

RECEIVED
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

2003 APR 30 PM 5:02

NANCY M.
MAYER-WHITTINGTON
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Case No. 1:96CV01285
(Judge Lamberth)

MOTION FOR RECONSIDERATION OF INTERIOR DEFENDANTS'
MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF
PAUL HOMAN AS OTHER THAN A REBUTTAL WITNESS

Interior Defendants respectfully move this Court for reconsideration of its denial of their motion to exclude the proffered expert testimony of Plaintiffs' rebuttal witness, Paul M. Homan. On April 28, 2003, Defendants filed Interior Defendants' Motion in Limine as to Plaintiffs' Proffered Expert "Rebuttal" Testimony and Opinions, which sought, inter alia, an order precluding Plaintiffs from introducing the testimony or the expert report of Mr. Homan for any purpose other than rebuttal. During the final pretrial conference on April 29, 2003, the Court denied Interior Defendants' motion. See Pretrial Order at 2 (Apr. 29, 2003). In light of additional facts not considered by the Court in denying the requested relief, Interior Defendants respectfully request that the Court reconsider its order.¹ Mr. Homan should be limited to giving rebuttal testimony, or alternatively, Defendants should be permitted further examination of his

¹ On April 30, 2003, Interior Defendants' counsel conferred with Plaintiffs' counsel regarding this motion, pursuant to Local Civil Rule 7.1(m), and Plaintiffs' counsel stated that Plaintiffs oppose this motion.

opinions in advance of his appearance.

Plaintiffs should not be permitted to offer Mr. Homan's expert testimony in their case in chief because they concealed their true plan for use of his testimony and expressly misrepresented his role in the case, all of which has seriously prejudiced Defendants. The Court's Scheduling Order entered last October required the parties to identify all testifying expert witnesses and to make their required expert disclosures by February 28, 2003. Phase 1.5 Trial Discovery Schedule Order at 1 (Oct. 17, 2002). This disclosure was mandatory for all experts who would be presented as part of a party's case in chief. The Order further provided that a party could identify rebuttal experts within the following month (*i.e.*, by Mar. 31, 2003) who had been retained to criticize or comment upon an opposing expert's testimony. *Id.*

Plaintiffs failed to disclose Mr. Homan on February 28, 2003 as an expert for their case in chief. In stark contrast, Plaintiffs did provide expert disclosures for all of their other expert witnesses.² Mr. Homan was not revealed as a retained expert witness until a month later, when Plaintiffs identified him as a rebuttal expert on March 31, 2003. Plaintiffs' Disclosure of Rebuttal Expert Witnesses With Respect to Trial 1.5 (Mar. 31, 2003). The Court should not countenance such inexcusable delay in identifying Homan as an expert witness, nor should it reward Plaintiffs for their misrepresentation of his role at trial.

Contrary to the representations made by counsel in open court on April 28, 2003, Mr. Homan's identification as a "rebuttal" expert has nothing to do with Plaintiffs' dashed hope that

² Plaintiffs timely expert disclosures for Messrs. Fasold, Gabriel, Wright, Stinnett, McQuillen and Duncan only underscores the blatant failure by Plaintiffs to provide Defendants with the same disclosures for Mr. Homan.

they would go second at this trial. The assertion is belied by Plaintiffs' identification of all their other experts as experts for their case in chief, and not as rebuttal experts. Rather, this was a sleight of hand by Plaintiffs, perhaps to protect Mr. Homan from a strong rebuttal and to blunt effective discovery into Mr. Homan's opinions.

