

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. |) | |
| _____ |) | |

**DEFENDANTS' MOTION FOR A PROTECTIVE ORDER REGARDING PLAINTIFFS'
REQUEST FOR PRODUCTION OF MMS AUDIT DOCUMENTS AND PLAINTIFFS'
NOTICES OF DEPOSITION OF DEBORAH GIBBS TSCHUDY AND LONNIE J.
KIMBALL WITH REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Federal Rule of Civil Procedure 26(c)(1), Defendants move for a protective order regarding Plaintiffs' October 1, 2003 request for production of Minerals Management Service ("MMS") audit documents ("Request for MMS Audit Documents") (attached as Exhibit 1),¹ Plaintiffs' Notice of Deposition of Deborah Gibbs Tschudy with Request for Production of Documents (October 17, 2003) ("Gibbs Tschudy Deposition Notice") (attached as Exhibit 2) and Plaintiffs' Notice of Deposition of Lonnie J. Kimball with Request for Production of Documents (October 20, 2003) ("Kimball Deposition Notice") (attached as Exhibit 3). These discovery requests constitute unauthorized discovery and are unrelated to a future proceeding. To the extent Plaintiffs premise their right to discovery at this time on the Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (undated) (filed Sept. 29, 2003)

¹ Plaintiffs incorporated this request for production of documents into the body of a letter from Plaintiffs' counsel to government counsel. See Letter from Dennis Gingold to Sandra P. Spooner, Deputy Director, Civil Division, Department of Justice (October 1, 2003).

("Dallas Site Visit Report"), the issuance of the Special Master's Report confers no additional discovery or investigatory rights upon Plaintiffs. In addition, much of the discovery Plaintiffs propound is not reasonably calculated to lead to the discovery of admissible evidence and requests categories of documents that are privileged. Accordingly, pursuant to Federal Rule of Civil Procedure 26(c)(1), Defendants move for a protective order to prevent Plaintiffs' discovery.²

I. PLAINTIFFS' DISCOVERY IS UNAUTHORIZED

Plaintiffs are not authorized to undertake 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 for that proceeding and there is no indication in the Court's October 17, 2002 Phase 1.5 Trial Discovery Order that the Court intended to permit Plaintiffs to conduct roving discovery after the conclusion of 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

² In accordance with Rule 26(c), Timothy E. Curley, one of the attorneys for Defendants, attempted to confer in good faith about this motion with Plaintiffs' counsel on October 29, 2003 by telephoning Mr. Keith Harper at approximately 11:30 a.m. and Mr. Dennis Gingold at approximately 1:15 p.m. In both instances, Plaintiffs' counsel was unavailable by telephone, so voice mail messages were left describing the nature of the proposed motion and requesting a return phone call to confer. The phone message to Mr. Gingold further informed him that if Defendants did not hear back from Plaintiffs by the close of business, Defendants would assume Plaintiffs opposed this motion. As of the filing of this motion, neither Mr. Harper nor Mr. Gingold had contacted Defendants' counsel to further confer.

likely that there will be discovery associated with it. However, there is no discovery order setting a discovery schedule for a Phase II trial.

Nor are there other proceedings before the Court requiring discovery. Even if the discovery requests Plaintiffs propound 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.³ 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 depositions of Deborah Gibbs Tschudy and Lonnie J. Kimball and relieve Defendants of the obligation to respond to the document requests attached to those notices, as well as Plaintiffs' Request for MMS Audit Documents.

