IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285
	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE PHASE 1.5 TRIAL

TABLE OF CONTENTS

I. PROPOSED FINDINGS OF FACT

A. Background

1. Defendants, the Secretary of the Interior, the Assistant Secretary of the Interior - Indian Affairs, and the Secretary of the Treasury, are the trustee-delegates of the United States with regard to the administration of Individual Indian Money ("IIM") trust accounts. See, e.g., Cobell v. Norton, No. 02-5374, 2003 WL 21673009, at *1 (D.C. Cir. 2003); Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001); Cobell v. Babbitt, 91 F. Supp. 2d 1, 9 (D.D.C. 1999).

2. Plaintiffs are a class of "present and former beneficiaries of Individual Indian Money accounts." Order Certifying Class Action, at 2-3 (Feb. 4, 1997).

3. Plaintiffs "seek to enforce their statutory right [as IIM account holders] to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C. § 4011." Cobell v. Babbitt, 91 F. Supp. 2d at 27.

4. The American Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), requires the Secretary of the Interior to "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)." 1994 Act, Pub. L. No. 103-412, § 102(a), 108 Stat. 4239, 4240 (1994), codified at 25 U.S.C.A. § 4011(a).[1]

---

[1] The quote in the text appears in Section 102 of the 1994 Act, and identical language is found in the United States Code Annotated at 25 U.S.C.A. § 4011(a). However, when the text was codified in the United States Code at 25 U.S.C. § 4011(a), a technical change was made (which was not enacted by Congress) that changed the phrase "which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)" to "which are deposited or invested pursuant to section 162a of this chapter." For the sake of consistency with the court opinions and prior filings in this case, the language from the 1994 Act and the 2001 edition of United States Code Annotated is used throughout this document.

5. By Order of September 17, 2002, this Court directed "that the Interior Defendants shall file with the Court and serve upon plaintiffs a plan for conducting a historical accounting of the IIM trust accounts." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002), vacated in part by No. 02-5374, 2003 WL 21673009 (D.C. Cir. July 18, 2003). The Court also required Interior Defendants to "file with the Court and serve upon plaintiffs a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." Id.

6. In compliance with the Court's September 17, 2002 Order, Interior Defendants filed their *Historical Accounting Plan for Individual Indian Money Accounts* ("Interior's Historical Accounting Plan") and their *Fiduciary Obligations Compliance Plan* on January 6, 2003.

7. On January 6, 2003, Plaintiffs filed a *Plan for Determining Accurate Balances in the Individual Indian Trust* ("Plaintiffs' Revenue Model") and a *Compliance Action Plan Together with Applicable Trust Standards* ("Plaintiffs' Compliance Action Plan with Standards").

8. By order of September 17, 2002, the Court scheduled the present "Phase 1.5 trial" which the Court stated would "encompass additional remedies with respect to the fixing the system portion of this case and approving an approach to conducting a historical accounting of the IIM trust accounts." Cobell v. Norton, 226 F. Supp. 2d at 162. The Court stated that it "will grant further injunctive relief to make the defendants correct the breaches of trust declared by the Court and stipulated to by the defendants back in 1999." Id. at 146-47. Specifically, the Court stated that it "plans on entering a structural injunction in this case," and described the goal of such injunctions as "'not merely to halt a single wrongful practice, but to halt a group of

wrongful practices by restructuring a social institution such as a mental hospital, school, or prison.'" Id. at 146 n.154 (quoting Dobbs, Law of Remedies (2d ed.) at § 7.4(4)).

B. Interior's Historical Accounting Plan

1. Overview of Interior's Historical Accounting Plan

9. Interior has made the performance of an historical accounting of IIM funds a priority. In July 2001, the Secretary established the Office of Historical Trust Accounting ("OHTA") to "plan, organize, direct, and execute the historical accounting of [IIM] accounts." Secretarial Order No. 3231, U.S. Department of the Interior 1 (July 10, 2001). OHTA is currently performing the historical accounting described in Interior's Historical Accounting Plan. See Interior's Historical Accounting Plan, at I-1 (Defs.' Ex. 55).

10. Interior's Historical Accounting Plan describes the Department of the Interior's ("Interior's") plan for conducting an historical accounting of funds in the IIM trust as required by the 1994 Act. Upon completion of the historical accounting described in the Historical Accounting Plan, Interior will be in a position to provide to the holder of each IIM account covered by the Plan a statement of account showing the opening balance, transaction-by-transaction account history (including income, receipts, and disbursements), and ending balance, as well as a statement regarding the accuracy of those transactions. Interior's Historical Accounting Plan, at I-1, II-2, III-1 (Defs.' Ex. 55); Tr., June 4, 2003, a.m., at 19:23-20:11, 21:14-

22:5, 76:25-77:7 (J. Cason);[2] Tr., June 5, 2003, a.m., at 41:5-14 (J. Cason); Tr., June 26, 2003, p.m., at 24:19-29:4 (R. Swimmer).[3]

11. In addition to accounting for funds, Interior "intends [at the end of the historical accounting process] to be in the position to provide the IIM account holders with information regarding their land assets as of December 31, 2000 . . . [and] [i]n the future, Interior intends to provide a listing of trust assets along with a report on the management of the funds generated from those assets and from other sources with each quarterly statement." Interior's Historical Accounting Plan, at 2 (Defs.' Ex. 55); Tr., June 4, 2003, a.m., at 22:2-5 (J. Cason); Tr., July 2, 2003, a.m., at 63:2-64:13 (R. Swimmer).

12. Interior's Historical Accounting Plan provides that the accuracy of the transactions appearing in the statements of account prepared for account holders will be verified

---

[2] Since becoming Associate Deputy Secretary in August 2001, Mr. Cason has spent over 90 percent of his time working on Indian-related issues. Tr., June 4, 2003, a.m., at 3:21-4:12 (J. Cason). Most of that time involves individual Indian-related issues, particularly IT and records management activities. Tr., June 4, 2003, a.m., at 42:22-43:10 (J. Cason). He has played a substantial role in IT systems security, records management, historical accounting, and a variety of reform-related issues. Tr., June 4, 2003, a.m., at 5:23-6: 4 (J. Cason).

Mr. Cason previously worked at Interior from August 1982 through early 1989 in various capacities with the Bureau of Land Management, then various positions in Land and Minerals Management culminating as Acting Assistant Secretary for Land and Minerals Management. Tr., June 4, 2003, a.m., at 4:18-5:3 (J. Cason).

Over the past two years, Mr. Cason has been involved in a number of formal and informal interactions with Congress and its staff regarding Interior's administration of the Indian trust. Tr., June 4, 2003, a.m., at 40:17-41:9 (J. Cason).

[3] Ross Swimmer recently became the Special Trustee for American Indians; before that he had been Director of the Office of Indian Trust Transition since mid-November 2001. Tr., June 25, 2003, p.m., at 11:7-17 (R. Swimmer). Mr. Swimmer served as the Assistant Secretary for Indian Affairs from October 1985 until February 1989. Tr., June 25, 2003, p.m., at 11:18-25 (R. Swimmer).

using a combination of transaction-by-transaction reconciliation to underlying documents and statistical sampling techniques. Interior's Historical Accounting Plan, at 1, I-1, II-2, III-1 - III-20 (Defs.' Ex. 55).

13. When the historical accounting work described in Interior's Historical Accounting Plan is complete, account holders will possess the best available information about the historical activity in their accounts, the accuracy of the account activity recorded historically in the IIM trust fund system, and the reliability of the IIM trust fund system as a whole, and Defendants will have a sound basis for meeting their accounting obligations in the future. Interior's Historical Accounting Plan, at 2 (Defs.' Ex. 55).

14. Interior's analysis to date suggests that approximately $13 billion has been received and deposited in IIM accounts since 1909; of this $13 billion "throughput," approximately $12.6 billion has been paid out, and the IIM funds balance as of December 31, 2000 is approximately $415 million.[4] Tr., June 4, 2003, p.m., at 24:8-25:10, 29:18-30:16 (J. Cason).

15. Interior estimates that the historical accounting will take five years and cost approximately $335 million. Interior's Historical Accounting Plan, at I-1 (Defs.' Ex. 55); see also Tr., June 4, 2003, a.m., at 13:3-15:12 (J. Cason). These estimates are based on Interior's experience to date, but will be affected by factors such as the pace of congressional funding and

[4] Interest on this throughput would depend on how long the funds were retained in an account before being disbursed, what the applicable interest rates were, and whether interest was being paid during the period in question. Tr., June 5, 2003, a.m., at 4:2-6:16 (J. Cason). For pooled accounts and pooled investments, the pooled interest and proceeds are distributed among the individual accounts based on the average daily balance of the individual accounts. Tr., June 5, 2003, a.m., at 16:14-23, 29:23-30:3 (J. Cason).

the relative difficulty encountered in compiling and indexing records. Tr., June 4, 2003, a.m., at 13:3-15:12 (J. Cason).

16. The successful implementation of Interior's Historical Accounting Plan is dependent upon sufficient appropriations. Interior's Historical Accounting Plan, at I-1 (Defs.' Ex. 55); see also Tr., June 4, 2003, a.m., at 13:3-15 (J. Cason). Between $15 and $20 million is available for the historical accounting in the fiscal year 2003 budget, and Interior has requested $100 million for the historical accounting for IIM accounts for fiscal year 2004. Tr., June 4, 2003, a.m., at 15:17-16:16 (J. Cason).

2. Scope of Interior's Historical Accounting Plan

17. Interior's Historical Accounting Plan anticipates that each eligible IIM account holder will receive an historical statement of account which includes the account history from the later of the inception of the account or June 24, 1938 (which is the date specified in the 1994 Act), until December 31, 2000 (unless the statute of limitations requires a different temporal limitation). Interior's Historical Accounting Plan, at II-2 (Defs.' Ex. 55). If the account was opened before June 24, 1938, the balance on that date will be the beginning balance for accounting purposes. Tr., June 4, 2003, a.m., at 79:9-13 (J. Cason).

