[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 05-5068

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

BRIEF FOR THE APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici:

Defendants-Appellants are Gale A. Norton, as Secretary of the Interior; the Assistant Secretary of Interior-Indian Affairs; and John W. Snow, as Secretary of Treasury. The named plaintiffs-appellees in this class action are Elouise Pepion Cobell; Earl Old Person; Penny Cleghorn; Thomas Maulson; and James Louis Larose. The district court has certified a plaintiff class consisting of present and former beneficiaries of Individual Indian Money accounts, excluding those who had filed their own actions prior to the filing of the complaint in this case.

B. Rulings Under Review:

Appellants seek review of the re-issued injunction entered on February 23, 2005, and memorandum opinions issued February 23, 2005, and September 25, 2003, by Judge Royce C. Lamberth, United States District Court for the District of Columbia, in Civ. No. 96-1285 (RCL). The order and opinions are published at 357 F. Supp. 2d 298 (D.D.C. 2005), and 283 F. Supp. 2d 66 (D.D.C. 2003).

C. Related Cases:

This case has previously been before this Court in Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); and Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

mandamus in this case, which remains pending, regarding the disqualification of Special Master Alan Balaran. See No. 03-5288. A mandamus petition filed by third parties was addressed in In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004).

Thomas M. Bondy

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TABLE OF AUTHORITIES

Cases: **Page**

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* Authorities chiefly relied upon are marked with asterisks.

Statutes:

Regulations:

Legislative Materials:

Miscellaneous:

GLOSSARY

APA	Administrative Procedure Act
Accounting Plan	Interior's 2003 Historical Accounting Plan for Individual Money Accounts
DOI	Department of the Interior
IIM Accounts	Individual Indian Money Accounts
OHTA	Office of Historical Trust Accounting

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5068

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. 1331 and 1361, inter alia. On February 23, 2005, the district court reissued portions of a "structural injunction" previously issued in September 2003, and vacated by this Court in December 2004. The government filed a timely notice of appeal on March 4, 2005. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court erred in reissuing a multi-billion dollar structural injunction governing the performance of an historical accounting for Indian trust monies, after this Court had made clear that Congress has not authorized an accounting of this kind and that the district court cannot, in

the name of compelling agency action, determine the content of an accounting and dictate the means for its accomplishment.

STATEMENT OF THE CASE

The Department of the Interior ("Interior" or "DOI") currently holds approximately $400 million in trust for the benefit of individual Indians. These funds are maintained in about 260,000 separate accounts - the Individual Indian Money ("IIM") accounts that are the subject of this litigation.

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). Section 102(a) provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)."

Plaintiffs brought this class action in 1996, asserting statutory and common law claims. The district court dismissed the common law claims, but held that Interior had an enforceable duty to provide an accounting for IIM funds. Because the agency had not yet provided such an accounting, the court remanded, retaining jurisdiction for five years and requiring DOI to file quarterly reports. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28-31, 56 (D.D.C. 1999).

In February 2001, this Court largely affirmed, rejecting the government's contention that Congress had committed to the agency's discretion decisions regarding the extent to which to

review transactions that pre-dated the 1994 Act. Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001). The Court held that agency action had been unreasonably delayed under governing APA standards, 5 U.S.C. 706(1), id. at 1108, and noted that the district court had properly remanded the matter to Interior, leaving to the agency the choice of how the accounting would be conducted. Id. at 1104, 1109.

In 2002, following a trial, the district court held Secretary Norton in contempt, declaring her an "unfit" trustee. Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002). Based on its contempt findings, the district court terminated the remand to the agency, id. at 152, and declared that it would issue structural injunctions governing the performance of accounting activities and trust management generally. Id. at 148-49. To that end, the district court ordered Interior to submit plans for an historical accounting and for achieving compliance with fiduciary obligations, to be evaluated, together with plans submitted by plaintiffs, in a "Phase 1.5" trial. The plan submitted by Interior in response to this order set out a program to complete an accounting meeting the requirements of this Court's 2001 decision within five years at a cost then estimated at $335 million, subject to congressional appropriations. Plaintiffs urged that an accounting was impossible and advocated a model that would, in their view, reflect the revenue generated by their trust assets over more than a century.

explaining that the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Cobell v. Norton, 334 F.3d 1128, 1148 (D.C. Cir. 2003).

In September 2003, the district court issued a detailed "structural injunction" encompassing both the performance of an accounting, and the implementation of a broad program of trust reform (termed the "Fixing the System" part of the injunction). Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003). In issuing the structural injunction, the district court stated that it would treat its contempt findings as "established," notwithstanding the fact that this Court had vacated the contempt ruling. Id. at 85. The structural injunction set aside virtually every significant premise of Interior's accounting plan, increasing its cost by orders of magnitude.

Congress responded to the injunction with legislation enacted in November 2003, as part of the FY 2004 Interior appropriations statute, Pub. L. No. 108-108. The legislation amended substantive law to remove any legal requirement to conduct an historical accounting before the legislation's expiration on December 31, 2004.

On December 10, 2004, this Court vacated all aspects of the structural injunction, except for a single filing requirement contained in the "Fixing the System" part of the injunction. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004). In light of the

legislation governing the accounting portion of the injunction, this Court did not rule on the government's argument that the injunction was fatally flawed even without regard to the appropriations legislation. This Court explained, however, that the legislation had been enacted "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required," 392 F.3d at 466, noting that the order's initial cost estimates ranged from $6 billion to $12 billion, ibid. In vacating the remainder of the injunction, this Court rejected the district court's assertion that it could formulate and direct agency plans, stressing that the APA "'empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Id. at 475 (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).[1]

In February 2005, the district court reissued the accounting portion of the structural injunction without modification. The court dismissed Pub. L. No. 108-108 as "a bizarre and futile attempt at legislating a settlement of this case," Mem. Op. 14, and concluded that this Court's decision vacating the structural injunction was "not relevant for the present purpose," id. at 2.

This Court granted the government's request for a stay pending appeal and expedited briefing.

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[1] In an opinion issued on December 4, 2004, this Court also vacated a separate injunction ordering Interior to disconnect its computer systems from the Internet. See Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004).

STATEMENT OF FACTS

I. Background: The IIM Accounts And The 1994 Act.

A. The IIM Accounts.

The United States holds approximately $400 million in trust for the benefit of individual Indians. Cason Decl. at 1; see also H.R. Rep. No. 103-778, at 9 (1994) ($390 million in 1994). As of December 31, 2000, these funds were maintained in approximately 260,000 separate accounts. Cason Decl. at 1.[2]

The IIM trust funds include three primary types of accounts: land-based accounts, judgment and per capita accounts, and special deposit accounts. Ibid.

Judgment accounts contain funds derived from tribal distributions of litigation settlements. Per capita accounts contain distributions of tribal revenues to individual Indians. As of December 31, 2000, about 36% of the IIM trust fund money was held in the roughly 42,000 IIM judgment and per capita accounts. Cason Decl. at 2.

Special deposit accounts are temporary accounts for the deposit of funds that cannot immediately be credited to the rightful account holders. As of December 31, 2000, about 16% of IIM funds was held in the roughly 21,500 special deposit accounts. Ibid.

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[2] The United States also holds money in trust for tribes. H.R. Rep. No. 103-778, at 9. The tribal trust accounts are not at issue in this litigation, although they are the subject of other pending lawsuits.

roughly 10 million acres of land that the United States separately holds in trust for individual Indians. Ibid. The monies deposited into land-based accounts reflect revenue-producing activities on those lands, including oil and gas leases, farming and grazing, and timber harvesting. As of December 31, 2000, about 48% of the $400 million in IIM trust funds was held in roughly 200,000 land-based accounts. Ibid.

The individual land-based accounts receive credits based on vast numbers of extremely small transactions reflecting the manner in which beneficial ownership of the corresponding land interests of the trust account holders has been divided over time. Pursuant to the "allotment policy" initiated by Congress in the late nineteenth century, land was parceled out to individual tribal members. Babbitt v. Youpee, 519 U.S. 234, 237 (1997). Allotted lands were held in trust by the United States or owned by the allottee subject to restraints on alienation. Ibid.

Through the years, land interests were divided and subdivided as allottees passed their interests on to multiple heirs. Id. at 238. As a result, beneficial ownership of the lands is now divided among some four million interests, Accounting Plan at II-1, and Interior records ownership interests to the 42nd decimal point. H.R. Rep. No. 102-499, at 28 & n.94 (1992).

Because of these extraordinarily "fractionated" interests, Youpee, 519 U.S. at 237, the land-based accounts are without ready counterpart in trust management. Tr., June 2, 2003 p.m., at 68-70. Indeed, Interior spends "a great deal of taxpayer money and other resources administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances less than $50." H.R. Rep. No. 102-499, at 28.

B. The 1994 Act.

In 1992, the House Committee on Government Operations released its "Misplaced Trust" report, which detailed problems with the management of the IIM and tribal trust funds. H.R. Rep. No. 102-499, at 10. The committee expressed particular concern over Interior's failure "to provide a full and accurate accounting of the individual and tribal account funds." Id. at 2.

The committee noted efforts by Interior's contractor, Arthur Andersen & Co., to conduct a reconciliation and audit. It observed that because of the difficulty of the task, an audit of even the 17,000 IIM accounts selected for the first phase might cost as much as $12.6 million. Id. at 25. The committee explained that, at that rate, "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 [Bureau of Indian Affairs] offices." Id. at 26. The committee stressed that, "[o]bviously, it makes little sense to spend so

much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." Ibid.

The "Misplaced Trust" report gave rise to the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239, enacted in 1994. Section 102(a) of that statute provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)."

II. The District Court's Initial Rulings And This Court's 2001 Decision.

A. The Initial District Court Rulings.

Plaintiffs brought this class action in 1996, naming as defendants the Secretary of the Interior, the Assistant Secretary for Indian Affairs, and the Secretary of the Treasury. They sought, among other relief, a decree "ordering an accounting and directing the defendants to make whole the IIM accounts of the class members." Complaint at 27.

The government moved to dismiss the complaint, urging that it sought money damages in excess of $10,000 and thus could be filed only in the Court of Federal Claims. Cobell v. Babbitt, 30 F. Supp. 2d 24, 38-39 (D.D.C. 1998). The district court rejected this argument based on the representations of class counsel that plaintiffs sought "only an accounting, not a cash infusion" into the IIM accounts. Id. at 40. As the court explained,

plaintiffs' counsel represented that "all of the money that should be held collectively in their IIM accounts is already there; the plaintiffs simply contend that the individual account balances are misstated." Id. at 39.