II. PLAINTIFFS HAVE NO RIGHT TO COMMENCE DISCOVERY CONCERNING THE SPECIAL MASTER'S DALLAS SITE VISIT

On September 29, 2003, the Special Master issued his Dallas Site Visit Report about his ex parte site visit. In the Report, he noted his purported "concerns" about the maintenance of MMS audit files, set forth a transcription of the telephone message he received from government counsel during his site visit requesting that he conduct his site visit inter partes, stated that his site visit was terminated at Defendants' request, and recommended further investigation. Dallas Site Visit Report. Within two days of the Special Master's Report having been filed and before Defendants filed their response to the Report, Plaintiffs propounded document requests for the same audit documents requested by the Special Master during his ex parte visit as well as additional audit documents. See Request for MMS Audit Documents at 4 (Exhibit 1). On

^{3/} Plaintiffs' counsel did not confer with Defendants' counsel before noticing and scheduling depositions for both Ms. Gibbs Tschudy and Mr. Kimball.

October 16, 2003, Defendants filed their response to the Special Master's Report, objecting among other things that the Special Master had exceeded the bounds of Federal Rule of Civil Procedure Rule 53 and his order of reference in conducting his site visit. See Interior Defendants' Response and Objection to the Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management Division of the Department of the Interior's Minerals Management Service (October 16, 2003) ("Response and Objection to Dallas Site Visit Report"). Then Plaintiffs noticed the depositions of two MMS employees, Ms. Gibbs Tschudy and Mr. Kimball, accompanied by requests for production of documents (Exhibits 2 and 3).

Thus, rather than provide a response under Rule 53 or allow the Court to resolve the contested legal issues through already pending motions, Plaintiffs are apparently attempting to take discovery regarding the Special Master's ex parte site visit and Defendants' response and objection thereto, before the Court has even decided whether to adopt the Report and Recommendation or ruled upon the contested issues surrounding the Special Master's role. Plaintiffs apparently intend to act as roving investigators concerning the Special Master's site visit through their document request and by deposing Ms. Gibbs Tschudy and Mr. Kimball. In the October 1, 2003 letter containing the Requests for MMS Audit Documents, Plaintiffs' counsel stated: "We can only infer that the Dugan Corporation and J.K. Edwards Corporation files, as well as other Trust Records, housed in MMS Dallas have been systematically destroyed since they have never been produced."⁴ Request for MMS Audit Documents at 4. Similarly, the

⁴ That Plaintiffs made such an inference and then immediately propounded document requests based on that inference -- without Defendants having any opportunity to have counsel present during the site visit or a chance to respond to the Report under Rule 53, and without the Court having addressed the Report -- illustrates the immediate and significant impact a judicial officer's ex parte activities has on the due process rights of litigants.

depositions Plaintiffs have noticed are apparently aimed at investigating the Special Master's site visit. The Gibbs Tschudy Deposition Notice requests, among other things, documents related to the request to have the Special Master leave the Dallas Office. See Gibbs Tschudy Deposition Notice at 2, ¶1. In addition, the Kimball Deposition Notice requests documents related to the declaration he provided in support of Defendants' response to the Special Master's Report. See Kimball Deposition Notice at 2, ¶1.

Plaintiffs are not authorized to conduct discovery into a matter simply because the Special Master has chosen, rightly or wrongly, to conduct an investigation. Nor should they be. In its July 18, 2003 decision, the Court of Appeals held that a "roving federal district court" has no role in our constitutional system. Cobell v. Norton, 334 F.3d 1128, 1141-43 (D.C. Cir. 2003) (quoting with approval Ruiz v. Estelle, 679 F.2d 1115, 1162 (5th Cir.), amended in part, reh'g denied in part on other grounds, 688 F.2d 266 (5th Cir. 1982)). Accordingly, district courts are not empowered to appoint agents to function in "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." Cobell, 334 F.3d at 1142.⁵ Plaintiffs have identified no order of this Court providing them with the authority they claim to conduct free-ranging investigations, and Defendants are aware of none.

