

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 GALE NORTON, Secretary of the Interior, et al.,)
)
 Defendants.)
)
 _____)

Case No. 1:96CV01285
(Special Master Alan Balaran)

**DEFENDANTS' MOTION FOR PROTECTIVE
ORDER AND TO QUASH DEPOSITION SUBPOENAS**

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants"), pursuant to Fed. R. Civ. P. 26(c) and 45(c), hereby move that this Court enter a protective order and quash deposition subpoenas issued by Plaintiffs to certain government officials. In support, Interior Defendants state:

On August 2 and 5, 2002, Plaintiffs served subpoenas for the depositions of six government officials, including three senior officers of the Department of the Interior,¹ two Deputy Assistant Attorneys General,² and a member of the White House Office of Counsel.³

As discussed in the supporting memorandum filed with this motion, Plaintiffs initially indicated that the depositions would pertain to the alleged "quashing" or "manipulating" of the

¹ J. Steven Griles (Deputy Secretary), James Cason (Associate Deputy Secretary) and Ross Swimmer (Director of the Office of Indian Trust Transition).

² Kelly Johnson (Principal Deputy Assistant Attorney General) and Jeffrey Clark (Deputy Assistant Attorney General), Environment and Natural Resources Division, Department of Justice.

³ Kyle Sampson (Associate Counsel to the President, a position holding the rank of Special Assistant to the President).

recent Congressional testimony of the Special Trustee for American Indians, Thomas Slonaker, although plaintiffs later claimed that the depositions would not be limited “to any specified subject areas.”

For the reasons set forth in the supporting memorandum filed with this motion, the depositions are impermissible, and, therefore, the deposition subpoenas should be quashed and a protective order entered. Accordingly, Interior Defendants move that this Court enter an order quashing the deposition subpoenas referenced above, and order that Plaintiffs are precluded from deposing those persons.

Counsel for Interior Defendants conferred with counsel for plaintiffs, Keith Harper, about this motion, and Mr. Harper stated that plaintiffs oppose this motion.

Dated August 21, 2002

Respectfully submitted,

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

Sandra P. Spooner / CIA
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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FOR THE DISTRICT OF COLUMBIA

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

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR PROTECTIVE
ORDER AND TO QUASH DEPOSITION SUBPOENAS**

Plaintiffs seek to depose high-level government officials and attorneys from the White House Counsel's Office, the Department of the Interior, and the Department of Justice about two matters that the Constitution entrusts exclusively to the Executive Branch: the removal of a purely executive official who serves at the pleasure of the President, and the internal review and clearance of the prepared testimony of such an official before a congressional committee.

Plaintiffs' attempt to obtain discovery into the President's removal of the Special Trustee for American Indians, for the purpose of imposing sanctions or consequences on the Executive Branch, is fundamentally misguided. The removal of a presidential appointee by the President is a matter committed entirely to his discretion. Plaintiffs may not challenge a removal decision directly or collaterally by seeking to impose sanctions or other consequences on the Executive Branch flowing from the President's action.

Similarly, the President and his advisors have plenary authority to review and approve the prepared testimony of presidential appointees to Congress. Any dispute about the adequacy of

information provided to Congress must be resolved by the political branches, not by courts at the behest of private litigants. Because the depositions relate to matters that are not the proper subject of judicial review, they cannot lead to evidence that is relevant to any valid claim in this case, and the subpoenas should be quashed.

Even assuming that such collateral review could proceed in unusual circumstances, separation-of-powers concerns would militate against permitting a probe into the basis of presidential decisionmaking absent a strong threshold showing of relevance, which is entirely absent here. The very subject of plaintiffs' proposed inquiries is the advice sought and received by the President, and the actions of the White House in reviewing congressional testimony, matters that implicate in the plainest way the privileges shielding presidential communications, attorney-client communications, and pre-decisional deliberations. Before embarking on a course of discovery fraught with constitutional peril, plaintiffs must, at a minimum, demonstrate that such discovery is necessary to the litigation of a valid claim. Because plaintiffs have made no such showing, the subpoenas should be quashed, and the Court should issue a protective order barring further inquiries on these matters.

Finally, even where constitutional concerns are not present, the case law makes clear that high-ranking officials and attorneys should not be deposed absent unusual circumstances. Because plaintiffs have made no showing why the testimony of the subpoenaed officials and attorneys is in any sense necessary, the deposition subpoenas would appropriately be quashed even apart from the other compelling reasons for precluding plaintiffs' proposed course of discovery.

