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DISTRICT OF COLUMBIA
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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.	)	

INTERIOR DEFENDANTS' MOTION IN LIMINE WITH REGARD TO EXPERT TESTIMONY AND REPORT IN SUPPORT OF PLAINTIFFS' PLAN FOR DETERMINING ACCURATE BALANCES IN THE INDIVIDUAL INDIAN TRUST

Pursuant to Rule 104(a) of the Federal Rules of Evidence, Rule 7(b) of the Federal Rules of Civil Procedure, and Local Civil Rule 7.1, Interior Defendants respectfully move this Court for an order in limine barring Plaintiffs from introducing the testimony and expert report of Mr. Richard E. Fasold in support of Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust ("Plaintiffs' Plan"). On April 18, 2003, Interior Defendants' counsel conferred with Plaintiffs' counsel regarding this motion, pursuant to Local Civil Rule 7.1(m), and Plaintiffs' counsel stated that this motion would be opposed. Interior Defendants seek an order in limine for the reasons set forth below.

I. The Supreme Court and Binding Case Law in This Circuit Confirm That Before This Court Receives Proffered Expert Opinions, the Court Must Determine That the Proffered Testimony is Both Relevant and Reliable

Pursuant to Rule 702 of the Federal Rules of Evidence, this Court may receive the testimony of a properly qualified expert "[i]f scientific, technical, or other specialized knowledge

will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. As this Court is well-aware, however, within the past decade, the United States Supreme Court has, on two occasions, confirmed the trial judge's responsibility to serve as a "gatekeeper" to ensure that expert testimony will be admitted only if it is both relevant and reliable. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

In Daubert, the Supreme Court stated:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

509 U.S. at 592-93 (footnote omitted) (emphasis added); see also Kumho Tire, 526 U.S. at 147 (confirming that Daubert principles apply to non-scientific experts). The Court proceeded to articulate a flexible standard, including a series of factors, for trial courts to consider in assessing whether proffered expert testimony is authoritatively grounded. 509 U.S. at 593-94. In so doing, the Court stated:

- "Ordinarily, a key question to be answered . . . will be whether it can be (and has been) tested." Id. at 593.
- "Another pertinent consideration is whether the theory or technique has been subjected to peer review or publication." Id.
- "Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation . . . ." Id. (citations omitted).

- "Finally, 'general acceptance' can yet have a bearing on the inquiry. . . . Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support with the community,' . . . may properly be viewed with skepticism." Id. (citation omitted).

In Kumho Tire, the Supreme Court affirmed that these questions apply equally to the trial judge's scrutiny of non-scientific experts. 526 U.S. at 149-50. See also Groobert v. President and Directors of Georgetown College, 219 F. Supp. 2d 1, 6 (D.D.C. 2002) (listing factors that trials courts may apply in assessing reliability) (citing Daubert and Kumho Tire).

Thus, the Daubert Court confirmed that because a trial judge can admit expert evidence, the judge must ascertain that the proffered evidence has already received sufficient approval within a recognized community of experts. The Court further explained the need for such scrutiny:

> Petitioners and, to a greater extent, their amici . . . suggest that recognition of a screening role for the judge that allows for the exclusion of 'invalid' evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging considerations of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment – often of great consequence – about a particular set of events in the past.

509 U.S. at 596-97 (citation omitted).

In this case, Plaintiffs have proffered a model which they claim "quantif[ies] the monies

generated from individual Indian trust lands." Plaintiffs' Plan at 39.[1] As is explained below, Plaintiffs' model relies upon a variety of methodologies that unquestionably fail to pass muster under the standards enunciated in Daubert and Kumho Tire. Thus, in its role as gatekeeper, this Court must not admit the proffered expert testimony of Mr. Fasold, Plaintiffs' lead expert witness responsible for the preparation of their model.[2]

II. This Court Should Not Admit the Proffered Expert Testimony of Mr. Richard E. Fasold or His Report Because the Methodologies Underlying His Opinions Fail All Standards of "Reliability"

A. Overview of Mr. Fasold's Methodology

Plaintiffs' Plan begins with the premise that "[i]t is simply not possible to provide to individual Indian trust beneficiaries a complete and accurate historical accounting of their trust assets . . . ." Plaintiffs' Plan at 7. It is not surprising, therefore, that Plaintiffs' lead expert regarding the plan's methodology, Mr. Fasold, confirmed that his methodology – "in and of itself" – will not provide an accounting to individual Indian trust beneficiaries. Fasold Deposition Transcript ("Depo. Tr.") 93:2-11.[3]

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[1] The Plaintiffs' model is plainly a damages model that should be wholly rejected by this Court. Interior Defendants intend to address this in a motion to be filed shortly.