In December 1999, the district court issued a declaratory judgment holding that the 1994 Act required the government to provide plaintiffs an accurate accounting of all IIM funds held for their benefit, without regard to when the funds were deposited. Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The court concluded that the government was not in compliance with this accounting obligation, or with various subsidiary responsibilities. Having declared the applicable legal duty, the court remanded the matter to allow defendants the opportunity to come into compliance. The court retained jurisdiction for five years, and directed defendants to submit quarterly reports setting forth the steps taken to rectify the breaches found. Id. at 58-59.

B. This Court's 2001 Decision.

In February 2001, this Court largely affirmed the district court's order insofar as it required the government to provide an accounting of funds deposited pursuant to the Act of June 24, 1938. Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001). The Court first determined that the district court had jurisdiction under the APA "to compel agency action 'unlawfully withheld or unreasonably delayed.'" Id. at 1095 (quoting 5 U.S.C. 706(1)).

It then rejected the government's contention that the 1994 Act committed to Interior's unfettered discretion decisions regarding the extent to which to review transactions that pre-dated the 1994 Act. Id. at 1102. The Court declared that "Section 102 of the 1994 Act makes clear that the Interior Secretary owes IIM trust beneficiaries an accounting for 'all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.'" Ibid. The Court concluded that the government could not give a "fair and accurate accounting of all accounts without first reconciling the accounts, taking into account past deposits, withdrawals, and accruals." Ibid. (emphasis omitted).

The Court stressed that the district court had properly "left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate" - decisions that are "properly left in the hands of administrative agencies." Id. at 1104. The Court also required the district court to amend its decision to make clear the distinction between the failure to provide an accounting and the failure to take discrete individual steps that would facilitate an accounting, reiterating that, in fulfilling their accounting obligations, the defendants "should be afforded sufficient discretion in determining the precise route they take[.]" Id. at 1106.

III. The Structural Injunction.

A. The 2002 Contempt Ruling and the Phase 1.5 Trial.

In September 2002, the district court held the Secretary of the Interior and an Assistant Secretary in contempt on the basis of Interior's purported failure to initiate an historical accounting and claimed inaccuracies in Interior's quarterly reports. Cobell v. Norton, 226 F. Supp. 2d 1 (D.D.C. 2002). The district court declared that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place ... in the pantheon of unfit trustee-delegates." Id. at 161. Based on its contempt findings, the district court announced that it, rather than the agency, would direct the conduct of the accounting and other trust activities. The district court thus ordered the government to submit a plan for an accounting as well as a plan for achieving compliance with the government's fiduciary obligations to Indians, to be evaluated by the court with a view to issuance of structural relief. Id. at 148-49.

In January 2003, Interior filed its accounting plan pursuant to the district court's directive. The Historical Accounting Plan for Individual Indian Money Accounts set out a plan to complete an accounting within five years, subject to congressional appropriations. At the time, the estimated cost of implementing the plan was $335 million. Interior also submitted its Comprehensive Trust Management Plan, addressing trust management generally. Plaintiffs, for their part, submitted a plan arguing that deficiencies in records made an accounting

impossible, and urging the district court to adopt a model that would in plaintiffs' view reflect the revenue generated by their trust assets over more than a century. Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust, at 3, 39-55. In the Phase 1.5 trial that commenced in May 2003, both sides presented testimony in support of their positions.

In July 2003, this Court vacated the contempt ruling. Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003). The Court concluded that the order, although denominated as an order of civil contempt, was, in effect, a ruling of criminal contempt with regard to the current Secretary. Since the district court had misconceived its civil contempt authority, its findings regarding the conduct of the Secretary's predecessors could not support its ruling. Id. at 1145-47. This Court then reviewed the findings regarding the conduct of Secretary Norton, concluding that they in no sense demonstrated a failure to undertake accounting activities. To the contrary, the record demonstrated that "in her first six months in office Secretary Norton took significant steps toward completing an accounting." Id. at 1148. Indeed, the Court Monitor had recognized that Interior had "'made more progress ... in six months [July through December 2001] than the past administration did in six years.'" Ibid. This Court described the district court's reasoning with respect to the remaining contempt charges as "mystifying," id. at 1149, and "inconceivable," id. at 1150.

B. The 2003 Structural Injunction.

The contempt trial had formed the predicate for the district

contempt ruling did not cause the district court to reconsider its approach. Instead, the district court announced that it

although this Court had held the district court's conclusions with regard to the current Secretary to be without basis, the

carry out their official duties. Id. at 225.

The detailed structural injunction that issued in September

The second addressed the implementation of a broad program of trust reform. See id. at 70, 239.

plan, its requirements bore no meaningful resemblance to Interior's plan. Under that plan, the agency would have provided

since 1938. See Accounting Plan at III-5.

The district court's injunction drastically expanded the parameters of the accounting and dictated its methodology. Its provisions - now reinstated - required that Interior:

- Produce account statements for all accounts that have ever been in existence, regardless of whether the accounts were long closed, and regardless of whether the accountholders were long deceased and their estates made the subject of a final probate order. Injunction, §§ III(E), (F); see 283 F. Supp. 2d at 169-75.

- Produce account statements that describe every account transaction since 1887. Injunction, § III(E); see 283 F. Supp. 2d at 172-73.

- Account for all transactions in land held in trust for individual Indians dating back to 1887. Injunction, §§ III(G), (M); see 283 F. Supp. 2d at 175-77.

- Account for monies that were never held in trust at all, but were paid directly to Indians by third parties. Injunction, § III(H); see 283 F. Supp. 2d at 177-80.

- Verify every transaction covered by the injunction, regardless of size and date, without use of statistical sampling. Injunction, §§ III(K), (L); see 283 F. Supp. 2d at 194-98.

Although Interior had made clear that sampling would be crucial to the feasibility of any historical accounting for land-based accounts, the injunction required Interior to verify individually each transaction encompassed by the injunction. Injunction, §§ III(K), (L); see 283 F. Supp. 2d at 194-98 (2003 opinion); 283 F. Supp. 2d at 288 (2003 injunction). Although the injunction purported to permit use of sampling for auditing purposes, that statement is without practical significance since the injunction makes the auditing or verification process part of the accounting itself, rendering the auditing (and sampling) envisioned by Interior entirely superfluous. As this Court

observed in reviewing the same provisions, the injunction rejects any use of statistical sampling. See 392 F.3d at 465 (citing 283 F. Supp. 2d at 288-90). In addition, the injunction asserts jurisdiction over the manner in which Interior identifies and retrieves missing trust records, including the issuance of subpoenas to third parties, see Injunction, § III(B); the manner in which Interior collects and indexes trust records, see id., § III(C); the mechanics of various system tests and quality control measures discussed in the Interior plan, see id., §§ III(N), (O); and the "industry production databases" and related computer software that Interior may decide to use in connection with the accounting and audit, see id., § III(P).

C. This Court's December 10, 2004 Decision.

Congress responded to the injunction with legislation enacted as part of the FY 2004 Interior appropriation, Pub. L. No. 108-108. The statute amended substantive law until December 31, 2004, to provide that neither the 1994 Act nor any provision of common law required the performance of an historical accounting.[3] This Court stayed all aspects of the injunction pending appeal.

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[3] Congress also declined to fund long-term historical accounting activities in its FY 2004 appropriation. See Pub. L. No. 108-108, 117 Stat. 1263 (providing $45 million appropriation for "records collection and indexing, imaging and coding, accounting for per capita and judgment accounts, accounting for tribal accounts, reviewing and distributing funds from special deposit accounts, and program management of the Office of Historical Trust Accounting").

On December 10, 2004, this Court vacated the structural injunction with the exception of a single filing requirement in the "Fixing the System" part of the injunction. Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004).[4]

This Court concluded that the passage of Pub. L. No. 108-108 had deprived the historical accounting portion of the injunction of any legal basis until the expiration of that legislation, stating that "[w]e do not address the issues that would be relevant if the district court then reissued those provisions." 392 F.3d at 468. The Court observed, however, that "[t]he provision's legislative history makes clear that Congress passed it in response to [the district court's structural injunction] to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." Id. at 466. The Court cited the conference committee's statement that "'[i]nitial estimates indicate that the accounting ordered by the court would cost between $6 billion and $12 billion,'" and the committee's rejection of "'the notion that in passing the American Indian Trust Fund Management Reform Act of 1994 Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" Ibid. (quoting H.R. Conf. Rep. 108-330, at 117, 118 (2003)).

In vacating virtually all provisions of the "Fixing the System" part of the injunction, this Court held that the district

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[4] The government made the required filing on March 15, 2005. Dkt. #2882.

court had improperly "abstracted the common law duties from any statutory basis." 392 F.3d at 471. This Court explained that common law trust duties could not be incorporated into federal law without regard to statutory requirements. Instead, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." Id. at 472.

This Court also made clear that the fiduciary nature of the duties at issue did not vitiate the normal structure of judicial review of agency action. Citing the Supreme Court's recent decision in Norton v. Southern Utah Wilderness Alliance, this Court noted that the purpose of "[t]he APA's requirement of 'discrete agency action,' ... was 'to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.'" 392 F.3d at 472 (quoting Southern Utah, 124 S. Ct. at 2381).

Applying these principles, this Court stressed that it is not the role of a court to assume control over the conduct of an agency's duties if it determines that its plans fail to comply with those legal duties. This Court noted that the district court (in the accounting portion of its opinion) had "used language suggesting an intent to take complete charge of the details of whatever plan Interior might submit: 'If the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional

defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142). This Court declared that "[t]his is in sharp contrast with Southern Utah's point that '§ 706(1) empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Ibid. (quoting 124 S. Ct. at 2379).

This Court rejected the view that more expansive judicial oversight was permissible because of proposed analogies to the duties of private trustees. The Court observed that "while the expenditures that plaintiffs seek are to be made out of appropriated funds, trust expenses for private trusts are normally met out of the trust funds themselves," so that "plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." 392 F.3d at 473. The Court further noted that even private trustees are generally free of judicial control over their methods of implementing their duties, and courts intervene only to prevent an abuse of discretion. Ibid.

