IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-1285 (JR)
v.	)	
DIRK KEMPTHORNE, Secretary of the Department of the Interior, et al.,	)	
Defendants.	)	

DEFENDANTS' REPORT ON THE PARTIES' CONFERRAL ON PRETRIAL SCHEDULING AND MOTION FOR ENTRY OF A PRETRIAL SCHEDULING ORDER

In accordance with the parties' discussions with the Court during the June 18, 2007 status conference, counsel for both Plaintiffs and Defendants have met and conferred about the scheduling of pretrial matters. Agreement was reached on some issues but not on others. The parties agreed to report separately. This is Defendants' report and our motion that the Court enter the attached pretrial scheduling order proposed by Defendants (Exhibit A).

1. Conferences between counsel. The parties met and conferred on June 27, 2007. At the meeting, Defendants tendered a draft "Joint Proposal For A Pretrial Order," which contained a timetable for various deadlines leading up to the commencement of the evidentiary hearing on October 10, 2007. Although the parties agreed on a few topics, they broadly disagreed in several areas, including the availability of additional discovery, the timing of expert witness disclosures, the timing of the exchange of exhibits, and whether Plaintiffs should be required to identify their challenges to Interior Defendants' 2007 plan to complete the historical accounting,

which was filed on May 31, 2007 [Dkt. 3333]. Plaintiffs provided a draft joint report to Defendants on Friday afternoon, June 29, 2007, and shared their draft proposed scheduling order on Monday, July 2, 2007. Counsel conferred again on July 2 by telephone. The parties reached agreement on the timing of motions *in limine* and a rolling three-day notice of upcoming trial witnesses. Finally, the parties agreed that, in view of the limited time available, they would submit separate reports to the Court.

2. Administrative Record.

(A) The parties agreed that the Interior Defendants will file and provide the Administrative Record ("AR") supporting the 2007 plan to complete the historical accounting on CD by Friday, July 6, 2007.

(B) Plaintiffs requested that the AR submission be provided in a "text searchable" format, preferably in Tagged Image File Format. Defendants are investigating the steps involved in providing the imaged AR documents in a searchable format and will endeavor to fulfill Plaintiffs' format request if practicable.

(C) The parties agreed that Plaintiffs should have thirty days (i.e., to August 6, 2007) to identify deficiencies they contend exist in the AR and to challenge the completeness of the AR. Plaintiffs, however, also desire further broad discovery of all documents relating to the issues identified by the Court at the June 18 status conference; Defendants oppose such discovery and address the issue separately below.

(D) The parties also agree that the Interior Defendants should have reasonable time to respond to Plaintiffs' contentions concerning the AR; Plaintiffs suggested seven days but Defendants consider fourteen days as reasonable and necessary.

(E) The parties further agreed that neither party shall be required to list as an exhibit any document that is part of the filed Administrative Record, which shall instead be cited and marked for identification at trial by prefix "AR" and the page numbers used.

3. Plaintiffs' Identification of Challenges to the Historical Accounting Plan. Consistent with the D.C. Circuit's direction, Defendants proposed that Plaintiffs should set forth specific objections to the 2007 plan, identifying any elements that they allege constitute "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("Cobell VI"). Defendants proposed that Plaintiffs make this identification by the same date that they identify any deficiencies they contend exist in the AR. Plaintiffs rejected this proposal and indicated that they should not be required to identify any objections to the accounting plan prior to trial. Defendants believe that such a basic disclosure by Plaintiffs is fundamental for trial preparation.

It is well-established that Plaintiffs bear the burden of proof concerning any fatal deficiency or error they believe exists in the historical accounting plan. Cobell v. Kempthorne, 455 F.3d 317, 334 (D.C. Cir. 2006) ("In two [decisions], the district court imposed an inappropriate evidentiary burden on Interior (Cobell XII and XIII)"); Cobell v. Norton, 391 F.3rd 251, 259 (D.C. Cir. 2004) ("Cobell XII") ("Prevailing on the merits of the liability claim of a breach of fiduciary duty by the Secretary in failing to account for IITD funds did not relieve the plaintiffs of their burden as the moving party [for an injunction]"). The Court of Appeals' position is clear:

> [T]he [district] court's innovation of requiring defendants to file a plan and then to say what "might" be wrong with it turns the litigation process on its head. However broad the government's failures as trustee, which go back over many decades and many administrations, we can see no basis for reversing the usual

> roles in litigation and assigning to defendants a task that is normally the plaintiffs' – to identify flaws in the defendants' filings.

Cobell v. Norton, 392 F.3d 461, 474 (D.C. Cir. 2004) ("Cobell XIII"). Defendants' submission of evidence and their case-in-chief will be influenced heavily by the issues that Plaintiffs dispute. This identification affects all trial planning, from the retention of experts to the selection, presentation, and number of both exhibits and fact witnesses. Consequently, it is critical that Plaintiffs specify their objections to the historical accounting plan as early as practicable. Plaintiffs have had the plan since May 31 (and its predecessor version for more than for years) to review and will shortly have the AR. Plaintiffs reasonably should be required to identify their challenges in a filing by late July. Nevertheless, because Defendants agreed to give Plaintiffs thirty days (i.e., until August 6, 2007) from the filing of the AR to identify deficiencies in the AR, that same date – August 6, 2007 – would be an acceptable deadline for Plaintiffs to identify their specific challenges in writing.

