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 DEFENDANTS' EXPERT TESTIMONY, REPORTS, AND OTHER INFORMATION TO THE EXTENT THEY RELY ON UNRELIABLE DATA

Plaintiffs have moved [Dkt. 3412] ("Pl. Mot.") to bar Defendants from presenting much of their historical accounting evidence on the ground that the underlying data are "unreliable." Plaintiffs' argument rests on the early record in this case, including old stipulations from the 1999 Phase 1 trial and evidence from the 2005 IT security hearing. That evidence, however, affords no support for their "unreliability" claim. To the contrary, the District Court twice ordered the accounting to proceed over Plaintiffs' similar, unsubstantiated claims, and the Court of Appeals, addressing IT security, observed that Plaintiffs had "pointed to no evidence showing that anyone has already altered [Individual Indian Trust Data ("IITD")] by taking advantage of Interior's security flaws, nor that such actions are imminent." Cobell v. Kempthorne, 455 F.3d 301, 315 (D.C. Cir. 2006) ("Cobell XVIII"), cert. denied, 127 S. Ct. 1875 (2007). The Court concluded that "[e]ven if someone did penetrate Interior's systems and alter IITD, we have been shown no reason to believe that the effects would likely be so extensive as to prevent the class members from receiving the accounting to which they are entitled." 455 F.3d at 315. The very purpose of the hearing scheduled to begin October 10, 2007, is to review the historical

accounting work, and Plaintiffs should not be permitted to foreclose such a review with unsubstantiated claims of unreliability. For these and the other reasons set forth below, Defendants respectfully oppose Plaintiffs' motion.[1]

I. PLAINTIFFS' ATTEMPT TO EXCLUDE DEFENDANTS' EVIDENCE REGARDING THE HISTORICAL ACCOUNTING PLAN AND ITS EXECUTION SHOULD BE REJECTED

A. Plaintiffs' Unreliability Claim Is Unsubstantiated And Has Been Rejected By Both The Court of Appeals And The District Court

Without specifying which evidence would be affected, Plaintiffs seek to foreclose Defendants from presenting any evidence that relies on Indian trust data and to prevent the Court from a meaningful review of the Interior Defendants' extensive historical accounting efforts, including the examination of over 100 million recorded transactions to study the reliability of the data set being used for the historical accounting. They seek to bar all such data because, they argue, all Indian trust data are indisputably "unreliable." Their motion is without merit, for it seeks to have this Court prejudge the record to be made at the upcoming hearing, and cannot be squared with an opposing conclusion reached by the Court of Appeals in 2006. Plaintiffs also assert several technical grounds for ignoring the historical accounting evidence. Such arguments are all flawed distractions from the questions the Court has asked the parties to address during the hearing commencing on October 10, 2007, and appear to be nothing more than a new attempt to perpetuate their "accounting is impossible" theory. Plaintiffs' motion should be rejected.

Despite Plaintiffs' assertions, Defendants do not concede that Indian trust data is unreliable. On the contrary, as noted above, the District Court previously ordered the accounting

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

to proceed despite Plaintiffs' same unsubstantiated claims, not once but twice, see generally Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003), vacated on other grounds, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 310 F. Supp. 2d 77 (D.D.C. 2004), vacated on other grounds, 428 F.3d 1070 (D.C. Cir. 2005), and the Court of Appeals, addressing IT security, found the same record Plaintiffs now cite to lack evidence that Indian trust data are too unreliable to permit an accounting for the class members in this case. Cobell XVIII, 455 F.3d at 315. Plaintiffs omit mention of this adverse ruling in their motion, but it nonetheless dooms their repetitive claims of "unreliability" here.

