

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 96-1285 (RCL)
	)	
v.	)	
	)	
GALE A. NORTON, et al.,	)	
	)	
Defendants.	)	

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**DEFENDANTS' MOTION FOR PROTECTIVE ORDER QUASHING PLAINTIFFS'  
NOTICE OF DEPOSITION OF ROBERT HATFIELD AND SUPPORTING  
MEMORANDUM OF POINTS AND AUTHORITIES**

On September 30, 2005, Plaintiffs served Defendants with a notice of deposition for Robert Hatfield (Exhibit 1), an appraiser of Indian land in the Department of the Interior. In a discussion with Defendants' counsel (*see* Exhibit 2),<sup>1</sup> Plaintiffs' counsel would not identify the subjects of questions that might be asked of Mr. Hatfield, other than to state his belief that they would be within the scope of this litigation. However, no subject appears to be appropriate for a deposition of Mr. Hatfield, primarily because previous rulings of this Court forbid discovery into asset management issues, specifically including the appraisal of Indian land. Plaintiffs may also seek to question Mr. Hatfield on issues similar to those that are the focus of Plaintiffs' other recent deposition notices. As noted in Defendants' most recent motion for a protective order, Plaintiffs' counsel confirmed that those depositions would concern IT security, as well as contempt and other issues that currently are not within the permissible scope of discovery in this case. While IT security may be the subject of discovery generally, as an appraiser Mr. Hatfield

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<sup>1</sup> This discussion was in part a meet and confer on this motion, which Plaintiffs' counsel stated Plaintiffs would oppose.

has no significant expertise in IT security that would make him an appropriate witness on that subject.

Pursuant to Fed. R. Civ. P. 26(c), Defendants respectfully request that the Court enter a protective order precluding the proposed deposition from taking place. This motion is an effort to provide for efficient management of discovery, by addressing potential conflicts and narrowing the issues now, rather than dealing with such issues after the deposition has begun. Mr. Hatfield should not be required to fly to Washington, D.C. from New Mexico and prepare to answer questions on a subject that Plaintiffs may have no intention of covering, or to face questions that relate to matters either outside the permissible scope of discovery or outside the scope of this litigation.

**I. PLAINTIFFS ARE NOT ENTITLED TO BROAD-BASED DISCOVERY WHILE APPEALS ARE PENDING.**

With Defendants' appeal of the Court's structural injunction, and the stay of that injunction, Plaintiffs' discovery rights are necessarily limited. The Court set forth the limitations under these circumstances in September 2004:

Generally, a party's filing of a notice of appeal divests the district court of jurisdiction over the matters being appealed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, the district court retains jurisdiction during the pendency of the appeal to preserve the status quo. *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922). The structural injunction issued by the Court was of significant scope and length. *Cobell*, 283 F. Supp. 2d at 287-295. Its stay leaves much of this case on hold until the appeal is completed. However, the Court retains the power to preserve the status quo and the Court's Order that "information regarding the IIM trust [be] properly secured and maintained," Order dated Sept. 17, 2002 at II. ¶ 1, is an order that goes toward preserving the status quo. Plaintiffs' discovery must be circumscribed by the restrictions on the Court's jurisdiction and is limited to discovery on whether information regarding the IIM trust is properly secured and maintained. Specifically, until resolution of the pending appeal of the Court's structural injunction, the scope of plaintiffs' discovery must be limited to individual Indian trust record retention and preservation and the agency's policies and practices to ensure that individual Indian trust records are properly retained and preserved.

Order of September 2, 2004 at 2-3 [Dkt. No. 2663].<sup>2</sup> Subsequently, this Court reiterated and clarified the scope of permissible discovery:

As the plaintiffs' only "live" claim here is that the defendants have breached their duty to render an accounting of the Indian trust, the scope of discovery includes only those matters directly related to the defendants' accounting infrastructure-- that is, those systems and processes, either in place or deficient and in need of reform, that constitute the defendants' capacity to render a complete accounting of the trust assets and the transactions involving those assets during the existence of the trust.