[2] Plaintiffs have also designated Mr. Dwight J. Duncan as an expert who will provide the opinion that "[t]he methodologies employed in the Plaintiffs' Plan are based on scientific knowledge, are applied appropriately, and are reliable and relevant in evaluating the issues before the Court in this matter." Expert Report of Dwight J. Duncan at 22 (Feb. 28, 2003) (filed with Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003)). Insofar as Daubert and Kumho Tire make it the trial judge's responsibility to make the legal determination as to the admissibility of Mr. Fasold's testimony, this Court should not consider Mr. Duncan's opinion as to this legal issue.

[3] Cited excerpts from deposition transcripts have been included in the appendix to this motion.

Mr. Fasold has been proffered by Plaintiffs to testify as an expert regarding the methodology for determining "revenues derived from individual Indian trust lands and other individual Indian trust monies from 1887 to the present without relying on information generated by the Department of Interior, to the extent possible."[4] Expert Report of Richard E. Fasold at 1 (Feb. 28, 2003) ("Fasold Report") (filed with Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003)); see Fasold Depo. Tr. 67:14-68:1. Mr. Fasold has been proffered as an expert with regard to financial models. See Fasold Depo. Tr. 24:7-20.

At the direction of Plaintiffs' counsel, he has prepared a model to estimate receipts by the Government, while – "to the extent possible" – disregarding Interior documents related to those receipts. Fasold Depo. Tr. 68:12-16. Mr. Fasold's own deposition testimony confirms the unusual nature of such an assignment:

> Question: Back before the break we were talking about the first paragraph on page 1, the background section in [Mr. Fasold's Expert Report], specifically where you said that you were preparing, your methodology derived -- I'm sorry. Methodology determines revenues without relying upon information generated by the Interior Department to the extent possible. Do you remember that?
>
> Answer: Yes.
>
> Question: In the course of all the work that you have done outside of the Cobell case, have you ever, particularly with respect to companies that you for example come in to try to turn around, have you ever come in and just wholly rejected the company's accounting data and relied exclusively on third party data instead?
>
> Answer: No.

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[4] Plaintiffs' Plan does not attempt to set forth a methodology to provide a historical accounting of disbursements. See Plaintiffs' Plan at 51.

> Question: So would it be fair to say that the methodology that's described in your background section is one you have never employed in any other context?
>
> Answer: Yes, I think that's fair to say.

Fasold Depo. Tr. 90:19-91:16.

In fact, Mr. Fasold's model represents an amalgam of different methodologies to generate estimates for revenues. The methodologies typically – although not uniformly – vary depending on the type of revenue stream. See Plaintiffs' Plan at 39-41. This variation is confirmed by the Table 1 in Plaintiffs' Plan, which describes the various methodologies employed in Mr. Fasold's model to ascertain "natural resource extraction monies estimated." Id. at 40-41. In two cases – "oil and gas" and "hard rock minerals" – Plaintiffs' Plan lists two different methodologies; in an "Other" category, Plaintiffs' Plan lists no methodologies at all. Id. at 41 (Table 1).[5] Moreover, Mr. Fasold's methodology remains in flux, as is confirmed by the following statement in the "Methodology" statement of his report:

> As new data becomes available to [Mr. Fasold's company] on the natural resource experts through discovery or is made available from third parties, the determination of the Indian and IIM Revenues will be refined.

