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.	)	
	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE PORTIONS OF DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE PHASE 1.5 TRIAL

Plaintiffs' Motion To Strike Portions Of Defendants' Proposed Findings Of Fact And Conclusions Of Law Following The Phase 1.5 Trial ("Plaintiffs' Motion to Strike") is meritless and should be denied. Stripped of its unfounded and sweeping allegations of "deception" and "misrepresentation," Plaintiffs' motion seeks to strike four of Defendants' proposed findings of fact pursuant to Federal Rule of Civil Procedure 12(f), which provides that "[u]pon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

In denying Defendants' motion to strike scandalous materials from Plaintiffs' response to the Department of the Interior's historical accounting plan, this Court stated:

> It has been observed by well respected commentators that "[t]he court possesses considerable discretion in disposing of a motion to strike redundant, impertinent, immaterial, or scandalous matter. However, because motions to strike on these grounds are not favored, often being considered 'time wasters,' they usually will be

> denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties."

Cobell v. Norton, No. 96-1285, 2003 WL 721477, at *1 (Mar. 3, 2003) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1382 (2d ed. 1990)).

The proposed findings of fact Plaintiffs seek to have stricken are not "redundant, impertinent, immaterial, or scandalous," they have obvious relation to the controversy, and they in no way prejudice the Plaintiffs. Plaintiffs' motion is nothing more than a "time waster" and should be summarily denied.

I. Defendants' Proposed Findings Of Fact Paragraph 276

Paragraph 276[1] of Defendants' proposed findings of fact does not, as Plaintiffs allege, contain a distortion of Mr. Homan's testimony. To the contrary, it addresses the relevant portions of Mr. Homan's opinion testimony concerning the likely ineffectiveness of a receiver and appropriately does not propose adoption of those portions of Mr. Homan's testimony recommending reforms that are not possible under existing law.

In his trial testimony, Mr. Homan simultaneously opined negatively on the effectiveness of a receiver and recommended as an alternative appointment of a national bank fiduciary to assume the Department of the Interior's trust functions (an alternative that would require legislation):

> Yes. That's what I recommended yesterday, that not only a receiver be appointed in the form of a board that would oversee

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[1] Paragraph 276 of Defendants' proposed findings of fact states: "Also, as Plaintiffs' lead expert has stated, 'I don't believe a receiver . . . in any way, shape, or form will ultimately solve the problem[.]' Tr., May 6, 2003, a.m., at 42:10-43:10 (P. Homan)." Defendants' Proposed Findings Of Fact And Conclusions Of Law Following The Phase 1.5 Trial at 82 (Aug. 4, 2003).

> and monitor the true administrator or the successor trustee delegate, which I suggested be a large national bank fiduciary, the – I think that's the only way or – the only way to truly achieve an independent administration is to move it out of the Department of the Interior.
>
> I don't believe a receiver, a fiduciary still compelled to use government employees employed by the Bureau of Indian Affairs in any way, shape, or form will ultimately solve the problem because I think that under such a regime, the employees would not act. They would refer all decisions to whoever their supervisors were, knew, or forward the receiver's information, and you simply can't practically operate what is the functional equivalent of a banking operation in that manner.
>
> Alternatively, reasonable alternatives exist. There are perhaps more than ten national bank fiduciaries that would be able to do research, do a feasibility study and convert these operations in less than a year. They did so over and over again in similar circumstances with the S&L industry and the banking industry difficulties of the late '80s and early '90s. So the methodologies are current; they do so every day in mergers, large mergers that far exceed any – far exceed the complexity of the simple IIM trust.

Phase 1.5 Trial Tr., May 6, 2003, a.m., at 42:10-43:10 (P. Homan).

Thus, Mr. Homan opined that a receivership would not "solve the problem" because Interior's employees would continue in their functions. Mr. Homan offered an alternative proposal (appointment of a national bank fiduciary to assume management of the trust), which Defendants did not include in their proposed findings because it is not a permissible alternative under existing law. Mr. Homan candidly testified the preceding day that his proposal would require legislation. See Phase 1.5 Trial Tr., May 5, 2003, p.m., at 67:5-6 (P. Homan).

That Defendants' proposed finding of fact did not misrepresent Mr. Homan's testimony is further demonstrated by additional testimony of Mr. Homan that a traditional receivership would

not solve problems in administering the IIM trust and that the application of a bank liquidation model used by the Resolution Trust Corporation was superior to a receivership:

> To this year I felt [the Resolution Trust Corporation Model applied in bank liquidations] was far superior to a receivership, because I *think a receiver, acting in the traditional sense, would have the same problems, or perhaps worse problems, administering the operations of this Indian Trust Administration* than plaintiffs [sic] will have, for the simple reason that subject to court sanctions, I don't believe that government employees would be willing to make any decisions on these transactions.