Background

I. Statutory And Regulatory Background

A. Congress created the Office of Special Trustee for American Indians to provide for “more effective management of, and accountability for the proper discharge of, the Secretary’s trust responsibilities to Indian tribes and individual Indians.” 25 U.S.C. § 4041(1). The Office of the Special Trustee is within the Department of the Interior, and is headed by the Special Trustee. 25 U.S.C. § 4042(a). The Special Trustee reports “directly to the Secretary.” *Id.*

“The Special Trustee shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.” 25 U.S.C. § 4042(b)(1). There are no statutory limits on the President’s authority to remove a Special Trustee.

B. Executive Branch procedures in force for more than 60 years require agencies to submit for presidential review and clearance any proposed testimony before Congress, as well as agency legislative proposals and recommendations. That function is performed by the Office of Management and Budget (“OMB”). See OMB Memorandum No. M-01-12 (Feb. 15, 2001), available at <<http://www.whitehouse.gov/omb/memoranda/print/m01-12.html>>; see also OMB Circular No. A-19, at 6 (Sept. 20, 1979), available at <<http://www.whitehouse.gov/omb/circulars/a019/print/a019.html>> (“Before an agency transmits proposed legislation or a report (including testimony) outside the Executive branch, it shall submit the proposed legislation or report or testimony to OMB for coordination and clearance.”).

The requirement of advance approval of proposed testimony “applies to all Executive Branch officials and staff.” OMB Memorandum No. M-01-21 (May 22, 2001), available at <http://www.whitehouse.gov/omb/memoranda/print/m01-21.html>. This clearance process allows the President to coordinate and control “agency views on legislation” pending before Congress, and ensures that agency officials’ statements or testimony to Congress “properly take into account the interests and concerns of all affected agencies.” OMB Memoranda No. M-01-12, at 2.

II. Factual Background

Thomas Slonaker was appointed as Special Trustee by President Clinton and confirmed by the Senate. He served as a holdover appointee under President Bush until July 30, 2002, when he resigned at the request of the President.

Prior to his resignation, Slonaker was scheduled to appear before the Senate Committee on Indian Affairs, at a hearing on the Department of Interior’s July 2, 2002 report on the historical accounting on individual Indian trust accounts. In accordance with established Executive Branch procedures, Slonaker submitted a proposed opening statement to OMB for its review and clearance. Plaintiffs allege that Slonaker’s proposed statement was not approved and that, as a result, he did not submit it to the Senate Indian Affairs Committee.¹ Slonaker appeared in person before the Committee on July 25, 2002, and answered the questions of Committee members.

¹ Solely for purposes of this motion, defendants will assume the truth of those allegations.

III. Plaintiffs' Request For A Court Monitor Investigation And Subpoenas Of Senior Government Officials And Lawyers

On August 1, 2002, plaintiffs requested the Court Monitor to conduct a formal investigation into whether Slonaker was “‘forced out’ by Secretary Norton and Deputy Secretary Griles, . . . aided and abetted – or directed – by officials in the White House, Office of Management and Budget, and the Department of Justice” Letter from D. Gingold, Plaintiffs’ Counsel, to J. Kieffer, III, Court Monitor (Aug. 1, 2002), at 1 (attached as Ex. 1). Plaintiffs alleged that Slonaker’s removal was “unlawful retaliation” for “speaking publicly about the problems with DOI’s trust reform operations.” Ex. 1, at 2-3 (quoting Seventh Report of the Court Monitor (May 2, 2002)). Plaintiffs also alleged that the OMB’s review of Slonaker’s proposed opening statement before the Senate Committee on Indian Affairs was intended to “intimidate” him and to “suppress” his proposed statement to Congress. Ex. 1, at 3. Plaintiffs requested an investigation into “[t]he identity and role of each official in the White House, OMB, Justice, and Interior” who participated in the review of Slonaker’s proposed testimony and his removal as Special Trustee. Ex. 1, at 3. They sought “corrective and punitive remedies” for this alleged government misconduct.² Ex. 1, at 3.

The following day, plaintiffs informed government counsel that plaintiffs intended to depose six government officials – two Deputy Assistant Attorneys General within the

² Defendants have objected to plaintiffs’ request on the ground that such an investigation would interfere with the President’s constitutional authority, and no such investigation has commenced to date. On August 8, 2002, however, the Court Monitor submitted to the Court a document concerning Slonaker’s public statements regarding presidential review of his proposed testimony before the Senate Committee on Indian Affairs. The Court Monitor recognized that the document was potentially subject to a claim of protection under the attorney-client privilege or the work product doctrine.

