[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 05-5068

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

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

REPLY BRIEF FOR THE APPELLANTS

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INTRODUCTION AND SUMMARY

Plaintiffs' position, in a nutshell, is this: The district court was entirely correct to announce a series of duties never contemplated by Congress at a cost of billions of dollars. However, this Court should not review the legal premises of the structural injunction because its extraordinary requirements might be impossible to perform. Instead, this Court should remand so that the district court can consider plaintiffs' preferred alternative to an accounting, which is an order requiring the government to pay the billions of dollars that, in plaintiffs' view, were generated by trust assets over the lifetime of the trusts but not properly disbursed.

Plaintiffs' eagerness to avoid scrutiny of the injunction is understandable, but their invitation cannot properly be accepted.

The district court has twice issued the provisions now on review and has made clear, in the current order, that it desires expedited resolution of the legal issues that the injunction presents. Plaintiffs have argued since January 2003 that an accounting (as they would define it) is impossible and that the district court should "restate" the account balances based on plaintiffs' estimate of the money that should be in the accounts. See Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust, at 3, 39-55. The district court has declined to do so (and there would of course be no legal basis for such an order). In effect, therefore, plaintiffs would have this Court leave the legal premises of the injunction untouched and require the district court to consider again their proposed revenue model based on those same premises. No basis exists for proceeding in this fashion.

Plaintiffs fail to perceive the irony of their "impossibility" argument. They repeatedly assert that the staggering cost of the court-ordered accounting would render it impossible, implicitly recognizing that Congress has no intention of funding an endeavor of this kind. That the accounting ordered by the district court is flatly at odds with congressional intent does not mean that the accounting required by law is impossible. The point, instead, is that the accounting ordered by the court is not required by law. Indeed, plaintiffs do not identify any respect in which the parameters of Interior's accounting plan are

inconsistent with any statutory requirement or with the mandate of this Court's 2001 decision.

To avoid the obvious conclusion that the accounting they defend is not required by law, plaintiffs engage in a highly abstract discussion of the incorporation of common law trust duties that provides no support for their position. It is a given that Congress legislates against the background of common law trust principles and does not need to identify all obligations with precision. Common law principles may thus be used to interpret statutory provisions. But they cannot properly be invoked to frustrate congressional intent. Plaintiffs insist that it is irrelevant whether Congress intended to authorize an accounting of the kind envisioned by the district court. See Pl. Br. 16. But a court cannot properly order expenditure of billions of dollars of taxpayer money in aid of an accounting that Congress never authorized, much less required.

Moreover, as this Court has made clear, a court, in ordering relief, must take into account the differences as well as the similarities between various Indian trust relationships and common law trusts. Congress's role as appropriator of funds has no apt analog in the operation of private trusts where, as this Court has explained, expenses are generally paid from the trust itself. The common law provides no example of an order requiring a trustee to expend billions of dollars of its own money to perform the kind of obligations established by the structural injunction.

In sum, plaintiffs do not and cannot show that the accounting ordered by the district court is consistent with the 1994 Act or any other enactment. Their attempt to avoid review of the injunction should be rejected. The district court's ruling should be reversed, and the case should be remanded to the agency to permit the government to complete its accounting activities consistent with this Court's mandate and congressional intent.

ARGUMENT

I. THE STRUCTURAL INJUNCTION, WHICH IS WITHOUT FACTUAL PREDICATE, IMPOSES A PANOPLY OF REQUIREMENTS NEVER AUTHORIZED BY CONGRESS AND EXCEEDS SETTLED LIMITATIONS ON JUDICIAL AUTHORITY.

A. The Record Demonstrates The Commitment Of Enormous Resources Resulting In Tangible Accomplishment.

As discussed below and in our opening brief, the structural injunction rests on multiple legal errors that would require reversal even if there had been a factual predicate for the district court's intervention. It should be emphasized at the outset, however, that there was no such predicate. The record demonstrates an unswerving commitment by the government to implement the mandate of this Court's 2001 decision.