IV. The District Court's February 2005 Reissuance Of The Accounting Injunction.

The Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, was signed into law on December 8, 2004, and did not renew the language of Pub. L. No. 108-108 that was set to expire on

December 31, 2004, although it expressly limited the funds available for accounting activities.[5]

On remand, plaintiffs - who had not sought a structural injunction in the first place - did not ask the district court to reissue the historical accounting portion of the injunction. Instead, plaintiffs renewed their contention that an accounting is impossible and that the district court should devise some other form of relief. Dkt. #2798.

Nevertheless, on February 23, 2005, the district court decided to "reissue without modification" the historical accounting provisions of the structural injunction vacated by this Court. Mem. Op. 3. The court incorporated by reference the lengthy opinion that it had issued in connection with the 2003 structural injunction, see id. at 3 & n.1, and announced that it would retain jurisdiction over the matter until March 27, 2011, see id. at 14.

The district court saw no need to revisit the requirements of its order in light of this Court's decision vacating the structural injunction. In the district court's view, the only germane aspect of this Court's decision was the holding that "Public Law 108-108 deprived the 'historical accounting' provisions of the Structural Injunction of its basis in law."

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[5] Congress appropriated $58,000,000 for historical accounting (for individuals and Tribes) for FY 2005, expressly providing that "total funding for historical accounting activities shall not exceed amounts specifically designated in the Act for such purpose." Pub. L. No. 108-447, § 112.

Id. at 2. The district court announced that the remainder of this Court's discussion was "not relevant for the present purpose." Ibid.

The district court explained that it felt free to reissue the injunction because this Court "did not disturb the findings of fact and conclusions of law upon which the 'historical accounting' provisions of this Court's Structural Injunction are predicated." Id. at 3. Although the district court noted this Court's determination that aspects of the structural injunction were beyond the court's equitable power, it found that these rulings provided no guidance because of the "fact-sensitive nature of the Court of Appeals' decisions regarding the outer bounds of this Court's equitable authority." Id. at 4. Because the provisions of the historical accounting portion of the structural injunction "were never addressed specifically on the merits," there was, in the district court's view, "no ruling from the Court of Appeals obstructing this Court's authority, sitting as a Court of Equity, to issue injunctive relief of the kind set forth in the 'historical accounting' portion of the September 2003 Structural Injunction." Ibid.

In addition to reissuing the historical accounting provisions of the structural injunction - including, inter alia, the provisions requiring an accounting for closed accounts and lands, and the ban on statistical sampling - the district court also reissued the injunction's "General Provisions" stating that the court's order must be construed in accordance with the

reasonable interpretation most consistent with "the 'most exacting fiduciary standards' demanded of a trustee," absent clarification by the court. Injunction, §§ II(B), (C). The court also reissued the directive that Interior "administer the Trust in compliance with applicable Tribal law and ordinances," id., § II(D), although this Court had declared that provision "impermissible." 392 F.3d at 475.

The injunction reimposed the deadlines in the original structural injunction for compliance with its requirements. The order issuing the injunction also denied a stay pending appeal. See Mem. Op. 14-15. The district court declared that "due to a delay directed by Congress in a bizarre and futile attempt at legislating a settlement of this case, the merits of this Court's September 25, 2003 Structural Injunction have still not been decided." Id. at 14.

This Court granted the government's emergency motion for a stay pending appeal and for expedited briefing.

SUMMARY OF ARGUMENT

The district court has reissued, without modification, the accounting portion of its structural injunction. Although the court found nothing relevant in this Court's December 2004 ruling, the structural injunction flouts two essential principles underscored in that decision.

First, contrary to this Court's clear guidance, the injunction orders the government to spend billions of dollars on an endeavor that Congress never authorized, much less required.

As this Court explained, while statutory duties are properly interpreted in light of common law trust principles, enforceable duties may not be "abstracted ... from any statutory basis." Cobell v. Norton, 392 F.3d 461, 471 (D.C. Cir. 2004). Thus, contrary to the district court's understanding, it was not free to impose - and reimpose - sweeping obligations without regard to the nature and scope of the accounting authorized by Congress.

As this Court explained, Congress enacted Pub. L. No. 108-108 "to clarify [its] determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466 (emphasis added). That declaration left no room for the district court to reinstate the identical accounting requirements.

Indeed, Pub. L. No. 108-108 should not have been necessary to clarify Congress's intent. The legislative history of Pub. L. No. 108-108 echoed the language of the "Misplaced Trust" report that gave rise to the 1994 legislation in the first place. As that report observed, it would make "little sense to spend" even as much as the $281 million to $390 million that had then been estimated as the cost of auditing the IIM accounts, "when there was only $440 million deposited in the IIM trust fund for account holders" at the time of the report. H.R. Rep. No. 102-499, at 26 (1992). Nor can it be plausibly argued that Congress inadvertently mandated a multi-billion dollar accounting when it legislated the requirement that the government account for "the daily and annual balance of all funds held in trust" for the

benefit of individual Indians. Pub. L. No. 103-412, § 102(a) (1994). Indeed, the district court did not assert that the requirements of the injunction were mandated by Congress and identified no respect in which the billions of dollars of obligations imposed by the injunction would be necessary to provide the accounting contemplated by this Court's 2001 decision.

The second fundamental principle stressed by this Court's December 2004 decision is that the power to compel an agency to take action unreasonably delayed does not encompass a concomitant power to formulate the plan of action and direct its implementation. A contrary rule would impermissibly enmesh the courts in ongoing supervision of agency activity in a manner at odds with the APA and its recognition of the respective roles of the executive and judicial branches.

This Court thus explicitly rejected the stated premise of the accounting injunction, that the court was free to adopt a plan of its own devising and direct the means of its implementation. See 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142). As this Court stressed, the APA "empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Ibid. (quoting Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).

The specific provisions of the injunction reflect its mistaken premises. They wrongly dictate the means and methodologies to be used in an accounting, ranging from the ban

on the use of statistical sampling to elaborate directions for records collection and processing. Taken together, they preclude the exercise of discretion at every level while multiplying attendant costs many times over.

At the same time, the injunction imposes a panoply of requirements never contemplated by Congress. Whereas Congress required an accounting of daily and annual balances of funds held in trust, the injunction requires, among other things, a statement of all transactions involving lands separately held in trust (at any time since 1887); an accounting of all transactions involving funds in accounts that had been closed before 1994 and for which there accordingly was no existing trust responsibility when the 1994 Act was enacted; and an accounting for trust revenues paid directly to beneficiaries by third parties that were never deposited in any IIM account at all. As Congress observed, the expenditure of billions of dollars necessitated by these and other requirements "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." H.R. Conf. Rep. 108-330, at 117 (2003).

In sum, it was error to enter the structural injunction in the first instance. It was egregious error to reinstate it.

ARGUMENT

I. This Court Has Made Clear That The District Court May Not Order A Multi-Billion Dollar Endeavor Never Authorized By Congress And That It Cannot Dictate The Content And Performance Of An Accounting In The Name Of Compelling Agency Action.

A. The Court Improperly Reissued An Injunction That Lacks Anchor In A Federal Statute And That Flatly Ignores Congressional Intent.

1. The 1994 Act requires that Interior account for "the daily and annual balance of all funds held in trust" for the benefit of individual Indians. Pub. L. No. 103-412, § 102(a). In its 2001 decision, this Court interpreted that requirement in light of common law principles to mandate a retrospective review of funds deposited pursuant to the Act of June 1938.

As this Court made clear in its 2004 decision, it did not thereby suggest that enforceable duties may be "abstracted ... from any statutory basis." 392 F.3d at 471. To the contrary, the "government's duties must be 'rooted in and outlined by the relevant statutes and treaties,' although those obligations may then be 'defined in traditional equitable terms.'" Id. at 472 (quoting 240 F.3d at 1099).

2. The total amount of funds in the IIM accounts is approximately $400 million, of which approximately half that amount is in land-based accounts, which present the greatest expense in recreating and auditing past statements. Cason Decl. at 2. A requirement that the government account for "the daily and annual balance of all funds held in trust" for the benefit of individual Indians would not lightly be construed to require

expenditures on a different order of magnitude from the total amount of the funds themselves. Were there any doubt on that score, it would have been dispelled by the 1992 "Misplaced Trust" report that gave rise to the 1994 Act. That report cautioned that it would make "little sense to spend" even as much as the $281 million to $390 million that had been estimated as the cost of auditing the IIM accounts, "when there was only $440 million deposited in the IIM trust fund for account holders" at the time of the report. H.R. Rep. No. 102-499, at 26 (1992).

In initially issuing the structural injunction, the district court dismissed the "Misplaced Trust" report as irrelevant, reasoning that it was not a part of the 1994 Act's legislative history because it pre-dated the Act by two years. 283 F. Supp. 2d at 170 n.53. The court thus ignored the clearest expression of congressional intent even though, as it had previously recognized, Congress passed the 1994 Act "[b]ased largely on the findings made in Misplaced Trust." 91 F. Supp. 2d at 13.

When Congress enacted Pub L. No. 108-108 in response to the structural injunction, it made clear that the district court had dramatically erred in imposing requirements without statutory anchor. As this Court explained, Pub. L. No. 108-108 was enacted in direct response to the original structural injunction, "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466 (emphasis added). The conference committee "'reject[ed] the notion that in passing the

which has now been ordered by the Court,'" stressing that "'[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.'" Ibid. (quoting H.R. Conf. Rep. 108-330, at 118). The committee report explained that the injunction "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs," a result that "would be devastating to Indian country and to the other programs in the Interior bill." H.R. Conf. Rep. 108-330, at 117 (2003). The committee report stressed that the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." Ibid.

As this Court observed, individual legislators similarly indicated that "the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" 392 F.3d at 466 (quoting 149 Cong. Rec. at S13,786 (2003) (statement of Sen. Dorgan)). As Senator Burns declared: "'If there is one thing with which everybody involved in this issue seems to agree, it is that we should not spend that kind of money on an incredibly cumbersome accounting that will do almost nothing to benefit the Indian people.'" Ibid. (quoting 149 Cong. Rec. S13,785 (2003)).

3. As discussed at Point II below, the specific provisions of the injunction are without anchor in any statute and, indeed, the district court did not identify any respect in which the burdens it imposed were required by statute or this Court's 2001 opinion. This Court made clear that the district court could not properly "abstract[]" general common law duties "from any statutory basis," 392 F.3d at 471, and, indeed, common law principles themselves would dictate that congressional intent be determinative in establishing trust obligations.