18. Interior will close the "historical" accounting period on December 31, 2000, because by that date the relevant Interior offices were fully converted to the Trust Funds Accounting System. Interior's Historical Accounting Plan, at II-4 (Defs.' Ex. 55). Account information recorded after December 31, 2000, is considered current accounting activity and reported on the quarterly accounting statements provided to IIM account holders. Id.

19. Defendants have raised statute of limitations and laches defenses that may affect the scope of the accounting described in Interior's Historical Accounting Plan, see Defendants' Corrected Memorandum Of Points And Authorities In Support Of Motion For Partial Summary Judgment Regarding Statute Of Limitations And Laches ("Defendants' Statute of Limitations Motion") (Jan. 31, 2003) (filed under seal). On April 28, 2003, the Court denied Defendants' Statute of Limitations Motion. Cobell v. Norton, 260 F. Supp. 2d 98 (D.D.C. 2003). If the statute of limitations ultimately is determined to apply as Defendants have argued, Interior will account for all transactions in the IIM accounts from the later of the inception of an account or October 1, 1984 (rather than June 24, 1938).

20. Interior's Historical Accounting Plan provides that an historical accounting will be performed for all IIM accounts existing on or after the enactment of the 1994 Act on October 25, 1994, but not for IIM accounts distributed and closed prior to this date. Interior's Historical Accounting Plan, at III-1 (Defs.' Ex. 55); see Defendants' Proposed Conclusions of Law at § II.C.2.d, infra.

21. Not all revenues generated from Indian trust lands are collected and managed by Interior. Interior's Historical Accounting Plan, at II-4 (Defs.' Ex. 55). Some revenues are paid directly to the Indian landowner by a lessee or other debtor. Id. Interior does not intend to include in the historical accounting funds that were paid directly to Indian landowners without ever coming into Interior's possession because such funds were never "held in trust by the United States" and therefore are not properly included in an accounting of "all funds held in trust by the United States." 25 U.S.C.A. § 4011(a); see Defendants' Proposed Conclusions of Law at § II.C.2.b, infra.

22. Interior's Historical Accounting Plan "does not contemplate performing historical accounting work for the closed accounts of deceased predecessors" of current IIM account holders as part of the historical accounting effort for those current account holders. Historical Accounting Plan, at II-3 – II-4. Probate orders are presumptively valid because of the due process protections afforded to interested parties; and questions about the correctness of a property distribution must be raised in an appropriate proceeding. See id. at II-4; see also Defendants' Proposed Conclusions of Law at § II.C.2.e, infra.

23. Defendants' Historical Accounting Plan does not specifically address fractionated real property interests removed from the individual Indian trust pursuant to the Indian Land Consolidation Act, Pub. L. No. 97-459, Title II, 96 Stat. 2515 (1983), amended by Pub. L. No. 98-608, 98 Stat. 3171 (1984) ("ILCA"). See Tr., June 5, 2003, p.m., at 35:2-22 (J. Cason). ILCA included an escheatment provision, which the Supreme Court struck down. See Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987). From 1984 until the Youpee decision, a large number of small, fractionated real property interests – each constituting less than two percent of an allotted tract and incapable of generating at least $100 in annual income – escheated to Indian tribes upon the death of the owner, without compensation. See Cobell v. Babbitt, 91 F. Supp. 2d at 17.

24. Interior is addressing the ILCA problem and has restored some of the escheated interests to the rightful heirs. See Defs.' Ex. 47 (Interior's Status Report to the Court Number Thirteen, May 1, 2003) at 49, 81; see also Defs.' Ex. 45 (Interior's Status Report to the Court Number Eleven, Nov. 1, 2002) at 43, 85-89; Defs.' Ex. 43 (Interior's Status Report to the Court Number Nine, May 1, 2002) at 58-59; Defs.' Ex. 42 (Interior's Status Report to the Court Number

Eight, Jan. 16, 2002) at 102, 104; Defs.' Ex. 22 (DOI Trust Reform: Trust Reform - Final Report and Roadmap, Jan. 24, 2002) at 50-51.

25. Defendants' Historical Accounting Plan is not required to address specifically fractionated real property interests that were removed from the individual Indian trust by escheatment pursuant to the Indian Land Consolidation Act ("ILCA"). The Supreme Court invalidated ILCA's escheatment provision in Babbitt v. Youpee, 519 U.S. 234 (1997). If and when Interior resolves an escheatment that is determined to have been invalid, the impact, if any, on an IIM account will depend upon a number of factors, including: whether the property interest was revenue-producing; whether restoration of the interest is possible; and what form of compensation, if any is owed, will take and how and when it will be paid. In any event, resolution of these escheatments is a process separate from the historical accounting and outside the bounds of this lawsuit. If and when that process results in funds being deposited in an IIM account, Interior must determine how to account to the account holder for those funds pursuant to the 1994 Act and the Orders of this Court. Accordingly, it is unnecessary that Interior's Historical Accounting Plan address specifically the escheated real property interests.

3. Methodology of Interior's Historical Accounting Plan

26. Interior's Historical Accounting Plan uses the term "reconciliation" to describe a process by which source financial documents and related records are examined to determine whether a transaction recorded in an IIM account reflects accurately a proper allocation of collection, interest, or disbursement of funds. See Interior's Historical Accounting Plan, at I-1, III-1 (Defs.' Ex. 55).

27. The IIM trust fund contains two distinct types of individual accounts: (1) Judgment and Per Capita accounts, which are established to receive funds from tribal distributions of litigation settlements and tribal revenues, respectively; and (2) land-based accounts, which are established to receive revenues derived from interests in allotted lands. Interior's Historical Accounting Plan, at 1, III-1 (Defs.' Ex. 55).

28. In addition to individual accounts, the IIM trust fund contains Special Deposit Accounts, which are temporary administrative accounts for the deposit of funds that cannot be immediately credited to the proper IIM account holder or other owner of the funds. Interior's Historical Accounting Plan, at III-15 (Defs.' Ex. 55); Tr., June 4, 2003, a.m., at 28:8-29:9 (J. Cason).

29. As of December 31, 2000, there were approximately 42,200 Judgement and Per Capita accounts with an aggregate balance of approximately $150 million, which was approximately 36% of the IIM Trust Fund balance as of that date. Interior's Historical Accounting Plan, at III-3 (Defs.' Ex. 55).

30. As of December 31, 2000, there were approximately 194,000 land-based IIM accounts with an aggregate balance of approximately $198 million, which was approximately 48% of the IIM Trust Fund balance as of that date. Interior's Historical Accounting Plan, at III-5 (Defs.' Ex. 55).

31. As of December 31, 2000, approximately 21,500 Special Deposit Accounts were inactive (that is, no longer being used as suspense accounts) and contained nearly $68 million. Id. at III-16. As of the filing of Interior's Historical Accounting Plan on January 6, 2003, Interior

had identified the proper owners of approximately one-third of the money held in these inactive accounts. Id.

32. After analyzing the characteristics of these individual account types, Interior determined that tailoring a methodology for each account type was preferable to developing a single, uniform methodology.

a. Judgment and Per Capita Accounts

33. Interior determined that the most appropriate approach for assessing the accuracy of transaction histories for Judgment and Per Capita accounts is to examine and reconcile each transaction in each account. Interior's Historical Accounting Plan, at III-2 - III-4 (Defs.' Ex. 55).

34. Because, for a particular judgment or per capita award, nearly all of the affected IIM accounts have identical opening balances (and, therefore, interest transactions), a transaction-by-transaction reconciliation approach for these accounts is relatively efficient, and sampling techniques are not particularly useful where the population of transactions is largely homogeneous. Id. at III-3.

35. The reconciliation process for these accounts involves verifying the opening balance, recalculating the interest on a transaction-by-transaction basis using interest distribution factors historically established by the Office of Trust Fund Management, comparing recalculated interest with interest actually posted, and verifying the final balance. Id. at III-3 – III-4; Tr., June 4, 2003, a.m., at 23:23-25:3 (J. Cason).

b. Land-based Accounts

36. For verifying the accuracy of transactions in land-based accounts, Interior considered a variety of methodologies, from reconciling each transaction in each account to

employing various statistical sampling techniques. Interior's Historical Accounting Plan, at III-5 - III-6 (Defs.' Ex. 55).

37. In the "Electronic Records Era" (approximately 1985 to December 31, 2000) alone, approximately 26.5 million transactions were posted to land-based IIM accounts. Interior's Historical Accounting Plan, at III-12 (Defs.' Ex. 55), Report to Congress on the Historical Accounting of Individual Indian Money Accounts at App. A-3 – A-4 (filed July 3, 2002) (Defs.' Ex. 56); see also Tr., June 4, 2003, a.m., at 25:16-19 (J. Cason).

38. The fractionation of allotment ownership – the increasing partition of ownership as allotments are divided among heirs in each generation – complicates the historical accounting for land-based accounts. Interior's Historical Accounting Plan, at III-5 (Defs.' Ex. 55). As a result of fractionation, revenue receipts may be divided among dozens, hundreds, or more than one thousand individual owners of a single allotment. Id. In addition, as a result of fractionation, many IIM account holders have ownership interests in allotments in several locations, processed by different agencies of the Bureau of Indian Affairs ("BIA"). Id.

39. In its July 2, 2002 Report to Congress on the Historical Accounting of Individual Indian Money Accounts, Interior estimated that utilizing transaction-by-transaction reconciliation methods for all IIM accounts would cost approximately $2.4 billion and require approximately ten years to complete. See Report to Congress on the Historical Accounting of Individual Indian Money Accounts at 35-41 (filed July 3, 2002) (Defs.' Ex. 56).