A "rebuttal" witness plays a materially different and more limited role at trial. By definition, "rebuttal" testimony is "[e]vidence which is offered by a party *after* he has rested his case and *after* the opponent has rested in order to contradict the opponent's evidence." BLACK'S LAW DICTIONARY at 1139 (5th Ed. 1979) (emphasis added). It necessarily follows, then, that a rebuttal witness may testify only in response to what has already been introduced as evidence at trial. "The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case." Faigin v. Kelly, 184 F.3d 67, 85 (1st Cir. 1999) (affirming exclusion of "rebuttal" testimony); accord Lubanski v. Coleco Indus., Inc., 929 F.2d 42, 47 (1st Cir. 1991) ("Rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in [the] opponent's case in chief.") (quoting Morgan v. Commercial Union Assurance Cos., 606 F.2d 554, 555 (5th Cir.1979)). Absent evidence of record that requires a response, no basis even exists for rebuttal testimony.

Plaintiffs actively seized on Mr. Homan's mere "rebuttal" status to prevent Defendants from inquiring into any details concerning his views of the compliance plans filed by the parties on January 6, 2003. In his expert "rebuttal" report, he identifies two areas for his opinion:

1. Review, analyze, and comment on the Expert Reports filed by the Defendant's [sic] testifying experts, including Edward Angel, John H. Langbein, David B. Lasater, Alan S. Newell and Joseph R. Rosenbaum as they relate to the historical accounting issues of the Individual Indian trust and the compliance

plans mentioned above.³

2. Review, analyze, and comment on both the defendants' and plaintiffs' plans to bring the U.S. trustee-delegates into compliance with the fiduciary obligations that they owe to the IIM beneficiaries, including, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards.

Expert Report (Rebuttal) of Paul M. Homan In Trial 1.5 of Cobell v. Norton at 4 (signed Mar. 31, 2003)⁴ ("Homan Rebuttal") (filed with Plaintiffs' Disclosure of Rebuttal Expert Witnesses With Respect to Trial 1.5 (Mar. 31, 2003). When Defendants sought to confirm what the second area of expert testimony involved, Plaintiffs' counsel represented -- and their witness confirmed -- that it was limited solely to rebuttal of testimony expected to be offered by Defendants' own experts. Midway through Mr. Homan's deposition on April 9, 2003, the following examination was attempted:

14 Q. From the materials listed in your
15 appendix, I forget now which one it is, but the
16 things that you considered, Appendix D, I believe
17 you identify the two plaintiffs' plans. Is that
18 right? Among the documents you --
19 A. Yes.
20 Q. -- looked at. To your understanding of
21 reading those in terms of the determining accurate
22 balances, do they propose a method for
23 transaction-by-transaction analysis?
24 MR. GINGOLD: Objection. That was not
25 within the scope of Mr. Homan's engagement as a
1 rebuttal witness.

³ "Compliance plans" refers to the corresponding trust compliance submissions of the Department of the Interior and the Plaintiffs filed on January 6, 2003, pursuant to the Court's Order of September 17, 2002. See Homan Rebuttal at 4.

⁴ Although the cover page of the Homan Rebuttal bears a date of March 30, 2003, Mr. Homan's signature at the end of the report is dated March 31, 2003.

2 MR. QUINN: Can you explain that?

3 MR. GINGOLD: He was retained as a
4 rebuttal witness. I think, let me read this. Maybe
5 you don't understand that.

6 * * *

8 MR. GINGOLD: What he stated earlier for
9 you, again, apparently there was a lack of
10 communication, was that he read the plans based on
11 the references made by the experts and the reliance
12 and consideration of those experts on the various
13 plans for him to be able to evaluate fully the
14 expert plans. Is that a correct statement, Paul?

15 THE WITNESS: That's correct.

16 MR. GINGOLD: That's what he reviewed the
17 plans for. That's exactly what he stated. He was
18 not -- he was retained as a rebuttal witness, and
19 that's also what he states.

20 If one of your experts relies upon or
21 considers plans that are identified, it's critical
22 for the individual who is assessing the credibility
23 of those plans to investigate or evaluate what that
24 person relies upon for purposes of rebuttal
25 testimony.