*Cobell v. Norton*, 226 F.R.D. 67, 77 (D.D.C. 2005). As an appraiser, Mr. Hatfield's responsibilities do not focus on "the accounting infrastructure" necessary to an accounting.

Therefore, he is not an appropriate witness for discovery that is currently permitted.

## **II. PLAINTIFFS ARE NOT ENTITLED TO EXPLORE ASSET MANAGEMENT ISSUES.**

Regardless of the limited scope of Plaintiffs' discovery pending appeal, Plaintiffs are not entitled to explore asset management issues, which include the conduct of appraisals of individual Indian interests in land. In its lengthy memorandum opinion of February 8, 2005, the Court repeatedly instructed that the only "live" claim in this litigation is Plaintiffs' statutory claim for an accounting; thus, the scope of discovery is limited to this statutory claim for an accounting. *See Cobell*, 226 F.R.D. at 76-81. Moreover, in limiting the scope of the Anson Baker deposition, this Court specifically forbade discovery into how Interior performed appraisals, permitting questioning related only to the creation, retention and preservation of documents relevant to an historical accounting. *See Id.*

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<sup>2</sup>On February 8, 2005, the Court vacated another order also issued on September 2, 2004 [Dkt. No. 2662], which contained precisely the same language as that quoted here, because the appeal of the structural injunction had been decided and thus the limitations on discovery were no longer applicable. Order of February 8, 2005 at 1; *see also Cobell v. Norton*, 226 F.R.D. 67, 73 n.2 (D.D.C. 2005). Of course, the situation in this case has now returned to where it was on September 2, 2004, with the Court's structural injunction again on appeal and stayed.

“[A]sset management is not part of this lawsuit.” *Id.* at 82. This Court further specified how Plaintiffs could and could not question witnesses:

To generalize the operative distinction, discovery is permissible as to the content-independent processes by which individual Indian trust documents and records are created, handled, stored, moved from place to place, and so forth; and discovery is not permissible as to the processes by which *document content* itself is selected and created. It follows that questions related to the adequacy and security of physical and electronic document storage facilities, computer data backup systems, and the like will be permissible. In contrast, questions concerning the standards that govern decisions about what kinds of information to provide to trust beneficiaries related to leasing mineral rights, for example, are beyond the scope of permissible discovery in this matter.

*Id.* at 83. Plaintiffs are thus restricted from gathering discovery about asset management issues or other issues unrelated to an accounting. Good cause exists to exclude such issues from this noticed deposition of Mr. Hatfield, who, as an appraiser, has no direct role to play in the historical accounting, IT security, or records management.

A protective order is particularly important given Plaintiffs’ past failure to abide by this Court’s protective order limiting the scope of the Baker deposition. *See Cobell v. Norton*, 226 F.R.D. at 83-88 (denying Plaintiffs’ motion to compel answers to deposition questions objected to by Defendants on ground that questions exceeded scope permitted by *Cobell v. Norton*, 220 F.R.D. 106, 108-109 (D.D.C. 2004)). In permitting Plaintiffs to depose Baker, the Court circumscribed the subject matter to two general areas: “first, the impact of Baker's actions on the administration of the trust, and second, the professed ignorance of at least one senior Interior official of the Court's long-standing directives to properly retain, safeguard and protect individual Indian trust information.” 220 F.R.D. at 108-109. Nevertheless, Plaintiffs asked questions beyond the permitted scope, which resulted in Defendants’ counsel instructing Mr. Baker not to answer and in Plaintiffs’ unsuccessful effort to compel those answers. 226 F.R.D. at 83-86. Here, Plaintiffs have offered no indication that they are taking Mr. Hatfield’s

deposition to address areas of discovery permitted by this Court: administration of the trust or retaining, safeguarding and protecting individual Indian trust information. Furthermore, Mr. Hatfield's position as an appraiser makes him an unlikely and inappropriate witness on IT security issues. Plaintiffs have not alleged otherwise.

