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U.S. DISTRICT COURT
DISTRICT OF COLUMBIA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

INTERIOR DEFENDANTS' MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' PLAN FOR DETERMINING ACCURATE BALANCES IN THE INDIVIDUAL INDIAN TRUST AND ALL EVIDENCE OFFERED IN SUPPORT

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Rule 7.1, Interior Defendants respectfully move this Court for an Order in limine excluding Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust (filed January 6, 2003) ("Plaintiffs' Plan"), and all evidence offered in support of Plaintiffs' Plan.[1] Interior Defendants seek an order in limine for the reasons set forth below.

I. PLAINTIFFS' PLAN IS NOT RELEVANT TO ANY JUSTICIABLE CLAIM

Plaintiffs do not mince words in their Plan: "[T]he accounting owed by the United States government and ordered by this Court is impossible." Plaintiffs' Plan at 3. With this principle of impossibility as its central premise,[2] Plaintiffs' Plan provides an alternative to the accounting

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[1] On April 18, 2003, Interior Defendants' counsel left a message for Plaintiffs' counsel asking to confer regarding this motion, pursuant to Local Rule 7.1(m). Not having received a reply, it is believed that Plaintiffs will oppose this motion.

[2] Interior Defendants dispute Plaintiffs' notion that an accounting is impossible. As discussed in Section III below, since "impossibility" is also not a justiciable claim, any evidence offered for the purpose of demonstrating impossibility should also be excluded.

required by the American Indian Trust Fund Management Reform Act of 1994 ("1994 Act") and ordered by this Court.[3] As even a cursory review makes plain, Plaintiffs' Plan is actually a methodology for calculating damages. Moreover, it is not – by Plaintiffs' admission – a plan for conducting the accounting required under the 1994 Act and, thus, does not comply with the Court's Order of September 17, 2002, authorizing Plaintiffs to file their own plan for conducting the historical accounting.

Under Fed. R. Evid. 401, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Because Plaintiffs' Plan does not comply with the Court's September 17, 2002 Order and does not relate to any cognizable claim in this action, it is irrelevant and should be excluded.

A. Plaintiffs' Plan Is A Methodology for Calculating Damages

On January 6, 2003, Plaintiffs submitted Plaintiffs' Plan for the Court's consideration. The bulk of Plaintiffs' submission is devoted to its argument that the Interior Department cannot produce an accounting that satisfies its trust obligations, and Plaintiffs ultimately propose a damages calculation based upon various methodologies for "quantify[ing] the monies generated from individual Indian trust lands." Plaintiffs' Plan at 39-55; see Plaintiffs' Plan, Ex. 42 (excerpt from "Measuring Commercial Damages" treatise); Plaintiffs' Plan, Ex. 43 (excerpt from "Recovery of Damages for Lost Profits" treatise).

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[3] For example, this Court has found that "[a]ny accounting of funds necessarily involves examining past transactions and events that could effect the current balance." Cobell v. Norton, 226 F. Supp. 2d 1, 116 n.135 (D.D.C. 2002). Plaintiffs' Plan does not even attempt to meet this standard.

1. **Plaintiffs Expressly Assert That An Accounting Cannot Be Performed**

Section II of Plaintiffs' Plan is captioned "Infeasibility of a Complete and Accurate Historical Accounting." Plaintiffs' Plan at 7. Plaintiffs' Plan continues with the following unqualified pronouncement:

> It is simply not possible to provide to individual Indian trust beneficiaries a complete and accurate historical accounting of their trust assets even if the Interior defendants, in good faith, had attempt [sic] to do so.

Id.

Plaintiffs contend that an accounting cannot be performed because the data necessary to perform an accounting has been "adulterated," "misappropriated," and "subject to fraud." Plaintiffs' Plan at 8-15. For example, Plaintiffs argue that

> [U]ntil the Interior Department's systems were shut down by this court on December 5, 2001 pursuant to plaintiffs' motion for a temporary restraining order, 24 hours a day, 7 days a week, 52 weeks a year – for more than a decade – all Trust data and billions of dollars of Trust funds were subjected to unlawful manipulation and misappropriation by anyone with access to the Internet anywhere in the world with no ability to prevent or detect, or assess and reconstruct, the nature and scope of unlawful transactions or the adulteration of Trust records.