As this Court noted, whereas "trust expenses for private trusts are normally met out of the trust funds themselves," in this case, "the expenditures that plaintiffs seek are to be made out of appropriated funds." Id. at 473. As Professor Langbein explained in the Phase 1.5 trial, "Congress is the functional equivalent of settlor of a private trust whose trust instrument establishes the terms of that trust," Report of Professor John Langbein at 6, and its further enactments, including appropriations measures, amend and define trust obligations. Thus, "if Congress passes a budget appropriation that gives you inadequate funds to carry out something that Congress has earlier said you should carry out, that is the same thing as if Congress says we hereby amend the trust to order you not to carry out the earlier duty." Tr., June 2, 2003 p.m., at 59-60.

Respect for congressional intent is particularly important because many of the features of the IIM accounts have no ready analogy in the world of private trusts. As Professor Langbein

explained, whereas a typical bank trust lasts, on average, 15 years, the IIM trusts are indefinite in duration. Tr., June 2, 2003 p.m., at 68-69. They include a "staggering" number of individual accounts, many with "extremely tiny balances," resulting in "a management problem which would test any sophisticated manager of financial assets and of account systems." Id. at 69.[6]

In short, the district court was not free to ignore the views of Congress and this Court. Congress, as this Court declared in no uncertain terms, clarified its "determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466. The district court's determination to reinstate a multi-billion dollar injunction in the face of this Court's ruling and Congress's action was extraordinary.[7]

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[6] Professor Langbein noted that under general principles of maximizing income and diversifying assets, an "ordinary trustee" who was not "working under special restrictions to hold this in perpetuity for these particular beneficiaries" would "have an auction and sell off most of this real estate and put it into conventional instruments." Id. at 65.

[7] The district court's castigation of Congress echoed its response to earlier legislation that sought to cap the annual compensation of the special masters in this litigation at twice the annual rate of the highest paid Senior Executive Service employee in the Washington-Baltimore locality pay area. Cobell v. Norton, 263 F. Supp. 2d 58, 63-64 (D.D.C. 2003). There, the district court deemed the appropriations provisions enacted by Congress to be "yet another attempt by defendants to evade the rule of law by any means available to them, no matter how duplicitous or underhanded." Id. at 66.

B. The Injunction Improperly Arrogates To The District Court The Formulation Of Plans And The Supervision Of Their Implementation.

In reissuing the injunction, the district court disregarded this Court's express directions regarding the limitations of the judicial role, which made clear that the district court could not, in the name of compelling agency action, formulate the parameters of accounting activities and direct their implementation.

1. This Court explained that the district court is empowered "'only to compel an agency ... to take action upon a matter, without directing how it shall act.'" 392 F.3d at 475 (quoting Southern Utah, 124 S. Ct. at 2379). As this Court observed, the purpose of "[t]he APA's requirement of 'discrete agency action,' ... was 'to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.'" 392 F.3d at 472 (quoting Southern Utah, 124 S. Ct. at 2381). This Court declared:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved - which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management .... The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such [broad] congressional directives is not contemplated by the APA.

Ibid. (quoting Southern Utah, 124 S. Ct. at 2381).

held to high fiduciary standards, are generally free of direct judicial control over their methods of implementing these duties, and trustee choices of methods are reviewable only 'to prevent an abuse by the trustee of his discretion.'" 392 F.3d at 473 (citing Restatement (Second) of Trusts §§ 186-87 (1959)). Thus, "a court of equity will not interfere to control [trustees] in the exercise of a discretion vested in them by the instrument under which they act." 392 F.3d at 473 (quoting Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989)). As the Court noted, "[i]f the trustee has been given discretion with respect to the act in question, ... the court will not interfere by ordering him to take a certain line of conduct unless there is proof of an abuse of the discretion." 392 F.3d at 473 (quoting Bogert & Bogert, Law of Trusts and Trustees § 861, p. 22).

Thus, as Professor Langbein explained, under common law principles, a court would be reluctant to interfere with the manner in which a trustee seeks to implement its duties, particularly when the trustee must determine how best to use limited funds to achieve an objective. See Tr., June 3, 2003 p.m., at 74-76, 78-79; Tr., June 3, 2003 a.m., at 33-34, 39, 67-68. See also United States v. Mason, 412 U.S. 391, 398-99 (1973) (noting the latitude given to the United States in administering Indian trust property).

3. This Court thus repudiated the premise underlying both the accounting portion and the "Fixing the System" portion of the original structural injunction. The Court specifically rejected the district court's view, set out in the historical accounting portion of the 2003 ruling, that "[i]f the court [concludes that the plan will not satisfy defendants' legal obligation], it may decide to modify the institutional defendant's plan, adopt a plan submitted by another entity, or formulate a plan of its own that will satisfy the defendant's liability.'" 392 F.3d at 475 (quoting 283 F. Supp. 2d at 142). This Court explained that this approach was "in sharp contrast with Southern Utah's point that '§ 706(1) empowers a court only to compel an agency ... to take action upon a matter, without directing how it shall act.'" Ibid. (quoting Southern Utah, 124 S. Ct. at 2379).

The fundamental flaws with the structural injunction should have been clear even before they were specifically identified in this Court's 2004 opinion. In issuing the injunction in the first instance, the district court disregarded this Court's 2001 decision, which distinguished between permissible orders remanding to the agency to permit it to discharge its responsibilities and impermissible injunctive orders that purport to direct agency operations. This Court, in its 2001 opinion, believed that the case was being "remand[ed] to the agency for the proper discharge of its obligations," 240 F.3d at 1109, stressing that the district court had properly "left open the choice of how the accounting would be conducted, and whether

certain accounting methods, such as statistical sampling or something else, would be appropriate" - decisions that are "properly left in the hands of administrative agencies." Id. at 1104.

This Court accepted the government's contention that "mandatory injunctive relief akin to that provided in a writ of mandamus" is inappropriate because the case involves no "clear, specific, 'ministerial' duties." Id. at 1109. This Court nevertheless affirmed the declaratory judgment because the district court had remanded to the agency, acknowledging that it could not become "enmeshed in the minutiae of agency administration." Id. at 1108.

4. The structural injunction thus radically departed from the framework contemplated by this Court's 2001 ruling. Moreover, the injunction perpetuated a system of judicial control that had prevailed virtually since the time of this Court's 2001 decision. The remand envisaged by that decision, which would have permitted Interior to discharge its obligations, was never allowed to occur in any meaningful fashion.

In the fall of 2001, following a report of the Special Master-Monitor, the district court declared that it would conduct contempt proceedings to determine, among other things, whether Secretary Norton had initiated an accounting. See Order to Show Cause. In October 2001, before the contempt trial had even begun, the district court declared that Secretary Norton's endorsement of an approach that would make use of statistical

sampling was "so clearly contemptuous, I don't understand what it is that we are going to try." Tr., Oct. 30, 2001, at 29.[8] From at least that time, the agency has at no point been free of pervasive judicial involvement in its accounting activities. Indeed, since the 2002 contempt decision declaring the Secretary to be an "unfit" trustee, 226 F. Supp. 2d at 161, responsibility for the conduct of accounting activities has been formally withdrawn from the agency and placed in the purview of the district court.

In short, within months of this Court's 2001 decision, a declaration that Interior should take action was transformed into a regime of judicial oversight that arrogated to the district court the responsibilities vested in the executive branch. The decision to assume such control disregarded the terms of this Court's 2001 decision. Now, notwithstanding this Court's express rejection of the premise of the accounting injunction, the district court has dismissed this Court's 2004 decision vacating the structural injunction as "not relevant for present purposes." Mem. Op. 2. The error is evident.

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[8] This pronouncement, which immediately cast doubt on an indispensable aspect of any historical accounting, was not merely a passing observation. Indeed, when Secretary Norton testified at the contempt trial, the court reiterated that "I had said from the bench that I thought your signature on that document [endorsing the use of sampling] was clearly contemptuous." Tr. at 4386.

C. As This Court's Decision Makes Clear, The Injunction Cannot Be Sustained By Reference To The Court's General Equitable Powers.

This Court's decision makes clear that the exercise of a court's equitable powers must be harmonized with principles of judicial review of agency action mandated by the APA and rooted in respect for the separation of powers. 392 F.3d at 472-73. Similarly, exercise of that authority must be harmonized with Congress's exclusive authority to authorize appropriations: A court's equitable authority does not permit it to require the expenditures of billions of dollars of taxpayer monies in contravention of congressional intent. In short, a court's equitable powers do not permit it to assume the roles of the executive and legislative branches. Ibid.

The assertion of equitable authority here is all the more remarkable because there is no reason to doubt the conference committee's conclusion that the injunction "would require that vast amounts of funds be diverted away from other high-priority programs, including Indian programs," a result that "would be devastating to Indian country and to the other programs in the Interior bill." H.R. Conf. Rep. 108-330, at 117. Nor is there any reason to question the committee's conclusion that the expenditure of billions of dollars on an accounting "would not provide a single dollar to the plaintiffs, and would without question displace funds available for education, health care and other services." Ibid.

Plaintiffs, indeed, press a different - though equally unsound - view of the way in which the court should exercise its "equitable" authority. Since the Phase 1.5 trial in 2003, plaintiffs have maintained that deficiencies in trust records render it impossible for Interior to perform the accounting required by Congress, and have thus urged the district court to award substitute relief. Thus, the "accounting" plan submitted by plaintiffs in January 2003 asserted that "the accounting owed by the United States and ordered by [the district court] is impossible," and urged the district court to adopt a model that would, in plaintiffs' view, reflect the revenue generated by their trust assets over more than a century, placing on Interior the burden of showing that the amounts posited by the model had been validly disbursed, with interest. Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust, at 3, 39-55. More recently, plaintiffs urged the district court to order the government to pay $13 billion into a district court registry, to be disbursed to the plaintiff class except to the extent that the government can prove that revenues collected over the lifetime of the trusts were properly disbursed over the lifetime of the trusts, with interest. Dkt. #2886, at 22-25 (filed 3/15/05).

The district court's equitable authority in this action does not authorize it to order payment of $13 billion in lieu of an accounting. Just as clearly, it does not permit the court to

require expenditure of a similar amount to achieve a vision of an accounting not shared by Congress.

D. The Court's Error In Reissuing A Structural Injunction Is Particularly Egregious Because No Factual Predicate Existed For Any Additional Orders Requiring Agency Action.