Environment and Natural Resources Division of the Department of Justice,³ an attorney in the Office of Counsel to the President,⁴ and three senior officers of the Department of the Interior⁵ – and asked defendants’ counsel to accept service of deposition subpoenas on their behalf. Plaintiffs initially indicated that the depositions would pertain to the alleged “‘quashing’ or ‘manipulating’ [of] the recent Congressional testimony of the Special Trustee.” See Letter from D. Gottesman, Department of Justice, to K. Harper, Plaintiffs’ Counsel (Aug. 2, 2002) (attached as Ex. 2). In a subsequent letter, plaintiffs claimed the right to depose the six government officials even beyond these matters, without limitation “to any specified subject areas.” See Letter from K. Harper, Plaintiffs’ Counsel, to D. Gottesman, Department of Justice (Aug. 5, 2002) (attached as Ex. 3). The first of the six depositions is scheduled for August 23, 2002.

Argument

I. Plaintiffs Cannot Depose Government Officials About The Removal Of A Purely Executive Officer And The Review Of Executive Branch Testimony To Congress

Plaintiffs seek discovery into deliberations and actions at the highest level of the Executive Branch for the apparent purpose of establishing that judicial consequences should be imposed for the removal of Mr. Slonaker and for the White House review of his testimony. It is axiomatic that parties may only obtain discovery of non-privileged matters that are “relevant to the subject matter involved in the action” and “reasonably calculated to lead to the discovery of

³ Kelly Johnson is the Principal Deputy Assistant Attorney General and Jeffrey Clark is a Deputy Assistant Attorney General.

⁴ Kyle Sampson is Associate Counsel to the President, a position holding the rank of Special Assistant to the President.

⁵ J. Steven Griles is the Deputy Secretary of the Interior, James Cason is the Associate Deputy Secretary, and Ross Swimmer is the Director of the Office of Indian Trust Transition.

admissible evidence.” Fed. R. Civ. P. 26(b)(1). Because plaintiffs seek review of matters committed to the discretion of the President and the Executive Branch, their discovery can lead to no relevant evidence, and their deposition subpoenas should be quashed.

A. 1. Plaintiffs seek discovery into the basis of the President’s decision to remove the Special Trustee from office. It is their apparent contention that the removal of the Special Trustee contravenes this Court’s prior orders or was based on impermissible factors, and that the Executive Branch should be subjected to sanctions or other judicial consequences as a result.

Plaintiffs’ attempt to explore the basis for the President’s decision and to impose consequences on the Executive Branch for his actions is plainly barred. The President has “unrestrictable power” to remove officers who perform exclusively Executive Branch functions. Humphrey’s Executor v. United States, 295 U.S. 602, 632 (1935). That authority is a necessary corollary of the power of appointment as well as the President’s obligation under Article II to “take Care that the Laws be faithfully executed.” See Myers v. United States, 272 U.S. 52, 117 (1926); Swan v. Clinton, 100 F.3d 973, 979 (D.C. Cir. 1996). Because the President relies on subordinate officers to enforce the laws, “he must have the power to remove” an officer “[t]he moment that he loses confidence in [his] intelligence, ability, judgment, or loyalty.” Myers, 272 U.S. at 134. Where Congress has imposed no restrictions on the President’s removal authority, a court may not force the President to retain officers “who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible.” Id. at 131; see also id. at 161 (where Congress has not restricted the removal power, it “must remain where the Constitution places it, with the President”).

A direct challenge to the President's removal of the Special Trustee would manifestly be precluded under settled law. Indeed, such a suit would find no basis in the Administrative Procedure Act, which does not subject presidential action to judicial review. See Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992).

Plaintiffs may not accomplish indirectly what they could not do in a direct challenge. In asking this Court to review the basis of the President's decision and to permit discovery to that end, plaintiffs seek judicial review just as plainly as they would in a direct challenge. And, just as in a direct challenge, plaintiffs seek to impose consequences on the Executive Branch for a removal decision that they believe should not have been made or was based on improper factors. But, as the Supreme Court has made clear, the removal power is "unrestrictable," Humphrey's Executor, 295 U.S. at 632, and is protected against both direct and indirect interference by the other branches of government, see id. at 629. Thus, a court has no more authority to impose sanctions or consequences for what it believes to be an improper removal than it has authority to bar a removal or require reinstatement. See INS v. Pangilinan, 486 U.S. 875, 882-83 (1988) (court's "equitable authority to craft remedy" does not permit court to "disregard statutory and constitutional requirements and provisions" (internal citation and quotation marks omitted)); see also id. at 883-85.

Plaintiffs' proposed course echoes their earlier efforts – properly rejected by this Court – to hold defendants liable for "obstruction" or "interference" with the Special Trustee's performance of his statutory duties on the basis of actions taken by the Secretary of the Interior in reorganizing the Office of Special Trustee and making funding requests for that Office. Cobell v. Babbitt, 91 F. Supp.2d 1, 51-52 (D.D.C. 1999), aff'd and remanded, 240 F.3d 1081 (2001). The

Court recognized that the Secretary's conduct was not "contrary to law" in light of the Secretary's "broad authority . . . to organize his department as he wishes" and to supervise and direct the Special Trustee in executing statutory functions. Id. at 52. That reasoning is fully applicable here. Plaintiffs cannot impose liability based on the President's exercise of his constitutional power of removal. And the Court should reject plaintiffs' apparent attempt to construe its prior orders so as to burden the President's removal powers.