Nor should the Court issue an order permitting discovery into this matter. There is no factual dispute that the Special Master conducted his Dallas MMS site visit ex parte and was

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).

asked by government counsel in a phone message during his site visit to conduct his visit inter partes. Compare Dallas Site Visit Report at 5 with Response and Objection to the Dallas Site Visit Report at 9, Ex. 3 at 1. In addition, notwithstanding their objection to the ex parte nature of the site visit, Defendants responded to the purported concerns raised in the Special Master's Report with facts demonstrating that the Special Master's concerns were unfounded. Response and Objection to the Dallas Site Visit Report at 2-7. Nevertheless, due to the ex parte nature of the Special Master's Dallas site visit, this Court should reject the Special Master's Report and deny Plaintiffs the right to seek discovery into the Special Master's ex parte site visit.

To the extent Plaintiffs' discovery requests are based on any other purported factual disputes concerning the Dallas MMS site visit, because the Special Master conducted the site visit ex parte, permitting discovery would place the Special Master in the unusual role of "witness" to the events of the site visit, at least as much as the individuals whom Plaintiffs seek to depose. Therefore, in the event the Court decides to grant Plaintiffs the authority to request documents and depose Interior employees concerning the Special Master's ex parte activities, then Defendants respectfully request leave of Court to depose and request documents from the Special Master concerning his own participation in these extra record events, his ex parte meetings in Albuquerque and Dallas with "oil and gas" experts and "MMS experts," see September, 2003 Invoice of the Special Master at 5, and all other communications and activities related to his investigation of MMS audit files.

III. PLAINTIFFS' DISCOVERY REQUESTS ARE OVERLY BROAD, SEEK TO ELICIT INFORMATION THAT IS NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE AND SEEK TO ELICIT PRIVILEGED MATERIAL.

Even if Plaintiffs were permitted to take discovery at this time, Plaintiffs' discovery requests would still be improper.⁶ 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 “relevant” information and must be “reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Plaintiffs have requested production of personnel documents of Ms. Gibbs Tschudy, Mr. Kimball and all individuals they supervise. Plaintiffs request all documents “that relate to, refer to, or embody, directly or indirectly, generally or specifically, and informal or formal, threatened disciplinary or personnel action, investigations, examinations, assessments or adverse or critical performance reviews “(sic) (“Professional Evaluations”) concerning [Ms. Gibbs Tschudy or Mr. Kimball] or any employee under [his or her] supervision.” Gibbs Tschudy Deposition Notice at 2, ¶ 3 (Exhibit 2) (emphasis added); Kimball Deposition Notice at 2, ¶ 3 (Exhibit 3) (emphasis added). It is not apparent how such personnel files of MMS employees are reasonably calculated to lead to the discovery of admissible evidence and in what future proceeding such evidence would be presented. In addition, production of confidential personnel

⁶ If required to respond to Plaintiffs' discovery requests, Defendants reserve the right to make all objections to those requests.

files has the potential to expose these employees to undue "annoyance" and "embarrassment."

See Fed. R. Civ. P. 26(c).⁷

Plaintiffs' document requests are also overly broad and would subject Defendants to undue burden and expense. By way of example, Plaintiffs' Request No. 2 asks for all audit files of any oil and gas company that is conducting or has ever conducted business on allotted lands: "All audit files – closed, open, cancelled, etc. – that reflect, directly or indirectly, MMS's review of oil & gas company royalty, rents, or bonus under-payments on allotted lands, including without limitation such information related to the Dugan Production Company, the Meridian Oil & Gas Company and J.K. Edwards and Associates." See Plaintiffs' Request for MMS Audit Documents at 4, ¶2 (emphasis added) (attached as Exhibit 1). That such a request is extremely broad is supported by the attached declaration of Deborah Gibbs Tschudy, Assistant Program Director, Onshore Compliance and Asset Management for Interior's Minerals Revenue Management, Minerals Management Service. As indicated by Ms. Gibbs Tschudy, if responsive documents are limited to files identified in the Case Tracking System ("CTS") as affecting leases which include allotted lands, there are approximately 250 feet of potentially responsive documents that would require approximately 2,000 employee hours to copy and review. See Declaration of Deborah Gibbs Tschudy at ¶ 3(a) and (b) (attached as Exhibit 4) If expanded to encompass all files in the CTS, whether or not identified as affecting leases that include allotted lands, then there are approximately 670 feet of additional responsive documents, for which