4. Additional Discovery.

(A) Document Production and Written Discovery. Plaintiffs desire additional document discovery, as well as unlimited requests for admission. Defendants oppose discovery except as to retained expert witnesses. At the last status conference on June 18, 2007, the Court determined that Plaintiffs should have no discovery "except on good cause shown." Tr. at 76 (June 18, 2007) ("I don't think they need any discovery.") Defendants respectfully concur with the Court's assessment and believe that Plaintiffs have demonstrated no need for further discovery. There has been extensive discovery in the case already, regular reports filed by the Defendants, two lengthy evidentiary proceedings on merits issues, as well as lengthy evidentiary proceedings on other matters (such as IT security). The Historical Accounting Plan Document was filed on May 31,

2007, and the Administrative Record is set to be filed by July 6, 2007. This voluminous record provides ample information for Plaintiffs. Indeed, Plaintiffs already had an opportunity to identify needed document discovery in their May 18, 2007 document request [Dkt. 3326], but they failed to demonstrate any need for the documents they sought. See generally Defendants' Response To Plaintiffs' May 18, 2007 Request For Production (June 13, 2007) [Dkt. 3340]. Moreover, additional discovery, whether document production or written queries, will prejudice Defendants' ability to identify their witnesses and marshal their evidence in the short time left before October. For these reasons, the Court should refuse any entreaty for more discovery, except in one limited area addressed below.

(B) Expert Disclosures and Depositions. Defendants proposed that both sides disclose retained testifying experts to be called as witnesses in a party's case-in-chief as provided under Rule 26(a)(2) of the Federal Rules of Civil Procedure by August 24, 2007, and that expert depositions be held over the following two weeks, if a party so desires. (Disclosure of rebuttal experts would follow sometime afterward, closer to trial.) Plaintiffs agreed to producing expert reports for such witnesses but do not want simultaneous exchange or expert depositions.

Although Plaintiffs have the burden of persuasion, Plaintiffs want Defendants to identify their experts unilaterally by August 15, 2007, with Plaintiffs to designate their experts up to thirty days later. In a draft proposed scheduling order Plaintiffs shared today, they also propose to be free of any disclosure obligation for any expert opinion they seek to elicit from a present or former employee or consultant of the Defendants. Plaintiffs' proposal would prejudice Defendants by unfairly requiring early preparation of expert reports and disclosure prior to Plaintiffs' own disclosures. In view of the short time available for trial preparation, only

simultaneous disclosure is fair.

Moreover, Plaintiffs objected to expert witness depositions, in part, because they want payment for expert witness depositions held prior to the Phase 1.5 trial in early 2003. Their complaint provides no basis to withhold experts from examination here. After the Phase 1.5 trial concluded, Plaintiffs sought reimbursement of nearly $71,000 for fewer than 40 hours of expert deposition. The amount claimed was not reasonable and included exorbitant charges and padded bills, including preparation time with Plaintiffs' counsel, a $1,000 hotel bill for a one-day deposition, a $139 restaurant meal, over $100 for a hotel lobby bar tab, and hourly fees of $1,000 for one expert's deposition See Defendants' Opposition to Plaintiffs' Motion For A Protective Order Requiring Defendants To Pay Plaintiffs' Expert Deposition Fees and Expenses at 2, 6-14 (Oct. 24, 2003) [Dkt. 2353]. Defendants also requested set-off to reimburse the government for its corresponding expert appearances, totaling $12,278.13, and contended that the net amount due for "reasonable" fees and expenses was only $25,780.66. Id. at 15-16. With a motion by Plaintiffs for reimbursement pending and fully briefed, and with a claim for set-off by Defendants, the fee dispute provides no basis to withhold experts now.

Finally, Plaintiffs desire to apply the expert disclosure rule to any regular employee or contractor of the Defendants who may give an expert opinion, even though such person is not retained for that purpose by Defendants. Defendants oppose such an extension of the Rule 26(a)(2) requirements to persons who do not provide expert testimony as part of their regular duties, and believe such a requirement would unfairly require Defendants to determine long beforehand whether any employee of special skill or training might say anything at trial that could possibly be perceived as expert opinion and then prepare a disclosure report for that. Defendants

believe their expert opinions will primarily come from experts retained for that purpose and do not believe the additional disclosures Plaintiffs want would demonstrably improve their preparation for trial.

(C) De Bene Esse Depositions. Plaintiffs proposed that they be permitted to take an undetermined number of trial depositions of witnesses who are unavailable for trial, for witnesses who are either beyond the court's subpoena power or otherwise unable to travel to Washington, D.C. for the hearing. As described to Defendants' counsel by Plaintiffs' counsel, such witnesses would most likely be absent class members. Defendants believe such depositions are not needed for the subjects that will be addressed at the October 10, 2007 proceeding, but Plaintiffs should in any case be required to submit a motion demonstrating good cause for each such deposition they need in order to preserve evidence, because any additional depositions during this period will hinder Defendants' own trial preparations.