Instead, Plaintiffs' motion clings to dicta. It cites the Court of Appeals' general observation, in vacating an order that would have required Interior to provide notice to beneficiaries that any information related to the IIM trust may be "unreliable": "To be sure, we have no doubt Interior's trust account information has serious reliability problems." Cobell v. Kempthorne, 455 F.3d 317, 325 (D.C. Cir. 2006) (dictum). The Court of Appeals was referring back to its 2001 opinion in Cobell v. Norton, 240 F.3d 1081, 1089 (D.C. Cir. 2001), which, in turn, provided observations regarding the uncertain state of knowledge regarding IIM records as of 1999: "Not only does the Interior Department not know the proper number of accounts, it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of IIM accounts." Id. Similarly, statements incorrectly characterized by Plaintiffs as "party admissions," Pl. Mot. at 3-5, are based on information that was in the record or available at the time of the Phase 1.5 trial but effectively discounted by the District Court when it twice ordered the historical accounting to proceed.

As was made clear in the Phase 1.5 trial, and as will also be apparent in this trial (assuming Defendants are permitted to present their evidence regarding the historical accounting work), much has been learned about the availability and integrity of data in the intervening years. Interior's 2007 Plan for Completing the Historical Accounting of Individual Indian Money Accounts ("2007 Plan") [Dkt. 3333] (Exhibit II to Notice of Filing filed May 31, 2007) states that "[w]ith few exceptions, the Indian trust records needed for the historical accounting exist, are being located with success, and are being used to reconcile IIM account transactions"; that "[s]ince about 1985, IIM accounts were maintained in electronic ledger systems that show a high degree of integrity and transparency, and no evidence exists of hacking or malicious alteration of records"; that "[t]he rate of errors in the ledgers revealed in the reconciliation work to date is small and the dollars in error are a small percentage of the dollars managed in the IIM Trust Fund"; and that "the errors appear to be randomly distributed, are about equally to the benefit and detriment of account holders, and give no indication of fraud or systemic accounting errors." 2007 Plan at 2, 6. The Court should not be precluded from hearing such evidence during the upcoming hearing.

B. Plaintiffs' Reliance On Reports and Information Predating The 1994 Act Is Outdated And Misplaced

To the extent Plaintiffs cite documents or testimony regarding reliability of data that predate the 1994 Act, such as the "Misplaced Trust" report, their reliance is misplaced. Interior's obligation to perform a historical accounting must be viewed in light of the facts available to Congress when it enacted the 1994 Act. See Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 187 (1959); Cosby v. United States, 8 Cl. Ct. 428, 438 n.16 (1985), aff'd, 795 F.2d 999 (Fed. Cir. 1986); see also S. Carolina State Highway Dep't v. Barnwell Bros.,

Inc., 303 U.S. 177, 191 (1938) (legislative judgment presumed supported by facts known to the legislature unless facts judicially known or proved preclude that possibility). Congress had authorized much study of the Indian accounts and was well informed regarding the state of Indian trust administration; therefore, it must be presumed to have taken into account the passage of time and condition of Indian trust records when it enacted the 1994 Act. Indeed, the Court of Appeals has expressly held that the 1994 Act does not "support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005).

Plaintiffs' reliance on such pre-enactment reports and information is also improper because it fails to acknowledge Congress' role as the settlor of the IIM trusts. See Phase 1.5 Tr. 53:9-20 (June 2, 2003, PM) (Phase 1.5 testimony of Defendants' expert John H. Langbein) ("You have the sovereign in a remarkable role as settlor of trust."). A settlor is generally free to specify the terms under which a trust will operate. Thus, Congress's passage of the 1994 Act and its subsequent levels of funding for the performance of the accounting must be considered as instructions from the settlor that constrain the approach that the Interior Defendants as a Trustee-Delegate can take in performing the accounting. See Cobell v. Norton, 428 F.3d at 1075 ("Congress's post-1994 appropriations fall . . . short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite.").