40. The Chairman of the House Committee on Resources, as well as the Chairman and the Ranking Minority Member of the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations have expressed concern about the length of time and level

of funding required to undertake such a transaction-by-transaction reconciliation.[5] See Letter from James V. Hansen, Chairman, U.S. House of Representatives, Committee on Resources, to Gale Norton, Secretary of the Interior, at 1 (Dec. 9, 2002) (Defs.' Ex. 169); Letter from Joe Skeen, Chairman, and Norman D. Dicks, Ranking Minority Member, U.S. House of

---

[5] In a letter to the Secretary of the Interior, the Chairman of the House Committee on Resources stated:

> We are sure . . . that the Department recognizes that Congress will necessarily determine the funding for any accounting, and we find the [*Report to Congress on the Historical Accounting of Individual Indian Money Accounts*] troubling in several areas. . . . Given the length of time required to complete the broad accounting outlined in the Report, as well as the costs associated with such an activity, which are likely to come at the expense of other key Indian programs, we request that you promptly consider ways to reduce the costs and the length of time necessary for an accounting. . . . The Committee asks that before committing significant resources to the broad approach described in the Report, the Department consider all available options regarding the use of alternative accounting methods.

Letter from James V. Hansen, Chairman, U.S. House of Representatives, Committee on Resources, to Gale Norton, Secretary of the Interior, at 1 (Dec. 9, 2002) (Defs.' Ex. 169). Similarly, the Chairman and the Ranking Minority Member of the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations stated in a letter to the Secretary:

> [T]he Committee remains very concerned over the effect the Cobell v. Norton litigation is having on the Department's ability to marshal the resources that are needed for trust reform to be successful. We are particularly concerned about the Department's plan to allocate over $2.4 billion over ten years for an historical accounting. We remain convinced that such a process would not yield the desired results, but instead would simply drain resources away from effectively implementing trust reform.

Letter from Joe Skeen, Chairman, and Norman D. Dicks, Ranking Minority Member, U.S. House of Representatives, Committee on Appropriations, Subcommittee on Interior and Related Agencies, to Gale Norton, Secretary of the Interior, at 1 (Dec. 10, 2002) (Defs.' Ex. 170).

Representatives, Committee on Appropriations, Subcommittee on Interior and Related Agencies, to Gale Norton, Secretary of the Interior, at 1 (Dec. 10, 2002) (Defs.' Ex. 170).

41. In light of the tremendous time and cost associated with an effort to test the accuracy of each transaction in each account, and the concern expressed by members of Congress about the length of time and level of funding required, Interior investigated alternative approaches that would more efficiently utilize available resources without compromising the accuracy of the results. Interior's Historical Accounting Plan, at III-6 - III-7 (Defs.' Ex. 55).

42. Interior concluded that the most reasonable method for assessing the accuracy of transaction histories for land-based accounts combines transaction-by-transaction and statistical sampling techniques. Thus, Interior's Historical Accounting Plan provides for a reconciliation of each high-dollar transaction in such accounts and a reconciliation of a statistically valid sample of the smaller transactions.

43. The sampling plan for land-based accounts will not be used to prepare the statement of account for an IIM account holder; but rather will "result in a [confidence][6] assertion" that will be included with each historical accounting statement. Tr., June 20, 2003, p.m., at 59:20-60:2 (D. Lasater).[7]

---

[6] The word "competence" in the cited portion of the trial transcript is incorrect; the word should have been transcribed as "confidence."

[7] Dr. David B. Lasater is a Forensic Services and Dispute Analysis Services partner in the firm KPMG LLP. He earned his Ph.D. from the University of Texas at Austin in August 1982, in accounting research methodologies, capital markets, and quantitative methods. He has a Masters degree in Professional Accounting from the University of Texas at Austin, May 1979, and a Bachelors degree in Business Administration, accounting, from the University of Houston, December 1973. Dr. Lasater is a licensed Certified Public Accountant in Texas and New York. He is a member of the American Statistical Association, the American Economic Association, the American Institute of Certified Public Accountants, and the American Accounting

44. Of the 26.5 million transactions posted to land-based IIM accounts during the Electronic Records Era (1985 to 2000), approximately 73,500 have a value of $5,000 or more. Interior's Historical Accounting Plan, at III-12 (Defs.' Ex. 55). These transactions are responsible for approximately 45% of the throughput associated with the land-based IIM accounts in the Electronic Records Era. Id. Of the remaining transactions, approximately 25.6 million have a value less than $500. Id.

45. For transactions in the Electronic Records Era (1985 to 2000), Interior's Historical Accounting Plan provides for individual examination and reconciliation of all transactions of $5,000 or more, and the examination and reconciliation of two statistically valid samples taken from the approximately 26 million lower-dollar transactions - one sample of approximately 80,000 transactions in the $500 to $4,999.99 range, and a second sample of approximately 80,000 transactions in the $0.01 to $499.99 range. Interior's Historical Accounting Plan, at III-7 - III-8 & App. D (Defs.' Ex. 55); see also Tr., June 4, 2003, a.m., at 25:25-26:5 (J. Cason); Tr., July 2, 2003, a.m., at 45:8-54:19 (R. Swimmer).

46. The verification process for land-based transactions entails reconciling the amount of the recorded transaction to both supporting financial documents and ownership information. Interior's Historical Accounting Plan, at III-8 – III-9 (Defs.' Ex. 55); see also Tr., June 4, 2003, a.m., at 61:18-62:1, 66:24-67:18 (J. Cason). Interior intends to trace each collection transaction back to the original source of revenue, usually a lease or contract. Interior's Historical Accounting Plan, at III-9 (Def's Ex. 55). The lease or contract is examined to identify the

---

Association. He has testified as a statistics expert in federal and state courts. Expert Report of David B. Lasater, at 1 (Defs.' Ex. 163).

allotment(s) related to the payment. Id. The ownership interests in the allotment are used to verify that the revenue was correctly allocated to IIM accounts. Id.; see also Tr., June 26, 2003, p.m., at 39:17-41:18 (R. Swimmer).

47. As noted in Interior's Plan, proven and reliable mathematical theories support sampling methodologies that can predict how large a sample must be to achieve a desired level of accuracy. See Interior's Historical Accounting Plan, at III-7 (Defs.' Ex 55). Interior's Historical Accounting Plan was developed with the assistance of a contractor known as the National Opinion Research Center of the University of Chicago, id. at App. D, whose efforts are led by Professor Fritz Scheuren, who is the President-Elect of the American Statistical Association, and Dr. Susan Hinkins. Tr., June 20, 2003, p.m., at 71:18-72:5 (D. Lasater).

48. Interior's determination of sample size was guided by an accepted audit sampling treatise.[8] Interior's Historical Accounting Plan, at App. D-11 (Table 2) (Defs.' Ex. 55) ("Assurance Level that the Error Rate is less than 1%, if No Errors Are Found"). Utilizing accepted statistical methods for calculating sample size, Interior's Historical Accounting Plan incorporates a provisional sample size of 800 per agency, per stratum, for a total of 80,000 transactions to be sampled in each stratum, i.e., for the stratum of electronic transactions with a value less than $500 and the stratum consisting of electronic transactions with a value of $500 to $5,000. Interior's Historical Accounting Plan, at App. D-10 (Defs.' Ex. 55); Tr., June 20, 2003, p.m., at 80:24-81:5 (D. Lasater).

[8] Interior's reliance on the information contained in Table 2 of Appendix D-11 in the Historical Accounting Plan does not mean that Interior anticipates no errors will be found. Tr., June 20, 2003, p.m., at 82:3-5 (D. Lasater).

49. The provisional sample size of 800 per agency, per stratum, is approximately two times the sample size required by the formula for calculating a sample size to attain a 99% confidence statement with 1% precision. Tr., June 20, 2003, p.m., at 79:25-80:23 (D. Lasater) (formula generates sample size of 359 items). A statement of 99% confidence with 1% precision means that Interior will be 99% confident that there is not more than a 1% error in the account listings. Tr., June 20, 2003, p.m., at 75:25-76:5 (D. Lasater); Tr., June 23, 2003, a.m., at 9:24-10:7 (D. Lasater).

50. Both the Ernst & Young study by Joseph R. Rosenbaum (discussed in Section I.B.4.c.(2), infra), which found no material differences between ledger entries and amounts reflected in supporting documents in the accounts of named Plaintiffs and predecessors, and the tribal reconciliation project (discussed in Section I.B.4.c.(3), infra), in which Arthur Andersen was able to trace 86% of transactions to supporting documents, support the reasonableness of the error rate assumption underlying Interior's calculation of sample size. Tr., June 20, 2003, p.m., at 77:20-79:3, 82:17-84:10, 92:22-95:6 (D. Lasater); see Expert Report of David B. Lasater, at 1-2 (Defs.' Ex. 162); Arthur Andersen Tribal Trust Reconciliation Project (Defs.' Ex. 168); Revised Interim Report of Joseph R. Rosenbaum (Defs.' Ex. 302).

51. Interior's Historical Accounting Plan doubles the sample size required by the formula for calculating sample size "to afford protection against the possibility that, in some agencies and strata, the observed error rates might be somewhat higher" than the rate initially utilized to calculate the sample size. Interior's Historical Accounting Plan, at App. D-10 (Defs.' Ex. 55); Tr., June 20, 2003, p.m., at 81:23-82:2 (D. Lasater). By doubling the required sample

size, Interior's plan creates "budget space as a part of [the] plan to allow [Interior] to do further exploration where they [do] find errors." Tr., June 20, 2003, p.m., at 82:3-7 (D. Lasater).

52. The sample size incorporated in Interior's Historical Accounting Plan is large enough to perform variable sampling, which can be used to generate dollar estimates. Tr., June 23, 2003, a.m., at 60:24-65:19 (D. Lasater). Given the large sample size in Interior's Historical Accounting Plan, Interior will be able to utilize the sample flexibly to make determinations beyond mere error rates, e.g., to make determinations regarding errors in dollar amounts, Tr., June 23, 2003, a.m., at 8:13-22 (D. Lasater), and to focus on individual agencies within Interior to discover errors and anomalies on an agency-by-agency basis, e.g., to identify the quality of bookkeeping within individual agencies. Tr., June 23, 2003, a.m., at 8:23-9:5 (D. Lasater).