1 MR. QUINN: Okay. I understand what you,
2 I think I understand what you are saying, but that
3 seems to be at odds with the plain language of his
4 cover letter that came with the report as well as
5 what he says -- describes his engagement to be. I
6 don't want to have an argument later that somehow we
7 missed something that we had an opportunity to
8 question him about.

9 MR. GINGOLD: No. We made a statement --

10 THE WITNESS: That's my --

11 MR. GINGOLD: We made a statement, and we
12 identified Mr. Homan as a rebuttal witness.

13 MR. QUINN: Let me just go back to this
14 for a second. Where was I? Back to your
15 engagement, Page 4. That last paragraph, Number 2,
16 and I'm sorry to spend more time on this than I need
17 to, but it says, Review, analyze and comment on both
18 the defendant's and plaintiff's plans to bring the
19 U.S. trustee delegates into compliance with
20 fiduciary obligation.

21 What you are saying is that comment is
22 limited only to rebut whatever one of our experts
23 has said?

24 MR. GINGOLD: I'll say it again, because
25 I've said it for the record. Mr. Homan was retained
1 as a rebuttal expert. Your experts commented on
2 plaintiff's plans and commented on defendant's plans
3 with regard to how they were assessing the situation
4 and whatever their engagement was with respect to
5 this litigation.

6 Mr. Homan said because they specifically
7 relied upon, considered or otherwise evaluated these
8 plans, he had to review those plans to determine the
9 credibility of the experts' plans for purposes of
10 rebuttal testimony. Is that correct, Mr. Homan?

11 THE WITNESS: Absolutely.

12 MR. QUINN: Okay. All right.

13 * * *

23 Q. The experts that you proposed to rebut in
24 terms of your opinion, what was their opinion, where
25 did the opinions about the plaintiff's plan that you
1 were rebutting?

2 A. Well, the four of them, Angel, Lasater,
3 Newell and Rosenbaum, at least in my reading
4 strictly mentioned the historic, the DOI's
5 historical accounting plan. They were opining on
6 that plus other research they had done.

7 They did not mention the Fiduciary
8 Obligations Compliance Plan except in passing.
9 However, Mr. Lasater states in his engagement
10 letter --

11 Q. Langbein or Lasater?

12 A. I am sorry, Langbein on page -- I quoted
13 him. He says on Page 18 under 3.1, paragraph 6, and
14 I quote, in part, the first sentence, "You have
15 asked me to examine the Department of the Interior's
16 Fiduciary Obligations Compliance Plan of January 6,
17 2003, hereafter the DOI 2003 Plan or the Plan, and
18 to evaluate the plaintiff's contention that common
19 trust law standards should be applied to DOI's
20 management and administration of the Indian trust."

21 So then he, as well as the others,
22 critiqued parts of plaintiff's plans. So I felt I

23 had to read both plaintiff's plan, which I had done
24 anyway, and also the Department of the Interior's
25 compliance and historical accounting plan.

1 Q. Okay. So just so I am clear and
2 understand your understanding of your opinion is you
3 are not going to be at trial offered to give --
4 opine on the preferability of plaintiff's plan
5 submission versus the government's plan submission.
6 Is that right?

7 A. That's correct.

Homan Deposition Tr. at 187-92 (Apr. 9, 2003) (emphasis added.). Thus, both Plaintiffs counsel and Mr. Homan himself expressly represented at Mr. Homan's deposition that Mr. Homan's expert testimony would not include any independent opinion concerning the plan submissions but instead would refer to the plans only in rebutting the testimony of Defendants' experts. During the Pretrial Conference, Plaintiffs' counsel also represented that, with respect to Mr. Homan's role, "our plans haven't changed." Tr. at 73 (Apr. 29, 2003). Thus, Mr. Homan must be limited to a rebuttal role, if any.