C. Technical Standards Of The GAO And The National Archives And Records Administration Do Not Affect Admissibility

Plaintiffs make a sweeping accusation that Defendants are not in compliance with General Accounting Office ("GAO") standards. Pl. Mot. at 7. The extent of their argument, however, is that a GAO publication entitled *Assessing the Reliability of Computer-Processed Data* "must govern evaluation of the reliability of [D]efendants' individual Indian trust data" because the publication is included in Interior's Administrative Record. Pl. Mot. at 7. According to Plaintiffs' logic, inclusion of the document in the Administrative Record somehow concedes that these GAO standards control any evaluation of the reliability of Indian trust data. To the contrary, inclusion of the document in the Administrative Record is no more than a recognition that Interior has considered these GAO standards in formulating its historical accounting plan. The document itself states that it is "guidance . . . intended to demystify the assessment of computer-processed data" and that it "provides a flexible, risk-based framework for data reliability assessments that can be geared to the specific circumstances of each engagement." GAO Report, Assessing the Reliability of Computer-Processed Data, at 3 (Oct. 2002), A.R. Bates No. D000-000-HTA-WDC-000060-0024-0004. Plaintiffs offer no authority that these GAO standards somehow control admissibility of evidence before the Court.

Plaintiffs' arguments for exclusion based upon National Archives and Records Administration ("NARA") regulations similarly depend on their unsubstantiated presumption that the data are unreliable. Moreover, Plaintiffs cite no authority applying regulations such as 36 C.F.R. § 1234.26 as an evidentiary bar, and the Court should not countenance one here. As with their GAO standards theory, Plaintiffs' contentions regarding NARA regulations establish

only that Plaintiffs want to prevent the Court from reviewing the historical accounting work that Interior has performed.

D. Plaintiffs' Fact Arguments About Data Completeness Are Contested Issues For The Upcoming Hearing, Not Grounds For Exclusion

Plaintiffs devote the remainder of their brief to arguments about the Interior Defendants' data completeness testing and Plaintiffs' views on varying aspects of the historical accounting. See Pl. Mot. at 17-21. Such factual assertions are inappropriate for a motion in limine. The arguments do no more than underscore the existence of genuine issues in material dispute which the Court will consider in the course of the upcoming evidentiary hearing. That Plaintiffs disagree with Interior Defendants' approach to the historical accounting is no basis for excluding evidence about the historical accounting work that Interior has completed, is performing, and plans to undertake. Instead, their disagreement supports the conclusion that such information should be considered at trial.[2]

Finally, even if all of Plaintiffs' novel grounds for finding inadmissibility had merit, they would not, under the circumstances, affect the presentation of the Administrative Record. The Administrative Record contains information the Department of the Interior considered when developing and adopting its 2007 Plan. Ample authority establishes that, because an administrative record should contain what the agency considered, it may consist of unauthenticated documents, hearsay, news reports, and other matter. See, e.g., Alexander v.

[2] Plaintiffs' citation to the Daubert standard for admission of expert opinion is likewise misguided. The Daubert standard governs only the Court's role as a gatekeeper for scientific or other expert opinion testimony, not underlying facts, and even then it is aimed at guarding against questionable, unsubstantiated methods of analysis. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 409 U.S. 579, 591-93 (1993).

Gardner-Denver Co., 415 U.S. 36 (1974) (allowing employment arbitration record to be admitted in a de novo review), cited in Hackley v. Roudebush, 520 F.2d 108, 157 & n.195 (D.C. Cir. 1975) (noting that the Alexander holding would admit hearsay testimony in the arbitral record); People's Mojahedin Organization of Iran v. Dep't of State, 182 F.3d 17, 19 (D.C. Cir. 1999) (Because Secretary may "act[] on the basis of third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities, the 'administrative record' may consist of little else."). In any event, Plaintiffs have offered only generalized allegations as to overall "reliability" with no specific showing that demonstrates the unworthiness of any document, whether part of the Administrative Record or a trial exhibit.

CONCLUSION

For the multiple reasons set forth above, the Court should deny Plaintiffs' motion in its entirety.

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 Defendants' Expert Testimony, Reports, and Other Information to the Extent They Rely on Unreliable Data* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Defendants.	

ORDER

This matter comes before the Court on *Plaintiffs' Motion* In Limine *to Preclude Defendants' Expert Testimony, Reports, and Other Information to the Extent They Rely on Unreliable Data* [Dkt. No. 3412]. 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.

_____
United States District Judge

Date:_____