

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA

2003 SEP 22 PM 7: 53

NANCY M.
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ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of
the Interior, et al.,

Defendants.

No. 1:96CV01285

(Judge Lamberth)

**INTERIOR DEFENDANTS' MOTION FOR A PROTECTIVE ORDER
REGARDING PLAINTIFFS' NOTICE OF DEPOSITION OF ANSON BAKER
AND REQUEST FOR PRODUCTION OF DOCUMENTS**

On August 21, 2003, Plaintiffs noticed the deposition of a non-party Interior employee, Anson Baker, for September 26, 2003. Mr. Baker is the Director of the Northwest Regional Appraisal Office for the Department of the Interior and was a subject of the August 20, 2003 Site Visit Report of the Special Master to the Office of Appraisal Services in Gallup, New Mexico and the Bureau of Indian Affairs Navajo Realty Office in Window Rock, Arizona ("Site Visit Report"). The Notice of Deposition of Mr. Baker also included a Request for Production of Documents. The document request seeks production of documents from both "defendants and the deponent." Notice of Deposition and Request for Production of Documents at 1-2 (Aug. 21, 2003) (attached as Exhibit 1). The noticed deposition and document requests constitute unauthorized discovery, unrelated to any issue within the jurisdiction of this Court. Accordingly, pursuant to Federal Rule of Civil Procedure 26(c)(1), Interior Defendants move for a protective order to prevent Plaintiffs' discovery.¹

¹ On September 22, 2003, counsel for Interior attempted to confer with counsel for Plaintiffs about this Motion for a Protective Order. It is assumed that Plaintiffs oppose the requested relief.

I. PLAINTIFFS' DISCOVERY IS UNAUTHORIZED

On August 20, 2003, the Special Master issued his Site Visit Report, discussing the appraisal practices of Mr. Baker in particular, and Interior generally. The next day, Plaintiffs noticed the deposition of Mr. Baker and propounded their related document requests.²

As discussed in the September 12, 2003 Memorandum of Points and Authorities in Support of the United States Motion for a Protective Order and the Motion to Quash the Subpoena Issued to Government Trial Attorneys Petrie, Quinn, and Spooner, at 13-14, Plaintiffs are not authorized to undertake discovery at this time. Fact discovery for the Phase 1.5 trial closed on March 28, 2003, and Plaintiffs have not sought leave of Court to take discovery out of time for that proceeding, which was concluded over two months ago. Moreover, because the parties have not held a discovery planning conference pursuant to Rule 26(f), any discovery purportedly related to some future proceeding in this case is also unauthorized. See Fed. R. Civ. P. 26(d), 30(a)(2)(C), 34(b).

Because no discovery is permitted at this time, the Court should issue a protective order to prevent the noticed deposition of Mr. Baker, and relieve Interior of the obligation of responding to the related discovery requests.

² It is not even clear whether the examination Plaintiffs seek of Mr. Baker is in his personal or official capacity. Mr. Baker is obviously not a party, or a managing agent of a party, and Plaintiffs failed to serve a subpoena compelling his attendance at his deposition as required by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 30, 37(d). Although the Notice of Deposition mentions Mr. Baker's title, the personal nature of many of the document requests (e.g., personal income tax returns), as discussed below, suggests that the deposition Plaintiffs desire to take is in his individual capacity. Moreover, Plaintiffs' counsel failed to confer with Interior Defendants' counsel before scheduling the deposition of Mr. Baker. If this discovery has a personal component, then Plaintiffs' failure to serve a subpoena under Fed. R. Civ. P. 45 renders the Notice of Deposition defective.

II. PLAINTIFFS' DISCOVERY IS NOT RELEVANT TO ANY CLAIM IN THIS CASE, AND IS NOT REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE

Even if Plaintiffs were permitted to take discovery at this time, the deposition of Mr. Baker and the accompanying document requests would be improper because they deal with matters outside the scope of this litigation. 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.

Plaintiffs obviously intend to explore the allegations in the Site Visit Report at any deposition of Mr. Baker.³ As demonstrated in Interior’s September 4, 2003 Objections to the Site Visit Report, at 5-10 (which Defendants incorporate herein by reference), the subject matter of the Site Visit Report is unrelated to any claim before the Court and, indeed, is beyond the jurisdiction of the Court.

Interior’s appraisal process, as conducted by Mr. Baker or otherwise, although important to the management of trust assets, is not related to Plaintiffs’ accounting claims in this case. Matters of asset management, as this Court has held, are “not part of this lawsuit.” Cobell v. Babbitt, 91 F. Supp. 2d 1, 18 (D.D.C. 1999).

