “possess information essential to [Plaintiffs’] case which is not obtainable from another source.” Id.; see also Alexander v. FBI, 186 F.R.D. 1, 4 (D.D.C. 1998). Because there are no current proceedings for which discovery is needed, Plaintiffs cannot demonstrate that any information is relevant to their case, let alone “essential.” Moreover, Plaintiffs cannot show that any information they would seek to elicit from Mr. Cason could not be obtained through other means. See Simplex, 766 F.2d at 587.

### **III. THE REQUESTED DISCOVERY CANNOT BE REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE**

Because the scope of any future proceedings in this litigation remains undefined, it is impossible to determine, and Plaintiffs cannot show, that the requested discovery 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 fishing expedition with no discernible bounds. A roving investigation untethered to any proceeding is not permissible discovery under Rule 26.<sup>5</sup>

### CONCLUSION

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

Dated: November 26, 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  
SANDRA P. SPOONER  
D.C. Bar No. 261495  
Deputy Director  
JOHN T. STEMPLEWICZ  
Senior Trial Counsel  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
(202) 514-7194

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<sup>5</sup> 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).

CERTIFICATE OF SERVICE

I hereby certify that, on November 26, 2003 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of James Cason and Request for Production of Documents* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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

/s/ Kevin P. Kingston  
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

**ORDER**

This matter comes before the Court on *Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of James Cason And Request For Production of Documents* (Dkt. # \_\_\_\_\_). 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 the Plaintiffs are precluded from deposing James Cason at this time;

ORDERED that Defendants need not respond to the document production requests included with the notice of deposition of Mr. Cason;

SO ORDERED.

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

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



cc:

Sandra P. Spooner  
John T. Stemplewicz  
Commercial Litigation Branch  
Civil Division  
P.O. Box 875  
Ben Franklin Station  
Washington, D.C. 20044-0875  
Fax (202) 514-9163

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

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

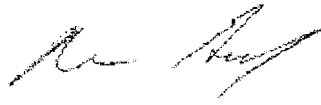
Elliott Levitas, Esq.  
1100 Peachtree Street, Suite 2800  
Atlanta, GA 30309-4530

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



before December 2, 2003:

1. All documents, including without limitation legal memoranda and opinions, memoranda, instructions, handwritten notes and marginalia, calendars, diaries, appointment books, schedulers, planners, Day-Timers, time records, voice mail, email, and the like, all hard copy documents, and electronic documents housed in, or created on, computers or personal digital assistants, whether the computers are owned or leased by the government, its agents, employees, Cason or any other individual, contractor, vendor, or any other entity, and any drafts thereof, that memorialize or were relied upon, considered (whether or not accepted or adopted), rejected, discarded, reviewed, or utilized in any way whatsoever in the preparation of, revision, amendment, modification, deletion, omission, or support for, each statement and representation made by Cason in his written and oral testimony before the Senate Committee on Indian Affairs on October 29, 2003 Declaration ("Cason Testimony").
2. A current resume or *curriculum vitae*, identifying and describing all licences, and professional certifications, and bonuses, promotions, and performance awards held by, or granted to, Cason.



OF COUNSEL:

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

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DENNIS M. GINGOLD  
D.C. Bar No. 417748  
607 14<sup>th</sup> Street., N.W.  
9th Floor  
Washington, D.C. 20005  
202 824-1448



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KEITH M. HARPER  
D.C. Bar No. 451956  
Native American Rights Fund  
1712 N Street, N.W.  
Washington, DC 20036-2976  
202 785-4166

Attorneys for Plaintiffs

October 29, 2003

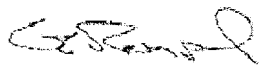
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing NOTICE OF DEPOSITION AND REQUEST FOR PRODUCTION OF DOCUMENTS was served on the following by facsimile, pursuant to agreement, on this day, October 29, 2003.

Mark E. Nagle  
Assistant U.S. Attorney  
Judiciary Center Building  
555 Fourth Street, N.W. Room 10-403  
Washington, D.C. 20001  
202.514.8780 (fax)

J. Christopher Kohn  
United States Department of Justice  
Civil Division  
1100 L Street, N.W. Room 10036  
Washington, D.C. 20005  
202.514.9163 (fax)

Earl Old Person (*Pro se*)  
Blackfeet Tribe  
P.O. Box 850  
Browning, MT 59417  
406.338.7530 (fax)



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Geoffrey M. Rempel