As discussed in our opening brief (Br. 38-40) and as plaintiffs do not dispute, the only record proceeding to consider Interior's efforts to comply with the 2001 decision was the portion of the 2002 contempt trial that reviewed Secretary Norton's alleged failure "'to initiate a Historical Accounting

Project.'" Cobell v. Norton, 334 F.3d 1128, 1147 (D.C. Cir. 2003) (quoting Cobell v. Norton, 226 F. Supp. 2d 1, 20 (D.D.C. 2002)). Plaintiffs mistakenly contend that this Court's decision vacating the contempt ruling did not disturb the underlying findings of fact. Pl. Br. 30 n.28. But even assuming that to be the case, plaintiffs do not and cannot explain how any of those fact-findings demonstrates delay or recalcitrance of any kind. To the contrary, after reviewing those findings and the relevant record, this Court explained 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), and declared that the "uncontested facts" were "inconsistent with a finding that Secretary Norton failed to" initiate an historical accounting project, ibid. (emphasis added).

Likewise, as plaintiffs do not dispute, the 44-day Phase 1.5 trial that began in May 2003 produced no evidence of delay. Indeed, that was not its purpose. The decision to issue a structural injunction had already been made by the time of the Phase 1.5 trial; the purpose of the Phase 1.5 proceeding was to determine the content of the injunction. See 226 F. Supp. 2d at 147-48.

The agency's record of accomplishment since 2001 in the face of extraordinary obstacles cannot seriously be questioned. Within months of this Court's 2001 ruling, the district court announced that the use of statistical sampling would be "clearly

contemptuous," thus depriving the agency of the tool that it has consistently stated is essential to any feasible audit of the account statements produced for the land-based accounts. Tr., Oct. 30, 2001, at 29; see also Tr. at 4386 (reiterating, when Secretary Norton testified at the contempt trial, that "I had said from the bench that I thought your signature on that document [endorsing the use of sampling] was clearly contemptuous"). As of October 2001, therefore, the agency was on notice that the use of statistical sampling courted contempt.

The following year, the district court formally rescinded the short-lived remand to the agency, declaring the Secretary an "unfit" trustee and announcing that the court would assume control over accounting operations through a structural injunction. Cobell v. Norton, 226 F. Supp. 2d 1, 148-49, 161 (D.D.C. 2002). Congress, in response to the structural injunction, then declined to provide any funding in its FY 2004 appropriation for long-term historical accounting activities for land-based accounts. See Pub. L. No. 108-108, 117 Stat. 1263.

Despite these major impediments, the agency's accomplishments have been substantial. As plaintiffs do not dispute, the agency has devoted an extraordinary level of resources to historical accounting activities, with obligated funds already exceeding $100 million. 2005 Cason Decl. at 3. This commitment of money and personnel has provided the groundwork for completing accounting for land-based accounts, with respect to which ongoing records collection, indexing,

imaging, and coding activities continue to proceed. See id. at 12. In addition, although the terms "judgment account," "per capita account" and "special deposit account" do not even appear in plaintiffs' brief (outside their "Glossary"), it is undisputed that as of December 2004, Interior had accounted for 36,701 judgment accounts with balances totaling almost $53 million, and 7,360 per capita accounts with balances of approximately $21.7 million, and had completed work on 8,496 special deposit accounts totaling over $40.8 million. See Opening Br. 55-56; see also Quarterly Report No. 21, at 16-24 (May 2005).

In short, no basis existed for revoking the short-lived remand to the agency, and no factual predicate exists that would warrant greater judicial oversight than that authorized by this Court in its 2001 decision.

B. Plaintiffs' Argument Rests On The Mistaken Premise That The Court Could Properly Require Expenditure Of Billions Of Dollars To Perform Tasks That Congress Has Not Authorized.

As shown in our opening brief, the structural injunction would require expenditure of billions of dollars to perform tasks without anchor in any statute. Plaintiffs do not suggest that Congress has mandated or even authorized performance of these obligations. Nor do they show how Interior's understanding of its obligations, as set out in its Historical Accounting Plan for Individual Indian Money Accounts, is inconsistent with any statutory provision or with this Court's 2001 decision interpreting the accounting duties at issue.