### **III. PLAINTIFFS ARE PRECLUDED FROM CONDUCTING DISCOVERY IN CONNECTION WITH ANY POTENTIAL CIVIL OR CRIMINAL CONTEMPT PROCEEDINGS.**

Given the areas of discovery that are precluded from discovery as shown above, the only conceivable purpose for Plaintiffs' proposed deposition of Mr. Hatfield would be to develop evidence for a show cause motion seeking civil or criminal contempt sanctions based upon the May 21, 1999 "anti-retaliation" order. *See, e.g., Plaintiffs' Motion for an Order to Show Cause Why Secretary Norton, W. Hord Tipton and Other Interior Employees Should Not Be Held in Civil and Criminal Contempt of Court for Violating This Court's Anti-Retaliation Order* (July 26, 2005).<sup>3</sup> Developing evidence for contempt sanctions is inappropriate where there is not even an allegation of contemptible action by Mr. Hatfield. *Massachusetts Union of Public Housing Tenants v. Pierce*, 1983 WL 150 at \*4 (D.D.C.) ("Before being permitted to take extensive discovery on the issue of compliance with a court's order, the party seeking such discovery bears the burden of making a prima facie case that there has in fact been disobedience of the order.") (citing *Central Soya Co. v. Geo. A. Hormel & Co.*, 515 F. Supp. 798, 799 (W.D. Okla. 1980)); *Wesley Jessen Corp. v. Bausch & Lomb, Inc.*, 256 F. Supp. 2d 228, 229 (D. Del.

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<sup>3</sup> Should Plaintiffs bring such a motion, it could have criminal implications for Mr. Hatfield. Plaintiffs are prohibited from conducting a criminal contempt investigation of their civil adversaries. *See Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (*Cobell VIII*). We have argued these points on several occasions previously, and most recently in our *Memorandum of Points and Authorities in Support of Defendants' Motion for a Protective Order Quashing Plaintiffs' Amended Notices of Deposition Served Sept. 29, 2005* at 3-5 (October 7, 2005).

2003). Accordingly, the Court should enter a protective order precluding a deposition relating to potential contempt allegations.<sup>4</sup>

### CONCLUSION

For all the foregoing reasons, Defendants request that the Court grant their motion for a protective order quashing Plaintiffs' September 30, 2005 notice of deposition of Robert Hatfield.

A proposed order is attached.

DATED: October 20, 2005

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/ Robert E. Kirschman, Jr.  
ROBERT E. KIRSCHMAN, Jr.  
(D.C. Bar No. 406635)  
Assistant Director  
JOHN R. KRESSE  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
Mailing Address:  
P.O. Box 875

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<sup>4</sup>Indeed, the Supreme Court has recognized that it is often appropriate for a district court to impose a protective order "to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases." *Degen v. United States*, 517 U.S. 820, 826 (1996) (citing cases); *see also United States v. Kordel*, 397 U.S. 1, 8-9 (1970) (presuming that appropriate remedy in a civil case where no corporate officer could respond to interrogatories without being subject to a "real and appreciable' risk of self-incrimination" would be a protective order "postponing civil discovery until termination of the criminal action.") (internal citations omitted). Thus, ample authority exists for the imposition of a protective order to prevent civil discovery from going forward when there are unresolved criminal allegations arising from the same matters.

Ben Franklin Station  
Washington, D.C. 20044-0875  
Phone (202) 307-3242  
Fax (202) 514-9163

CERTIFICATE OF SERVICE

I hereby certify that, on October 20, 2005 the foregoing *Defendants' Motion for Protective Order Quashing Plaintiffs' Notice of Deposition of Robert Hatfield and Supporting Memorandum of Points and Authorities* 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.		)	
		)	
	Plaintiffs	)	
		)	
v.		)	Civil Action No. 96-1286 (RCL)
		)	
Gale A. Norton, et al.		)	
		)	
	Defendants.	)	
<hr/>			

**NOTICE OF DEPOSITION OF ROBERT HATFIELD**

To: ROBERT E. KIRSCHMAN, Jr.  
Assistant Director  
United States Department of Justice  
Civil Division  
Commercial Litigation Branch  
1100 L Street, NW, Room 10008  
Washington, D.C. 20005

PLEASE TAKE NOTICE, that on October 21, 2005, at the offices of plaintiffs' counsel, **Kilpatrick Stockton, LLP**, 607 14<sup>th</sup> St., N.W., 9<sup>th</sup> floor, Washington, D.C. 20005, plaintiffs in this action will take the deposition of **Robert Hatfield**, Department of Interior, 1849 C Street, NW, Washington, DC. This deposition will commence at **10:00 a.m.** and will continue on consecutive days thereafter until completed. Testimony will be recorded by stenographic means.

