IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE TESTIMONY FROM THOSE EXPERTS FOR WHOM DEFENDANTS ONLY PROVIDED A REBUTTAL REPORT

Plaintiffs have moved [Dkt. 3410] to preclude certain of Defendants' expert witnesses from testifying because their opinions will only be responsive to ones tendered by experts retained by Plaintiffs.[1] Their motion seeks to bar all testimony by Susan Hinkins, Caren Dunne, Edward Angel, Alan Newell and John Langbein[2] solely on the ground that these experts were somehow obligated to first have an affirmative opinion in Defendants' case and, failing to be offered for such a purpose, they are foreclosed from responding to Plaintiffs' experts. Beyond citing the inapposite proposition that a court may "reject[] the testimony offered in rebuttal that should have been offered in chief," Pl. Mot. at 3, Plaintiffs cite no precedent supporting their novel proposition that no expert can ever be a responsive expert without also being an affirmative expert. There being no merit to Plaintiffs' motion, it should be denied in its entirety.

Plaintiffs' entire argument rests upon a misinterpretation of the Court's remarks at the

[1] Defendants are filing this response on an expedited basis in accord with the Court's directive. See Tr. 70:1-7 (May 14, 2007).

[2] Plaintiffs' erroneously identify Defendants' trust expert as Joseph Langbein. Plffs' Mot. at 1.

July 9, 2007 status conference with respect to rebuttal testimony. Although it is true that the Court discussed the "narrow" and "unusual" use of rebuttal testimony during the course of the July 9, 2007 hearing, Tr. at 18 (July 9, 2007), Plaintiffs seek to blur the distinction between a "responsive" expert – a witness identified before trial who provides a report under Rule 26(a)(2)(B) in response to an opposing expert's report – and true "rebuttal" testimony, when a previously undisclosed expert is brought in to "rebut" an unexpected statement made at trial. All of the expert witnesses Plaintiffs challenge here have provided an expert report in conformity with Rule 26(a)(2)(B). These witnesses will be called to respond to one or more assertions proffered by one or more of Plaintiffs' experts. So, these are responsive experts, not rebuttal experts in the sense we understand the Court was using in the remarks quoted by Plaintiffs in their motion.

The Scheduling Order entered by the Court on July 11, 2007 [Dkt. 3359] confirms Defendants' position. Paragraph 2 of that Order provides in pertinent part: "Rule 26(a)(2) designations of expert witnesses are due August 17 from both sides. Designations of responding experts are due September 17." Id. at 1 (emphasis added). Thus, the Court's subsequent order expressly contemplates use of responsive experts and sets a timetable for their Rule 26(a)(2) disclosures. Defendants have complied with the Court's order. Every responding expert whom Plaintiffs seek to bar has prepared and produced an expert report.

Moreover, Plaintiffs' motion wholly ignores a subsequent telephonic conference that the Court held on August 16, 2007, with attorneys for both sides. The conference call was held after Defendants' counsel requested a one-week extension to serve the affirmative report of one expert, Dr. Fritz Scheuren, and Plaintiffs' counsel objected. During that conference call, counsel

for the Government, Robert Kirschman, asked the Court to clarify "the responding expert" provision in the Scheduling Order, because Defendants were unsure whether the Court viewed the word "responding" as something different from "rebuttal." Although the conference call was not transcribed, we understood the Court to advise that "responding" had a broader meaning than "rebuttal." Plaintiffs participated in this telephone conference but fail to address it in their motion. Defendants submit that their expert disclosures for responding experts Hinkins, Dunne, Angel, Newell, and Langbein, comply with the Scheduling Order as clarified by the Court's further guidance during its conference call with counsel for the parties on August 16, 2007.

On these grounds, the motion should be denied, and the Court need not consider the specific proffer Plaintiffs make for each witness in order to resolve their motion. In each case, Plaintiffs attempt to find some "issue" that Defendants should have "anticipated" that Plaintiffs would address by expert testimony. Plaintiffs' novel argument essentially demands that Defendants have the foresight not only to predict Plaintiffs' evidentiary challenges but also to prophesy the content of their experts' opinions. Plaintiffs offer no authority for this position, and it makes little sense. To adopt Plaintiffs' unfounded and unreasonable position would necessarily impair Defendants' ability to respond to Plaintiffs' experts at trial. Denying the motion, on the other hand, works no prejudice on Plaintiffs. They have received disclosure under the rules and the Scheduling Order as required for each of these experts. Because the Court has not permitted depositions or other discovery, they have not been prejudiced in any way in terms of trial preparation.

Finally, Plaintiffs concede in their motion that Defendants' experts, Susan Hinkins, Caren Dunne, and John Langbein, do "respond" in their reports to opinions proffered by one or more of

Plaintiffs' experts, see Pl. Mot. at 4-7, and this admission is a sufficient basis on which to deny the motion as it applies to these experts.

For Defendants' historians, Alan Newell and Edward Angel, Plaintiffs further argue that their reports do not respond to Plaintiffs' experts, but they are mistaken. Despite Plaintiffs' protestations to the contrary, Mr. Newell and Dr. Angel do respond to reports prepared by Mr. Homan and Mr. Fasold. Mr. Newell, for example, acknowledges gaps in historical records, but concludes that document copies may be available to fill those gaps, Newell Report at 3, thus rebutting Mr. Homan's unsupported hypothesis that the extant federal record is hopelessly inadequate to complete the accounting.[3] Likewise, Mr. Newell specifically critiques Mr. Fasold's methodology: "[T]he model specifically ignores primary source data on Indian resources. It also fails to account for the numerous ways that reservations were allotted . . . ." Id. at 2-3. Dr. Angel's report clearly responds to Mr. Homan's dire document assessment when he asserts that there is "a greater volume of potentially useful records . . . than I originally anticipated," Angel Report at 1, and that such "records are impressive not only for their volume, which can be measured in miles, but also for their accessibility." Id. at 7. Dr. Angel also criticizes Mr. Fasold's refusal to use Interior's records, finding that approach defective because

[3] Plaintiffs complain that "Mr. Newell . . . is not familiar with what documents may be necessary to render an accurate accounting for plaintiffs," Pl. Mot. at 8, without disclosing that Mr. Homan himself is not a Certified Public Accountant. Tr. at 84 (Trial 1.5, Day 1 A.M., May 1, 2003) (Q: "Sir, do you hold a CPA?" A: "No, I do not."). Such challenges, however, should go to weight, not admissibility, and shed little light on the responsive character of the expert's report. Moreover, Plaintiffs misquote the Newell Report. Mr. Newell does not state that he is "not familiar with what documents may be necessary," Pl. Mot. at 8, but he actually states that he is not qualified to express an opinion regarding whether the accounting here invokes a "need to find every single financial record that documents each transaction in an IIM account," as Mr. Homan contends. Newell Report at 3.

"the existing historical record must be used whenever possible." Id. at 1.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion *In Limine* To Preclude Testimony from Those Experts for Whom Defendants Only Provided a Rebuttal Report should be denied in all respects.

Dated: September 25, 2007

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion* In Limine *to Preclude Testimony from Those Experts for Whom Defendants Only Provided a Rebuttal Report* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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FOR THE DISTRICT OF COLUMBIA

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v.	Case No. 1:96cv01285JR
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	
Defendants.	

ORDER

This matter comes before the Court on *Plaintiffs' Motion* In Limine *to Preclude Testimony from Those Experts for Whom Defendants Only Provided a Rebuttal Report* [Dkt. No. 3410]. Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

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United States District Judge

Date:_____