53. Plaintiffs' expert, Mr. Duncan, was in error when he testified that Interior's sampling plan was simply an attribute sampling plan because Interior's sampling plan is, in fact, a multipurpose sampling plan. Tr., June 23, 2003, a.m., at 9:13-23 (D. Lasater). A multipurpose sample is one that is either designed to have specific multiple objectives or is large enough to allow for a variety of after-design hypotheses to be tested or explained from the sample size. Tr., June 23, 2003, a.m., at 59:25-60:6 (D. Lasater).

54. Plaintiffs' expert, Mr. Duncan, agreed that sample sizes are calculated before one begins testing. Tr., May 29, 2003, p.m., at 53:16-54:1 (D. Duncan). Mr. Duncan also agreed that one can properly conduct both attribute sampling and sampling to assess the magnitude of errors. Tr., May 29, 2003, p.m., at 56:23-57:16 (D. Duncan). Mr. Duncan further agreed that it is appropriate to adjust the sample size as more is learned about the underlying data and that it is "a fairly common approach" to conduct attribute sampling and to develop a variable sampling

approach based on the attribute sampling results. Tr., May 29, 2003, p.m., at 84:16-85:9 (D. Duncan).

55. The sample size incorporated in Interior's Historical Accounting Plan is substantial and is large enough to provide reasonable assurance to the Court and the parties regarding the reliability of the transactional listings and balances reflected in the individual account statements. Tr., June 23, 2003, a.m., at 5:25-7:20 (D. Lasater).

56. Because electronic transaction histories are already available for Electronic Records Era transactions, the historical accounting work for these transactions is underway. See, e.g., Interior's Status Report to the Court Number Fourteen, at 34-38 (Aug. 1, 2003); see also Tr., June 6, 2003, a.m., at 20:12-22:3 (M. Herman).

57. Transaction records from the "Paper Records Era" (prior to 1985) are in books, on cards, or on other paper media. Interior's Historical Accounting Plan, at III-5 (Defs.' Ex. 55). These records must be located, scanned, coded and digitized to create electronic transaction histories before the accuracy of the account activity can be assessed. Id. When these transaction histories are available in electronic form, Interior intends to design a sampling methodology for Paper Records Era transactions similar to the sampling methodology described for Electronic Era transactions. Id. at III-13.

58. Interior acknowledges in its Plan, as it has in the past, that OHTA and its contractors will encounter gaps in transaction histories or supporting records as they proceed with the historical accounting work. Interior's Historical Accounting Plan, at III-13. However, Interior's Historical Accounting Plan neither expects nor requires that all documents be found, see Tr., June 4, 2003, p.m., at 82:8-84:17 (J. Cason), and Interior has developed adaptive

strategies to take into account record deficiencies, see id.; Interior's Historical Accounting Plan, at III-13 (Defs.' Ex. 55); Expert Report of Edward Angel, at 46 (Defs.' Ex. 60) ("[B]y making allowances for missing records, OHTA's plan both addresses gaps in the records and uses other historical records combined with the forensic abilities of skilled accountants to overcome those gaps.").

59. Interior's Historical Accounting Plan states that where supporting documentation is not located for a particular transaction, the lack of information will be reported in the account transaction history. See Interior's Historical Accounting Plan, at III-14 (Defs.' Ex. 55).

60. Interior's Historical Accounting Plan includes procedures for assessing transactions for which no supporting documentation can be located. Interior's Historical Accounting Plan, at III-13 (Defs.' Ex. 55); Tr., June 23, 2003, a.m., at 31:20-33:21 (D. Lasater). The absence of supporting documentation does not imply that a transaction has been erroneously recorded; accepted statistical techniques provide a basis for Interior to assess the correctness of a transaction, Tr., June 23, 2003, a.m., at 30:21-31:19 (D. Lasater), and to assess whether the error rate associated with the population of transactions with supporting documentation may be extrapolated to the population of transactions that is missing supporting documentation, id. at 34:5-37:4, 40:16-42:12 (D. Lasater).

61. If an auditor cannot find a specific document to support a transaction, normal audit procedures provide that the auditor should search for other documents that may corroborate the transaction. Tr., June 23, 2003, a.m., at 15:11-21 (D. Lasater). Interior's Accounting Standards Manual (Defs.' Ex. 59) includes procedures for consideration of alternative

documentation to support a transaction.[9] See Tr., June 23, 2003, a.m., at 15:22-16:19 (D. Lasater); Tr., June 16, 2003, a.m., at 63:4-10, 63:16-64:15 (E. Angel); Tr., June 18, 2003, a.m., at 33:2-34:12 (A. Newell). Indeed, Plaintiffs' expert from the Phase 1 trial, Ms. Sharon Fitzsimmons, previously testified in support of the appropriateness of using alternative documentation to verify transactions when specific supporting documentation is unavailable. Id. at 17:13-19:14 (D. Lasater).

62. An accepted statistical technique known as the Kolmogorov-Smirnov Test (K-S Test) provides a basis for Interior to assess whether the population of transactions that is missing supporting documentation is different from the population of transactions that is not missing supporting documentation. Tr., June 23, 2003, a.m., at 34:5-37:4 (D. Lasater). Utilizing the K-S Test, Interior could compare the distribution of transactions with supporting documentation to the distribution of transactions without supporting documentation, and if the distributions are not statistically different, Interior properly could conclude that the error rate associated with the supported transactions may be applied to unsupported transactions. Tr., June 23, 2003, a.m., at 40:16-42:12 (D. Lasater).

63. The absence of supporting documentation does not lead to the conclusion that a transaction has been erroneously recorded, but in such circumstances, it is appropriate to apply other analytic techniques, such as regression analysis and a time-series review of transactions to assess the correctness of the transaction. Tr., June 23, 2003, a.m., at 30:21-31:19 (D. Lasater).

---

[9] In forming his opinions, Plaintiffs' expert, Mr. Duncan, never reviewed Interior's Accounting Standards Manual and did not know what the manual provided with regard to the vouching of transactions by accountants. Tr., May 29, 2003, p.m., at 121:4-19 (D. Duncan).

64. It is not unusual for accounting systems to have some transactions omitted from their records, Tr., June 23, 2003, a.m., at 23:6-14 (D. Lasater); such undercoverage does not mean that sampling cannot be performed to make sound statistical inferences. Id. at 23:15-24:4 (D. Lasater).

65. Methods exist for assessing undercoverage, such as sampling documents to determine whether they are reflected in the accounting system, as well as other standard analytic procedures auditors employ. Id. at 24:5-18 (D. Lasater). Interior's Historical Accounting Plan contemplates sampling of documents to assess the extent to which transactions have been omitted from the transaction ledgers. Interior's Historical Accounting Plan, at App. D-6 - D-7 (Defs.' Ex. 55); Tr., June 23, 2003, a.m., at 46:18-48:19 (D. Lasater).

66. Dr. Lasater's analysis of empirical data from the Ernst & Young study by Joseph R. Rosenbaum revealed that missing transactions constituted between two and five percent of the total number of transactions and less than one percent of the total dollars collected. Tr., June 23, 2003, a.m., at 21:21-22:19 (D. Lasater). There is no empirical support for the suggestion by Plaintiffs' expert, Mr. Duncan, that missing transactions in Interior's IIM system would substantially outnumber recorded transactions, id. at 22:20-23:5 (D. Lasater); indeed, Plaintiffs' expert performed no tests to ascertain the extent to which data and documents are missing from Interior's systems, Tr., May 29, 2003, p.m., at 91:14-21, 92:11-16 (D. Duncan).

67. Historians from Morgan, Angel & Associates, LLC ("Morgan Angel") and Historical Research Associates ("HRA") will work with the accountants to close gaps found in the records. Tr., June 12, 2003, p.m., at 70:8-72:3 (E. Angel).

c. Special Deposit Accounts

68. In addition to describing the historical accounting work for individual IIM accounts, Interior's Historical Accounting Plan describes the work underway to distribute properly the funds currently held in Special Deposit Accounts, which are temporary administrative accounts for the deposit of funds that cannot be immediately credited to the proper IIM account holder or other owner of the funds. Interior's Historical Accounting Plan, at III-15 (Defs.' Ex. 55); Tr., June 4, 2003, a.m., at 28:8-29:9 (J. Cason). This "Retrospective (pre-2001) Special Deposit Account Cleanup Project" entails identifying trust and non-trust account balances in Special Deposit Accounts, distributing monies to proper IIM accounts, tribes or private entities, and identifying or reclassifying funds that were improperly held in Special Deposit Accounts. Interior's Status Report to the Court Number Fourteen, at 36 (Aug. 1, 2003).

69. The work required for Special Deposit Accounts differs from the historical accounting for IIM accounts in that the objective is the proper distribution of funds in, and closure of, the inactive Special Deposit Accounts rather than the preparation of account statements for individual account holders. Interior's Historical Accounting Plan, at III-15; see also Tr., June 4, 2003, a.m., at 28:8-29:9 (J. Cason).

70. In order to properly allocate the funds in Special Deposit Accounts, Interior's accountants examine the history of the account as contained in related financial records and other documents to ascertain the source and purpose of the original funds, determine what portion of the funds and interest have been distributed, and determine why funds remain in the account. Interior's Historical Accounting Plan, at III-17 (Defs.' Ex. 55). Interior's accountants then make a recommendation regarding allocation of the funds and closure of the account. Id. The final

determination of the allocation of funds in a Special Deposit Account is made jointly by BIA and the Office of the Special Trustee ("OST"). The transfer of funds is processed by OST, and any resulting transfers to IIM accounts (or tribal accounts) would be posted as current deposits. Id. Because such a transfer of funds to an IIM account would be posted as a current deposit, it would not be included on the Historical Statement of Account, but instead would appear on the IIM account holder's regular quarterly statement. Id.

d. System Testing

71. Interior's Historical Accounting Plan also includes several high-level system tests designed to assess the reliability of the IIM trust fund system as a whole. Interior's Historical Accounting Plan, at III-17 - III-20; see also Tr., June 4, 2003, a.m., at 22:13-23:22 (J. Cason); Tr., July 2, 2003, a.m., at 54:21-59:15 (R. Swimmer). These tests will reveal whether data gaps exist; whether account balances were properly transferred during system conversions from paper to electronic records and between electronic systems; whether interest was properly calculated; whether problems with the posting of transactions to the IIM system exist; and whether ownership records are accurate. Interior's Historical Accounting Plan, at III-17 - III-20.