Fasold Report at 2. On its face, Mr. Fasold's model is unreliable because it is not even defined.[6]

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[5] Plaintiffs' Plan and Mr. Fasold's analysis purport to rely upon "Historical Data" for two revenues categories, land leases and land sales. Plaintiffs' Plan at 41 (Table 1) and Fasold Report at 6-8. While Interior Defendants reserve the ability to challenge Mr. Fasold's actual historical research efforts in these areas, Interior Defendants do not challenge the reliability of historical data research. In fact, if properly performed, such research should provide the most reliable revenue information.

[6] In his report, Mr. Fasold describes his methodology as being "a reliable methodology for determining the revenues derived from individual Indian trust lands and other individual Indian trust monies from 1887 to the present." Fasold Report at 9. When asked about

B. Mr. Fasold's Use of GIS Data Overlays Does Not Provide a Reliable Basis for Estimating Revenues

As explained above, Mr. Fasold relies on two methods – Geographic Information System ("GIS") data overlays and natural resource experts – to estimate revenues associated with oil and gas and mining revenues. See Plaintiffs' Plan at 41 (Table 1). For such revenues, Mr. Fasold apparently relies primarily on GIS data overlays, except where "GIS data are not available." Fasold Report at 2.

Mr. Fasold describes his use of GIS data overlays as "begin[ning] with digitized map information as a base." Fasold Report at 1. Mr. Fasold "overlays" additional GIS data for the purpose of estimating production data "within reservation boundaries." Id. Mr. Fasold then relies upon other experts to generate estimates of production and pricing, again with respect to an entire reservation. Id. at 1-2. Finally, Mr. Fasold applies a ratio that he determined to allocate a portion of the amounts calculated for reservations to allottees. Id. at 2.

Interior Defendants do not dispute that GIS computer data can be used to assemble, store, manipulate, and display geographically referenced information.[7] The novelty of Mr. Fasold's model, however, is found in Mr. Fasold's efforts to use GIS data overlays as a critical component of a revenue-estimating model. Under Daubert and Kumho Tire, Plaintiffs have the burden of

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that statement in his deposition, Mr. Fasold stated that he was using the term "reliable" as referring to "the ability to be replicated." See Fasold Depo. Tr. 74:12-23. While Daubert and Kumho Tire plainly require more than replicability for a methodology to be reliable, it is noteworthy that Mr. Fasold's methodology is not even replicable because of the changing nature of the components he considers in his model.

[7] An overview regarding the application of GIS technology can be found on the United States Geological Survey web site at www.usgs.gov/research/gis/title.html. A copy of this page from the web site appears in the Appendix as Tab E.

demonstrating the reliability of this novel approach. Mr. Fasold's own deposition testimony, however, confirms that they cannot meet this burden.

Prior to Cobell, Mr. Fasold had no personal experience with GIS data overlays. Fasold Depo. Tr. 111:9-12. When Mr. Fasold was asked whether he was aware of any case other than Cobell in which GIS data overlays had been used in a revenue-estimation process, he reiterated the vagueness of his own familiarity with GIS data overlays and referred to a case plainly not relevant to his own methodology:

> Answer: I am vaguely familiar with GIS applications. I read somewhere, and I believe the venue was Houston, that they used GIS overlays to -- and I can't remember the exact application, there was -- it had to do with income brackets and it had to do with proximity to I believe hazardous waste sites. That's my recollection.

Fasold Depo. Tr. 144:13-19 (emphasis added).[8] See also Gabriel Depo. Tr. 63:3-8 (Plaintiffs' GIS expert confirms that he is unaware of any judicial uses of GIS, other than Plaintiffs' attempted use in Cobell).

Moreover, during his deposition, Mr. Fasold confirmed Plaintiffs' inability to meet the legal requirements for showing that the GIS data overlays were reliable for estimating revenues. When asked about efforts to test the validity of his methodology for estimating revenues, Mr. Fasold could only identify one such effort, undertaken by Lancaster Consulting, the firm which employs one of Plaintiffs' testifying experts, Mr. Dwight Duncan. Fasold Depo. Tr. 144:20-

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[8] Even Mr. Fasold's self-described vague knowledge confirms that the one case referenced in his response did not involve using GIS data overlays to estimate revenues. The case described by Mr. Fasold involved issues of "proximity to . . . hazardous waste sites." Fasold Depo. Tr. 144:18-19. In the case described by Mr. Fasold, GIS data overlays could provide an appropriate methodology because issues of proximity likely would involve geographic determinations.