⁷ It is not even clear whether the examinations Plaintiffs seek of Ms. Gibbs Tschudy or Mr. Kimball are in their personal or official capacities. These individuals are obviously not parties, or a managing agent of a party, and Plaintiffs failed to serve subpoenas compelling their attendance at their depositions as required by the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 30, 37(d).

reviewing and copying would take approximately 2,500 to 4,000 additional employee hours. Id. Moreover, Plaintiffs' requests are neither limited in time nor limited to records pertaining to allotted lands; they are broadly drafted apparently to also request tribal, and even non-Indian, records. See, e.g., Request for MMS Audit Documents at 4, ¶¶3-5.

Defendants should also not be required to respond to document requests seeking to elicit privileged information or be subjected to deposition questions into privileged matters. Plaintiffs' Deposition Notices for Ms. Gibbs Tschudy and Mr. Kimball each request categories of documents that are, on their face, protected from disclosure by the attorney-client privilege and work product doctrine. Document Request Number 1 attached to both the Gibbs Tschudy and Kimball Deposition Notices requests "legal memoranda and opinions," as well as other broad request that could include privileged documents. See Gibbs Tschudy Deposition Notice at 2, ¶1; Kimball Deposition Notice at 2, ¶ 1. While Defendants are mindful of this Court's December 23, 2002, and February 5, 2003 Orders recognizing a fiduciary exception to the attorney client privilege and work product doctrine, these communications and categories of documents sought by the Plaintiffs, would, if they exist, have been made and created solely to protect the government from liability in this litigation and not for purposes of facilitating the administration of the IIM trust. Cobell v. Norton, 212 F.R.D. 24, 30 (D.D.C. 2002); Cobell v. Norton, 213 F.R.D. 69, 77 (D.D.C. 2003). With regard to the Gibbs Tschudy Deposition Notice, any reference of authority to the Special Master, and issues arising therefrom, are purely litigation related and do not relate to administration of the IIM trust. Thus, any attorney-client communications or work product documents associated with Defendants' request that the Special Master terminate his ex parte site visit are privileged and do not fall within any fiduciary

exception. Similarly, Defendants' Response and Objection to the Special Master's Dallas Site Visit Report was filed pursuant to Federal Rule of Civil Procedure 53 for the purpose of protecting the government from liability in this litigation and was not filed to facilitate administration of the IIM trust. Thus, any attorney-client communications or work product documents associated with the preparation of Mr. Kimball's declaration in support of that filing are privileged and do not fall within any fiduciary exception.

CONCLUSION

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

Dated: October 29, 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
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel

TIMOTHY E. CURLEY
D.C. Bar No. 470450
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

CERTIFICATE OF SERVICE

I hereby certify that, on October 29, 2003 the foregoing *Defendants' Motion for a Protective Order Regarding Plaintiffs' Request for Production of MMS Audit Documents and Plaintiffs' Notices of Deposition of Deborah Gibbs Tschudy and Lonnie J. Kimball with Requests for Production of Documents* was served by Electronic Case Filing, or as otherwise indicated below, upon:

Dennis M. Gingold, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005

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

by Facsimile and U.S. Mail upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W., 13th Floor
Washington, D.C. 20006
(202) 986-8477

Per the Court's Order of April 17, 2003,
by Facsimile and by U.S. Mail upon:

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

Keith Harper, Esq.
Richard A. Guest, Esq.
Native American Rights Fund
Washington, D.C. 20036-2976
(ECF c/o Dennis M. Gingold, Esq.)

Mark K. Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(ECF c/o Dennis M. Gingold, Esq.)

/s/ Kevin Kingston
Kevin Kingston