72. To identify electronic data gaps, Interior plans to compare historical electronic balance files with electronic account transaction files. Interior's Historical Accounting Plan, at III-18 (Defs.' Ex. 55). Interior also intends to review information for BIA agencies that have no electronic data for a given month to determine whether the agency processed transactions for the month in question. Id.

73. Two system conversions, in which records were moved from one system to another, have occurred in the Electronic Records Era. Interior's Historical Accounting Plan, at

III-19. The conversion from paper ledger cards to the Integrated Records Management System ("IRMS") occurred in the late 1970s and early 1980s. Id. Interior plans to examine a statistical sample of accounts and balances to determine whether they were correctly converted from paper to the IRMS system. Id. Beginning in the late 1990s, the electronic data in IRMS was transferred to the Trust Funds Accounting System ("TFAS"). Id. Interior has electronic data available for the conversion from IRMS to TFAS, which was contemporaneously reviewed at the time of conversion, and will use that data to verify that account balances in IRMS were properly transferred to TFAS. Id.

74. After the centralization of investment activities in the late 1960s and early 1970s, Interior began to compute interest factors, which are utilized to calculate and apply interest earnings to all IIM accounts. Interior's Historical Accounting Plan, at III-19 (Defs.' Ex. 55). Interior plans to analyze the IIM Trust Fund's rate of return and recalculate interest factors, then apply the recalculated interest factors to IIM accounts according to the policies in effect at the relevant time to calculate expected interest payments for each account. Id. The expected interest amounts will be compared to the interest payments actually posted in the accounts to identify errors. Interior expects this process to result in the reconciliation of almost half of the transactions in IRMS and TFAS as well as the majority of transactions in each IIM account, and to facilitate the identification and resolution of data gaps in the electronic records. Id.

75. To test the completeness of transactions listings and determine whether problems with the posting of transactions to the IIM system exist, Interior plans to perform "document-to-transaction" testing, which will entail tracing a random sample of supporting Interior documents to transaction records to determine whether transaction postings that should be present actually

appear in the electronic or paper ledgers. Interior's Historical Accounting Plan, at III-20, App. D-6 - D-7 (Defs.' Ex. 55); Tr., June 4, 2003, p.m., at 104:25-105:17, 107:14-108:5 (J. Cason); Tr., Jun. 6, 2003, a.m., at 45:6-12 (M. Herman); Tr., June 23, 2003, a.m., at 46:18-48:19 (D. Lasater).

76. To assess whether land-based receipts have been appropriately distributed, Interior intends to select a statistical sample of land parcels to test ownership records. This process will involve verifying that ownership records at the Land Title Records Office agree with electronic ownership modules, and that lease revenue is allocated in accordance with this ownership data. Interior's Historical Accounting Plan, at III-20 (Defs.' Ex. 55).

e. Record Indexing

77. An ongoing records indexing process will facilitate the location of records needed for the historical accounting. Interior's Historical Accounting Plan, at III-8 (Defs.' Ex. 55). When the indexing is complete, relevant records will be electronically imaged and coded. Id.

78. Interior estimates that the government holds approximately 195,000 boxes or containers of Indian trust records containing an estimated 300 million to 500 million pages. Interior's Historical Accounting Plan, at App. E-2 (Defs.' Ex. 55); see also Tr., June 12, 2003, p.m., at 625-64:10 (E. Angel); Tr., June 17, 2003, p.m., at 120:19-123:3 (A. Newell).

79. Working and active records are stored at BIA regional and agency offices around the United States. Id. Interior's Office of Trust Records ("OTR") has several facilities in Albuquerque that store approximately 51,000 boxes of records; the Federal Records Center in Lee's Summit, Missouri, stores approximately 42,000 boxes of records; the National Archives stores approximately 64,000 containers of records; the Indian Trust Accounting Division of the

General Services Administration stores approximately 20,000 boxes of records at its facility in Lanham, Maryland; and the Department of the Treasury and the General Accounting Office have approximately 18,000 boxes of records at storage facilities. Id.

80. OTR has engaged Labat-Anderson, Inc. to index trust-related records stored at OTR's facilities in Albuquerque and at the Federal Records Center in Lee's Summit. Interior's Historical Accounting Plan, at App. E-2 (Defs.' Ex. 55). The indexing involves opening boxes and indexing the contents for ease of future reference. Tr., June 4, 2003, a.m., at 26:11-27:17 (J. Cason). The index will be a "file-level" index in which every file title will be entered verbatim into an electronic database. Id. The database will also include data appearing on the exterior of a box, the source agency, and document types and date ranges. Interior's Historical Accounting Plan, at App. E-3. The indexing project is expected to be completed in fiscal year 2004. Id.

f. Collection of Missing Information From Outside Sources

81. Interior has developed – and included in Interior's Departmental Manual – policy and procedures for the collection of missing information from outside sources. See Interior's Fiduciary Obligations Compliance Plan, at 72-75 (Defs.' Ex. 1); Interior's Status Report to the Court Number Fourteen, at 33 (Aug. 1, 2003). Implementation of the policy to collect information from third parties is underway, and implementation activities have been reported in Interior's status reports to the Court.

82. On February 6, 2002, Interior published a Federal Register notice requesting that third parties with records relating to IIM trust funds notify Interior and preserve those documents

indefinitely.[10] See 67 Fed. Reg. 5607-08 (Feb. 6, 2002); see also Tr., June 5, 2003, p.m., at 65:15-23 (J. Cason). As a result of the notice, three energy companies contacted OHTA and indicated that they may have records pertaining to allotted lands. Interior's Fiduciary Obligations Compliance Plan, at 74 (Defs.' Ex. 1). On August 6 and 7, 2002, OHTA staff conducted an on-site overview of records at one of these companies and concluded that a small percentage of the records may be useful as "fill-the-gap" data. Id. The company agreed to retain custody of the records until further notice. OHTA is in discussions with the other two companies.

83. Interior followed the Federal Register notice with a letter in March 2002, that was sent to approximately 4,200 addresses derived from the Oil and Gas Journal subscription list. 68 Fed. Reg. 23,756, 23,757 (May 5, 2003). The letter asked company addressees if they possessed records relating to production on individual-allotted Indian lands and requested an inventory of those records from 1887 to the present. The letter also requested that the addressee preserve and maintain those documents. Id.

84. Interior is also seeking other potential sources of records. In September 2002, OHTA secured a membership to the American Heritage Center at the University of Wyoming, which houses the Anaconda Geological Documents Collection, a large body of economic geologic data. Interior's Fiduciary Obligations Compliance Plan, at 74 (Defs.' Ex. 1). On February 5 and 6, 2003, OHTA completed a review of these documents and determined that, while the collection appears to contain some documents that may relate to IIM and/or tribal

[10] On October 15, 2002, the Office of Management and Budget approved a request that will allow Interior to continue to seek Indian trust-related information from third parties under the original Federal Register notice. Interior's Fiduciary Obligations Compliance Plan, at 74 (Defs.' Ex. 1).

historical accounting, only a small percentage appear directly relevant. Interior's Status Report to the Court Number Thirteen, at 31 (May 1, 2003) (Defs.' Ex. 47).

85. Interior has also engaged private consultants in an effort to locate potential sources of third-party records. Gustavson Associates ("Gustavson") completed a pilot study to search and identify oil and gas records on allotted lands and submitted a report with its findings in June 2002. Interior's Fiduciary Obligations Compliance Plan, at 74 (Defs.' Ex. 1). The study successfully demonstrated a methodology for collecting records from third parties, particularly oil and gas companies. Id. Gustavson's discussions with representatives of the oil and gas industry revealed that no standard policy for records retention exists in the petroleum industry, primarily because of the cost of maintaining large volumes of records, the frequent buying and selling of oil and gas resources, and ongoing industry consolidation. Id. at 75. Gustavson recommended that OHTA work with the Council of Petroleum Accounting Societies ("COPAS") to survey its membership about records retention practices. On October 23, 2002, OHTA made a presentation to COPAS and asked for assistance in identifying potential sources of relevant records within the oil and gas industry. Id.

86. OHTA's historian contractors, HRA and Morgan Angel are also assisting OHTA with the effort to locate potential sources of third-party documents. Tr., June 18, 2003, a.m., at 57:17-58:7, 60:5-13, 88:14-89:1, 91:12-23 (A. Newell).

g. Interior's Accounting Standards Manual

87. Interior's Accounting Standards Manual (Defs.' Ex. 59), prepared collaboratively by OHTA, Chavarria, Dunne & Lamey LLC, Deloitte & Touche LLP, Ernst & Young LLP, Grant Thornton LLP, KPMG LLP, and the National Opinion Research Center ("NORC") at the

University of Chicago, was developed to provide guidance to the accounting firms and others involved in the historical accounting work. Interior's Accounting Standards Manual at I-1 (May 9, 2003) (Defs.' Ex. 59). The Accounting Standards Manual "identifies the key documents to be used and briefly outlines the policies and procedures to be followed in performing the [h]istorical [a]ccounting of IIM accounts." Interior's Accounting Standards Manual at I-1 (Defs.' Ex. 59); Tr., June 6, 2003, a.m., at 17:2-6 (M. Herman). The manual will be updated periodically as the historical accounting progresses. Interior's Accounting Standards Manual at I-1 (Defs.' Ex. 59); Tr., June 6, 2003, a.m., at 18:4-9 (M. Herman). The Manual is intended "to make uniform the tests of the transactions so that all of the field audit teams . . . would be able to follow a protocol that would be uniform across all of the evaluations." Tr., June 23, 2003, a.m., at 15:22-16:19 (D. Lasater).

