IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285 (RCL)
	)	(Special Master Alan Balaran)
GALE A. NORTON, Secretary of the Interior, et al.,)		
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO COMPEL APPEARANCE AND TESTIMONY OF PLAINTIFF ELOUISE COBELL AT DEPOSITION

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants"), pursuant to Fed. R. Civ. P. ("Rule" or "Rules") 26(c) and 37, hereby move that this Court enter an order requiring Plaintiff Elouise Cobell to appear and give testimony at a deposition.

Background

On July 2, 2002, Interior Defendants served Plaintiffs with a Notice of Deposition, which, pursuant to Rule 30, set the deposition of Plaintiff Elouise Cobell to begin on July 30, 2002, at the offices of Interior Defendants' attorneys. A copy of that Notice of Deposition is attached as Exhibit A.

On July 5, 2002, Plaintiffs filed a motion for protective order, seeking a stay of the deposition of Ms. Cobell, and of all other discovery by Defendants.[1] Ms. Cobell did not appear

[1] See Plaintiffs' Motion for Protective Order Seeking (1) Stay of Plaintiffs' Obligation to Respond to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002; (2) Stay of Threatened Depositions of the Five Named Plaintiffs; and (3) Stay of Rule 11 Motion With Respect to Court-Ordered Attorney's Fees, filed July 5, 2002 ("Plaintiffs' Motion for

for her scheduled deposition.[2]

On July 16, 2002, Interior Defendants' filed their Opposition to Plaintiffs' Motion for Protective Order. Plaintiffs filed a reply on July 24, 2002. Thus, Plaintiffs' Motion for Protective Order is fully briefed and awaiting a ruling.

An Order Compelling Ms. Cobell's
Appearance and Testimony Is Appropriate

Even though denial of the Plaintiffs' Motion for Protective Order would dispose of the objections that Plaintiffs raised to the deposition of Ms. Cobell, Interior Defendants seek an order requiring her to appear and testify at her deposition, in order to ensure that the deposition takes place promptly, without Plaintiffs engaging in further efforts to unduly delay or avoid a deposition.

Rule 26(c) provides, in pertinent part, that if a motion for protective order is "denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery." Rule 37(d) provides, in pertinent part:

> (d) Failure of Party to Attend at Own Deposition . . . . If a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just . . . . The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(emphasis added).

Protective Order").

[2] Plaintiffs also failed and refused to produce any documents in response to Interior Defendants' Request for the Production of Documents, Dated June 5, 2002. On July 16, 2002, Interior Defendants filed a separate motion to compel the production of those documents.

An order compelling Ms. Cobell to appear for a deposition is appropriate and just. The only bases cited by Plaintiffs for Ms. Cobell's refusal to be deposed are those stated in their Motion for Protective Order, i.e., because, Plaintiffs contend, Defendants did not respond to discovery as Plaintiffs desired, or because of other alleged bad acts by Defendants, and because Plaintiffs seek a "respite." As shown in Interior Defendants' Opposition to Plaintiffs' Motion for Protective Order, filed on July 16, 2002, and which is incorporated herein by reference, the grounds relied upon by Plaintiffs are insupportable justification for their requested blanket exemption from all depositions and other discovery obligations. Therefore, Plaintiffs' Motion for Protective Order should be denied and Plaintiff Elouise Cobell should be ordered to appear for her deposition.

Conference With Opposing Counsel

Counsel for Interior Defendants called Plaintiffs' counsel to discuss the relief requested in this Motion, and Plaintiffs' counsel said that Plaintiffs do not agree to such relief.

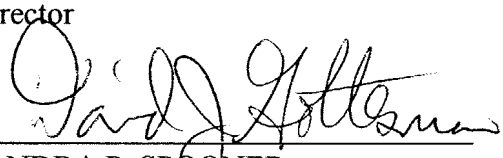
(CONTINUED ON NEXT PAGE)

Conclusion

For the foregoing reasons, Interior Defendants request that the Court enter an order requiring Plaintiff Elouise Cobell to appear and give testimony at a deposition, on dates to be selected by Interior Defendants.[3]

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



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Commercial Litigation Branch
Civil Division
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P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

Dated: August 16, 2002

[3] Of course, Interior Defendants' attorneys will confer with Plaintiffs' attorney in a good faith effort to select mutually agreeable dates, but if no agreement can be reached, Interior Defendants should be entitled to select the dates.

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FOR THE DISTRICT OF COLUMBIA

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

NOTICE OF DEPOSITION

TO: Mr. Dennis M. Gingold
Mr. Mark Kester Brown
P.O. Box 14464
Washington, D.C. 20044-4464
Fax: 202/318-2372

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 30, the Secretary of the Interior and the Assistant Secretary - Indian Affairs shall conduct the oral deposition of Plaintiff **ELOUISE PEPION COBELL**, at the offices of Defendants' attorneys, U.S. Department of Justice, Civil Division, 1100 L Street NW, 10th Floor, Washington, D.C., beginning at **9:30 a.m. on July 30, 2002.** To the extent permitted by applicable rules, the deposition may continue on subsequent dates to be scheduled later.

(CONTINUED ON NEXT PAGE)

This Notice of Deposition requires the appearance of the above-named deponent for the entirety of the deposition. The deposition will be recorded by sound-and-visual and stenographic means.

Respectfully submitted,

ROBERT D. McCALLUM
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
Deputy Director
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Washington, D.C. 20044-0875
Tel: (202) 307-0183

Dated: July 2, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on July 2, 2002, I served the foregoing *Notice of Deposition* by facsimile only, in accordance with their written request of October 31, 2001, upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

and by U.S. Mail upon:

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

Courtesy copy by U.S. Mail and by fax upon:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
202-986-8477

Sean P. Schmergel

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 16, 2002 I served the foregoing *Defendants' Motion to Compel Appearance and Testimony of Plaintiff Eloise Cobell at Deposition* by facsimile upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
(202) 318-2372

and by U.S. Mail upon:

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.
12th Floor
Washington, D.C. 20006
(202) 986-8477

Courtesy Copy by U.S. Mail upon:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

K. P. Kingston

Kevin P. Kingston

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	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER COMPELLING PLAINTIFF
ELOUISE COBELL TO
APPEAR AND TESTIFY AT DEPOSITION

This matter comes before the Court on Defendants' Motion to Compel Appearance and Testimony of Plaintiff Elouise Cobell at Deposition. After considering that motion, any responses thereto, and the record of the case, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED that Plaintiff Elouise Cobell shall appear and give testimony at a deposition in this cause, on dates to be selected by Interior Defendants.

SO ORDERED this _____ day of _____, 2002.

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
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