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.	)	
	)	

DEFENDANTS' OPPOSITION TO "PLAINTIFFS' BILL OF COST"

Defendants respectfully submit this opposition to Plaintiffs' Bill of Cost [sic]. Plaintiffs continue to clutter the record in this case with inappropriate filings that lack any basis in law. In this instance, Plaintiffs request that the Clerk of the Court immediately tax costs in their favor. The request is improper on its face. First, under this Court's local rules, a request for costs to be taxed may only be made after a judgment terminating the case as to the party seeking costs has been entered by the Court. Second, the Clerk may not tax costs until such judgment has become final. Obviously, no such judgment has been entered, much less become final. Third, only a prevailing party may seek costs. A substantial portion of the costs Plaintiffs seek relate to the Phase 1.5 trial, in which Plaintiffs' litigation position was expressly rejected by the Court. Having not prevailed at the 1.5 trial, Plaintiffs may not submit a bill of costs with respect to that trial. Frivolous in every respect, Plaintiffs' Bill of Cost[s] should be rejected in its entirety.

ARGUMENT

The prerequisites for obtaining taxation of costs by the clerk are plainly set out in the Court's rules:

> Costs shall be taxed as provided in Rule 54(d), Federal Rules of Civil Procedure. A prevailing party may serve and file a bill of costs which shall include all costs the party seeks to have taxed. This bill of costs shall specifically designate which costs fall within paragraph (d) of this Rule. A bill of costs must be filed within 20 days after entry of judgment terminating the case as to the party seeking costs, unless the time is extended by the court. Any cost omitted from the bill of costs shall not be allowed, except for post-judgment costs.

LCvR 54.1(a) (emphasis added). If the foregoing requirements are met, the rules direct the clerk to "tax costs after the judgment has become final or at such earlier time as the parties may agree or the court may order." LCvR 54.1(c) (emphasis added). For purposes of the rule, a judgment is considered final "when the time for appeal has expired and no appeal has been taken, or when the court of appeals issues its mandate." Id. However, any order that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties," and such order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Fed. R. Civ. P. 54(b). Thus, costs may only be taxed if the party seeking such costs has prevailed, and if a final judgment terminating the case as to that party has been entered.

Plaintiffs' Bill of Cost[s] runs clearly afoul of these fundamental rules.[1] They ask the Clerk of the Court to tax costs based, ostensibly, on final judgments being issued with respect to both the 1999 and 2003 trials held by the Court. Plaintiffs' Bill of Cost[s] at 1 ("Judgments having been enter [sic] in the above-entitled action on the 21st day of December 1999 (Trial 1.0), and on the 25th day of September 2003 (Trial 1.5), against defendants, the clerk is requested to tax the following as costs . . ."). Yet, there has been no "judgment terminating the case" that would allow the bill to be filed, nor, a fortiori, has any such judgment become "final" such that it would be appropriate for the Clerk to now tax costs. Indeed, the Court's structural injunction order, from which a large portion of the costs Plaintiffs seek arises, is presently on appeal. Given this fact, it is inconceivable that Plaintiffs have represented to the Court that the structural injunction order constitutes a judgment (and, presumably, a final one) that can give rise to an immediate taxation of costs by the Clerk. Plaintiffs' position is utterly at war with the clear rules governing the taxation of costs in this Court, and warrants summary rejection. See LCvR 54.1(a), (c); Fed. R. Civ. P. 54(b); Machesney v. Bruni, 905 F. Supp. 1122, 1137 (D.D.C. 1995) ("The Court finds that the costs should not be taxed until the judgment becomes final.

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[1] Defendants reserve their right to object to specific costs that Plaintiffs seek in the event that taxation of costs in Plaintiffs' favor becomes appropriate in this case. Though not relevant to disposing of Plaintiffs' application at this time, even a cursory examination of the invoices attached to Plaintiffs' application reveals manifest impropriety in the costs sought. See Plaintiffs' Bill of Cost[s] (attaching invoices, e.g., for a June 11, 2003 charge for "lock maintenance"; a January 22, 2003 charge for an overnight stay by Laura Maulson at the Excalibur Hotel and Casino in Las Vegas, as well as for a rental car there; airfare charges of $2,264, $2,269 and $2,389 for three trips between Phoenix and Washington for Plaintiffs' witness Dwight Duncan; individual meal charges of $126.96, $101.55, and $95.35 for Plaintiffs' witness Richard Fasold; an individual meal charge of $249.45 for Plaintiffs' witness John Wright; a $1334.79 charge for a 3-day stay at the Willard Hotel by Mr. Wright; and charges for in-room hotel movies for Mr. Duncan).

Accordingly, the motion for approval of bill of costs is premature.") (quoting Local Civil Rule 214(c), now 54.1(c)).

In addition to seeking taxation of costs prior to the issuance of a final judgment terminating the case, Plaintiffs' Bill of Cost[s] is also improper because it asks for costs to be taxed with respect to proceedings in which Plaintiffs did not prevail. In the Phase 1.5 trial that gave rise to the Court's structural injunction order of September 25, 2003, Plaintiffs urged the Court to adopt a proxy accounting model, based on the argument that an historical accounting was impossible. See Plaintiffs' Accounting Plan. The Court rejected Plaintiffs' approach. Cobell v. Norton, 283 F. Supp. 2d 66, 209 (D.D.C. 2003) ("The bottom line is that to constitute a historical accounting, the Plan advocated by plaintiffs would require significant modifications . . ."). Because only a prevailing party may seek costs under Local Civil Rule 54.1(a), Plaintiffs' request for costs to be awarded them with respect to the Phase 1.5 trial is patently deficient.

Because no final judgment has been entered that terminates this litigation, Plaintiffs' request for taxation of costs is improper. Even if an appropriate final judgment had been entered, Plaintiffs' request for costs relating to proceedings in which they did not prevail would remain improper. Their request for taxation of costs should be denied.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that Plaintiffs' Bill of Cost[s] be denied in its entirety.

Dated: December 19, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 2003 the foregoing *Defendants' Opposition to "Plaintiffs' Bill of Cost"* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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