As this Court observed, Congress enacted Pub. L. No. 108-108 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." Cobell v. Norton, 392 F.3d 461, 466 (D.C. Cir. 2004) (emphasis added). Plaintiffs stress that the statute is no longer in place, Pl. Br. 17, but they do not suggest that this Court misunderstood the point of the enactment. As this Court explained, the conference committee "'reject[ed] 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,'" stressing that "'[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.'" 392 F.3d at 466 (quoting H.R. Conf. Rep. No. 108-330, at 118 (2003)). See also Pub. L. No. 108-447, § 112 (limiting the funds for historical accounting activities (individual and Tribal) in FY 2005 to $58 million).

The views of the conference committee accurately reflect the legislative history of the 1994 Act, which plaintiffs do not even cite. As plaintiffs do not dispute, the "Misplaced Trust" report that gave rise to the 1994 Act stressed that "[o]bviously, it makes little sense to spend [$281 million to $390 million] when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." H.R. Rep. No. 102-499, at 26 (1992).

Plaintiffs' response is to insist that whether Congress "intended to authorize an historical accounting of the kind envisioned by the district court" poses "the wrong question." Pl. Br. 16. Plaintiffs are not altogether clear as to what the right question would be. Their view seems to be, however, that because Congress created the trust relationship, it does not matter whether it authorized the obligations imposed by the district court.

As this Court's previous decisions make clear, plaintiffs are quite wrong. The Constitution grants Congress "plenary power to legislate in the field of Indian affairs." United States v. Lara, 541 U.S. 193, 200 (2004) (quotation marks and citations omitted). It is common ground that Congress legislates against the background of common law trust principles and that all trust duties need not be spelled out in detail in a statute. Thus, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." 392 F.3d at 471-72. This does not mean, however, that enforceable duties may be "abstracted ... from any statutory basis." Ibid. 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 Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001)). The central point is that, apart from claims arising directly under the Constitution, "no money can be paid out of the Treasury unless it has been

appropriated by an act of Congress," OPM v. Richmond, 496 U.S. 414, 424 (1990), and a court has no license to impose obligations costing billions of taxpayer dollars except as authorized by Congress.

Nor could congressional intent be dismissed by an analogy to private trust law. As Professor Langbein explained, "Congress is the functional equivalent of settlor of a private trust whose trust instrument establishes the terms of that trust," and Congress's enactments define and amend trust obligations. Langbein Report at 6; see also Tr., June 2, 2003 p.m., at 59-60. Plaintiffs' attempt to dismiss congressional intent is particularly anomalous because the law governing private trusts provides no ready analogy to Congress's role as appropriator. As this Court observed, "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." 392 F.3d at 473. Congressional appropriations limiting expenditures thus define the trustee's duties.

In sum, it is one thing to state that the authorization for court-ordered expenditures need not be explicit in all particulars. It is quite another to say that the authorization is irrelevant.

C. Plaintiffs Err In Insisting That The District Court Could Properly Formulate A Plan For An Accounting And Direct Its Implementation.

Plaintiffs argue at length that the district court could properly develop its own "accounting" plan and direct its

implementation. Even if the court could properly assume that role, it could not, of course, establish obligations never authorized by Congress. But plaintiffs are mistaken in believing that this Court's discussion of the limits on judicial authority are irrelevant to the accounting portion of the structural injunction.

In vacating the original structural injunction, this Court observed 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 Cobell v. Norton, 283 F. Supp. 2d 66, 142 (D.D.C. 2003)). The Court explained that this assertion of authority was "in sharp contrast" with the point emphasized by the Supreme Court "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 Norton v. Southern Utah Wilderness Alliance, 124 S. Ct. 2373, 2379 (2004)).

It is not plausible to suggest, as plaintiffs do, that this Court's discussion had no application to the very passage that it quoted. The Court recognized that judicial review should take into account the nature of the suit and common law trust

principles. See 392 F.3d at 473. But, as it noted, the common law, like the APA, does not contemplate that a court will instruct the trustee as to the means by which it fulfills its responsibilities. As the Court stressed, "[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." Ibid. (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989)) (emphasis in original). The common law thus does not anticipate a substantially more intrusive judicial role than the APA, and restrictions inherent in judicial review of executive branch action implementing congressional mandates are readily harmonized with common law.