Phase 1.5 Trial Tr., May 5, 2003, p.m., at 67:7-14 (P. Homan) (emphasis added).

A proposed finding of fact regarding Mr. Homan's proposal to use a bank liquidation model would not be helpful to the Court precisely because the proposal would require legislation and therefore is not a viable option for the Court to consider. Thus, Mr. Homan's opinion testimony regarding the efficacy of placing the individual Indian trust in the hands of a private entity is irrelevant. Defendants' proposed finding of fact addressed the remaining portion of Mr. Homan's testimony, which contained his opinion that a receivership to oversee the government's administration of the IIM trust would not "ultimately solve the problem."[2] Phase 1.5 Trial Tr., May 6, 2003, a.m., at 42:18-43:1 (P. Homan). Defendants' proposed finding of fact contained no misrepresentation and was wholly appropriate.[3]

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[2] As set forth in Defendants' proposed conclusions of law, appointment of a receiver over the IIM trust is also proscribed by the Constitution. See Defendants' Proposed Findings Of Fact And Conclusions Of Law Following The Phase 1.5 Trial at 239-61 (Aug. 4, 2003).

[3] Moreover, the testimony in question was provided in open court in the Phase 1.5 trial, and all of the trial transcripts are part of the record. Under these circumstances, it is difficult to imagine how the Court could be "misled" by Defendants' proposed finding of fact.

II. Defendants' Proposed Findings Of Fact Paragraphs 319-321

Plaintiffs also seek to strike paragraphs 319, 320, and 321 of Defendants' proposed findings of fact because they describe exhibits that the Court did not accept into evidence. Plaintiffs fail to disclose that these paragraphs clearly stated that the Court did not admit these exhibits into evidence at trial.

Paragraph 319 begins:

> Had the Court admitted into evidence the media articles offered by Defendants,[] those articles would have shown that allegations of Government mishandling of IIM accounts were widely publicized long before 1984. Although they were not admitted into evidence, Defendants describe them in order to further demonstrate for the record the significance and purpose of these exhibits.

Defendants' Proposed Findings Of Fact And Conclusions Of Law Following The Phase 1.5 Trial at 96 (Aug. 4, 2003). This text contained a footnote, which stated:

> Defendants offered at trial three newspaper articles which were marked for identification, including the 1928 article, *Now It Can Be Told*, from the journal AMERICAN INDIAN LIFE (marked for identification as Defs.' Ex. 282), the December, 1978 article, *Suit Charges BIA Misappropriates Indian Funds*, published in WASSAJA A NATIONAL NEWSPAPER OF INDIAN AMERICA (marked for identification as Defs.' Ex. 283), and a November 20, 1983 article, *The New Indian Wars - Empty Promises, Misplaced Trust*, from the DENVER POST EMPIRE MAGAZINE, (marked for identification as Defs.' Ex. 284). The Court did not admit these newspaper articles into evidence, apparently based upon a ruling that they contain hearsay. Defendants, however, did not offer the articles for the truth of the matters asserted in them but, rather, offered them merely to show pre-1984 awareness of and notice to the public (including Plaintiff class members) of allegations of mismanagement or other wrongdoing in connection with the IIM trust. Defendants respectfully assert that these exhibits should have been admitted into evidence.

Id.

Thus, the paragraphs Plaintiffs seek to strike forthrightly stated that these exhibits were not admitted into evidence, explained that Defendants described them to further demonstrate for the record the significance and purpose of the exhibits, and asserted that the exhibits should have been admitted into evidence. The Court may or may not revisit its ruling on the admissibility of these exhibits, but Defendants' proposed findings of fact are in no sense misleading.

CONCLUSION

Plaintiffs' Motion to Strike does not (and cannot) establish that paragraphs 276, 319, 320, or 321 of Defendants' proposed findings of fact are "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). For the reasons set forth above, Plaintiffs' motion should be denied.

Dated: September 2, 2003

Respectfully submitted,

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ORDER

Upon consideration of Plaintiffs' Motion to Strike Portions of Defendants' Proposed Findings of Fact and Conclusions of Law Following the Phase 1.5 Trial and Defendants' opposition thereto, it is hereby

ORDERED that Plaintiffs' motion is DENIED.

SO ORDERED this _____ day of _____, 2003.

ROYCE C. LAMBERTH
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 2, 2003 I served the foregoing *Defendants' Opposition to Plaintiffs' Motion to Strike Portions of Defendants' Proposed Findings of Fact and Conclusions of Law Following the Phase 1.5 Trial* by facsimile in accordance with their written request of October 31, 2001 upon:

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Per the Court's Order of April 17, 2003,
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