  
\_\_\_\_\_  
Dennis M. Gingold  
DC Bar No. 417748  
Box # 6  
Washington, DC 20005  
Telephone: (202) 824-1448



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Keith M. Harper  
DC Bar No. 451956  
Native American Rights Fund  
1712 N Street, NW  
Washington, DC 20036-2976  
Telephone: (202) 785-4166

Attorneys for Plaintiffs

Dated: September 30, 2005



**U.S. Department of Justice**  
CIVIL DIVISION, COMMERCIAL LITIGATION BRANCH,  
Fax: (202) 307-0494

## **FAX COVER SHEET**

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From: John R. Kresse  
Agency: United States Department of Justice, Civil Division, Commercial Litigation Branch  
Address: 1100 L Street, N.W., Washington, D.C. 20005  
Telephone: (202) 616-2238  
Fax No.: (202) 307-0494

Date: October 14, 2005

To: Mr. Dennis M. Gingold  
Fax No.: 202-318-2372

NUMBER OF PAGES SENT (INCLUDING COVER SHEET): 2



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Civil Division

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John R. Kresse  
Trial Attorney

Tel.: (202) 616-2238  
Facsimile: (202) 307-0494  
E-mail: John.Kresse@usdoj.gov

October 14, 2005

By Facsimile

Dennis M. Gingold, Esq.  
607 - 14th Street, NW  
Box No. 6  
Washington, DC 20005

**Re: Cobell v. Norton**

Dear Mr. Gingold:

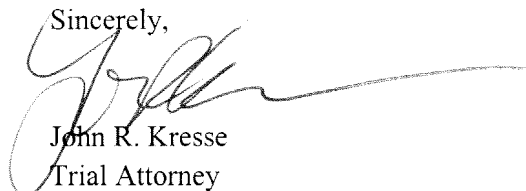
This letter is to confirm Bob Kirschman's and my discussion with you yesterday regarding plaintiffs' notice of deposition issued on September 30, 2005, of Robert Hatfield of the Department of the Interior.

We informed you of our intent to file a motion for a protective order regarding this deposition notice. Our conversation with you was conducted to satisfy the requirements of Local Rule 7(m). In addition, we do not intend to produce Mr. Hatfield pending resolution of our motion so that plaintiffs would not unnecessarily incur the costs of engaging a court reporter. We understand that you will oppose our motion for protective order.

We asked you what topics you intended to cover in the deposition, given that Mr. Hatfield is an appraiser in the Navajo Region. You declined to provide any information in response, other than to say that the deposition would cover matters that were within the scope of this litigation. You further pointed out that counsel noticing a deposition have no obligation to provide such information. We responded that it would nevertheless be helpful in this circumstance, because we are aware of no issues within the scope of the litigation for which Mr. Hatfield would be a particularly relevant witness.

Please let us know promptly if you wish to clarify plaintiffs' position on Mr. Hatfield's deposition. Thank you for your attention to this matter.

Sincerely,



John R. Kresse  
Trial Attorney  
Commercial Litigation Branch

MODE = MEMORY TRANSMISSION

START=OCT-14 17:01

END=OCT-14 17:02

FILE NO.=412

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
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Trial Attorney

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E-mail: John.Kresse@usdoj.gov

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607 - 14th Street, NW  
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Washington, DC 20005

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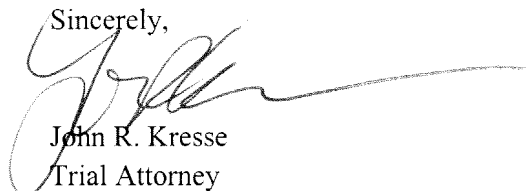
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Sincerely,



John R. Kresse  
Trial Attorney  
Commercial Litigation Branch

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