Plaintiffs are likewise wrong to assert that the decision vacating the structural injunction conflicted with this Court's previous decisions. This Court's initial decision in 2001 affirmed a district court order that "remand[ed] to the agency for the proper discharge of its obligations." 240 F.3d at 1109. The order, this Court explained, was authorized by 5 U.S.C. 706(1), which empowers a court to "to compel agency action 'unlawfully withheld or unreasonably delayed.'" 240 F.3d at 1095. This Court's decision looked to § 706(1) and cases applying that provision to determine that the district court had not exceeded its authority in retaining jurisdiction for five years and requiring periodic progress reports. At the same time, however, this Court emphasized that "we expect the district court to be mindful of the limits of its jurisdiction," id. at 1110.

This Court observed that it was possible that the agency might take steps "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, and the detection of such steps would fit within the court's jurisdiction to monitor the Department's remedying of the delay." Ibid. This Court stressed that, "beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction." Ibid. That decision is entirely consistent with this Court's later declaration that the district court had erred in formulating its own plan in the form of a structural injunction.

Plaintiffs are on no firmer ground in attempting to discover a conflict between this Court's decision vacating the structural injunction and its decision, released six days earlier, that vacated the order requiring Interior to disconnect its computer systems from the Internet. See Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); Pl. Br. 24. The internet disconnection decision did not address historical accounting activities; indeed, it was precisely because the activities at issue did not involve historical accounting that the case was not controlled by Pub. L. No. 108-108. See 391 F.3d at 256-57. More important, this Court's analysis was premised on the existence of a consent order that had authorized judicial control over the reconnection of computer systems to the internet. The mechanism established in the consent decree (which involved supervision by the Special Master) had become the subject of dispute. At that point, this

Court concluded, the district court had equitable authority to enforce the consent order by other reasonable means (although the injunctions actually issued could not be sustained). See ibid. Accordingly, this Court had no reason to address Southern Utah and the principles that it reaffirmed.

By contrast, the structural injunction is not a consent decree or an attempt to enforce a consent decree. In directing the agency to perform accounting activities unreasonably delayed, the district court must exercise its authority consistent with the limits reflected in § 706(1).

In insisting that this Court's decision vacating the original structural injunction has no relevance to the accounting portion of the injunction, plaintiffs struggle to explain this Court's references to statistical sampling. 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 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). Plaintiffs respond that this Court "stated only that statistical sampling might be within an agency's discretion in a case governed by traditional APA principles." Pl. Br. 42 n.40 (citing 392 F.3d at 473). Inasmuch as this Court has twice stated that statistical sampling is within the agency's

discretion in this case, plaintiffs' point is difficult to comprehend.

Plaintiffs urge that § 706(1) has no application because the order requiring Interior to produce account statements is backward-looking and remedial. The order is remedial in the sense that all orders under § 706(1) remedy an agency's unreasonable delay. That the government was found to have unreasonably delayed action in this case does not render the APA framework inapplicable. Indeed, even when a court reviews final agency action, its role is not to establish detailed programs for agency implementation but to permit the agency to implement programs in light of the legal principles clarified by the court. The "guiding principle ... is that the function of the reviewing court ends when an error of law is laid bare." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952). No principle of law permits the district court to establish and direct a multi-billion dollar program of agency activities under the general rubric of an "accounting."

D. The Specific Requirements Of The Structural Injunction Are At Odds With Congress's Intent.

The dangers of implying duties without regard to congressional intent are made manifest by the specific requirements of the structural injunction. Any number of activities might be deemed a useful adjunct to a particular accounting process. But it is for Congress to weigh the costs and benefits of various requirements. Plaintiffs' defense of the

injunction amply illustrates the extent to which "plaintiffs here are free of private beneficiaries' incentive not to urge judicial compulsion of wasteful expenditures." 392 F.3d at 473. Although they defend the injunction in its entirety, they make absolutely no attempt to refute the sentiment expressed by Senator Burns in response to the original structural injunction: "'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.'" 392 F.3d at 466 (quoting 149 Cong. Rec. S13,785 (2003). Plaintiffs thus sidestep not only the question of whether Congress authorized the injunction's requirements but the question of why Congress would have done so when "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)).