145:7; see footnote 2, above (discussing inappropriateness of Plaintiffs' attempt to proffer Mr. Duncan to offer expert opinion that Mr. Fasold's methodology satisfies legal requirements of Daubert and Kumho Tire).

With regard to peer review of the revenue estimation methodology utilizing GIS data overlays, Mr. Fasold could only describe efforts undertaken by two consultants, Lancaster Consulting (Mr. Duncan's firm) and Freeman & Mills, a firm that Mr. Fasold's firm retained. Fasold Depo. Tr. 145:8-146:2. Mr. Fasold further confirmed that the Freeman & Mills analysis – undertaken in November 2000-January 2001 – never resulted in a published or "formal" report. Fasold Depo. Tr. 146:3-10. Finally, Mr. Fasold confirmed – repeatedly – that he personally was not aware of any publication of any form addressing the methodology set forth in his report. Fasold Depo. Tr. 147:19-148:16.

Mr. Fasold's testimony confirms that he cannot provide any measure to quantify the error associated with his methodology:

> Question: Can you quantify the amount of error that would be associated with your to [sic] methodology?
>
> Answer: No.
>
> Question: Why is that?
>
> Answer: I am unaware of the techniques that would enable me to do that.

Fasold Depo. Tr. 149:1-6.

Finally, when asked whether his methodology enjoyed "general acceptance within any professional community," Mr. Fasold could only provide the following vague statement:

> In the sense that I regard all of this, and I don't as you know, have a

> legal background, the methodology in general that I have employed for a financial market are in general acceptance in just about every company I go to and just about every assignment I take.

Fasold Depo. Tr. 7-15. Mr. Fasold was then asked to focus on the peculiar element in his model, i.e., the use of GIS data overlays to estimate revenues: "[A]re you aware of any publications or any documentation that we could go to that would show an analysis of your methodology, taking GIS overlays and using it as a way to calculate revenues?" Fasold Depo. Tr. 149:16-20. Mr. Fasold initially could only refer to materials cited in Mr. Duncan's report (wherein Mr. Duncan offers his inadmissible opinions that the methodologies in Plaintiffs' Plan satisfy the legal requirements of Daubert and Kumho Tire). Fasold Depo. Tr. 146:21-150:1; see footnote 2, above (regarding inadmissibility of Mr. Duncan's "legal" opinions). Mr. Fasold was then asked, "So aside from whatever appears in Mr. Duncan's report, is it correct to say that you have no knowledge of any such publications?"; Mr. Fasold's response was simply, "That's correct." Fasold Depo. Tr. 150:2-5.

Thus, while GIS data do provide an acceptable methodology for certain geographic applications, see generally www.usgs.gov/research/gis/title.html (copy included in Appendix, Tab E), Plaintiffs have not established that their use of GIS data overlays provides a reliable basis for the revenue-estimation model undergirding Plaintiffs' Plan. By his own admission, Mr. Fasold's experience with GIS data overlays is limited to the Cobell case, and his methodology's reliance upon GIS data overlays to estimate revenues has not been subject to publication or peer review, as contemplated by Daubert and Kumho Tire.[9] Mr. Fasold has no ability to quantify the

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[9] The only reviews cited by Mr. Fasold were by Mr. Duncan, a consultant retained by Plaintiffs' counsel, and Freeman & Mills, a consulting firm apparently retained by Mr. Fasold's firm. Such reviews plainly do not meet the independent publication and peer review

error associated with his model. Finally, Mr. Fasold cannot describe with specificity any professional community in which his methodology has "general acceptance." Thus, the principal methodology employed in Mr. Fasold's model, i.e., the use of GIS data overlays to estimate revenues, lacks the reliability legally required for this Court to consider it at the Phase 1.5 trial.

C. Mr. Fasold's Reliance Upon Natural Resource Experts to Estimate Revenues Is Not Based Upon Reliable Methodologies

Plaintiffs' Plan states, "When GIS Data Overlays were not feasible, Plaintiffs' Plan relies on natural resource experts to research revenues from the Allotted Lands in question." Plaintiffs' Plan at 40. Similarly, Mr. Fasold's report states:

> For some resources pertinent GIS data are not available. In such instances, [Mr. Fasold's firm] relies first on natural resource experts to develop Indian Revenues calculations, from which the IIM Revenues are then calculated.

Fasold Report at 2.

Plaintiffs' Plan identifies three revenue categories as to which natural resource experts have provided support: (1) oil and gas revenues, (2) hard rock minerals, and (3) timber. Plaintiffs' Plan at 41 (Table 1).[10] For various reasons – confirmed by Mr. Fasold during his deposition -- none of the natural resource experts provide a reliable basis for supporting Mr. Fasold's revenue estimates.

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discussed in Daubert and Kumho Tire.

[10] As noted above, for the first two categories, Plaintiffs have used GIS data overlays in some instances and natural resource experts in other instances.

1. Mr. Fasold's Reliance Upon the Oil and Gas Expert's Analysis is Not Based Upon a Reliable Methodology

Mr. Fasold did not calculate some of the oil and gas revenues in his analysis; rather, he relies upon Questa Engineering, which he identifies as "the oil and gas experts retained by the Plaintiffs, [which] have developed a methodology to identify oil and gas production, rents and bonuses, on Indian lands . . . ." Fasold Report at 3 (citing Expert Report of John D. Wright (Feb. 28, 2003) (filed with Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003)).

Mr. Fasold cannot truly attest to much of what Mr. Wright or Questa Engineering have done with regard to the oil and gas revenues analysis. Mr. Fasold stated that Mr. Wright and Questa Engineering were "fairly new to this assignment," having been involved only since December 2002 or January 2003. Fasold Depo. Tr. 126:4-21. As of March 21, 2003, Mr. Fasold had not seen a finished product "in any category" from Mr. Wright or Questa Engineering. Fasold Depo. Tr. 126:22-127:1. See also Fasold Depo. Tr. 163:14-18 (Mr. Fasold has not received any information from Questa with regard to oil and gas rents and bonuses).

Given the recent arrival of Questa Engineering and Mr. Wright, coupled with the fact that Mr. Fasold has not received any finished work from Questa Engineering or Mr. Wright, it is hardly surprising that Mr. Fasold's testimony does not provide a basis for this Court to find the oil and gas expert analysis to be reliable under Daubert and Kumho Tire. Mr. Fasold could not attest to any efforts undertaken to test the validity of Mr. Wright's techniques for estimating revenues. Fasold Depo. Tr. 166:2-13. Moreover, Mr. Fasold knew of no peer review with regard to Mr. Wright's techniques and confirmed that he was unaware of any publications addressing

Mr. Wright's techniques for estimating revenues. Fasold Depo. Tr. 166:14-167:2.

2. Mr. Fasold's Reliance Upon the Minerals Expert's Analysis is Not Based Upon a Reliable Methodology

Mr. Fasold's analysis relies upon Pincock Allen & Holt, which he identifies as "hard rock minerals experts retained by the Plaintiffs, [which] developed a methodology to identify hard rock mineral production on Indian lands . . . ." Fasold Report at 5 (citing Expert Report of Landy A. Stinnett (Feb. 28, 2003) (filed with Plaintiffs' Disclosure of Expert Witnesses With Respect to Trial 1.5 (filed Feb. 28, 2003)).

During his deposition, Mr. Fasold stated that after he identified mines within a reservation, utilizing the GIS data overlays, he relied on Mr. Stinnett to provide production estimates. Fasold Depo. Tr. 173:5-16. Mr. Fasold then applied his allotted ratio to the production figures provided from Mr. Stinnett to estimate the allottees' revenues, "except for instances where we have superior information." Fasold Depo. Tr. 173:17-20. Mr. Fasold conceded, however, that he only had "superior information" as to no more than three mines out of a total of anywhere between forty and some figure "less than a hundred." Fasold Depo. Tr. 176:9-21.

Mr. Fasold was aware that Mr. Stinnett's analysis relies upon average market prices, rather than actual prices associated with a mine's production. Fasold Depo. 99:22-100:9. In fact, Mr. Fasold was aware – from attending Mr. Stinnett's deposition – that Mr. Stinnett stated that his reliance upon average prices could result in a variance as great as 50 percent. Fasold Depo. Tr. 100:10-14; see Stinnett Depo. Tr. 101:21-102:14.

Regardless of the uncertainties surrounding elements of Mr. Stinnett's estimates,

Mr. Fasold's testimony does not provide a basis for this Court to find the minerals expert analysis to be reliable under Daubert and Kumho Tire. Mr. Fasold knew of no efforts undertaken to test the validity of Mr. Stinnett's techniques for estimating revenues. Fasold Depo. Tr. 179:4-11. Mr. Fasold knew of no peer review with regard to Mr. Stinnett's techniques. Fasold Depo. Tr. 179:12-15. Moreover, he was unclear regarding the existence of any publications addressing Mr. Stinnett's techniques for estimating revenues. See Fasold Depo. Tr. 179:16-180:12 (initially denying that Mr. Stinnett's techniques were subject of publication but stating that techniques of performing historical research "clearly have been published all over the place"). Finally, Mr. Fasold could not quantify with any specificity the amount of error associated with Mr. Stinnett's technique of using average prices in lieu of actual mine prices. Fasold Depo. Tr. 182:17-25.

3. Mr. Fasold's Reliance Upon the Timber Expert's Analysis is Not Based Upon a Reliable Methodology

Plaintiffs' Plan and Mr. Fasold rely exclusively upon the work of Dr. Alan McQuillan for information regarding "timber volume and values on individual Indian trust beneficiaries' lands." Fasold Report at 5; see Plaintiffs' Plan at 41 (Table 1); Fasold Depo. Tr. 133:13-21.

During his deposition, Dr. McQuillan identified time and method restrictions on his analysis. Dr. McQuillan was first asked by Plaintiffs' counsel to perform his initial analysis during the summer of 2000. McQuillan Depo. Tr. 40:13-41:2. Dr. McQuillan responded to Plaintiffs' counsel that "it was a very short period of time, but [he] believed that he knew enough about the data sources that [he] could capture the vast majority, [he] could get a number with a reasonable amount of accuracy [during the summer of 2000]." McQuillan Depo. Tr. 41:4-9. He further stated, however, that he believed he needed "about two years" to perform a more

complete analysis. McQuillan Depo. Tr. 41:10-16. Dr. McQuillan never performed the "two year" analysis subsequent to his work during the summer of 2000. McQuillan Depo. Tr. 41:17-20.

Moreover, Dr. McQuillan performed his entire analysis of the years 1999-2002 during the month of February 2003. McQuillan Depo. Tr. 78:13-17. As a result, Dr. McQuillan described his analysis for the years 1999-2002, which relied upon an "average ratio" to estimate allotted values – a different methodology than his pre-1999 analysis – as being "a very crude methodology." See McQuillan Depo. Tr. 71:24-72:18.

Mr. Fasold attended Dr. McQuillan's deposition and recalled his testimony. Fasold Depo. Tr. 183:1-12 (recalls that Dr. McQuillan stated he had three months, rather than two years, to develop pre-1999 volume and value amounts); 184:7-20 (has recollection refreshed regarding Dr. McQuillan's characterization of 1999-2002 methodology as being "a very crude methodology"). In spite of hearing this testimony, Mr. Fasold testified that he has not reconsidered his timber revenue-based opinions in any fashion. Fasold Depo. Tr. 183:13-18; 184:11-20.

In light of Dr. McQuillan's concessions regarding the limitations on his own analysis, Mr. Fasold lacks a sound basis to conclude that the products of Dr. McQuillan's separate efforts are sufficiently reliable for this Court's consideration. Moreover, as with other experts upon whose work he relies, Mr. Fasold did not know whether Dr. McQuillan's techniques had been the subject of peer review or publication. Fasold Depo. Tr. 188:12-21. Finally, when asked whether the crudeness of the 1999-2002 model created the potential for "a high rate of error," Mr. Fasold confirmed that he did not know the answer to that question. See Fasold Depo. Tr. 188:22-189:2.

D. Mr. Fasold's Analysis Fails to Establish a Reliable Methodology for "Other" Revenues

Plaintiffs' Plan and Mr. Fasold's report contain an "Other" revenue category. Plaintiffs' Plan at 41 (Table 1); Fasold Report at 8-9. In his report, Mr. Fasold states:

> No reliable methodology has been found for determining revenues from annuities, water rights, settlements, judgments and per capita payments, rights-of-way, aggregates (construction materials) and any other unidentified categories.

Fasold Report at 8. Mr. Fasold's report proceeds to value the Other revenues as the difference between revenues identified in an Interior Department report to Congress "and the total of all other revenues identified by the Plaintiffs' experts." Id. at 7-8. In common parlance, Mr. Fasold' has simply applied a "plug" figure analysis. Insofar as Mr. Fasold concedes that the Other revenue figure is not based on a reliable methodology, id. at 6, this Court should reject his opinion as to Other revenues as failing to meet the legal requirements of Daubert and Kumho Tire.

III. This Court Should Enter Its Order In Limine Barring Plaintiffs From Introducing the Expert Testimony and Report of Mr. Fasold

"The purpose of a motion in limine is to 'procure a definitive ruling on the admissibility of evidence at the outset of the trial.'" Crocker v. Piedmont Aviation, Inc., 743 F. Supp. 1, 1 (D.D.C. 1989) (quoting 21 C. Wright & K. Graham, Jr., Federal Practice and Procedure § 5037, at 194 (1977) and citing Koller v. Richardson-Merrell, 737 F.2d 1038, 1067 (D.C.Cir.1984) (concurring opinion)). Further, the Supreme Court has specifically directed that when presented with questions regarding the reliability or relevance of proffered expert testimony, trial judges should make a preliminary assessment, pursuant to Rule 104(a) of the Federal Rule of Evidence, regarding the admissibility of the expert testimony. Daubert, 509 U.S. at 592-93.

As the foregoing confirms, Plaintiffs' lead model expert relies repeatedly upon methodologies that are untested, unchallenged, undefined, and/or subject to unknown potentials for error. His model, therefore, relies upon numerous unreliable methodologies.

The Supreme Court, as well as case law in this Court, make appropriate scrutiny and knowledge about an expert's methodology the sine qua non of "reliability." The absence of such a foundation makes proffered expert testimony conjectural in nature and insufficient to provide a basis for "a quick, final, and binding legal judgment – often of great consequence – about a particular set of events in the past." Daubert, 509 U.S. at 597.

Conclusion

For the foregoing reasons, Interior Defendants respectfully move this Court for an order in limine barring Plaintiffs from introducing the expert testimony and report of Mr. Richard E. Fasold in support of Plaintiffs' Plan.

Respectfully submitted,

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April 18, 2003

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.	)	
	)	

ORDER

This matter comes before the Court on Interior Defendants' Motion in Limine With Regard to Expert Testimony and Report in Support of Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust ("Interior Defendants' Motion in Limine"). After considering that motion, any responses thereto, and the record of the case, the Court finds that Interior Defendants' Motion in Limine should be, and hereby is, GRANTED. It is further

ORDERED that the proffered expert testimony of Mr. Richard E. Fasold in support of Plaintiffs' Plan will not be admitted at the Phase 1.5 Trial, and it is further

ORDERED that the proffered expert report of Mr. Richard E. Fasold in support of Plaintiffs' Plan will not be admitted at the Phase 1.5 Trial.

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 18, 2003 I served the foregoing *Interior Defendants' Motion in Limine with Regard to Expert Testimony and Report in Support of Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust* by facsimile in accordance with their written request of October 31, 2001.

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

Earl Old Person (*Pro Se*)
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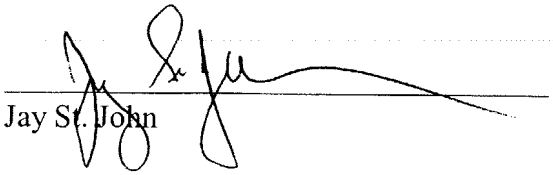

Jay St. John