³ Given the serious nature of the allegations in the Site Visit Report, including an aside by the Special Master that Mr. Baker may have violated federal laws, see Site Visit Report at 2 n.4, Mr. Baker has retained Rod Lewis of Davis, Wright & Tremaine, in Portland, Oregon, as personal counsel. Mr. Lewis has been in contact with Plaintiffs’ counsel and apparently intends to file separate papers in response to the deposition notice on behalf of Mr. Baker in his personal capacity.

Many of Plaintiffs' document requests are also particularly troubling, in that they are related to personal matters and appear designed more to harass and embarrass Mr. Baker than to inquire into legitimate matters. See, e.g., Notice of Deposition Document Requests No. 6-8. These requests, asking for documents related to his tax returns (Request No. 6), communications with the IRS (Request No. 7), and bank statements (Request No. 8) are clearly intended to imply, without any substantiation, that Mr. Baker improperly profited personally in his position as appraiser. By making these requests, Plaintiffs' counsel also appear to be appointing themselves as quasi-investigators to ferret out imagined wrongdoing even though they have not shown any basis whatsoever for their supposition.⁴ They cannot properly assume this role.

Furthermore, federal income tax returns are confidential communications between the taxpayer and the government. St. Regis Paper Co. v. United States, 368 U.S. 208, 219 (1961); American Air Filter Co., Inc. v. Kannapell, No. 85-3566, 1990 WL 137385 at *3 (D.D.C. Sept. 10, 1990); Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977). It is a felony, punishable upon conviction by imprisonment up to five years or by fine in any amount up to \$5,000, or both, as well as discharge from employment, for United States employees to disclose income tax information to any person not authorized to receive it. 26 U.S.C. § 7213(a)(1). Section 6103(a) of the Internal Revenue Code, with certain exceptions, specifically prohibits agency disclosure of tax return information. See LaRouche v. U.S. Dep't of Treasury, 112 F. Supp. 2d 48, 54 (D.D.C. 2000) (Section 6103 provides that tax returns and return information shall be

⁴ This requested discovery also runs counter to Plaintiffs' motion urging the court to adopt the Special Master's recommendation in his Site Visit Report that the Court conduct an investigation of these matters. Although, as discussed in Interior's Objections to that Report, Interior does not believe that it is appropriate for the Court to conduct such an investigation, Plaintiffs have intruded on their requested Court investigation by commencing their own.

confidential and shall not be disclosed except as authorized); Lake v. Rubin, 162 F. 3d 113 (D.D.C. 1998) (same). None of these exceptions, which include disclosure to federal, state, and Congressional officials and to private parties in specifically enumerated instances,⁵ applies here.

While release of tax returns can be ordered, courts have been reluctant to permit discovery routinely because of the recognition that the information is confidential. American Air Filter Co., 1990 WL 137385 at *3; see also Payne, 75 F.R.D. at 469 (courts have broadly construed 26 U.S.C. §§ 6103 and 7213(a) to "embody a general federal policy against indiscriminate disclosure of tax returns from whatever source"). The court in American Air Filter Co. noted that several courts have adopted a two prong test weighing the above concerns against the liberal policies of pretrial discovery. Under that approach, to compel disclosure, the court must find: (1) that the returns are relevant to the subject matter of the action; and (2) that there is a compelling need for the returns because the information contained therein is not readily otherwise obtainable. Id. at *3. Because Plaintiffs seek Mr. Baker's tax returns to intimidate, to engage in a fishing expedition, and to pursue information that plainly is not relevant to the subject matter of this litigation, protection is most appropriate.

⁵ Disclosure to private parties is permitted: (1) for the individual taxpayer to inspect his own return and any return information associated with that return, 26 U.S.C. § 6103(e)(1), (6); (2) for a written designee of a taxpayer to examine return information of that taxpayer, 26 U.S.C. § 6103(c); and (3) for certain persons, other than the taxpayer, deemed to have a "material interest" in tax returns, 26 U.S.C. § 6103(e)(1)(C)-(F), (e)(6). Plaintiffs are none of these.

Because the discovery sought through the deposition of Mr. Baker, and the accompanying document requests, is unrelated to any claim in this case, it is impermissible discovery.⁶ Under these circumstances, this Court should order that the “discovery not be had.” Rule 26(c)(1).

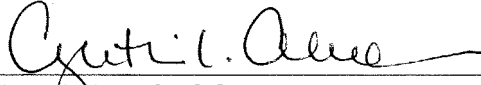
CONCLUSION

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

Dated: September 22, 2003

Respectfully submitted,

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⁶ Many of the document requests are also objectionable as overbroad, unbounded in time, and unduly burdensome. *See, e.g.*, Requests No. 1-3, 5. In addition, to the extent that the requested documents relate to “tribal land” (Request No. 1), and “tribal trust lands” (Request No. 2), as opposed to individual Indian allotted land, this information is also outside the scope of this litigation. If required to respond to these requests, Interior reserves the right to assert all its objections.

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FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Interior Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Anson Baker And Request For Production of Documents. 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 Anson Baker at this time;

ORDERED that Defendants need not respond to the document production requests included with the notice of deposition of Anson Baker;

SO ORDERED.

Date: _____

ROYCE C. LAMBERTH
United States District Judge

cc:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)

Plaintiffs)

v.)

GALE NORTON, Secretary)

Defendants.)

Case No.1:96CV01285 (RCL)

NOTICE OF DEPOSITION and REQUEST FOR PRODUCTION OF DOCUMENTS

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

The Honorable Alan L. Balaran
Special Master
1717 Pennsylvania Avenue, NW
13th Floor
Washington, DC 20006
(By Facsimile)

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

Attorneys for Defendants

PLEASE TAKE NOTICE, that on **September 26, 2003**, at plaintiffs counsel's offices, the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of **Anson Baker**, Director, Northwest Regional Appraisal Office, Department of Interior, 1849 C Street, NW, Room 7229, Washington, DC 20240.

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.

PLEASE TAKE FURTHER NOTICE – Request is hereby made that defendants and the

deponent produce on or before September 22, 2003 the following documents:

1. All documents, including without limitation memoranda, 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, Mr. Baker or any other individual or other entity, and any drafts thereof, which directly or indirectly relate to, refer to, or embody material regarding the appraisal of individual Indian allotted land and tribal land.
2. Any documents including legal opinions, memoranda, instructions or other material relied upon by Mr. Baker or any individuals under his supervision now or in the past which address or relate in any way to the appraisal of individual Indian trust lands or tribal trust lands, including but not limited to governing policies or standards for any such appraisal activities.
3. All documents, including without limitation memoranda, 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, Mr. Baker or any other individual or other entity, and any drafts thereof, which embody, refer to or relate to any communication between Mr. Baker and any third-party lessee or contractor – including, but not limited to any agent, representative or any other direct or indirect intermediary of such third-party lessee or contractor – of individual Indian trust assets.
4. A resume or *curriculum vitae*, licences, and professional certifications of Mr. Baker.
5. All documents, whether in hard copy or electronic format – including all memoranda, voice mail, email, handwritten notes and marginalia – that relate to, refer to, or embody, directly or indirectly, generally or specifically, and informal or formal, disciplinary or

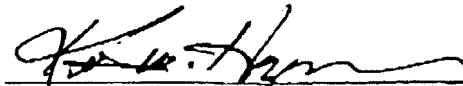
- personnel action, threatened disciplinary or personnel action, investigations, examinations, assessments or adverse or critical performance reviews ("Professional Evaluations") concerning Mr. Baker or any employee under his supervision.
6. All federal and state tax returns for Mr. Baker since calendar year 1983, including but not limited to, all supporting documentation for such returns.
 7. All communications by and between the Internal Revenue Service and Mr. Baker since calendar year 1983.
 8. All bank statements, bank books, credit card statements, personal financial statements, checking account statements, savings account statements, mutual fund statements and all other statements which embody, reflect, or relate to assets or investments made or held by Mr. Baker, including those assets held or invested on behalf of Mr. Baker in the possession of agents, representatives or any other third party since 1983.

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Attorneys for Plaintiffs

August 21, 2003

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 22, 2003 I served the foregoing *Interior Defendants' Motion for a Protective Order Regarding Plaintiffs' Notice of Deposition of Anson Baker And Request for Production of Documents* by facsimile in accordance with their written request of October 31, 2001 upon:

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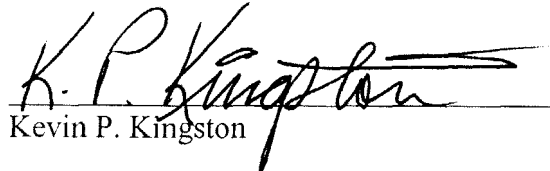
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Per the Court's Order of April 17, 2003,
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