2. Plaintiffs' attempt to obtain discovery into White House review of prepared testimony by the Special Trustee is similarly foreclosed. The President is authorized under the Constitution to set policy and to supervise the conduct of Executive Branch officials to ensure compliance with that policy. See Building & Constr. Trades Council, AFL-CIO v. Allbaugh, 295 F.3d 28, 32 (D.C. Cir. 2002) (President has power to "supervise and guide" actions of subordinate executive officers); Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981) (President has power "to control and supervise executive policymaking"). That is precisely the authority that the President invoked in requiring executive officers to submit proposed congressional testimony to the Office of Management and Budget for review and approval. See OMB Memorandum No. M-01-12, at 2 (noting that clearance process assists President in taking care that the laws are faithfully executed by assuring that "position statements submitted to Congress by one agency properly take into account the interests and concerns of all affected agencies"). The President's constitutional authority is supplemented by the statutory authority given to the Secretary to supervise and direct the Special Trustee in executing the laws governing Indian trusts. See 25 U.S.C. §§ 162a(d), 4011, 4042(a).

Plaintiffs' claims regarding the adequacy of information provided to Congress by the Executive Branch seek a direct intrusion into the relations of the political branches. The Executive Branch has the power to review and approve testimony to be provided on its behalf to Congress. The adequacy of information provided is a matter committed to resolution by the political branches, and cannot be made the basis of a private action. See Natural Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 318-19 (D.C. Cir. 1988) (challenge to adequacy of Executive Branch report to Congress not subject to judicial review).

Indeed, plaintiffs would lack standing to challenge either Mr. Slonaker's removal or the White House's review of his prepared testimony even if such actions were reviewable. Plaintiffs' interest in the form or substance of testimony presented to Congress or in having a specific person fill the position of Special Trustee is not the type of particularized injury on which suit may be premised. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992). Nor could plaintiffs show that any legally authorized remedy would redress injury traceable to conduct of the government. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-46 (1976).

In sum, plaintiffs' proposed depositions are premised on claims that fail as a matter of constitutional law and that plaintiffs have no right to adjudicate. Because the evidence sought in the depositions is not relevant to a valid cause of action, the subpoenas must be quashed. See Fed. R. Civ. P. 26(b)(1); see also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978) (discovery properly denied as to matters that are not relevant to claims, defenses and issues actually in the case); Planned Parenthood Fed. of Am., Inc. v. Heckler, 101 F.R.D. 342, 344

(D.D.C. 1984) (“[I]f an issue is not properly part of the case, as a matter of law, then discovery in that vein is inappropriate.”).

B. Even assuming that some extraordinary circumstances might permit judicial inquiry of the kind plaintiffs seek, the separation-of-powers concerns discussed above would strongly militate against permitting discovery without a showing of precisely how each aspect of the proposed discovery might lead to the production of relevant evidence. That rule would apply even if the decision at issue were one made by an agency administrator: established law would preclude plaintiffs from probing the process by which the agency decisionmaker arrived at his determination. See United States v. Morgan, 313 U.S. 409, 422 (1941). Here, the very subject matter of plaintiffs’ proposed discovery is the formulation of a presidential decision to remove an Executive Branch officer. Plaintiffs’ proposed depositions will inevitably involve inquiries into sensitive deliberations at the highest levels of the Executive Branch, including presidential communications, attorney-client communications, and other internal deliberations that are protected by longstanding litigation privileges. In these circumstances, it is for plaintiffs to show at the outset why discovery is appropriate rather than to allow discovery to go forward and put the government to the burden of invoking and litigating sensitive claims of privilege.

II. Plaintiffs Have Failed To Demonstrate Any Basis For Deposing Senior Government Officials And Attorneys

A. High-Ranking Government Officials Cannot Be Deposed Absent Extraordinary Circumstances

Even apart from the objections discussed above, plaintiffs have made no showing that could permit depositions of the high-ranking government officials whom they have subpoenaed. 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. at 422); 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.) (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”); Braniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453, 462 (D.C. Cir. 1967) (“[t]he general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize”).⁶

Plaintiffs have made no showing that the depositions of several high-ranking officials are required to develop relevant evidence. Certainly, the mere allegation that persons advising the President may have executed their responsibilities in a way that plaintiffs deem improper does not justify the depositions they seek. As the 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

⁶ The restriction on compelling testimony of senior government officials applies not only to Cabinet officers, but to other officials as well. See, e.g., Simplex, 766 F.2d at 586 (precluding testimony of Solicitor of Labor, Secretary of Labor’s Chief of Staff, OSHA’s Regional Administrator and OSHA’s Area Director); In re United States, 197 F.3d at 314 (issuing writ of mandamus to prevent compelled testimony of Attorney General and Deputy Attorney General); United States Bd. of Parole v. Merhige, 487 F.2d 25, 28-30 (4th Cir. 1973) (issuing writ of mandamus to prevent deposition of parole board members). It clearly encompasses the officials subpoenaed here.