5. Pretrial Exchanges and Submissions.

(A) Pretrial Statements. The parties agreed that the pretrial statements provided for in Local Rule 16.5 can be filed eleven days before the pretrial conference. Defendants suggested September 28, 2007, as the date for such a final conference, but Plaintiffs leave this date to the Court's convenience. Using Defendants' proposed final pretrial conference date, the pretrial statements would be filed on or before September 17, 2007.

(B) Motions *In Limine*. The parties agreed that motions *in limine* should be filed within four business days after the parties file their pretrial statements, which would be September 21, 2007, under Defendants' proposed timetable.

(C) Exchange of Exhibits. Defendants also proposed that the parties exchange other

potential trial exhibits by August 31, 2007, but Plaintiffs do not desire any exchange until the filing of the pretrial statements.

(D) Prior Exhibits and Testimony. Both parties agreed that exhibits and testimony admitted during the Phase 1.5 trial could be offered again during the October 10, 2007 proceeding without having to re-mark or re-offer exhibits, although prior trial testimony would need to be designated in the pretrial statements in the same manner as deposition testimony. Plaintiffs also appear to desire the same treatment for testimony and exhibits used in other proceedings in this case, but Defendants oppose that. The subject matter and scope of the Phase 1.5 trial is closely related to the upcoming proceedings, but other proceedings (e.g., the Phase 1 trial, contempt proceedings, the IT security hearing) involved different issues. The testimony and exhibits may have been introduced for different purposes than it would be proffered for now, and much of the other evidence would be out of date today. Therefore, Defendants urge the Court to limit use of prior testimony and exhibits to those admitted into evidence during the Phase 1.5 hearing.

(E) No Rule 30(b)(6) Designations. In their draft pretrial order, Plaintiffs seek to have the Court require that Defendants "designate" party witnesses on undetermined subjects, not for deposition purposes, but for appearance at trial. Such a provision would improperly put the burden on Defendants to create Plaintiffs' witness list for them by identifying witnesses who would testify as a party representative of Defendants at trial. This is an unfair burden that should not be imposed on Defendants.

(F) Order of Witnesses. The parties agreed to a rolling three business day disclosure of the next three witnesses to be called in order, throughout the hearing.

(G) Trip to Lenexa. The parties briefly conferred about the Court's possible trip to Lenexa, Kansas, to view the American Indian Records Repository as part of the upcoming hearing. They agreed that a protocol should be set by the parties and approved by the Court but deferred consideration of such terms to a later date.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court grant their motion for a Pretrial Scheduling Order to govern preparations for the October 10, 2007 hearing and enter the order submitted herewith as Exhibit A.

Dated: July 2, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 2, 2007 the foregoing *Defendants' Report on the Parties' Conferral on Pretrial Scheduling and Motion for Entry of a Pretrial Scheduling Order* 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

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

[PROPOSED] PRETRIAL SCHEDULING ORDER

In accordance with the discussions in open court on June 18, 2007, regarding the scheduling of matters in preparation for the Court's evidentiary hearing ("Trial"), which is scheduled to commence on October 10, 2007, the parties having conferred thereon and provided their respective positions thereon to the Court, and the Court having considered the same, the Court hereby sets the following schedule for pre-trial activities to be undertaken in preparation for said Trial:

Date	Event
July 6, 2007	Interior Defendants to File Administrative Record
August 6, 2007	Last Day for Plaintiffs to Identify Challenges to the Completeness of the Administrative Record
August 6, 2007	Last Day for Plaintiffs to Set Forth Specific Objections to the 2007 Historical Accounting Plan, Identifying Any Elements That Constitute Steps So Defective That They Would Necessarily Delay Rather than Accelerate the Ultimate Provision of an Adequate Accounting

August 20, 2007	Last Day for Defendants to Respond to Plaintiffs' Identification of Challenges to the Completeness of the Administrative Record
August 24, 2007	Last Day for Parties to Identify Testifying Experts and Disclose Expert Reports (Except for Rebuttal Experts)
August 31, 2007	Parties to Exchange Potential Trial Exhibits
September 7, 2007	Last Day for Parties to Depose Experts (Except for Rebuttal Experts)
September 14, 2007	Last Day for Parties to Identify Testifying Rebuttal Experts and Disclose Rebuttal Expert Reports
September 17, 2007	Local Civil Rule 16.5 Pretrial Statement Due for Each Party[1]
September 21, 2007	Last Day to File Motions *in Limine*
September 26, 2007	Last Day for Parties to Depose Rebuttal Experts
September 28, 2007	Final Pre-Trial Conference
October 5, 2007	Identification of First Three Witnesses to Be Called to Testify (to be followed on a rolling basis with 3 days notice of next three witnesses)
October 10, 2007	Trial Begins

SO ORDERED, this _____ day of _____, 2007.

_____
James Robertson
United States District Judge

[1] For exhibit lists accompanying the pretrial statements, neither party shall be required to list any document that is part of the filed Administrative Record, which shall instead be cited and marked for identification at trial by the prefix "AR" and the page number(s) used.