As discussed, the structural injunction would have been improper even if it had been based on evidence of renewed agency delay in the wake of this Court's 2001 decision. To the contrary, however, no factual predicate existed for the district court to issue any additional order compelling agency action, much less the orders that actually issued.

Secretary Norton assumed office in January 2001, shortly before this Court issued its 2001 decision. The record is barren of evidence of unreasonable delay from that time onward; indeed, since 2001, Secretary Norton has filed numerous quarterly reports detailing substantial progress in the agency's accounting work. See, e.g., Quarterly Report No. 21, at 16-24 (May 2005).

As Secretary Norton recognized upon taking office, the complexities of the land-based accounts made the task of furnishing account statements formidable, and required an immediate focus of administrative efforts. Within six months of assuming office, the Secretary had created the Office of Historical Trust Accounting (OHTA), which she charged with developing a plan for historical accounting. Accounting Plan at I-1. In conjunction with OHTA's efforts, Interior engaged five public accounting firms, the largest commercial trust operator in the United States, two historian firms specializing in Indian

issues, and firms to assist in statistical issues, trust legal matters and other pertinent areas. Id. at 2.

Nevertheless, despite this evidence of progress and ongoing commitment, the district court initiated contempt proceedings in the fall of 2001 with regard to several "specifications," including the asserted failure to initiate historical accounting activities. At the conclusion of the trial, the court declared that "Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place ... in the pantheon of unfit trustee-delegates." 226 F. Supp. 2d at 161. Based on its conclusion that the responsible officials were unfit to perform their duties, the district court formally terminated the remand to the agency, id. at 152, requiring submission of a plan for the accounting of IIM funds (as well as a plan to achieve compliance with fiduciary obligations generally) to be evaluated by the court with the assistance of expert trial testimony, following which the court would issue a structural injunction. Id. at 148-49.

As contemplated by the contempt decision, the Phase 1.5 trial did not consider issues of progress or delay. The purpose of that trial was not to determine whether to enter an injunction but, instead, to determine the content of the injunction which the court had already determined to issue.

In July 2003, before the structural injunction issued, this Court vacated the contempt decision. This Court noted that as of December 2001, Interior had "made more progress ... in six months

than the past administration did in six years." 334 F.3d at 1148 (quotation marks and citation omitted). This Court held that the "uncontested facts" were "inconsistent with a finding that Secretary Norton failed to" initiate an historical accounting project. Ibid.

Although the district court attributed no significance to this Court's contempt decision, that ruling removed the only predicate for new orders compelling agency action. If, as this Court concluded, the Secretary had initiated accounting activities and was making tangible progress, there would be no apparent basis to issue any new judicial commands, and, of course, there could be no basis for the court to assume control of accounting responsibilities altogether.

Had the district court heeded the terms of this Court's 2001 decision, it would have allowed the agency to proceed with the "discharge of its obligations." 240 F.3d at 1109. Instead, it issued an order that would have exceeded its authority under any circumstances. That is the order that the court has now reissued in the face of this Court's most recent ruling. Reversal is required. The task of accounting should be remanded to the agency.

II. Viewed Individually Or Collectively, The Particular Requirements Of The Structural Injunction Are Without Legal Basis.

A. The Substantive Obligations Imposed By The Court Under The Rubric Of An Accounting Are Without Basis In Law.

The district court identified no way in which the billions of dollars of new requirements imposed by the injunction were required by statute or mandated by this Court's 2001 decision. Instead, as discussed above, the district court wrongly believed that it was free to require expenditure of enormous sums without regard to the views of Congress, based on its understanding of the duties imposed on a trustee at common law.

The specific provisions discussed below illustrate the extent to which the district court has acted without reference to governing principles clarified in this Court's December 2004 opinion. In vacating the injunction, the Court should leave no doubt that the district court is not free to reinvigorate its specific elements at some future point.

1. Closed accounts.

The injunction requires Interior to produce account statements for all IIM accounts ever in existence, including accounts long closed. See Injunction, §§ III(E),(F); 283 F. Supp. 2d at 169-73. That requirement has no basis in the 1994 Act and misunderstands the trust relationship. The 1994 Act requires that Interior account for "the daily and annual balance of all funds held in trust." This Court believed that a retrospective inquiry was necessary to meet the obligation to

provide an accurate balance to accountholders with whom Interior has an existing trust relationship. See 240 F.3d at 1102. But closed accounts have no balance. Similarly, once an account is closed, the trust relationship is ended and trust duties cease. Nor may current beneficiaries demand an accounting on behalf of former account holders. See Pub. L. No. 103-412, § 102(b).

Moreover, the clear premise of the "Misplaced Trust" report was that an accounting would be performed only for the roughly 300,000 open accounts. Noting the expense entailed in an accounting, the report observed that "it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund." H.R. Rep. 102-499, at 26. See also id. at 7, 16, 23.

Had Congress intended to mandate an accounting for accounts closed before its legislation took effect, it surely would have said so. Expanding the accounting in this manner adds enormously to the accounting task, and, in general, review of accounts closed as of 1994 would be particularly expensive because transactions in those accounts tend disproportionately to implicate older, paper records, rather than more recent records that are available electronically. Cason Decl. at 6.

2. Transactions dating back to 1887.

As the district court itself recognized, the 1994 Act requires an accounting for funds "deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)," and does not

that the government has a generalized fiduciary duty - without identified connection to any statute - to account for all funds deposited or invested in IIM accounts since the Indian land trusts were first created in 1887. Id. at 173; Injunction, § III(E).

Whatever the scope of Interior's accounting responsibility, no reading of the 1994 Act could plausibly compel an accounting of transactions that predate 1938. The court's order renders the statutory language "deposited or invested pursuant to the Act of June 24, 1938" wholly superfluous.

3. Accounting for lands.

Although by its terms the 1994 Act requires an accounting for funds, the injunction requires an accounting for all "assets," i.e., lands, held in trust since 1887. See Injunction, § III(G); 283 F. Supp. 2d at 175-77. The injunction thus ignores the language of the statute as well as this Court's observation that "funds have quite a different legal status from the allotment land itself." 392 F.3d at 464.

Contrary to the district court's understanding, there is no unitary or monolithic "Indian trust." Each individual's IIM account is separate from that of other individual Indians. Likewise, the land held in trust for an individual Indian (often a "fractionated" interest in a tract) and the funds held in trust for the same individual are distinct. Income from revenue-

producing trust lands is often deposited in an IIM account. But many IIM accounts contain no land-based revenue, and many trust lands are not revenue-producing at all, or produce revenue that is paid directly to the individual Indian.

The injunction's "lands" component would transform the accounting activities envisioned by Congress beyond recognition. As a practical matter, the district court's ruling would require Interior to reconstruct the entire process of "fractionation" of land that, as the "Misplaced Trust" report observed, has yielded over the past century land ownership interests recorded to the 42nd decimal point. H.R. Rep. No. 102-499, at 28; see also id. at 28 n.94 ("One 320-acre tract at the Standing Rock reservation has 542 owners, including 531 individual Indians and 11 tribal or other owners. ... The land size equivalent of the smallest ownership interest in that tract is smaller than the dimensions of this page [0.35 square feet or 7.1 inches by 7.1 inches]."). This endeavor (assuming that it is even feasible) would dwarf the task of accounting for the funds in the IIM accounts.[9]

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[9] A tract identified in Hodel v. Irving, 481 U.S. 704 (1987), illustrates the complexities that may arise as trust land becomes increasingly fractionated:

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $0.05 in annual rent, and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming all 439 owners could agree) for its estimated $8,000 value, he would be entitled to

Moreover, even if there were a basis to require an accounting of current trust lands, of the 20 to 40 million acres of land that were allotted between 1887 and 1934, only about 10 million acres are owned by individual Indians today. Cason Decl. at 8. Thus, wholly apart from any other issues, the district court would have Interior devote considerable resources to document the history of lands that are no longer held in trust. Ibid.

4. Non-conclusiveness of probate determinations.

The injunction requires that Interior, in reconstructing more than a century of various transactions, audit closed accounts that have gone through probate.

The court apparently believed that the presumptive validity of probate proceedings extends only to the determination of descent, i.e., the identification of heirs and the share of the estate each heir should receive, and not to the separate question of whether the inventory of the estate was complete and accurate. The court explained that probate would not, for example, account for $500 that a deceased beneficiary should have received during his lifetime but did not. See 283 F. Supp. 2d at 174-75. In other words, the court's ruling requires that Interior not only verify the transactions that took place in the accounts of deceased account holders, but also ascertain whether there were

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> $0.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

Id. at 713.

transactions that should have taken place, so that Interior can then re-determine amounts that should have been entered into the accounts of their heirs. See ibid.

Interior's probate proceedings afford heirs the opportunity to contest Interior's determination of the estate's holdings. 43 C.F.R. 4.271. The determination at the end of probate is final. Indeed, the very point of such proceedings is to dispose with finality of all assets, claims, and issues concerning a decedent and his estate. It is no part of an accounting of funds held in trust for current beneficiaries to look behind such a final determination of the interests of a decedent, even a predecessor in interest. Indeed, because there is no requirement that funds held in trust in the decedent's IIM account be paid into IIM accounts held in trusts for his heirs - rather than being passed to the heirs outright - a discovery that a decedent did not receive a payment into his IIM account that should have been made does not mean that an heir's IIM trust account should contain a greater balance. 25 C.F.R. 115.502.

In any event, neither the 1994 Act nor this lawsuit provides a means to adjust the amounts in IIM accounts to compensate for payments that were never made into those accounts in the first place (whether the accounts were closed long ago or remain open at present). Such a process is not an accounting for funds paid into and out of an IIM account, but a damages claim for funds that allegedly should have been but were not paid. And as the district court recognized long ago, plaintiffs properly seek

"only an accounting, not a cash infusion" into the IIM accounts. 30 F. Supp. 2d at 40.

5. Accounting for funds never held in IIM accounts.

Not all revenues generated by Indian trust lands are collected and managed by Interior. Accounting Plan at II-4. Some monies are paid directly to the Indian owner of the land by a third-party lessee. Ibid. The injunction nevertheless requires Interior to provide an accounting for all such direct payments from third parties since 1887, even though the funds were never held by the government at all, much less placed in an IIM account, and even though Interior thus does not maintain records necessary for such an accounting. See Injunction, § III(H); 283 F. Supp. 2d at 177-81; Cason Decl. at 9-10. This ruling, which would require that Interior reconstruct the financial arrangements between individual Indians and third parties (including neighbors and friends), bears no connection to the language of the 1994 Act, or to common sense.