Id. at 9-10. Plaintiffs' Plan also contends that their funds have been misappropriated for over fifty years. E.g., id. at 10-11 (citing 1951 document allegedly supportive of misappropriation claim). Plaintiffs' Plan further seeks damages for alleged fraud, citing an alleged conspiracy "among 23 natural resources companies to underpay royalty obligations." Id. at 12-15 (referring to newspaper article from 1988).

Plaintiffs' Plan continues by asserting that "[d]uring the 116 years of Trust management

and administration, the majority of source and related Trust documents have been destroyed." Id. at 16. Plaintiffs also support their allegations by relying upon a report prepared by a government consultant and statements made by Special Master Balaran. Id. at 17-21.

Finally, Plaintiffs refer the Court to statements of various government officials – the former Special Trustees for American Indians, General Accounting Office employees, independent accountants engaged by the government, members of Congress, and "defendants" – as confirmation of the premise underlying Plaintiffs' Plan, that "an accounting is impossible." Id. at 21-38.

2. Because Plaintiffs Allege That An Accounting Cannot Be Performed, Plaintiffs Propose a Plan for Estimating Damages Owed by the Government

Plaintiffs' design to obtain a damages award is confirmed by a review of the proposal that follows their discussion of impossibility. See Plaintiffs' Plan at 39-55. Plaintiffs' damages proposal begins with the statement that it is designed to

> quantify the monies generated from individual Indian trust lands ("Allotted Lands"). Due to overwhelming evidence of missing, unreliable, incomplete and misleading individual Indian trust data available from the trustee-delegate, Plaintiffs' Plan has sought to use other data sources in every instance possible.

Id. at 39 (parenthetical in original). Since Plaintiffs openly are using non-source documents to quantify allegedly "missing, unreliable, incomplete and misleading" data, their plan uses models – not source data – as a proxy for estimating the amounts that would be determined if an accounting were to be performed.[4]

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[4] In its 2001 opinion, the D.C. Circuit Court of Appeals was cognizant of Plaintiffs' allegations that underlying records for an accounting may be unavailable, but the appellate court – as did Congress in enacting the 1994 Act, with knowledge of many of the claims now asserted

After setting forth the bases for estimating total monies generated from the Allotted Lands,[5] Plaintiffs' Plan then suggests that the monies will be distributed among the class members, in some vague, as yet to be determined, manner. See Plaintiffs' Plan at 52. While Plaintiffs' Plan presents the concept of distributing money among class members – a routine process for a damages class action – it fails to describe any attempt to provide accountings for class members. Of course, since Plaintiffs have alleged that an accounting is impossible, it is not surprising that their Plan contains no accounting component. Rather, Plaintiffs concede that distributions to class members will not be based on accounting data because "[d]ue to the inadequacy of the data, this process will prove to be a challenge." Id. at 52.

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by Plaintiffs – adhered to the concept of an accounting:

> The government's broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.

Cobell v. Norton, 240 F.3d 1081, 1105 (D.C. Cir. 2001). Plaintiffs' Plan seeks to calculate damages through models, instead, and in so doing, Plaintiffs notably disregard the direction of the appellate court, which described the government's duties to complete an accounting. Plaintiffs' decision simply reflects their election to pursue damages, rather than the equitable remedy of an accounting.

[5] Plaintiffs' Plan even goes so far as to concede that its model would not capture all forms of revenues from the Allotted Lands. Plaintiffs' Plan at 50-51. Thus, Plaintiffs' Plan includes a category of revenues captioned "Other" which the plan quantifies "as the difference between the Department of Interior's estimate of total monies generated from Allotted Lands as presented in the Department's July 2, 2002 Report to Congress and Plaintiffs' quantification of monies generated from Allotted Lands . . . ." Id. at 51.

Plaintiffs complete their discussion by explaining the reliability of the proxies used to estimate monies generated by the Allotted Lands. Id. at 53-55. In so doing, Plaintiffs specifically rely upon excerpts from two damages treatises, Id. at 54-55 and Exhibits 42 and 43 (citing and quoting from R. Dunn, Recovery of Damages for Lost Profits (5th ed. 1998), and P. Gaughan, Measuring Commercial Damages (2000)), as additional confirmation that Plaintiffs' Plan is truly a damages model.