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 subpoenaed witnesses “possess information essential to [plaintiffs’] case which is not obtainable from another source.” Id. As explained above, the information plaintiffs seek is not even relevant to their case, let alone “essential.” And even if they could demonstrate that the information is essential, plaintiffs have made absolutely no showing that the information could not be obtained through other means. See Simplex, 766 F.2d at 587.

B. Attorney Depositions Are Highly Disfavored.

Plaintiffs’ attempt to depose high-ranking government attorneys – an Associate Counsel to the President and two Deputy Assistant Attorneys General – fails for the additional reason that attorney depositions are strongly disfavored. Indeed, “the mere request to depose a party’s attorney constitutes good cause for obtaining a Rule 26(c) . . . protective order unless the party seeking the deposition can show both the propriety and need for the deposition.” N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987); see also Dunkin’ Donuts, Inc. v. Mandorico, Inc., 181 F.R.D. 208, 210 (D. P.R. 1998); Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp., 125 F.R.D. 578, 594 (W.D.N.Y. 1989).

As the Eighth Circuit has explained, “the increasing practice of taking opposing counsel’s deposition [is] a negative development in the area of litigation, and one that should be employed only in limited circumstances.” Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); see also Theriot v. Parish of Jefferson, 185 F.3d 477, 491 (5th Cir. 1999) (“Generally, federal courts have disfavored the practice of taking the deposition of a party’s attorney; instead, the practice should be employed only in limited circumstances.”), cert. denied, 529 U.S. 1129

(2000); Rainbow Investors Group, Inc. v. Fuji Tricolor Mo., Inc., 168 F.R.D. 34, 36 (W.D. La. 1996) (“deposition of opposing counsel is a practice that has long been discouraged as disruptive of the adversarial system”). Accordingly, the party seeking to depose another party’s attorney has the burden of establishing that: “(1) no other means exist to obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” Shelton, 805 F.2d at 1327; see also Boughton v. Cotter Corp., 65 F.3d 823, 829-30 (10th Cir. 1995); Jennings v. Family Management, 201 F.R.D. 272, 277 (D.D.C. 2001); West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302 (S.D. Fla. 1990).

Plaintiffs fail to satisfy any of those three elements. They have not shown that the “information sought is relevant and nonprivileged” or “crucial to the preparation of the case.” Shelton, 805 F.2d at 1327. The only apparent information that plaintiffs seek to learn concerns Slonaker’s removal from office and the rejection of his proposed congressional testimony. See Exs. 1-3. For the reasons explained above, those matters may not be the basis for liability or sanctions in this case and involve information protected by the deliberative process, attorney-client, and presidential communications privileges. Moreover, even if the depositions would provide relevant and nonprivileged information, plaintiffs have failed to demonstrate that “no other means exist” to obtain that information. Shelton, 805 F.2d at 1327. Accordingly, plaintiffs should not be permitted to depose the government’s attorneys.

Conclusion

For the foregoing reasons, defendants respectfully request that the Court enter an order quashing the deposition subpoenas that plaintiffs have served upon the persons identified above, and enter a protective order precluding plaintiffs from conducting such depositions.

Dated August 21, 2002.

Respectfully submitted,

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

Sandra P. Spooner /CIA
SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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

ORDER

This matter coming before the Court on Defendants' Motion for Protective Order and to Quash Deposition Subpoenas, any responses thereto, and the record in this case, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED that the deposition subpoenas that Plaintiffs caused to be issued and served upon J. Steven Griles, James Cason, Ross Swimmer, Kelly Johnson, Jeffrey Clark, and Kyle Sampson are hereby quashed, and Plaintiffs are precluded from deposing those persons.