88. Interior's Accounting Standards Manual (Defs.' Ex. 59) provides that a negotiated check, an electronic fund transfer, or, if the payee is not the account holder, an authorization for disbursement are the preferred ("Level One") documents for verifying disbursements. See Interior's Accounting Standards Manual at 2.0-1 (May 9, 2003) (Defs.' Ex. 59); Tr., June 6, 2003, a.m., at 18:14-15 (M. Herman). If these primary documents are not available, the Accounting Standards Manual provides that secondary ("Level Two") documents, such as checks without proof of negotiation, disbursement schedules, journal vouchers and check registers, may be used to verify a disbursement, but instructs accountants "to use professional judgment to determine the sufficiency of the Level Two documents for meeting the purposes of the Historical Accounting." Interior's Accounting Standards Manual at 2.0-1 n.1; see also Tr., June 5, 2003, a.m. at 10:9-11:6, 12:18-14:1 (J. Cason); Tr., June 6, 2003, a.m., at 18:14-19:1 (M. Herman).

h. Quality Control

89. Interior is implementing quality control checks to achieve "best practices" at each phase of the historical accounting process. Interior's Historical Accounting Plan, at App. C-2 (Defs.' Ex. 55). Appendix C to Interior's Historical Accounting Plan describes OHTA's quality control procedure.

4. Feasibility of Interior's Historical Accounting Plan

a. Budget and Staffing

90. The Secretary of the Interior is committed to Interior's Historical Accounting Plan, Interior has been moving forward with the accounting efforts described in the Plan, and the Secretary prevailed upon the Office of Management and Budget to add $100 million to the fiscal year 2004 budget to permit the plan to go forward. Tr., June 5, 2003, a.m., at 75:16-76:24 (J. Cason). To the extent that Interior Defendants can control the factors affecting the Plan, they are committed to implementing it. Id.

91. On July 10, 2003, the House Appropriations Committee reported H.R. 2691 to the full House with House Report 108-195. Interior's Status Report to the Court Number Fourteen, at 4 (Aug. 1, 2003). The overall Federal trust programs funding in H.R. 2691 was $219,641,000, which was $55,000,000 below the budget request but $79,282,000 above the fiscal year 2003 enacted level. Id. The Committee included $75,000,000 for historical accounting, a decrease of $55,000,000 from the budget request but an increase of $65,844,000 above the fiscal year 2003 enacted level. Id. These funding levels were included, without amendment, in H.R. 2691 as passed by the House on July 18, 2003. Id.

92. On July 10, 2003, the Senate Appropriations Committee reported S. 1391 to the full Senate with Senate Report 108-89. Interior's Status Report to the Court Number Fourteen, at 5 (Aug. 1, 2003). The Senate bill included the same funding levels for the Federal Trust Programs as passed by the House. Id.

93. The Senate Report states that the Committee did not fund the entire request due to the ongoing litigation and uncertainty as to whether Interior's Historical Accounting Plan will be fully accepted by the Court. Interior's Status Report to the Court Number Fourteen, at 5 (Aug. 1, 2003). The Report also noted that because past accounting efforts have illustrated few mistakes within the individual accounts reconciled, it is the Committee's belief that the funding provided "will allow Interior to utilize a statistical sampling model sufficient to further illustrate Interior's performance in managing trust accounts." Id. (quoting S. Rep. No. 108-89, at 47 (2003)). The Committee also made clear that its reduction below the request level should not be mistaken for an endorsement of the Plaintiffs' Revenue Model or its assumptions. Id.

94. As of the filing of Interior's Historical Accounting Plan on January 6, 2003, Interior had engaged fourteen consulting firms to assist in the historical accounting effort, including five accounting firms, the largest commercial trust operator in the United States, two historian firms which have specialized in Indian issues for many years, and firms to assist in statistical matters, trust legal matters, and other areas pertaining to the historical accounting. Interior's Historical Accounting Plan, at 2 (Defs.' Ex. 55). Representatives from these firms were instrumental in designing Interior's Historical Accounting Plan. Id.

95. The five accounting firms Interior has engaged to assist in the historical accounting effort are KPMG LLP, Ernst & Young LLP, Deloitte & Touche LLP, Grant Thornton

LLP, and Chavarria, Dunne & Lamey LLC. Interior's Historical Accounting Plan, at I-1 – I-2 (Defs.' Ex. 55).

96. Interior retained the accounting firms to benefit from the "brain trust of the accounting industry," and to accelerate the accounting process by having multiple firms with multiple teams working on it. Tr., June 4, 2003, a.m., at 11:10-12:6 (J. Cason). These firms will all be providing general assistance to OHTA as well as performing the historical accounting work. Tr., June 6, 2003, a.m., at 16:14-17 (M. Herman).[11] Grant Thornton provides general assistance to OHTA, but its primary role will be in providing quality control and quality review of the work product of the other four accounting firms. Tr., June 6, 2003, a.m., at 16:18-21 (M. Herman).

97. To ensure consistency in the historical accounting work performed by the accountants, OHTA has instituted regular meetings, designed cooperative work such as the Alaska Region historical accounting project, developed the Accounting Standards Manual (Defs.' Ex. 59), and will develop a training manual. Tr., June 6, 2003, a.m., at 17:1-13 (M. Herman).

98. To facilitate the work of the accountants, Interior retained historians from Morgan Angel and HRA to assist in locating as many useful documents as possible, because they have

---

[11] Defendants' witness Michelle Herman is a director in the forensics practice at KPMG whose specialty is in complex data management and analysis. Tr., June 6, 2003, a.m., at 7:3-4, 7:8-9 (M. Herman). Her first involvement in this litigation was in early 1997, when she was employed at Arthur Andersen; she started working with OHTA in the summer of 2001, when OHTA was created. Id. at 9:23-10:1, 20:12-13 (M. Herman). Ms. Herman was part of the team of accountants that assisted Interior in designing Interior's Historical Accounting Plan and performing data analysis. Tr., June 6, 2003, a.m., at 15:25-16:3 (M. Herman).

the "talent and skill to look both within Interior's records and other possible places" to get the records need to perform the historical accounting. Tr., June 4, 2003, a.m., at 12:7-22 (J. Cason).

99. Morgan Angel has been assisting OHTA since its inception in 2001, by sharing its historical knowledge and helping OHTA develop a historical perspective for its accounting plan. Expert Report of Edward Angel, at 44 (Defs.' Ex. 60).

100. Like Morgan Angel, HRA has been assisting OHTA since its formation in 2001. Expert Report of Alan S. Newell, at 1 (Defs.' Ex. 141). HRA has consulted with OHTA on a variety of historical matters, and assisted OHTA in the preparation of Interior's July 2, 2002, Report to Congress on the Historical Accounting of Individual Indian Money Accounts. Id. at 11.

b. Work Completed And Currently Underway

101. Interior has completed the accounting work for 16,821 Judgment Accounts with December 31, 2000 balances of approximately $48.5 million. Interior's Status Report to the Court Number Fourteen, at 34 (Aug. 1, 2003); see also Tr., June 4, 2003, a.m., at 23:23-25:3 (J. Cason). In addition, Interior has reconciled 117,425 transactions in Per Capita Accounts with a value of approximately $162 million. Interior's Status Report to the Court Number Fourteen, at 34.

102. As reported in Interior's quarterly status reports, the historical accounting work for land-based accounts has also begun. See, e.g., Interior's Status Report to the Court Number Fourteen, at 34-35; Tr., June 4, 2003, a.m., at 20:12-22 (J. Cason).

103. A project is underway to perform the historical accounting work for the Eastern Region, which has forty-eight land-based accounts. To date, 260 transactions have been

reconciled from these accounts, and OHTA's contractor, Deloitte & Touche, is obtaining additional documents from to reconcile the remaining 61 transactions. Interior's Status Report to eh Court Number Fourteen, at 34. The contractor expects to complete this project by August 31, 2003. Id.

104. A project is also underway to perform the historical accounting work for new land-based accounts in the Southwest Region. The Southwest Region was selected because relevant land records are in the Albuquerque Land Title Records Office and relevant financial records are in the Office of Trust Records' Albuquerque Records Center. Interior's Status Report to the Court Number Fourteen, at 34. OHTA expects this project to be completed by December 31, 2003. Id. at 35.

105. As a pilot test of the sampling and records collection process, OHTA and its contractors selected a random sample of electronic transactions in the Alaska Region. Interior's Status Report to the Court Number Fourteen, at 35. While the sample is not large enough to be representative, the purpose of the project is to test and refine record location and document collection procedures, develop and test training materials, and provide information to inform the historical accounting. Interior's Status Report to the Court Number Thirteen, at 33 (May 1, 2003).

106. The Alaska project will also help ensure that the results from the various accounting firms are reasonably consistent. Tr., June 4, 2003, a.m., at 29:10-30:7 (J. Cason). OHTA and the accounting firms will be working cooperatively on this project to ensure that all of the firms are implementing the same procedures. Tr., June 6, 2003, a.m., at 17:9-13 (M. Herman).

107. A preliminary process for collecting documents to be used in the historical accounting has been developed, and OHTA and the accounting firms are currently testing it with the Alaska Region documents they are collecting. Tr., June 6, 2003, a.m., at 19:4-12 (M. Herman). The first step in that process entails a meeting between the accounting firms and the agency and area personnel to enable the accountants to understand the business process and filing system of the agency and area, as there are regional differences in filing systems and paper data. Id. All of OHTA's accounting firms have visited both the Juneau agency office and the Anchorage agency office as part of this document collection process. Tr., June 6, 2003, a.m., at 19:16-17 (M. Herman). Records in the Alaska Region are very well organized, and the agency personnel had no difficulty finding relevant documents. Id. at 20:1-5.

108. Clean-up of land records has been underway for several years as has been reported to the Court, and the historical accounting will benefit from any resulting improvements in the accuracy of the records. Tr., June 4, 2003, a.m., at 67:19-68:10 (J. Cason).

109. OHTA and the accounting firms have begun performing some of the data validation and system tests outlined in Interior's Historical Accounting Plan. Tr., Jun. 6, 2003, a.m., at 32:4-5 (M. Herman).