Finally, Plaintiffs' experts – retained to testify at the upcoming trial in support of their Plan – also confirm that the Plan is not intended to be an accounting. See, e.g., Richard E. Fasold Depo. Tr. at 93:2-11 (confirming that Plaintiffs' Plan and methodology do not provide a complete and accurate historical accounting "in and of itself"); 94:14-24 (Fasold's methodology would need to be "supplemented by additional steps taken by other people" for it to produce an historical accounting) (attached as Exhibit 1). One of Plaintiffs' retained experts even refers to Plaintiffs' Plan as a "damage model." Dwight J. Duncan Depo. Tr. at 290:21-291:17 (summarizing discussion with Fasold) (attached as Exhibit 2).

B. Plaintiffs Do Not Have A Damages Claim in this Action

This Court previously considered whether it had subject matter jurisdiction over Plaintiffs' claims and concluded that it did. Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998). In reaching this conclusion, the Court recognized the potential for confusion between Plaintiffs' purported claims for equitable relief, i.e., for an accounting, and a damages claim (which would have been beyond this Court's subject matter jurisdiction):

> In determining whether the United States has consented to be sued in a federal district court in this case, the crucial issue becomes whether the plaintiffs' requested retrospective remedy of an

> accounting is an equitable, specific claim, or whether it is simply a money damages claim in disguise. Given the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, the Court holds that the retrospective allegations of the Complaint seek solely an accounting. Thus, the plaintiffs do not seek money damages.

Id. at 39 (emphasis added).[6] Later, this Court reiterated its conclusion that it possessed subject matter jurisdiction to entertain Plaintiffs' claims. Cobell v. Babbitt, 91 F. Supp. 2d 1, 24 (D.D.C. 1999) ("Plaintiffs have alleged various statutory violations, and, in substance, the focus of their claims is to enforce the statutory right to an accounting."), aff'd sub nom. Cobell v. Norton, 240 F.3d 1081. This Court has thus conclusively determined that Plaintiffs do not have a damages claim in this action.

C. Adoption of Plaintiffs' Plan Would Divest this Court of Subject Matter Jurisdicition

In its prior rulings, this Court made clear that it does not possess subject matter jurisdiction to entertain damages claims brought by Plaintiffs. See, e.g., 30 F. Supp. 2d at 39. Rather, as the Court is aware, through the Tucker Act, Congress expressly addressed subject matter jurisdiction as to damages claims:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

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[6] Plaintiffs' Plan is erroneously captioned "Cobell v. Babbitt" on the cover page. One can understandably infer from this that Plaintiffs have long intended to pursue a damages claim in this case, notwithstanding their prior representations, as referenced in the Court's 1998 opinion. However, they have not moved to amend their complaint to include any such claim.

28 U.S.C. § 1491(a)(1) (2003).[7]

Ordering Interior Defendants to follow the damages methodology in Plaintiffs' Plan would be the equivalent of amending the Complaint to include a damages claim. This Court does not have jurisdiction to hear a damages claim. Adoption of Plaintiffs' Plan would thus divest this Court of jurisdiction and require transfer of the action to the Court of Federal Claims.

Because Plaintiffs' Plan is a model for damages calculation in a case without a damages claim – and before a Court with no jurisdiction to entertain one – Plaintiffs' Plan is not related to "any fact that is of consequence to the determination of the action," Fed. R. Evid. 401, as it currently stands or to any other justiciable claim in this action.

II. PLAINTIFFS' PLAN, AND ANY EVIDENCE IN SUPPORT, ARE INADMISSIBLE

Under Fed. R. Evid. 402, "[e]vidence which is not relevant is not admissible." Because, as described above, Plaintiffs' Plan is not relevant to any justiciable claim, it is inadmissible. For this Court to consider evidence in support of a Plan that cannot be adopted would be an unfortunate waste of judicial resources. Plaintiffs' Plan, and any evidence offered in support, should be excluded.

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[7] In limited circumstances, Congress has provided, through the "Little Tucker Act," that federal district courts have original jurisdiction concurrent with the Court of Federal Claims over damages claims against the United States, provided the claims are not in excess of $10,000 and are not brought pursuant to the Contract Disputes Act. 28 U.S.C. § 1346(a)(2) (2003). To date, Plaintiffs have not asserted that they seek to rely upon the Little Tucker Act as a basis for federal district court jurisdiction. In the event Plaintiffs choose to amend their complaint to seek damages pursuant to the Little Tucker Act, such claims, of course, would be subject to the $10,000 statutory limit on damages claims. Such a change would also require proof that each member of the class qualifies for such jurisdictional treatment.

III. EVIDENCE SUBMITTED TO PROVE "IMPOSSIBILITY" IS INADMISSIBLE

As discussed above, Plaintiffs' Plan is premised on the alleged impossibility of conducting the accounting required under the 1994 Act. Impossibility of performance, however, is not a claim or defense that has been asserted in this case; it actually contradicts the relief sought in the Complaint. Any evidence offered to demonstrate impossibility would thus not be relevant to any claim or defense in this action and should also be excluded under Fed. R. Evid. 402.[8]

CONCLUSION

For these reasons, Interior Defendants' Motion in limine should be granted. Plaintiffs' Plan, and all evidence offered in support of the Plan, should be excluded. In addition, any

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[8] Amending the Complaint to add a novel "impossibility" claim would also divest this Court of jurisdiction. The D.C. Circuit has indicated that this Court's jurisdiction over the action is based upon unreasonable delay of agency action under the Administrative Procedure Act, 5 U.S.C. § 706. Cobell v. Norton, 240 F.3d at 1097. Interior Defendants obviously could not have unreasonably delayed conducting an accounting if such an accounting is impossible. Plaintiffs could try to assert a claim for damages against Interior Defendants for creating the conditions in which an accounting is impossible, but, again, such a claim is not within the jurisdiction of this Court.

evidence offered for the purpose of demonstrating the impossibility of conducting an accounting should be excluded.

Dated: April 18, 2003

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Interior Defendants' Motion In Limine To Exclude Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust And All Evidence Offered In Support. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Interior Defendants' Motion is GRANTED;

ORDERED that Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust will not be admitted into evidence at the Phase 1.5 trial;

ORDERED that all evidence offered in support of Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust will not be admitted at the Phase 1.5 trial;

ORDERED that all evidence offered for the purpose of proving that an accounting of the Individual Indian Money trust is impossible will not be admitted at the Phase 1.5 trial.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA
3 - - - - - - - - - - - - - - - -X
4 ELOUISE PEPION COBELL, :
5 et al., : Case No.
6 Plaintiffs, : 1:96CV01285
7 v. : (Judge Lamberth)
8 GALE NORTON, Secretary of :
9 the Interior, et al., :
10 Defendants. :
11 - - - - - - - - - - - - - - - X
12 Washington, D.C.
13 Friday, March 21, 2003
14 Deposition of RICHARD E. FASOLD, a
15 Witness herein, called for examination by counsel
16 for Defendants in the above-entitled matter,
17 pursuant to notice, the witness being duly sworn
18 by PAUL A. GASPAROTTI, a Notary Public in and for
19 the State of Maryland, taken at the offices of
20 U.S. Department of Justice, 1100 L Street, N.W.,
21 Washington, D.C., at 9:35 a.m., Friday, March 21,
22 2003, and the proceedings being taken down by
23 Stenotype by PAUL A. GASPAROTTI, and transcribed
24 under his direction.
25

1 on aggregate numbers, no.
2 Q. Well, the methodology that you've
3 described, does that provide individual Indian
4 trust beneficiaries with a complete and accurate
5 historical accounting?
6 A. No.
7 Q. Do you have an opinion as to whether
8 the methodology described in Fasold Exhibit 1
9 complies with the Court's requirement that a
10 historical accounting be performed?
11 A. Not in and of itself.
12 Q. And can you explain what you mean by
13 that?
14 A. According to the plaintiffs' plan that
15 I've read --
16 Q. And helped draft, right?
17 A. And helped draft, and I will then go
18 into a parenthetical to clear the record on your
19 potential misconception.
20 Q. Fair enough.
21 A. I was informed that my draft, my ideas
22 to go into that document were woefully inadequate
23 and most of them weren't used. So when you say I
24 helped draft, a number of my suggestions were
25 summarily rejected.

1 Q. But when we were going through
2 plaintiffs' plan earlier this morning, you were
3 ticking off a number of pages that included your
4 suggestions, right?
5 A. Right.
6 Q. So you -- I'm sorry -- you were
7 explaining your response to my question about
8 whether your methodology would provide a
9 historical accounting as required by the Court.
10 A. Yeah. As described in the plaintiffs'
11 plan, there are additional phase or phases to be
12 completed after, I believe, a ruling in Trial 2,
13 should the plaintiffs' plan be adopted, that would
14 provide individual Indians with balances.
15 Q. And which additional steps are you
16 referring to?
17 A. It begins on page 52, and I'm looking
18 at --
19 Q. Oh, we're in the plaintiffs' plan?
20 A. Plaintiffs' plan, yes. Page 52, and it
21 follows under the paragraph I, distribution of
22 restated accounts, and I can read it if you would
23 like me to read it.
24 Q. You can just tell me which section
25 you're referring to.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA
3 - - - - - - - - - - - - - - - -X
4 ELOUISE PEPION COBELL, :
5 et al., : Case No.
6 Plaintiffs, : 1:96CV01285
7 v. : (Judge Lamberth)
8 GALE NORTON, Secretary of :
9 the Interior, et al., : VOLUME II
10 Defendants. :
11 - - - - - - - - - - - - - - - - X
12 Washington, D.C.
13 Tuesday, March 25, 2003
14 Continued Deposition of DWIGHT J.
15 DUNCAN, a Witness herein, called for examination
16 by counsel for Defendants in the above-entitled
17 matter, pursuant to notice, the witness being duly
18 sworn by PAUL A. GASPAROTTI, a Notary Public in
19 and for the State of Maryland, taken at the
20 offices of U.S. Department of Justice, 1100 L
21 Street, N.W., Washington, D.C., at 9:35 a.m.,
22 Friday, March 21, 2003, and the proceedings being
23 taken down by Stenotype by PAUL A. GASPAROTTI, and
24 transcribed under his direction.
25

1 should have been collected, not stepping back to
2 question whether things have been negotiated in
3 good faith at that level.
4 Q. Do you know why you're not up at that
5 level, by the way?
6 A. I don't think there has been any
7 effort, and this model doesn't incorporate what
8 market negotiated contracts would be.
9 Q. Have you formed any opinions regarding
10 any weaknesses in the plaintiffs' plan?
11 A. Mr. Fasold and I had several
12 discussions about the actual implementation of the
13 methodologies, but I would say that those
14 discussions really went to the actual numerical
15 calculations that are going to be provided in
16 trial 2.
17 Q. So there were no discussions about the
18 weaknesses in the method?
19 A. No. I think we had some discussion
20 specifically about methodologies.
21 Q. Would you summarize those discussions
22 please?
23 A. Well, we talked obviously about the
24 methodologies and evaluating them relative to the
25 relevance and reliability standards. Specifically

1 I identified some areas in Mr. Fasold's plan where
2 I thought that the number of data points available
3 for certain of the variables that he was
4 analyzing, it certainly would have been desirable
5 to have more data points. There were some
6 portions where there were no data points over
7 three or four or five-year periods, and I probed
8 Mr. Fasold as to whether or not there was any
9 other source that could be used to try and fill in
10 some of those gaps.
11 We talked specifically about the
12 estimate of aggregates, the methodology behind the
13 estimate of aggregates, and it was my opinion that
14 the estimate of aggregates was, the methodology
15 behind it was a fairly weak methodology and that
16 was something that Mr. Fasold ultimately, I
17 believe, removed from the damage model as it now
18 exists.
19 Q. Now, what methodology did he remove?
20 A. The estimation of aggregates --
21 aggregates being compounds used in -- things used
22 in making, like concrete.
23 Q. Mr. Duncan, have you ever participated
24 in a hearing, in a court hearing under Daubert or
25 Kumho Tire?

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 18, 2003 I served the foregoing *Interior Defendants' Motion In Limine to Exclude Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust and All Evidence Offered in Support* by facsimile in accordance with their written request of October 31, 2001 upon:

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By U.S. Mail upon:

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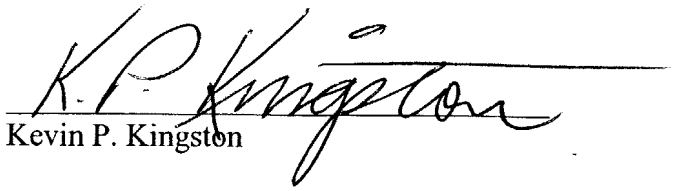

Kevin P. Kingston