6. Statute of limitations.

The court compounded its multiple errors by concluding that duties untethered to any statute may be enforced without regard to any statute of limitations. In the court's view, claims for "trust mismanagement," including failure to provide an accounting, cannot accrue for purposes of 28 U.S.C. 2401(a) "until the trustee has repudiated the beneficiary's right to the benefits of the trust." Cobell v. Norton, 260 F. Supp. 2d 98, 105 (D.D.C. 2003).

The trust relationship between the federal government and Indian tribes and individual Indian beneficiaries is established by statute and thus cannot be "repudiated." In effect, therefore, the court's ruling would allow Indian beneficiaries to sue for any claimed breach of trust occurring at any point in the history of the Indian trust, even if the beneficiary had full knowledge of the alleged breach and failed to bring an action within the six-year limitations period.

Unsurprisingly, the law does not suggest that Indian beneficiaries may pursue claims against the government based on events occurring a century ago. The courts have repeatedly held that actions brought by Indian beneficiaries for breaches of trust are barred by the applicable statutes of limitations if the beneficiaries knew or should have known of the alleged breach, without discussing any "repudiation" the trust. See, e.g., United States v. Mottaz, 476 U.S. 834, 843-44 (1986); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988). Cf. City of Sherrill, New York v. Oneida Nation, 125 S. Ct. 1478 (2005) (tribe's claim against municipality barred by laches).[10]

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[10] The treatise cited by the district court merely observed that either a violation of trust obligations or a repudiation of the trust will trigger the statute of limitations. See 260 F. Supp. 2d at 105 (citing Bogert & Bogert, The Law of Trusts and Trustees § 951, at 638-39 (Rev. 2d ed. 1995)). See also Shoshone Indian Tribe v. United States, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as

The district court alternatively suggested that customary limitations principles govern only damages claims, and not claims for equitable relief. 260 F. Supp. 2d at 107. It is long established, however, that the limitations period in 28 U.S.C. 2401 applies to both legal and equitable claims. See Blassingame v. Secretary of Navy, 811 F.2d 65, 70 (2d Cir. 1987); Geyen v. Marsh, 775 F.2d 1303, 1306-07 (5th Cir. 1985). Indeed, that limitations period has been applied in Indian trust cases presenting claims for equitable relief. See Sisseton-Wahpeton, 895 F.2d at 592; Christensen v. United States, 755 F.2d 705, 707 (9th Cir. 1985).

B. The Injunction Improperly Directs The Means And Methods Of An Accounting.

As discussed above, fundamental principles of administrative law make clear that it is the task of the agency, not the court, to formulate and implement its plans. Likewise, principles governing review of private trustees foreclose judicial attempts to direct the manner in which a trustee performs its functions.

1. Statistical Sampling.

The district court's dictates with regard to statistical sampling epitomize its errors. In vacating the original structural injunction, this Court contrasted its earlier approval of the district court's "expression of intent to leave [the] issue of choice of accounting methods, including statistical sampling, to administrative agencies," 392 F.3d at 473 (citing

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trustee."), cert. denied, 125 S. Ct. 1824 (2005).

240 F.3d at 1104), with the district court's September 2003 order "forbidding use of statistical sampling," ibid. (citing 283 F. Supp. 2d at 289).

Interior has consistently explained that statistical sampling is crucial to any feasible accounting of land-based accounts given the number of transactions at issue and the fact that the vast majority of transactions involve relatively small sums of money. See, e.g., Cason Decl. at 4. Indeed, the "Misplaced Trust" report that gave rise to the 1994 Act expressly contemplated that Interior would "review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund," given that "cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund." H.R. Rep. No. 102-499, at 26.

The district court nonetheless reissued the provisions banning the use of statistical sampling cited with disfavor by this Court. Injunction, §§ III(K), (L); see 283 F. Supp. 2d at 194-98. The district court's decision to ignore this Court's most recent guidance is particularly extraordinary because this Court's 2001 decision had already made clear that decisions such as "the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," are "properly left in the hands of administrative agencies." 240 F.3d at 1104.

The requirement that Interior reconcile each individual account transaction with its underlying documentation would by itself impose staggering costs, hugely increasing the number of individual verifications required. Cason Decl. at 5. For many of the transactions, the cost of the court's accounting would exceed the monetary value of the transaction. Id. at 4 ("Significantly, for the stratum $0 to $500, Interior estimates that the average cost of accounting, per transaction, exceeds the average dollar value of the transactions in the stratum.").

Interior's historical examination of the accounts of the named plaintiffs in this case underscores the point. The agency's search for relevant records, and a subsequent analysis of those records performed by Joseph Rosenbaum of Ernst & Young, were undertaken pursuant to a special $20 million appropriation provided with the expectation that the results would help Congress determine "whether this expenditure was a wise use of appropriated funds, and [would] serve as a benchmark to determine any future appropriations for this type of activity." November 20, 2001 letter from the Chairman of House Subcommittee on Interior. Ernst & Young reviewed the accounts of the named plaintiffs and their agreed-upon predecessors (a total of 25 persons and 37 IIM accounts), analyzing 12,617 transactions in the period from 1914 to 2000, finding contemporaneous evidence of 86% of the transactions representing 93% of the total dollar amount. Report at 2, 5.

Although the Ernst & Young study was undertaken for independent purposes, its findings confirmed that statistical sampling would form an essential part of any viable accounting plan. Nearly 60% of the transactions analyzed were for less than $10.00. Id. at 3. This reflected the fact that some ownership interests were as small as .00008 of an interest. Ibid.; see also Def. Phase 1 Trial Exh. 51 (chart). As Mr. Rosenbaum explained in his trial testimony, the task of individually verifying such small transactions by reference to supporting documentation is exceptionally complex. See Tr., June 9, 2003 p.m., at 46-51.[11] And, with a single exception, Ernst & Young found "no evidence of transactions that were not recorded in the available IIM account ledgers." Report at 2. The one exception was a credit of $60.94 that was incorrectly credited to an account with a similar account number. Ibid.

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[11] For example, Mr. Rosenbaum cited a particular credit in the amount of ten cents. That amount reflected the plaintiff's share of a total lease payment of several thousand dollars. To audit the accuracy of the payment to plaintiff, it was necessary to verify plaintiff's interest in the total payment. The lease payment giving rise to the ten cent credit covered multiple allotments in addition to that in which plaintiff possessed an interest. It was thus necessary to determine the payment attributable to plaintiff's allotment. The payment concerning plaintiff's particular allotment, in turn, reflected rents calculated at different rates for crop land and pasture land. Adding these rents together resulted in a total of $858.54. It was then necessary to determine plaintiff's interest in the allotment. This was done by examining probate documents indicating that plaintiff received a 1/9 share of estate holdings, and further ascertaining that the decedent's fractional holding had been 7/6480 at the time of death. Mr. Rosenbaum multiplied the total rent for plaintiff's allotment by plaintiff's 7/58,320 interest to verify the accuracy of the ten cent credit. See Tr., June 9, 2003 p.m., at 46-51.

2. Other Requirements Including Collection Of Records From Third Parties.

The injunction also improperly asserts jurisdiction over the manner in which Interior identifies and retrieves potentially missing trust records, including the issuance of subpoenas to third parties, see Injunction, § III(B); the manner in which Interior collects and indexes trust records, see id., § III(C); the mechanics of various system tests and quality control measures discussed in the Interior Accounting Plan, see id., §§ III(N), (O); and the "industry production databases" and related computer software that Interior may decide to use in connection with the accounting and audit, see id., § III(P).

The injunctive provisions governing the collection of trust records from third parties illustrate the court's departure from the proper judicial role. As the district court understood, the federal government already holds nearly 200,000 boxes of trust documents, see 283 F. Supp. 2d at 153, and intends to collect records from third parties such as oil and timber companies only if a data gap is discovered that could not be addressed with existing federal records, see id. at 156. The district court rejected this gap-filling approach, however, and ruled that Interior instead must identify and subpoena all third-party records without delay. See id. at 156-60. Thus, the injunction declares that "the Interior defendants are under an obligation to recover missing trust records where possible," and directs Interior to submit a plan for determining which trust records are likely to be possessed by entities outside the federal

government, identifying the trust-related records maintained by such entities, and also for issuing a potentially massive number of subpoenas, where appropriate, to ensure that trust-related records will be preserved. See Injunction, § III(B).

The district court had no basis for second-guessing the agency's judgment. As explained in the 2003 trial testimony of Interior's Associate Deputy Secretary, the agency concluded that it "would be more productive to spend our time and energy indexing all of the records that we do have, and in a more targeted fashion the records that we don't, rather than spending a lot of time collecting records that may end up being duplicates of all of the records we do have. From the Department's perspective, it is a matter of just prioritizing the resources that we have available in the most productive way possible." Tr., June 5, 2003 p.m., at 55.

Although the court professed concern about possible record-destruction, Interior addressed that issue in a February 6, 2002 Federal Register notice requesting that persons possessing records relating to IIM trust funds preserve those records and notify the Department, 67 Fed. Reg. 5,607 (2002), and in a subsequent notice establishing the policy and procedures to be followed in collecting records from third parties, 68 Fed. Reg. 23,756 (2003). The court apparently believed that resources should have been devoted to subpoena enforcement in the first instance. However, a plan that must await an initial response to burdensome subpoenas (which may well become the subject of

ancillary litigation), is hardly calculated to result in less delay than the approach proposed by Interior. The district court's ruling reflects no appreciation for the sheer numbers of entities that would be subject to government subpoenas, including businesses that might well find this invasive burden a deterrent to future relations with individual Indians. See Cason Decl. at 10-11.

C. Despite Injunctions And Funding Restrictions, Interior Has Continued To Make Progress In Historical Accounting Activities.

Finally, although the structural injunction and subsequent funding restrictions curtailed Interior's ability to proceed with any long-term accounting for land-based accounts, there is no doubt that Interior has continued to commit its financial and human resources to the completion of the historical accounting and has achieved significant results. Although Congress, in response to the 2003 structural injunction, strictly limited funds available for long-term historical accounting activities, it did not similarly restrict Interior's authority to proceed with regard to judgment, per capita and special deposit accounts which, taken together, comprise approximately half of the total funds held in IIM accounts. See Cason Decl. at 2. As a result, as of December 31, 2004, Interior had been able to account for approximately 25% of the December 31, 2000 total balance in all IIM accounts. 2005 Cason Decl. at 3. As of that date, it had performed an accounting for 36,701 judgment accounts with balances totaling almost $53 million, and had reconciled 7,360

per capita accounts, involving balances of approximately $21.7 million. For 8,496 special deposit accounts totaling over $40.8 million, Interior had completed its analysis and either closed the account, converted the account to a proper account type, or had residual balances in the account distributed to the proper parties. See ibid. These concrete accomplishments reflect the fact that, in total, about $111 million has already been obligated for activities associated with producing an historical accounting. Ibid.

For all of these reasons, this Court should make clear that the structural injunction is fundamentally flawed in its premises and particulars and direct that the accounting be remanded to the agency.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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MAY 2005

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 13,401 words, according to the count of Corel WordPerfect 9.

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STATUTORY ADDENDUM

ADDENDUM CONTENTS

Public Law 103-412
103d Congress

An Act

To reform the management of Indian Trust Funds, and for other purposes.

Oct. 25, 1994
[H.R. 4833]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

American Indian Trust Fund Management Reform Act of 1994.
25 USC 4001 note.

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "American Indian Trust Fund Management Reform Act of 1994".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

[illegible] means the Special Trustee for American Indians appointed under section 302.

(2) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims

Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) The term "Secretary" means the Secretary of the Interior.

(4) The term "Office" means the Office of Special Trustee for American Indians established by section 302.

(5) The term "Bureau" means the Bureau of Indian Affairs within the Department of the Interior.

(6) The term "Department" means the Department of the Interior.

TITLE I—RECOGNITION OF TRUST RESPONSIBILITY

SEC. 101. AFFIRMATIVE ACTION REQUIRED.

The first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by adding at the end the following new subsection:

"(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

"(1) Providing adequate systems for accounting for and reporting trust fund balances.

"(2) Providing adequate controls over receipts and disbursements.

"(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

"(4) Determining accurate cash balances.

"(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

"(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

"(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

"(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.".

25 USC 4011.

SEC. 102. RESPONSIBILITY OF SECRETARY TO ACCOUNT FOR THE DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS.

(a) REQUIREMENT TO ACCOUNT.—The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

(b) PERIODIC STATEMENT OF PERFORMANCE.—Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a). The statement, for the period concerned, shall identify—

(1) the source, type, and status of the funds;

(2) the beginning balance;

(3) the gains and losses;

(4) receipts and disbursements; and

(5) the ending balance.

(c) ANNUAL AUDIT.—The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a), and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) after the completion of the audit.

SEC. 103. PAYMENT OF INTEREST ON INDIVIDUAL INDIAN MONEY ACCOUNTS.

(a) PAYMENT OF INTEREST.—The first section of the Act of February 12, 1929 (25 U.S.C. 161a), is amended—

(1) by striking out "That all" and inserting in lieu thereof "That (a) all"; and

(2) by adding after subsection (a) (as designated by paragraph (1) of this subsection) the following:

"(b) All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of individual Indians shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities.".

(b) WITHDRAWAL AUTHORITY.—The second sentence of subsection (a) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by inserting "to withdraw from the United States Treasury and" after "prescribe,".

(c) TECHNICAL CORRECTION.—The second subsection (b) of the first section of the Act of June 24, 1938 (25 U.S.C. 162a), as added by section 302 of Public Law 101–644 (104 Stat. 4667), is hereby redesignated as subsection (c).

(d) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to interest earned on amounts deposited or invested on or after the date of the enactment of this Act. 25 USC 161a note.

SEC. 104. AUTHORITY FOR PAYMENT OF CLAIMS FOR INTEREST OWED. 25 USC 4012.

The Secretary shall make payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual before the date of enactment of this Act retroactive to the date that the Secretary began investing individual Indian monies on a regular basis, to the extent that the claim is identified—

(1) by a reconciliation process of individual Indian money accounts, or

(2) by the individual and presented to the Secretary with supporting documentation, and is verified by the Secretary pursuant to the Department's policy for addressing accountholder losses.

TITLE II—INDIAN TRUST FUND MANAGEMENT PROGRAM

25 USC 4021.

SEC. 201. PURPOSE.

The purpose of this title is to allow tribes an opportunity to manage tribal funds currently held in trust by the United States and managed by the Secretary through the Bureau, that, consistent with the trust responsibility of the United States and the principles of self-determination, will—

(1) give Indian tribal governments greater control over the management of such trust funds; or

(2) otherwise demonstrate how the principles of self-determination can work with respect to the management of such trust funds, in a manner consistent with the trust responsibility of the United States.

25 USC 4022.

SEC. 202. VOLUNTARY WITHDRAWAL FROM TRUST FUNDS PROGRAM.

(a) IN GENERAL.—An Indian tribe may, in accordance with this section, submit a plan to withdraw some or all funds held in trust for such tribe by the United States and managed by the Secretary through the Bureau.

(b) APPROVAL OF PLAN.—The Secretary shall approve such plan within 90 days of receipt and when approving the plan, the Secretary shall obtain the advice of the Special Trustee or prior to the appointment of such Special Trustee, the Director of the Office of Trust Fund Management within the Bureau. Such plan shall meet the following conditions:

(1) Such plan has been approved by the appropriate Indian tribe and is accompanied by a resolution from the tribal governing body approving the plan.

(2) The Secretary determines such plan to be reasonable after considering all appropriate factors, including (but not limited to) the following:

(A) The capability and experience of the individuals or institutions that will be managing the trust funds.

(B) The protection against substantial loss of principal.

(c) DISSOLUTION OF TRUST RESPONSIBILITY.—Beginning on the date funds are withdrawn pursuant to this section, any trust responsibility or liability of the United States with respect to such funds shall cease except as provided for in section 207 of this title.

25 USC 4023.

SEC. 203. JUDGMENT FUNDS.

(a) IN GENERAL.—The Secretary is authorized to approve plans under section 202 of this title for the withdrawal of judgment funds held by the Secretary.

(b) LIMITATION.—Only such funds held by the Secretary under the terms of the Indian Judgment Funds Use or Distribution Act (25 U.S.C. 1401) or an Act of Congress which provides for the secretarial management of such judgment funds shall be included in such plans.

(c) SECRETARIAL DUTIES.—In approving such plans, the Secretary shall ensure—

(1) that the purpose and use of the judgment funds identified in the previously approved judgment fund plan will continue to be followed by the Indian tribe in the management of the judgment funds; and

(2) that only funds held for Indian tribes may be withdrawn and that any funds held for individual tribal members are not to be included in the plan.

SEC. 204. TECHNICAL ASSISTANCE. 25 USC 4024.

The Secretary shall—

(1) directly or by contract, provide Indian tribes with technical assistance in developing, implementing, and managing Indian trust fund investment plans; and

(2) among other things, ensure that legal, financial, and other expertise of the Department of the Interior has been made fully available in an advisory capacity to the Indian tribes to assist in the development, implementation, and management of investment plans.

SEC. 205. GRANT PROGRAM. 25 USC 4025.

(a) GENERAL AUTHORITY.—The Secretary is authorized to award grants to Indian tribes for the purpose of developing and implementing plans for the investment of Indian tribal trust funds.

(b) USE OF FUNDS.—The purposes for which funds provided under this section may be used include (but are not limited to)—

(1) the training and education of employees responsible for monitoring the investment of trust funds;

(2) the building of tribal capacity for the investment and management of trust funds;

(3) the development of a comprehensive tribal investment plan;

(4) the implementation and management of tribal trust fund investment plans; and

(5) such other purposes related to this title that the Secretary deems appropriate.

SEC. 206. RETURN OF WITHDRAWN FUNDS. 25 USC 4026.

Subject to such conditions as the Secretary may prescribe, any Indian tribe which has withdrawn trust funds may choose to return any or all of the trust funds such tribe has withdrawn by notifying the Secretary in writing of its intention to return the funds to the control and management of the Secretary.

SEC. 207. SAVINGS PROVISION. 25 USC 4027.

By submitting or approving a plan under this title, neither the tribe nor the Secretary shall be deemed to have accepted the account balance as accurate or to have waived any rights regarding such balance and to seek compensation.

SEC. 208. REPORT TO CONGRESS. 25 USC 4028.

The Secretary shall, beginning one year after the date of the enactment of this Act, submit an annual report to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate on the implementation of programs under this title. Such report shall include recommendations (if any) for changes necessary to better implement the purpose of this title.

SEC. 209. REGULATIONS. 25 USC 4029.

(a) IN GENERAL.—Not later than 12 months after the date of enactment of this title, the Secretary shall promulgate final regulations for the implementation of this title. All regulations promulgated pursuant to this title shall be developed by the Sec-

retary with the full and active participation of the Indian tribes with trust funds held by the Secretary and other affected Indian tribes.

(b) EFFECT.—The lack of promulgated regulations shall not limit the effect of this title.

TITLE III—SPECIAL TRUSTEE FOR AMERICAN INDIANS

25 USC 4041.

SEC. 301. PURPOSES.

The purposes of this title are—

(1) to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities to Indian tribes and individual Indians by establishing in the Department of the Interior an Office of Special Trustee for American Indians to oversee and coordinate reforms within the Department of practices relating to the management and discharge of such responsibilities;

(2) to ensure that reform of such practices in the Department is carried out in a unified manner and that reforms of the policies, practices, procedures and systems of the Bureau, Minerals Management Service, and Bureau of Land Management, which carry out such trust responsibilities, are effective, consistent, and integrated; and

(3) to ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians.

25 USC 4042.

SEC. 302. OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS.

(a) ESTABLISHMENT.—There is hereby established within the Department of the Interior the Office of Special Trustee for American Indians. The Office shall be headed by the Special Trustee who shall report directly to the Secretary.

(b) SPECIAL TRUSTEE.—

President.

(1) APPOINTMENT.—The Special Trustee shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.

(2) COMPENSATION.—The Special Trustee shall be paid at a rate determined by the Secretary to be appropriate for the position, but not less than the rate of basic pay payable at Level II of the Executive Schedule under section 5313 of title 5, United States Code.

(c) TERMINATION OF OFFICE.—

(1) CONDITIONED UPON IMPLEMENTATION OF REFORMS.—The Special Trustee, in proposing a termination date under section 303(a)(2)(C), shall ensure continuation of the Office until all reforms identified in the strategic plan have been implemented to the satisfaction of the Special Trustee.