110. For example, OHTA and the accounting firms are analyzing the Integrated Records Management System to determine whether account numbers were reused over time. An account holder's name is recorded both in a master file and in the transactional data itself. Each time a transaction is posted to the system, the account holder's name is associated with the transaction, so accounts that have more than one name associated with them can be identified. Tr., Jun. 6, 2003, a.m., at 31:12-23 (M. Herman).

111. Another test that OHTA and the accounting firms have undertaken is an analysis of data distribution to aid understanding of the data characteristics. Tr., Jun. 6, 2003, a.m., at 35:14-16 (M. Herman). OHTA and the accounting firms began the analysis of data distribution by graphing the number of credit transactions and dollars by month and year, and the number of debit transactions and dollars by month and year to detect any abnormal patterns. Tr., Jun. 6, 2003, a.m., at 35:16-19, 36:6-12 (M. Herman). If any abnormally large spikes in the data appear, the underlying transactions are reviewed to determine whether the abnormal pattern can be explained by, for example, a new creation of accounts, or a large judgment distribution. If the abnormal pattern cannot be explained by the underlying transactions, then OHTA and the accounting firms will meet with the agency personnel and review the records associated with those transactions. Tr., Jun. 6, 2003, a.m., at 36:6-24 (M. Herman).

112. OHTA and the accounting firms have initiated this analysis of data distribution for the Alaska region. See Tr., Jun. 6, 2003, a.m., at 36:25-37:1 (M. Herman). For example, they charted IRMS and TFAS credit transactions by month and year for the Alaska region, identified nine "spikes within the graph" at which data appeared to be distributed abnormally, and then managed to explain each of these spikes by examining the underlying transactions. See Tr., Jun. 6, 2003, a.m., at 37:10-39:6 (M. Herman).

113. OHTA and the accounting firms have also undertaken a study of the conversion of accounts from IRMS to TFAS. Tr., Jun. 6, 2003, a.m., at 39:25-40:3 (M. Herman). This study involves identifying accounts with non-zero balances in IRMS at the point of conversion and determining whether all of those accounts were converted to TFAS with the same balance. Tr., Jun. 6, 2003, a.m., at 40:5-10 (M. Herman).

114. The study of the conversion of accounts from IRMS to TFAS has begun in the Alaska region. See Tr., Jun. 6, 2003, a.m., at 40:16-17 (M. Herman). Approximately 800 accounts converted from IRMS to TFAS in the Alaska region. Tr., Jun. 6, 2003, a.m., at 41:12 (M. Herman). Of these, only one account appeared to have a discrepancy: the account had a negative balance in IRMS that did not appear to convert to TFAS. The accountants looked to the underlying transactional data and discovered a missing transaction early on in the account's history. They then went to the Office of Trust Records to review the IIM jacket folder for that account holder, and discovered a transaction recorded on the IIM ledger that was not in the electronic database. With that transaction, the account had a zero balance in IRMS and, therefore, was properly not converted to TFAS. Tr., Jun. 6, 2003, a.m., at 40:19-41:16 (M. Herman).

115. OHTA and the accounting firms are also undertaking an interest recalculation test, which entails recalculating interest posted to IIM accounts through time based on the policies and procedures in place and the interest factors used at that point. Tr., Jun. 6, 2003, a.m., at 41:21-24 (M. Herman). The purpose of this test is to identify missing data and to ensure that the policies that were in place at the point in time were applied correctly. Tr., Jun. 6, 2003, a.m., at 42:2-5, 42:13-18 (M. Herman). If OHTA and the accounting firms determine that missing information is responsible for any failure of recalculated interest to match the interest actually posted, then, depending on the number of accounts affected, they will first look for the transaction registers and then turn to the jacket files. Tr., Jun. 6, 2003, a.m., at 42:24-43:1 (M. Herman). The firm of Chavarria, Dunne & Lamey has begun designing the program for this interest recalculation test, but the test itself has not yet been implemented. Tr., Jun. 6, 2003, a.m., at 43:4-6 (M. Herman).

116. To determine whether transactions are missing from the system, OHTA has created a document-to-transaction test, which entails sampling documents and tracing them to transactions, and a test to compare balances derived from transactional data to balances in the balance (or master) file. Tr., Jun. 6, 2003, a.m., at 48:9-11, 48:23-49:1 (M. Herman).

117. In 2002, OHTA tasked Morgan Angel with examining materials in the Federal Records Center at Lee's Summit, Missouri, and assessing their value for the historical accounting. Expert Report of Edward Angel, at 44 (Defs.' Ex. 60). The firm examined both Federal Records Center and agency finding aids, and found a high correlation between the agency records transmittal forms and the documentation contained in the appropriate boxes. Id. at 45; Tr., June 12, 2003, a.m., at 81:7-25 (E. Angel). The finding aids accurately reflected the contents of all but one of the several hundred boxes inspected. Tr., June 16, a.m., at 76:24-77:22 (E. Angel).

118. In 2002, OHTA also tasked Morgan Angel with developing a template for use in preparing brief histories of Indian reservations, which are intended to support OHTA's outreach program and to help the accounting research teams by imparting a basic knowledge of the reservations. Expert Report of Edward Angel, at 45 (Defs.' Ex. 60). In addition to basic historical information, Morgan Angel proposed sections describing the location of reservation documents within the National Archives system, important treaties and legislation affecting the reservation, a description of the allotment process at the reservation if it is allotted, natural resource development, population, and historical data pertaining to judgment funds, per capita payments, and the IIM trust. Id.; Tr., June 12, 2003, a.m., at 83:1-13 (E. Angel); Tr., June 12, 2003, p.m., at 95:19-23 (E. Angel). Using this template, four reservation histories have been

completed, and more are currently being prepared. Tr., June 12, 2003, a.m., at 83:20-84:2 (E. Angel).

119. HRA's work for OHTA includes developing a document collection plan that will guide efforts to collect documents for the historical accounting, assisting OHTA with the Alaska Region Project, working with Morgan Angel to produce reservation histories, and performing research to verify the validity of statistics obtained from Interior by investigating statistics from public and private sources outside the agency. Expert Report of Alan S. Newell, at 12-14 (Defs.' Ex. 141).

120. Both Morgan Angel and HRA have provided to Interior a substantial number of reports relevant to the historical accounting. See Expert Report of Edward Angel (Defs.' Ex. 60); Expert Report of Alan S. Newell (Defs.' Ex. 141); Tr., June 12, 2003, a.m., at 79:18-22 (E. Angel); Tr., June 13, 2003, a.m., at 32:25-33:3 (E. Angel); Tr., June 17, 2003, p.m., at 75:2-12, 82:11-15, 87:9-15, 89:23-90:2 (A. Newell); Defs. Exs. 142-153 (Reports prepared by HRA).

121. Morgan Angel and HRA have developed a catalog of record repositories to assist with the historical accounting work. Tr., June 17, 2003, p.m., at 90:3-12, 90:16-91:7 (A. Newell).

c. Availability and Accuracy of Records

122. Interior has made improvement of records retention and management a priority; the status of these efforts is reported to the Court in Interior's quarterly reports. See Tr., June 4, 2003, a.m., at 30:8-34:21 (J. Cason). Records management has implications for both the historical accounting and trust reform, so Interior's goal is not only to obtain the records necessary for the historical accounting, but also to improve its records retention and management

program generally so that documents can be retrieved more easily in the future. Tr., June 4, 2003, a.m., at 39:23-40:16 (J. Cason).

123. The steps Interior has taken to ensure the protection of trust records include hiring a Senior Executive Service-level records manager, temporarily transferring responsibility for records from the Office of the Special Trustee to an Assistant Deputy Secretary who reports to Associate Deputy Secretary James Cason, implementing a process to ensure that no existing records are destroyed, and initiating the records-indexing process in Albuquerque and Lee's Summit. Tr., June 4, 2003, a.m., at 30:8-34:3 (J. Cason).

124. Interior's policy is to preserve all documents that may be related to the IIM trust. Tr., June 4, 2003, a.m., at 55:15 (J. Cason). Not all documents that contain individual Indian trust data, however, are necessary to conduct an historical accounting. Id. at 51:15-53:12 (J. Cason). For example, while ledgers and documents that reflect sale and lease transactions are relevant to the historical accounting work, land-use plans and surface management plans are not. Id. at 51:15-53:12 (J. Cason).

125. Contrary to the allegations of the Plaintiffs that an accounting is impossible because relevant records are unavailable, the experience of Interior and its consultants, including their experience with the named Plaintiffs' records, indicates that sufficient records are available to proceed with the historical accounting project. This is the view of both the professional historians and the forensic accountants retained by OHTA to assist with Interior's efforts to provide accountings to IIM account holders.

(1) The Paragraph 19 Search And Collection Process

126. The Paragraph 19 search and collection process demonstrates that sufficient records to conduct the historical accounting exist and are retrievable.

127. In 1999, both Interior and Treasury engaged the firm Arthur Andersen to assist them in searching for and collecting documents required to be produced pursuant to Paragraph 19 of the First Order for Production of Information ("Paragraph 19"). Tr., June 6, 2003, p.m., at 38:2-22 (R. Brunner). Paragraph 19 required the production of all documents, records or tangible things that embody, refer to or relate to the IIM accounts of the named Plaintiffs or their agreed-upon predecessors in interest. Tr., June 6, 2003, p.m., at 39:5-11 (R. Brunner).

128. Robert L. Brunner was the individual at Arthur Andersen who oversaw the firm's work on behalf of Interior and Treasury. Tr., June 6, 2003, p.m., at 38:2-22, 46:10-47:2 (R. Brunner). Mr. Brunner spent 15 years at Arthur Andersen, where he was a Principal, the national partner in charge of the firm's Complex Data Management and Class Action practice, and the partner in charge of the firm's Value Solutions Litigation Consulting Practice for the Pacific Northwest. Tr., June 6, 2003, p.m., at 28:10-17 (R. Brunner). In May of 2002, Mr. Brunner joined KPMG, where he is currently a principal in the forensic practice and national partner in charge of the class action and complex data management practice. Tr., June 6, 2003, p.m., at 28:2-7 (R. Brunner).