The delay in disclosing Mr. Homan as an affirmative expert and his misidentification as a "rebuttal" expert will greatly prejudice Interior Defendants. Not only has Mr. Homan transformed into witness for Plaintiffs' case in chief, but he has become their key witness.⁵ The misrepresentations as to the content of his expected testimony caused Defendants to forego extensive questioning on his preference for one compliance plan versus another. Now, Mr. Homan will be proffered for precisely such opinion testimony, and Defendants have been

⁵ At the Pretrial Conference, Plaintiffs' counsel, Mr. Harper, stated: "we think Mr. Homan is going to be the longest witness, obviously, and we will be on direct a day and a half to two days. The remainder we think is just going to be a few hours for each, and we would probably say two weeks for the presentation of the case-in-chief." Tr. at 26 (Apr. 29, 2003).

Homan will be proffered for precisely such opinion testimony, and Defendants have been deprived of a full opportunity to examine him on these topics. Second, by identifying Mr. Homan as a "rebuttal" witness only, Defendants were not afforded the opportunity, contemplated in the Court's Scheduling Order, to engage an expert to rebut the affirmative opinions of Mr. Homan. Consequently, the Court should disallow all of Mr. Homan's testimony, except testimony he offers as a true "rebuttal" witness (assuming he otherwise qualifies as an expert).

Conclusion

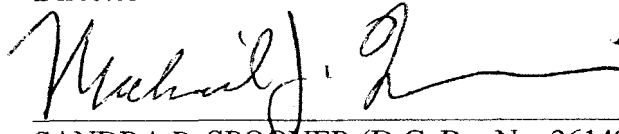
For the foregoing reasons, Interior Defendants respectfully move this Court to reconsider its order denying a motion in limine to preclude Plaintiffs from introducing any testimony of Paul M. Homan as an expert witness in their case in chief.⁶

Respectfully submitted,

ROBERT McCALLUM, JR.
Assistant Attorney General

STUART E. SCHIFFER
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director



SANDRA P. SPOONER (D.C. Bar No. 261495)

Deputy Director

JOHN T. STEMPLEWICZ

Senior Trial Attorney

MICHAEL J. QUINN (D.C. Bar No. 401376)

Trial Attorney

Commercial Litigation Branch

Civil Division

P.O. Box 875

Ben Franklin Station

Washington, D.C. 20044-0875

(202) 514-7194

April 30, 2003

⁶ Alternatively, Defendants should at least be permitted further deposition discovery of Mr. Homan's opinions prior to his trial testimony.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

This matter comes before the Court on Motion for Reconsideration of Interior Defendants' Motion in Limine to Exclude Expert Testimony of Paul Homan as Other than a Rebuttal Witness ("Motion for Reconsideration"). After considering that motion, any responses thereto, and the record of the case, the Court finds that Interior Defendants' Motion for Reconsideration should be, and hereby is, GRANTED. It is further

ORDERED that the Court's oral Order of April 29, 2003 regarding the testimony of Paul M. Homan should be and hereby is VACATED; and it is further

ORDERED, that the proffered expert testimony of Mr. Paul Homan, including his expert report, shall be limited to rebuttal of the opinions of Defendants' expert witnesses, provided that Mr. Homan is otherwise qualified as an expert.

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 30, 2003 I served the foregoing *Motion for Reconsideration of Interior Defendants' Motion In Limine to Exclude Expert Testimony of Paul Homan as Other Than a Rebuttal Witness* by facsimile in accordance with their written request of October 31, 2001 upon:

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

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

Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

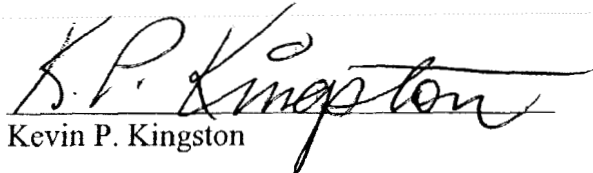
By U.S. Mail upon:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

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

By facsimile and U.S. Mail:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006
(202) 986-8477


Kevin P. Kingston