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

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

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

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

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 21, 2002 I served the foregoing *Defendants' Motion for Protective Order and to Quash Deposition Subpoenas and Defendants' Memorandum of Points and Authorities in Support of Motion for Protective Order and to Quash Deposition Subpoenas* 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:

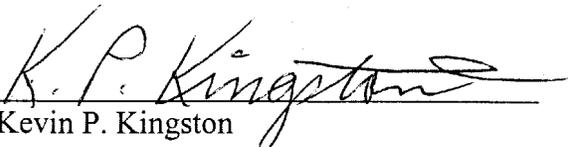
Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Copy 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


Kevin P. Kingston

Dennis M. Gingold
P.O. Box 14464
Washington, D.C. 20044-4464

BY FACSIMILE

August 1, 2002

The Hon. Joseph S. Kieffer, III
Court Monitor
420 7th St. N.W. #705
Washington, D.C. 20004

Re: Formal Request for Investigation of Efforts of White House Counsel Gonzalez, Interior Secretary Norton, Office of Management and Budget Director Daniels, and Their Staff, and Department of Justice Attorneys to Obstruct the Special Trustee and Unlawfully Suppress Written Testimony Before the Senate Indian Affairs Committee.

Dear Mr. Kieffer:

As you know, on July 30, 2002, the Honorable Thomas Slonaker was forced to resign as Special Trustee for American Indians. Mr. Slonaker now follows his predecessor, Mr. Homan, in this regard.

My understanding of the facts is as follows: According to published reports, Mr. Slonaker was "forced out" by Secretary Norton and Deputy Secretary Griles, who were aided and abetted – or directed – by officials in the White House, Office of Management and Budget, and the Department of Justice (individually and collectively "Contemnors").¹

This unlawful action occurred immediately following two events that relate directly to *Cobell v. Norton*. First, the Administration exposed its manifest bad faith and disdain for individual Indian trust beneficiaries when its eleventh-hour attempt to procure legislation to obstruct the Court's December 21, 1999 Order, by limiting the scope of the court-ordered accounting, was defeated on the floor of the House of Representatives 281 to 144. Second,

¹"Interior Aide Says He Was Forced To Quit Indian Trust-Fund Probe," *Wall Street Street Journal*. July 30, 2002 ("He said he was given a letter of resignation to sign during a meeting with Ms. Norton and Deputy Secretary Steven Griles Tuesday afternoon."). *See also*, Bill McAllister, "Indian trust supervisor resigns under pressure: Slonaker was increasingly critical of Interior's handling of accounts." *Denver Post*. July 31, 2002 ("I was forced out," quoting Slonaker).

within a week of that debacle, Contemnors attempted to block – or materially change – Mr. Slonaker’s oral and written testimony before the Senate Indian Affairs Committee that disclosed inadequacies inherent in the OHTA “accounting plan” and explained the inability of Contemnors to perform the accounting ordered by Judge Lamberth. While Mr. Slonaker, in fact, did testify on these matters, he did so only in response to questions from the Members of the Senate Indian Affairs Committee. White House counsel, at the request of Justice Department attorneys, have suppressed, and continue to conceal from Congress and the Court, Mr. Slonaker’s written testimony that the government cannot conduct a complete and accurate accounting of the Individual Indian Trust because of defendants’ and their counsel’s massive spoliation of essential trust records.²

The actions taken by Contemnors to suppress the written testimony of Mr. Slonaker have obstructed the Special Trustee’s legal obligation to report directly to the Senate Committee on Indian Affairs on trust reform, including without limitation all Individual Indian Trust accounting matters:

The Special Trustee shall report to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate each year on the progress of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service in implementing the reforms identified in the comprehensive strategic plan under subsection (a)(1) of this section and in meeting the timetable established in the strategic plan under subsection (a)(2)(C) of this section.

See 25 U.S.C. 4043 (f). Contemnors’ concerted efforts to deceive the Court and Congress and their willful and repeated obstruction of the Special Trustee – unlawful actions that culminated in Mr. Slonaker’s forced resignation – further the fraud that has been perpetrated on the Court and continues to undermine materially the integrity of this litigation. Contemnors have been warned repeatedly that this misconduct must cease:

This Court has had occasion to caution the Defendants against taking adverse personnel actions against their employees for speaking publicly about the problems with DOI’s trust reform operations and has taken action where necessary. The Secretary’s memorandum can have no other result than a chilling effect upon those OST officials carrying out their Congressionally mandated oversight functions. It, in itself, due to its patently false assertions and misinterpretation of past events, could qualify for such prohibited retaliation.

²*See* Associated Press, “Interior Aide Says He Was Forced To Quit Indian Trust-Fund Probe,” *Wall Street Street Journal*, July 30, 2002 (“Last week, White House counsel and Justice Department attorneys urged Mr. Slonaker not to submit prepared testimony to a Senate Indian Affairs Committee hearing in which he challenged the department’s plans to account for lost Indian money.”).

Cobell v. Norton, 2002 WL 844726 at *47 (D.D.C. May 2, 2002) (emphasis added).