129. With respect to Treasury, Arthur Andersen assisted in four primary areas related to compliance with Paragraph 19: the development of a plan; the development of protocols and procedures for implementing the search and collection process; the development and implementation of quality control procedures to ensure the effectiveness and comprehensiveness

of the search; and the issuance of an opinion as to the thoroughness and adequacy of the search. Tr., June 6, 2003, p.m., at 39:16-40:9 (R. Brunner). Arthur Andersen performed these tasks and completed its work for Treasury by January 31, 2001. Tr., June 6, 2003, p.m., at 40:10-51:14 (R. Brunner).

130. After the completion of its work for Treasury, Anderson rendered its professional opinion that Treasury's response to Paragraph 19 had been "a thorough, well-executed search that met or exceeded industry practices." Tr., June 6, 2003, p.m., at 51:15-52:9 (R. Brunner). Treasury ultimately produced approximately 2,300 documents in response to Paragraph 19. Tr., June 6, 2003, p.m., at 52:10-12 (R. Brunner).

131. Arthur Anderson's role with respect to Interior's Paragraph 19 response was to provide management advice and consulting, as well as assistance with the development of search and collection procedures. Tr., June 6, 2003, p.m., at 52:13-53:3 (R. Brunner). The search and collection process with respect to Interior was in some respects facilitated by the fact that recordkeeping is often tied to the geography of the corresponding IIM account holder. Tr., June 6, 2003, p.m., at 53:16-54:5 (R. Brunner).

132. Interior ultimately searched approximately eighty facilities for documents responsive to Paragraph 19. Tr., June 6, 2003, p.m., at 54:6-55:8 (R. Brunner). Criteria employed to determine whether documents were responsive included the names and aliases of the named Plaintiffs and predecessors, account numbers, associated tract numbers, associated lease numbers, and transactions. Tr., June 6, 2003, p.m., at 56:1-57:7 (R. Brunner).

133. Interior implemented a number of procedures to ensure quality control in every aspect of its Paragraph 19 search and collection process, including quality control checks and

certifications by team members that they had properly and completely performed searches. Tr., June 6, 2003, p.m., at 61:11-62:4 (R. Brunner). The quality control procedures implemented by Interior exceeded those typically employed in the context of private business litigation. Tr., June 6, 2003, p.m., at 62:2-4 (R. Brunner).

134. Interior's Paragraph 19 response encompassed the "appropriate universe of records," "applied the appropriate search criteria," was based on a "well-planned and well-organized search," and included "a component of quality control throughout that entire process;" as such, it was "a well-executed, well-thought out search that . . . exceeded industry practices." Tr., June 6, 2003, p.m., at 65:12-66:4 (R. Brunner). Interior has produced approximately 160,000 documents in response to Paragraph 19. Tr., June 6, 2003, p.m., at 66:5-7 (R. Brunner).

135. The work undertaken in response to Paragraph 19 showed that "when Interior and Treasury were required to find documents, they could find documents . . . of any nature." Tr., June 6, 2003, p.m., at 67:4-8 (R. Brunner).

136. OHTA is "learning from and taking advantage of that which [Interior, Treasury and Arthur Anderson] learned in going through the Paragraph 19 search." Tr., June 6, 2003, p.m., at 67:19-21 (R. Brunner).

(2) The Ernst & Young Analysis

137. The analysis performed by Ernst & Young confirms that sufficient data exists to perform an accounting for the named Plaintiffs (and their predecessors), and that Interior's IIM records related to their accounts are substantially accurate.

138. In early 2001, the Department of Justice retained the firm Ernst & Young to review documents that had been gathered pursuant to Paragraph 19 and to analyze those

documents with respect to the accounts of the named Plaintiffs and predecessors encompassed by Paragraph 19. Tr., June 9, 2003, a.m., at 53:5-54:12 (J. Rosenbaum). Specifically, Ernst & Young was tasked with preparing a listing of the transactions that appeared in ledgers maintained by the Department of the Interior, and determining whether those transactions could be verified by comparing them to the relevant supporting documents that were gathered pursuant to Paragraph 19. Tr., June 9, 2003, a.m., at 54:5-12 (J. Rosenbaum).

139. In performing this work, Ernst & Young undertook and completed a number of specific tasks: (1) assembly of transaction histories; (2) identification of ownership information; (3) linking of transactions to supporting documents; (4) identification of any variances between transactions and documentation; (5) comparison of expected revenue from leases to transaction entries; and (6) recalculation of interest paid on the subject accounts. Tr., June 9, 2003, a.m., at 61:25-63:21 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 4 (Mar. 28, 2003) (Defs.' Ex. 156).

140. The individual at Ernst & Young with primary responsibility for this project was Joseph R. Rosenbaum. Tr., June 9, 2003, a.m., at 53:14-20 (J. Rosenbaum). Mr. Rosenbaum is a partner with Ernst & Young and practices in its Global Investigations and Disputes Advisory Services Practice. Tr., June 9, 2003, a.m., at 6:17-7:4 (J. Rosenbaum). Mr. Rosenbaum is a Certified Public Accountant in California and also holds a law degree and a master's degree in business administration. Tr., June 9, 2003, a.m., at 5:17-22; 9:14-25 (J. Rosenbaum). Mr. Rosenbaum has over twenty years of experience as an accountant with international firms, specializing in the area of forensic accounting related to investigations, analysis of historical information, dispute resolution, and litigation consulting services. Tr., June 9, 2003, a.m., at

5:23-9:13, 12:19-14:18 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 3 (Defs.' Ex. 156).

141. Ernst & Young assembled complete transaction histories, from the inception of the accounts, for twenty-five named Plaintiffs and predecessors; the transactions analyzed ranged in time from 1914 through 2000. Tr., June 9, 2003, a.m., at 64:3-66:7 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 5, 11 (Defs.' Ex. 156).

142. Because of the historical nature of the project, some of the original transaction ledgers were not available; in some such cases, however, other documentation such as bills for collection and leases provided bases to fill in these gaps and make the transaction listing more complete. Tr., June 9, 2003, a.m., at 68:7-70:19 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 5 (Defs.' Ex. 156). Transactions evidenced by documents other than the original transaction ledgers or statements were noted as "reconstructed" or "recreated" by Ernst & Young and distinguished from transactions that were deemed supported in the analysis, despite the existence of documentary evidence that such transactions had occurred. Tr., June 9, 2003, a.m., at 68:8-70:19 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 5 (Defs.' Ex. 156).

143. Ernst & Young obtained from Interior account balances as of December 31, 2000, as set forth in the Trust Fund Accounting System, and compared those balances to balances Ernst & Young calculated as of the same date, and no differences were noted. Expert Report of Joseph R. Rosenbaum, at 5-6 (Defs.' Ex. 156).

144. Ernst & Young's work in assembling transaction histories demonstrated that the documents collected pursuant to Paragraph 19 are sufficient to create a listing of the transactions, including monies collected and disbursed, for thirty-seven IIM accounts of twenty-five

individuals who are named Plaintiffs or predecessors of named Plaintiffs. Tr., June 9, 2003, a.m., at 56:15-22 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 2, 5, & Ex. A (Defs.' Ex. 156).

145. Ernst & Young verified ownership information relating to allotments owned by the named Plaintiffs and their predecessors to ensure that the payments allocated to those individuals accurately reflected the percentage of their ownership interests in such allotments. Tr., June 9, 2003, a.m., at 70:20-71:17 (J. Rosenbaum). Ownership information was verified by reviewing the Land Record Information System, and then confirming that information by examining probate documents that were collected pursuant to Paragraph 19. Tr., June 9, 2003, a.m., at 71:8-17 (J. Rosenbaum).

146. Many of the named Plaintiffs and their predecessors held small, fractionated interests in allotments, which resulted in a substantial number of the transactions being for small dollar amounts – nearly 60% were for less than $10.00. Tr., June 9, 2003, a.m., at 67:15-24 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 3 (Defs.' Ex. 156). For example, one individual owns a 7/58,320 fractionated interest in a particular allotment which generates lease income of $858.54 per year; because of the tiny interest in this allotment, the income allocable to the individual is only ten cents per year. Tr., June 9, 2003, p.m., at 46:17-51:14 (J. Rosenbaum); Defs.' Ex. 155 at D155-0124 – D155-0155.

147. The total balance for all of the accounts of the named Plaintiffs and their predecessors analyzed by Ernst & Young as of December 31, 2000, is less than $3,000. Tr., June 9, 2003, a.m., at 77:20-78:10 (J. Rosenbaum).

148. Ernst & Young linked transactions in each of the named Plaintiff/predecessor accounts to supporting documents by searching the Paragraph 19 documents based on relevant bibliographic information and transaction characteristics, and then reviewing pertinent documents to ascertain whether they provided support for the particular transactions. Tr., June 9, 2003, a.m., at 72:14-74:13 (J. Rosenbaum). Characteristics employed to identify supporting documents included the document and transaction dates, lease number, allotment or tract number, IIM account number, transaction amount, name of IIM account holder, name of lessee, name of original allottee, reference numbers found in transactions descriptions and documents, and any other relevant characteristic that might have appeared on the ledgers. Tr., June 9, 2003, a.m., at 73:16-74:2 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 6 (Defs.' Ex. 156).

149. The types of documents that supported a transaction varied based on the nature of the transaction and the geographic location where the account was administered. Tr., June 9, 2003, a.m., at 74:14-75:4 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 7 (Defs.' Ex. 156). Thus, a collection typically was supported by a contract (such as a lease), a bill for collection, or a journal voucher, whereas a disbursement would more likely be supported by a copy of a check. Tr., June 9, 2003, a.m., at 74:14-75:4 (J. Rosenbaum).

150. Ernst & Young's verification of transactions included a review of various types of documents and data, such as original ledger pages or statements of account, leases or other contracts giving rise to the payments at issue, bills for collection that identified the amount of money received, ownership information set forth in the LRIS system that dictated an account holder's allotment interest, and probate documents that confirmed the ownership information

identified in the LRIS system. Tr., June 9, 2003, p.m., at 14:6-29:2, 30:11-31:9 (J. Rosenbaum).

151. Ernst & