IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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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 AS TO PLAINTIFFS' PROFFERED EXPERT TESTIMONY AND REPORT REGARDING THE RELIABILITY AND RELEVANCE OF METHODOLOGIES EMPLOYED IN PLAINTIFFS' PLAN

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Civil Rule 7.1, Interior Defendants respectfully move this Court for an order in limine barring plaintiffs from introducing proffered expert opinions in support of the "reliability" and "relevance" of the methodologies employed in Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust ("Plaintiffs' Plan"). Specifically, those opinions consist of the following:

- Proffered testimony of Mr. Dwight J. Duncan and
- Sections 4.0-5.4.4 and the second opinion set forth in Section 6.0 of Mr. Duncan's proffered expert report with regard to his opinions.

On April 21, 2003, Interior Defendants' counsel conferred with plaintiffs' counsel regarding this motion, pursuant to Local Civil Rule 7.1(m), and plaintiffs' counsel stated that this motion would be opposed. Interior Defendants seek an order in limine for the reasons set forth below.

I. Overview of Mr. Dwight J. Duncan's Opinions

Plaintiffs have identified Mr. Dwight J. Duncan as one of their experts to testify at the upcoming Phase 1.5 trial. Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003). Mr. Duncan's expert report sets forth the following two subjects for his opinions:

> 1. Review, analyze, and comment on the statistical sampling procedures presented in the DOI Plan.
>
> 2. Review, analyze, and comment on the methodologies employed in the Plaintiffs' Plan.

Expert Report of Dwight J. Duncan at 2 (Feb. 28, 2003) ("Duncan Report") (filed with Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003)). While Interior Defendants do not concede that Mr. Duncan is sufficiently qualified to opine regarding the first subject identified above, i.e., "the statistical sampling procedures in the DOI Plan," this motion in limine only addresses Mr. Duncan's proffered opinions regarding the second identified subject, i.e., "the methodologies employed in the Plaintiffs' Plan."

A review of Mr. Duncan's expert report confirms that his proffered opinions on this topic are simply his unqualified legal conclusions as to whether Plaintiffs' Plan satisfies the reliability and relevance requirements articulated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). See Duncan Expert Report at 14-22 (Sections 4.0-5.4.4 and Section 6.0 (second opinion)). For example, early in this portion of his report, Mr. Duncan sets forth his analysis of Daubert and Kumho Tire. Duncan Expert Report, Section 5.1 ("Reliability and Relevance Standards"). Mr. Duncan's analysis proceeds to assess the various methodologies utilized in Plaintiffs' Plan – GIS data overlays,

reliance on other experts, and historical data – and for each category concludes that the methodology is both "reliable" and "relevant." Duncan Expert Report, Sections 5.2.4 (GIS data overlays), 5.3.4 (reliance on other experts), and 5.4.4 (historical data). After setting forth his analysis, Mr. Duncan's report concludes:

> The methodologies employed in the Plaintiffs' Plan are based on scientific knowledge, are applied appropriately, and are reliable and relevant in evaluating the issues before the Court in this matter.

Duncan Expert Report, Section 6.0 (second opinion).

As this Court is well-aware, it is this Court's responsibility to make determinations under Daubert and Kumho Tire; such determinations are not factual issues in dispute to be decided by the trier of fact. Thus, they are not properly the subject of expert opinions, such as those proffered in Mr. Duncan's report. Moreover, even if this Court were to conclude that it could consider expert opinions as to whether plaintiffs have met their burden under Daubert and Kumho Tire, Mr. Duncan is wholly unqualified to offer such opinions. Therefore, as is explained below, this Court should enter its order in limine barring Mr. Duncan's opinions regarding the reliability and relevance of the methodologies employed in Plaintiffs' Plan, as set forth in Mr. Duncan's Expert Report at Sections 4.0-5.44 and the second opinion of Section 6.0.

II. Plaintiffs Cannot Satisfy Either Prong of This Circuit's Two-Part Test for Determining the Admissibility of Expert Testimony

In Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207 (D.C. Cir. 1997), the D.C. Circuit interpreted Rule 702 of the Federal Rules of Evidence as follows:

> To evaluate expert testimony, the Federal Rules of Evidence provide that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or

> to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Interpreting this provision, we apply a two-part test for determining the admissibility of expert testimony: the witness (1) must be qualified, and (2) must be capable of assisting the trier of fact.

112 F.3d at 1211 (citing Exum v. General Electric Co., 819 F.2d 1158, 1163 (D.C. Cir. 1987)) (emphasis added) (brackets in original). Plaintiffs cannot satisfy either prong of this two-part test with respect to Mr. Duncan's proffered testimony and opinions regarding "the methodologies employed in the Plaintiffs' Plan."

Interior Defendants note, at the outset, that even if this Court were inclined to consider expert opinions as to whether the Court, in its "gatekeeper" role under Daubert and Kumho Tire, should admit the expert testimony of Plaintiffs' other experts, Mr. Duncan is not qualified to provide such opinions. Mr. Duncan's two college degrees are in economics. Duncan Report, Appendix A at 8 ("Education and Training" section lists B.S. in Economics and M.S. in Economics). Indeed, Mr. Duncan's resume, included within his report, describes himself as "an economist who hold the Chartered Financial Analyst designation and has over nine years of experience in economic and financial consulting." Duncan Report, Appendix A at 1.

Thus, even if this Court were to determine that an expert could offer opinions as to whether the methodologies employed in Plaintiffs' Plan comply with the legal requirements in Daubert and Kumho Tire, Mr. Duncan is plainly unqualified to serve as that expert. As we explain in the next paragraph, however, the Supreme Court's controlling decisions make such opinions plainly inadmissible from any proffered expert.

The more significant barrier to Mr. Duncan's proffered opinions is that the Supreme Court

has clearly established that it is the trial judge's responsibility to make the "gatekeeper" determinations regarding the reliability and relevance of expert testimony. In Daubert, the Supreme Court stated:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) [of the Federal Rules of Evidence] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.

509 U.S. at 592 (footnote omitted). Similarly, in Kumho Tire, the Court stated:

> In Daubert, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant but reliable." The initial question before us is whether [Daubert's] basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony.

526 U.S. at 147 (quoting 509 U.S. at 589) (emphasis added).

When the Court makes determination under Daubert and Kumho Tire, it is not acting as a trier of fact. Since Mr. Duncan's opinions are not addressed to questions to be resolved by the trier of fact, Mr. Duncan's opinions are plainly inadmissible under the second prong articulated in Burkhart.

III. This Court Should Enter Its Order In Limine Barring Plaintiffs From Introducing the Expert Opinions of Mr. Duncan With Regard to the Reliability and Relevance of Methodologies Employed in Plaintiffs' Plan

"The purpose of a motion in limine is to 'procure a definitive ruling on the admissibility of evidence at the outset of the trial.'" Crocker v. Piedmont Aviation, Inc., 743 F. Supp. 1, 1 (D.D.C. 1989) (quoting 21 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5037,

at 194 (1977) and citing Koller v. Richardson-Merrell, 737 F.2d 1038, 1067 (D.C.Cir.1984) (concurring opinion)). Mr. Duncan's opinions regarding the application of Daubert and Kumho Tire – which are not even based upon sufficient knowledge, skill, experience, training, or education – are wholly inadmissible under Rule 702 of the Federal Rules of Evidence. Mr. Duncan's opinions are with respect to issues committed to this Court in Daubert and Kumho Tire; they are not offered with respect to an issue of fact. As such, the opinions proffered by Mr. Duncan fail both prongs of the two-part test set forth by the D.C. Circuit in Burkhart.

Conclusion

For the foregoing reasons, Interior Defendants respectfully move this Court for an order in limine barring plaintiffs from introducing Mr. Duncan's proffered expert opinions in support of the "reliability" and "relevance" of the methodologies employed in Plaintiffs' Plan.

Respectfully submitted,

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April 21, 2003

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

ORDER

This matter comes before the Court on Interior Defendants' Motion in Limine as to Plaintiffs' Proffered Expert Testimony and Report Regarding the Reliability and Relevance of Methodologies Employed in Plaintiffs' Plan ("Interior Defendants' Motion in Limine"). After considering that motion, any responses thereto, and the record of the case, the Court finds that Interior Defendants' Motion in Limine should be, and hereby is, GRANTED. It is further

ORDERED that the proffered expert testimony of Mr. Dwight J. Duncan in support of the "reliability" and "relevance" of the methodologies employed in Plaintiffs' Plan will not be admitted at the Phase 1.5 Trial, and it is further

ORDERED that Sections 4.0 through 5.44, inclusive, and the second opinion in Section 6.0 of the proffered expert report of Mr. Dwight J. Duncan in support of Plaintiffs' Plan will not be admitted at the Phase 1.5 Trial.

SO ORDERED this ___ day of _____, 2003.

_____
ROYCE C. LAMBERTH
United States District Judge

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on April 21, 2003 I served the foregoing *Interior Defendants' Motion in Limine as to Plaintiffs' Proffered Expert Testimony and Report Regarding the Reliability and Relevance of Methodologies Employed in Plaintiffs' Plan* by facsimile in accordance with their written request of October 31, 2001.

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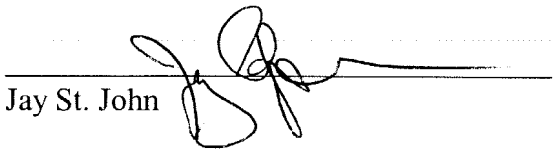

Jay St. John