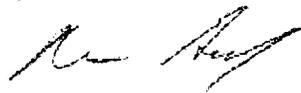
Accordingly, plaintiffs respectfully request that you commence an investigation in conformity with the authority conferred on you in the Orders of Reference dated April 16, 2001 and April 15, 2002 and identify each Contemnor to ensure personal accountability for his or her misconduct.³ Plaintiffs believe the investigation should include without limitation the following:

- The identity and role of each official in the White House, OMB, Justice, and Interior who participated in the unlawful retaliation against – and the constructive removal of – Special Trustee Tom Slonaker;
- The identity and role of each official in the White House, OMB, Justice, and Interior and the actions taken to intimidate the Special Trustee as a witness and to suppress the Special Trustee's written and oral Congressional testimony;
- An assessment of the impact of such unlawful conduct on the integrity of this litigation and appropriate recommendations for corrective and punitive remedies.

³“The actions Defendants have taken against these two officials [Messrs. Slonaker and Thompson] and contempt trial witnesses and the methods used by them come very close to constituting retaliation. **The reasons for these actions may be even more suspect and may require this Court's investigation.**” *Cobell*, 2002 WL 844726 at *68 (emphasis added).

It is unfortunate that government malfeasance in the management of the Individual Indian Trust is condoned and fostered by the White House at the same time the White House prosecutes the same misconduct vigorously when it harms investors in publicly held companies. No government official is above the law. No government official is entitled to undermine the integrity of this litigation. No government official is entitled to breach the trust obligations that the United States owes to 500,000 individual Indian trust beneficiaries. Under these circumstances, plaintiffs believe that real accountability is overdue and that a formal investigation must proceed forthwith.⁴

Very truly yours,



Dennis M. Gingold

cc: Alan Balaran
Elouise Cobell
Mark Nagle
Christopher Kohn

⁴"The actions of the Defendants subordinates and attorneys toward the Special Trustee and his Principal Deputy are unconscionable and smack of retaliation for and obstruction of, once again, the Special Trustee's Congressionally mandated oversight duties if not this Court's oversight. The method attempted to accomplish these ends and the reasons why may be sufficiently close to obstructing this Court's oversight to draw its attention and inquiry." *Id.* at *70.



U.S. Department of Justice

Civil Division

Commercial Litigation Branch

David J. Gottesman

P.O. Box 875 Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 307-0183
Fax: (202) 307-0494

August 2, 2002

BY FAX

Mr. Keith Harper
Native American Rights Fund
1712 N Street NW
Washington, D.C. 20036

Re: Cobell v. Norton, (D.D.C. Case No. 1:96CV01285 (RCL))

Dear Mr. Harper:

This will confirm that this office has been authorized by the following persons to accept service of the deposition subpoenas that you described in your phone call to me earlier today: Kelly Johnson, Jeffrey Clark, Kyle Sampson, James Cason, J. Steven Griles. You stated that the depositions would pertain to what Plaintiffs contend was "quashing" or "manipulating" the recent Congressional testimony of the Special Trustee.

As I mentioned on the phone, our acceptance of service of the deposition subpoenas is without prejudice to the rights of the named deponents and the Defendants to object to the depositions and to seek appropriate relief in that regard.

Very truly yours,

DAVID J. GOTTESMAN
Trial Attorney
Commercial Litigation Branch
Civil Division

cc: Alan L. Balaran

ATTORNEYS
Keith Harper
Tracy Labin

Native American Rights Fund

1712 N Street N.W., Washington, D.C. 20036-2976 • (202) 785-4166 • FAX (202) 822-0068

EXECUTIVE DIRECTOR
John E. Echohawk

MAIN OFFICE
1506 Broadway
Boulder, CO 80302-6926
(303) 447-8760
FAX (303) 443-7776

ANCHORAGE OFFICE
420 L Street, Suite 505
Anchorage, AK 99501
(907) 276-0680
FAX (907) 276-2466

WEBSITE ADDRESS
www.narf.org

August 5, 2002

BY HAND DELIVERY

David Gottesman
U.S. Department of Justice
Civil Division
1100 L Street, NW, Room 10012
Washington, D.C. 20005

Re: *Cobell v. Norton*, CA No. 96-1285

Dear Mr. Gottesman:

This is confirm that you have agreed to accept service of the attached subpoenas for Ross O. Swimmer, Director of the Office of Indian Trust Transition, United States Department of Interior. I have attached, as well, a notice of deposition.

I also would like to respond to the letter you sent to me dated August 2, 2002. As I mentioned to you on Friday, the deposition of Mr. Swimmer and the other government officials – Messrs. Griles, Cason, Sampson, Clark and Johnson – will not be limited to any specified subject areas. Any suggestion in your letter to the contrary is erroneous.

Have a good day.