(2) 30-DAY NOTICE.—Thirty days prior to the termination date proposed in the plan submitted under this section, the Special Trustee shall notify the Secretary and the Congress in writing of the progress in implementing the reforms identi-

fied in the plan. The Special Trustee, at that time, may recommend the continuation, or the permanent establishment, of the Office if the Special Trustee concludes that continuation or permanent establishment is necessary for the efficient discharge of the Secretary's trust responsibilities.

(3) TERMINATION DATE.—The Office shall terminate 180 legislative days after the date on which the notice to the Congress under paragraph (2) is provided, unless the Congress extends the authorities of the Special Trustee. For the purposes of this section, a legislative day is a day on which either House of the Congress is in session.

SEC. 303. AUTHORITIES AND FUNCTIONS OF THE SPECIAL TRUSTEE. 25 USC 4043.

(a) COMPREHENSIVE STRATEGIC PLAN.—

(1) IN GENERAL.—The Special Trustee shall prepare and, after consultation with Indian tribes and appropriate Indian organizations, submit to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, within one year after the initial appointment is made under section 302(b), a comprehensive strategic plan for all phases of the trust management business cycle that will ensure proper and efficient discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians in compliance with this Act.

(2) PLAN REQUIREMENTS.—The plan prepared under paragraph (1) shall include the following:

(A) Identification of all reforms to the policies, procedures, practices and systems of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service necessary to ensure the proper and efficient discharge of the Secretary's trust responsibilities in compliance with this Act.

(B) Provisions for opportunities for Indian tribes to assist in the management of their trust accounts and to identify for the Secretary options for the investment of their trust accounts, in a manner consistent with the trust responsibilities of the Secretary, in ways that will help promote economic development in their communities.

(C) A timetable for implementing the reforms identified in the plan, including a date for the proposed termination of the Office.

(b) DUTIES.—

(1) GENERAL OVERSIGHT OF REFORM EFFORTS.—The Special Trustee shall oversee all reform efforts within the Bureau, the Bureau of Land Management, and the Minerals Management Service relating to the trust responsibilities of the Secretary to ensure the establishment of policies, procedures, systems and practices to allow the Secretary to discharge his trust responsibilities in compliance with this Act.

(2) BUREAU OF INDIAN AFFAIRS.—

(A) MONITOR RECONCILIATION OF TRUST ACCOUNTS.—The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts.

(B) INVESTMENTS.—The Special Trustee shall ensure that the Bureau establishes appropriate policies and proce-

dures, and develops necessary systems, that will allow it—

(i) properly to account for and invest, as well as maximize, in a manner consistent with the statutory restrictions imposed on the Secretary's investment options, the return on the investment of all trust fund monies, and

(ii) to prepare accurate and timely reports to account holders (and others, as required) on a periodic basis regarding all collections, disbursements, investments, and return on investments related to their accounts.

(C) OWNERSHIP AND LEASE DATA.—The Special Trustee shall ensure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands.

(3) BUREAU OF LAND MANAGEMENT.—The Special Trustee shall ensure that the Bureau of Land Management establishes policies and practices adequate to enforce compliance with Federal requirements for drilling, production, accountability, environmental protection, and safety with respect to the lease of Indian lands.

(4) MINERALS MANAGEMENT SERVICE.—The Special Trustee shall ensure that the Minerals Management Service establishes policies and practices to enforce compliance by lessees of Indian lands with all requirements for timely and accurate reporting of production and payment of lease royalties and other revenues, including the audit of leases to ensure that lessees are accurately reporting production levels and calculating royalty payments.

(c) COORDINATION OF POLICIES.—

(1) IN GENERAL.—The Special Trustee shall ensure that—

(A) the policies, procedures, practices, and systems of the Bureau, the Bureau of Land Management, and the Minerals Management Service related to the discharge of the Secretary's trust responsibilities are coordinated, consistent, and integrated, and

(B) the Department prepares comprehensive and coordinated written policies and p cedures for each phase of the trust management business /cle.

(2) STANDARDIZED PROCEDURES.—The Special Trustee shall ensure that the Bureau imposes standardized trust fund accounting procedures throughout the Bureau.

(3) INTEGRATION OF LEDGER WITH INVESTMENT SYSTEM.—The Special Trustee shall ensure that the trust fund investment, general ledger, and subsidiary accounting systems of the Bureau are integrated and that they are adequate to support the trust fund investment needs of the Bureau.

(4) INTEGRATION OF LAND RECORDS, TRUST FUNDS ACCOUNTING, AND ASSET MANAGEMENT SYSTEMS AMONG AGENCIES.—The Special Trustee shall ensure that—

(A) the land records system of the Bureau interfaces with the trust fund accounting system, and

(B) the asset management systems of the Minerals Management Service and the Bureau of Land Management interface with the appropriate asset management and

accounting systems of the Bureau, including ensuring that—

(i) the Minerals Management Service establishes policies and procedures that will allow it to properly collect, account for, and disburse to the Bureau all royalties and other revenues generated by production from leases on Indian lands; and

(ii) the Bureau of Land Management and the Bureau provide Indian landholders with accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources.

(5) TRUST MANAGEMENT PROGRAM BUDGET.—

(A) DEVELOPMENT AND SUBMISSION.—The Special Trustee shall develop for each fiscal year, with the advice of program managers of each office within the Bureau of Indian Affairs, Bureau of Land Management and Minerals Management Service that participates in trust management, including the management of trust funds or natural resources, or which is charged with any responsibility under the comprehensive strategic plan prepared under subsection (a) of this section, a consolidated Trust Management program budget proposal that would enable the Secretary to efficiently and effectively discharge his trust responsibilities and to implement the comprehensive strategic plan, and shall submit such budget proposal to the Secretary, the Director of the Office of Management and Budget, and to the Congress.

(B) DUTY OF CERTAIN PROGRAM MANAGERS.—Each program manager participating in trust management or charged with responsibilities under the comprehensive strategic plans shall transmit his office's budget request to the Special Trustee at the same time as such request is submitted to his superiors (and before submission to the Office of Management and Budget) in the preparation of the budget of the President submitted to the Congress under section 1105(a) of title 31, United States Code.

(C) CERTIFICATION OF ADEQUACY OF BUDGET REQUEST.—The Special Trustee shall—

(i) review each budget request submitted under subparagraph (B);

(ii) certify in writing as to the adequacy of such request to discharge, effectively and efficiently, the Secretary's trust responsibilities and to implement the comprehensive strategic plan; and

(iii) notify the program manager of the Special Trustee's certification under clause (ii).

(D) MAINTENANCE OF RECORDS.—The Special Trustee shall maintain records of certifications made under paragraph (3)(B).

(E) LIMITATION ON REPROGRAMMING OR TRANSFER.—No program manager shall submit, and no official of the Department of the Interior may approve or otherwise authorize, a reprogramming or transfer request with respect to any funds appropriated for trust management which is included in the Trust Management Program Budget unless such request has been approved by the Special Trustee.

(d) PROBLEM RESOLUTION.—The Special Trustee shall provide such guidance as necessary to assist Department personnel in identifying problems and options for resolving problems, and in implementing reforms to Department, Bureau, Bureau of Land Management, and Minerals Management Service policies, procedures, systems and practices.

(e) SPECIAL TRUSTEE ACCESS.—The Special Trustee, and his staff, shall have access to all records, reports, audits, reviews, documents, papers, recommendations, files and other material, as well as to any officer and employee, of the Department and any office or bureau thereof, as the Special Trustee deems necessary for the accomplishment of his duties under this Act.

(f) ANNUAL REPORT.—The Special Trustee shall report to the Secretary and the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate each year on the progress of the Department, the Bureau, the Bureau of Land Management, and the Minerals Management Service in implementing the reforms identified in the comprehensive strategic plan under subsection (a)(1) and in meeting the timetable established in the strategic plan under subsection (a)(2)(C).

25 USC 4044.

SEC. 304. RECONCILIATION REPORT.

The Secretary shall transmit to the Committee on Natural Resources of the House of Representatives and the Committee on Indian Affairs of the Senate, by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995. In carrying out this section, the Secretary shall consult with the Special Trustee. The report shall include—

(1) a description of the Secretary's methodology in reconciling trust fund accounts;

(2) attestations by each account holder that—

(A) the Secretary has provided the account holder with as full and complete accounting as possible of the account holder's funds to the earliest possible date, and that the account holder accepts the balance as reconciled by the Secretary; or

(B) the account holder disputes the balance of the account holder's account as reconciled by the Secretary and statement explaining why the account holder disputes the Secretary's reconciled balance; and

(3) a statement by the Secretary with regard to each account balance disputed by the account holder outlining efforts the Secretary will undertake to resolve the dispute.

25 USC 4045.

SEC. 305. STAFF AND CONSULTANTS.

(a) STAFF.—The Special Trustee may employ such staff as the Special Trustee deems necessary. The Special Trustee may request staff assistance from within the Department and any office or Bureau thereof as the Special Trustee deems necessary.

(b) CONTRACTS.—To the extent and in such amounts as may be provided in advance by appropriations Acts, the Special Trustee may enter into contracts and other arrangements with public agencies and with private persons and organizations for consulting services and make such payments as necessary to carry out the provisions of this title.

[illegible] provision of law, the Special Trustee shall establish an advisory board to provide advice on all matters within the jurisdiction of the Special Trustee. The advisory board shall consist of nine members, appointed by the Special Trustee after consultation with Indian tribes and appropriate Indian organizations, of which—

(1) five members shall represent trust fund account holders, including both tribal and Individual Indian Money accounts;

(2) two members shall have practical experience in trust fund and financial management;

(3) one member shall have practical experience in fiduciary investment management; and

(4) one member, from academia, shall have knowledge of general management of large organizations.

(b) TERM.—Each member shall serve a term of two years.

(c) FACA.—The advisory board shall not be subject to the Federal Advisory Committee Act.

(d) TERMINATION.—The Advisory Board shall terminate upon termination of the Office of Special Trustee.

TITLE IV—AUTHORIZATION OF APPROPRIATIONS

SEC. 401. AUTHORIZATION OF APPROPRIATIONS. 25 USC 4061.

There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

Approved October 25, 1994.

LEGISLATIVE HISTORY—H.R. 4833:

HOUSE REPORTS: No. 103-778 (Comm. on Natural Resources).
CONGRESSIONAL RECORD, Vol. 140 (1994):
Oct. 3, considered and passed House.
Oct. 7, considered and passed Senate.