1. Substantive Obligations.

a. Closed accounts and the conclusiveness of probate.

The 1994 Act directs the government to "account for the daily and annual balance of all funds held in trust" for the benefit of an individual Indian. Pub. L. No. 103-412, § 102(a). In its 2001 opinion, this Court reasoned that the government could not provide an accurate current balance without reviewing past transactions, and the Interior plan thus provided for a

review of past transactions in all accounts open when the 1994 Act was enacted or thereafter. Plaintiffs insist, however, that the government must produce account statements for all accounts open at any time in history. Pl. Br. 33. Thus, even if an account holder died in 1948 and her estate went through probate, the government would now be required to create a statement for the long closed account.

Congress was clearly of a different mind. As plaintiffs do not dispute, the "Misplaced Trust" report contemplated an accounting for the roughly 300,000 open accounts and, even then, recognized that the expense of the project would require use of techniques such as statistical sampling. Thus, 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. No. 102-499, at 26 (emphasis added). See also id. at 7, 16, 23 (similar references to accounting of the 300,000 open accounts).

Consistent with this history, the 1994 Act requires that Interior account for "the daily and annual balance" of funds held in the IIM accounts. Closed accounts have no balance. And as our opening brief explained (Br. 45-47), it would be particularly anomalous to require Interior to revisit transactions in accounts that have gone through probate, which, as plaintiffs do not dispute, affords heirs the opportunity to contest Interior's determination of the estate's holdings. 43 C.F.R. 4.271. Once

probate proceedings are completed, a final order is entered. 43 C.F.R. 4.240(b). Nothing in the 1994 Act contains the slightest hint that closed probate proceedings were to be reopened, or that current beneficiaries may demand an accounting on behalf of former account holders. The obligations imposed by the district court thus would transform the nature of the accounting activities contemplated by Congress at an exponential increase in cost and without any apparent benefit.

b. Transactions before 1938.

The 1994 Act requires that the government account for the daily and annual balances of "funds which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Pub. L. No. 103-412, § 102(a). Plaintiffs would further revise the nature of the obligations contemplated by Congress by requiring an accounting not only of closed accounts but of all account transactions reaching as far back as the initial land allotments in 1887. Pl. Br. 34. Thus, even if an account holder died in 1918, a full account statement would be required.

Although plaintiffs attempt to find support for their position in this Court's 2001 decision, their quotation simply omits this Court's reference to the 1938 Act. Compare Pl. Br. 34, 35, with 240 F.3d at 1102 ("'all funds' means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)") (second emphasis added). And while plaintiffs would deem 1938 an "arbitrary" date, Pl. Br. 35, it was significant to Congress as

the point at which the government was authorized to deposit Indian trust funds in private banks or invest them in public securities.

c. Land transactions.

Although the 1994 Act requires that the Secretary account for the daily and annual balances of funds held in trust, the district court ordered the government to account for all transactions in land since 1887. The injunction thus ignores the language of the Act as well as this Court's recognition that "funds have quite a different legal status from the allotment land itself." 392 F.3d at 464. Indeed, as our opening brief explained (Br. 43-44), there is no "unitary" Indian trust; each individual's IIM account is separate from those of other individuals, and the land held in trust for an individual Indian is distinct from the funds held in trust for the same individual.

Plaintiffs do not dispute that the order 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. They insist, however, that this Court's 2001 decision compelled such an extraordinary undertaking. See Pl. Br. 36. Plaintiffs are mistaken. This Court's 2001 decision affirmed an order requiring an accounting "'of all money'" in the IIM accounts. 240 F.3d at 1103 (quoting Cobell v. Babbitt, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) (emphasis added)). This Court did not hold (or remotely

suggest) that the government was required to recreate the history of transactions in land. Indeed, plaintiffs do not explain how the plaintiff class, which is defined solely in terms of IIM account holders, would even have standing to seek such relief.[1]

d. Funds never held in IIM accounts.

As our opening brief explained (Br. 47), the injunction requires Interior to account for funds that were never held in an IIM account, but were instead paid directly to the Indian owner of the land by a third-party lessee. Plaintiffs cannot square this requirement with the terms of the 1994 Act, which require Interior to account for the balances of funds held in trust. Nor could plaintiffs defend it by analogy to common law, where such direct pay arrangements are unknown. See Tr., June 1, 2003, p.m. at 72-74 (Langbein). Plaintiffs note that Interior has some trust responsibilities in direct pay situations, such as in approving certain direct pay contracts. Pl. Br. 38. But this observation provides no basis for requiring Interior to account for payments that the government never had an obligation to collect or hold. Indeed, as plaintiffs do not dispute, in many cases Interior would not even be informed of the direct payments. See Cason Decl. 10.

e. Statute of limitations.

As our opening brief explained, the district court compounded its multiple errors by concluding that duties

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[1] Plaintiffs' brief misstates the certified class. Compare Pl. Br. i & n.1, with Order Certifying Class at 2-3.

untethered to any statute may be enforced without regard to any statute of limitations. The court declared that 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). But as our opening brief explained (Br. 47-49), repudiation or breach may provide the basis for accrual of a claim. The cases that plaintiffs cite address instances in which the claimed breach of a private trust was the repudiation and the question was when the repudiation occurred. See, e.g., Kosty v. Lewis, 319 F.2d 744, 750 (D.C. Cir. 1963); see also United States v. Taylor, 104 U.S. 216, 222 (1881) (citing the general principle that a limitations period runs from the time that the beneficiary becomes aware that the trustee "unequivocally repudiates the trust, and claims to hold the estate as his own").

Plaintiffs provide no reason why customary limitations principles should not apply. In particular, plaintiffs do not explain how claims that have not yet accrued could form the basis for a lawsuit. If such claims really do not accrue until a trust has been repudiated, it must also be the case that the claims cannot be asserted until that time.[2]

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[2] Plaintiffs' argument regarding tribal management of trust assets (Pl. Br. 38-39) misunderstands Interior's accounting plan, which did not suggest that tribal management of revenue-producing assets would relieve Interior of the obligation to account for the funds that it holds in an IIM account.

2. Methods And Means Of The Accounting.

As this Court stressed in vacating the original structural injunction, the district court may direct the agency to take action required by law, but may not direct "'how it shall act.'" 392 F.3d at 475 (quoting Southern Utah, 124 S. Ct. at 2379). In this regard, the limits on APA review largely correspond to principles of common law, which foreclose judicial attempts to direct the manner in which a trustee performs its functions. See id. at 473.

Consistent with these principles, this Court has twice indicated that decisions regarding accounting methodology, including the use of statistical sampling, are properly left to the agency. See ibid. (citing 240 F.3d at 1104). Nonetheless, the district court reissued the provisions of the injunction "forbidding use of statistical sampling" that were cited with disapproval by this Court. Ibid. (citing 283 F. Supp. 2d at 289).

Although plaintiffs defend this bar, Pl. Br. 41-42, they do not dispute that the enormous number of transactions involving small amounts of money would make statistical sampling crucial to any viable plan to audit the land-based account statements. See Opening Br. 50. Nor do they dispute that the "Misplaced Trust" report specifically 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." H.R. Rep. No. 102-499, at 26.

Instead, plaintiffs assert that "statistical sampling is no part of a recognized accounting." Pl. Br. 42. Like the district court, plaintiffs confuse the process of creating a ledger of account transactions with the process of auditing (or verifying) that ledger. As the record reflects, the Interior plan would not use statistical sampling to create the ledger; sampling would be used only in the audit process. See Tr. 6/20/03 p.m., at 59 (Lasater). And as the district court recognized, sampling is an accepted auditing tool. See 283 F. Supp. 2d at 192. Plainly, the district court had no basis for requiring Interior to verify every account transaction through supporting documentation, a requirement that would impose staggering costs and delay indefinitely the production of account statements for the land-based accounts.

Nor did the district court have any basis for directing the details of agency operations, such as the collection and indexing of trust records. Indeed, as this Court observed in its 2001 decision, the district court itself had previously recognized the limits of its role. See 240 F.3d at 1108 ("the [district] court properly notes that it 'cannot "become ... enmeshed in the minutiae" of agency administration'") (quoting 91 F. Supp. 2d at 54) (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

Plaintiffs nonetheless insist that the government's "gap-filling" approach to third party records is "inappropriate," Pl. Br. 44, and assert that the government must obtain all such records immediately. But as we explained in our opening brief

(Br. 54-55), there is no good reason for Interior to "spend[] a lot of time collecting records that may end up being duplicates of all of the records we [already] have," Tr., June 5, 2003 p.m., at 55, and the subpoena process that plaintiffs envision has considerable potential to embroil the government in ancillary disputes and to delay the production of account statements. The district court had no basis to second-guess the agency's judgment in this regard, and its efforts to regulate every aspect of the accounting process reflects a deeply mistaken vision of its role.

II. PLAINTIFFS' ATTEMPT TO AVOID REVIEW OF THE LEGAL PREMISES OF THE STRUCTURAL INJUNCTION SHOULD BE REJECTED.

Plaintiffs insist that the requirements of the structural injunction, individually and collectively, are required by law. They nevertheless assert that the case should be remanded without consideration of its legal premises because the sweeping program imposed by the injunction might be impossible to perform. In particular, plaintiffs repeatedly emphasize that the cost of the injunction has been estimated at $12 billion. See Pl. Br. 6, 8, 12 n.16.

Plaintiffs' logic thus comes full circle. It was altogether proper, they insist, for the court to impose requirements never authorized by Congress. However, since no one believes that Congress would appropriate funds to conduct activities that it never authorized, the injunction's requirements are impossible to perform.

Plaintiffs' conundrum is entirely of their own making. An injunction that imposes obligations never authorized by Congress is not "impossible" to perform: it is an invalid injunction without basis in law. In reviewing such an injunction, the role of the appellate court is to identify its mistaken premises and vacate the injunction. No authority or principle suggests that the Court should leave the legal premises of the injunction in place and remand so that the district court can "fashion other equitable relief," Pl. Br. 10, based on the same mistaken view of the law.

As the treatise that plaintiffs cite makes plain, the doctrine of "impossibility" cabins a court's discretion even when an injunction would otherwise be wholly proper. See 42 Am. Jur. 2d Injunctions § 21 (2005) ("Injunctive relief that is otherwise appropriate may be denied if there are inherent difficulties in framing or enforcing an effective order."). Plaintiffs' "impossibility" argument skips over the crucial antecedent question: Did Congress require the multi-billion dollar package of obligations imposed by the district court? As we have shown, it plainly did not. The multi-billion dollar price tag that plaintiffs cite as evidence of impossibility only confirms that Congress never "'had any intention of ordering an accounting on the scale'" ordered by the district court. 392 F.3d at 466 (quoting H.R. Conf. Rep. No. 108-330, at 118). The very magnitude of the district court's error cannot be a reason to immunize its legal premises from judicial review.

Plaintiffs' appellate brief does not explain what they mean by the "other equitable relief" that they would have the district court fashion, but their district court pleadings have been more forthcoming. As plaintiffs note, in the plan that they submitted in January 2003 and at the Phase 1.5 trial, plaintiffs "took the position that it was impossible for the decree to be implemented to lead to an adequate historical accounting." Pl. Br. 8. Accordingly, they urged the district court to "restate" the account balances based on plaintiffs' model for estimating the revenues generated by trust assets over the lifetime of the trusts, plus interest. See Plaintiffs' Plan For Determining Accurate Balances In The Individual Indian Trust, at 3, 39-55. More recently, plaintiffs proposed that the government be required to pay $13 billion into a court registry. Dkt. #2886, at 22-25 (filed 3/15/05).[3]

Plaintiffs' ultimate position boils down to this: (1) This Court held that the government should complete an historical accounting; (2) in response to that mandate the district court properly imposed a multi-billion dollar package of requirements without regard to congressional intent; (3) those requirements

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[3] In the same filing, plaintiffs also proposed that the district court order "the removal of the Interior defendants as trustee-delegates," relief that plaintiffs described as an "intermediate remedy" within the inherent power of the district court. Dkt. #2886, at 21. Plaintiffs have also improperly sought to transform the ongoing evidentiary proceeding regarding internet security into a forum for arguing that internet security problems render the entire accounting undertaking "impossible." See Pl. Br. 9.

will never be funded and are thus impossible to perform; (4) ergo, the district court should adopt some form of revenue model based on the same legal premises underlying the structural injunction. Thus, once the issue of congressional authorization has been declared irrelevant, the panoply of unauthorized requirements can be transformed into a basis for various forms of monetary relief.

The attempt to obtain relief never authorized by Congress is improper regardless of the form it takes, and the error of plaintiffs' strategy is plain. Moreover, since plaintiffs' appellate brief does not identify the alternative "equitable" relief they seek, it also makes no attempt to explain how such relief could fall within the parameters of the APA, or, for that matter, private trust law.[4]

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[4] Plaintiffs' models for distributing billions of dollars to the plaintiff class are strikingly at odds with the statements that they made in order to bring the case within the scope of the district court's jurisdiction in the first place. The district court rejected the government's contention that suit should have been brought in the Court of Federal Claims under the Tucker Act based on the representations of class counsel that plaintiffs sought "only an accounting, not a cash infusion" into the IIM accounts, Cobell v. Babbitt, 30 F. Supp. 2d 24, 40 (D.D.C. 1998), and that "all of the money that should be held collectively in their IIM accounts is already there; the plaintiffs simply contend the individual account balances are misstated," id. at 39. Accordingly, to establish the propriety of its jurisdiction, the district court struck from the complaint various allegations that could be read to seek a cash infusion, including the allegation that "the true totals would be far greater than those amounts, but for the breaches of trust herein complained of." Id. at 40 & n.18. Now, however, plaintiffs demand an infusion of $13 billion - from sources they do not specify - into a registry of the court. See Dkt. #2886, at 22-25.

The crucial point here, however, is that no basis exists for declining to review the structural injunction actually issued by the district court. That would be the case even if there were some reason to believe that the district court was unaware of plaintiffs' "impossibility" contentions. But, of course, precisely the opposite is true. As just explained, the plan that plaintiffs submitted in January 2003 asserted that deficiencies in trust records made an adequate accounting impossible and urged the district court to adopt their revenue model. Likewise, on remand from this Court's decision vacating the original structural injunction, plaintiffs renewed the contention that any accounting effort is futile and that the district court should "adopt alternative methods to ensure that the beneficiaries are paid at least what they are owed[.]" Dkt.# 2798, at 6 (filed 12/30/04).

Even if the district court could be thought to have been unaware of the cost of compliance when it first issued its structural injunction, it could not have been unaware when it reissued the accounting injunction. The cost of compliance with the injunction had been underscored by Congress in enacting Pub. L. No. 108-108 and by this Court in the decision vacating the initial injunction. See 392 F.3d at 466. The district court, however, has long deemed irrelevant the vast gulf between the injunction's cost and Congress's appropriations. See, e.g., 283 F. Supp. 2d at 262 ("claims of lack of funding cannot be allowed to legally impair the United States' trustee-delegates' exacting

fiduciary duties toward management of this trust") (internal quotation marks and citation omitted).

The reissued injunction reflects the considered and unwavering views of the district court. The district court has expressly asked that its injunction be reviewed on the merits and that the appeal proceed on an expedited basis. Mem. Op. at 14-15. The government is just as eager as the district court for this Court's expedited determination of the nature and scope of Interior's statutory accounting responsibilities. There is plainly no basis for a remand to the district court, which would only delay the performance of the accounting activities contemplated by Congress.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

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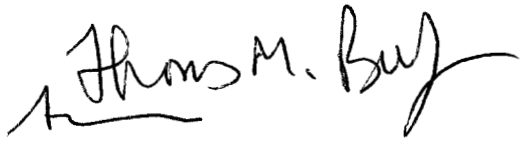

JULY 2005

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)
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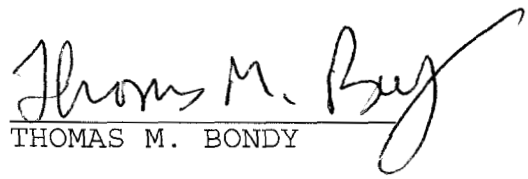

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