Sincerely,



Keith M. Harper

cc: Special Master Alan Balaran
Court Monitor Joseph Kieffer

Respectfully submitted,

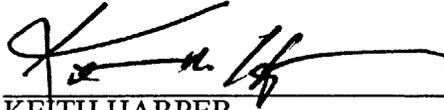
OF COUNSEL:

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

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027



DENNIS M. GINGOLD
D.C. Bar No. 417748
MARK KESTER BROWN
D.C. Bar No. 470952
1275 Pennsylvania Ave., N.W.
9th Floor
Washington, D.C. 20004



KEITH HARPER
D.C. Bar No. 451956
Native American Rights Fund
1712 N Street, NW
Washington, DC 20036-2976

Attorneys for Plaintiffs

August 2, 2002

Issued by the
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et. al.

Plaintiffs,
V.

SUBPOENA IN A CIVIL CASE

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

CASE NUMBER: 1:96CV01285 (RCL)

Defendants.

Ross O. Swimmer

TO: US Department of the Interior
1849 C Street, NW, Room 7229
Washington, DC 20240

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

Native American Rights Fund
1712 N Street, NW
Washington, DC 20036

DATE AND TIME

August 30, 2002
9:30 a.m.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE

DATE AND TIME

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

Attorney for Plaintiffs

DATE

August 2, 2002

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Keith Harper, Native American Rights Fund, 1712 N Street, NW, Washington, DC 20036

ATTORNEYS
Keith Harper
Tracy Labin

Native American Rights Fund

1712 N Street N.W., Washington, D.C. 20036-2976 • (202) 785-4166 • FAX (202) 822-0068

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August 5, 2002

BY HAND DELIVERY

David Gottesman
U.S. Department of Justice
Civil Division
1100 L Street, NW, Room 10012
Washington, D.C. 20005

Re: *Cobell v. Norton*, CA No. 96-1285

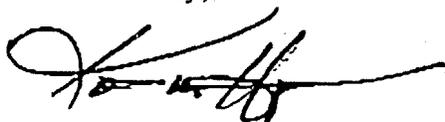
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I also would like to respond to the letter you sent to me dated August 2, 2002. As I mentioned to you on Friday, the deposition of Mr. Swimmer and the other government officials – Messrs. Griles, Cason, Sampson, Clark and Johnson – will not be limited to any specified subject areas. Any suggestion in your letter to the contrary is erroneous.

Have a good day.

Sincerely,



Keith M. Harper

cc: Special Master Alan Balaran
Court Monitor Joseph Kieffer

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et. al.

Plaintiffs,
V.

SUBPOENA IN A CIVIL CASE

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

CASE NUMBER: 1:96CV01285 (RCL)

Defendants.

Ross O. Swimmer

TO: US Department of the Interior
1849 C Street, NW, Room 7229
Washington, DC 20240

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

Native American Rights Fund
.1712 N Street, NW
Washington, DC 20036

DATE AND TIME

August 30, 2002
9:30 a.m.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE

DATE AND TIME

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

Attorney for Plaintiffs

DATE

August 2, 2002

ISSUING OFFICER'S NAME ADDRESS AND PHONE NUMBER

Keith Harper, Native American Rights Fund, 1712 N Street, NW, Washington, DC 20036

(See Rule 45, Federal Rules of Civil Procedure, Part C & D on Reverse)

If action is pending in district other than district of issuance, state district under case number.

AO 88 (Rev. 1/84) Subpoena in a Civil Case

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in

person, except that, subject to the provisions of clause (c)(3)(B) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer or director of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise obtained without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business; shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

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

NOTICE OF DEPOSITION

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

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

Attorneys for Defendants

PLEASE TAKE NOTICE, that on August 30, 2002, at the offices of the Native American Rights Fund, 1712 N Street, NW, Washington D.C. 20036, plaintiffs in this action will take the deposition of Ross O. Swimmer, Director, Office of Indian Trust Transition, US Department of the Interior, 1849 C Street, NW, Room 7229, Washington, DC 20240.

This deposition will commence at 9:30 a.m. and will continue from day to day until completed. Testimony will be recorded by stenographic means. You are invited to attend and examine.

Respectfully submitted,

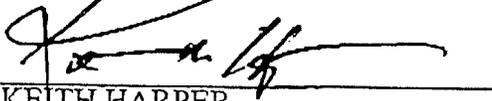
OF COUNSEL:

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

HENRY PAUL MONAGHAN
435 West 116th Street
New York, New York 10027



DENNIS M. GINGOLD
D.C. Bar No. 417748
MARK KESTER BROWN
D.C. Bar No. 470952
1275 Pennsylvania Ave., N.W.
9th Floor
Washington, D.C. 20004



KEITH HARPER
D.C. Bar No. 451956
Native American Rights Fund
1712 N Street, NW
Washington, DC 20036-2976

Attorneys for Plaintiffs

August 2, 2002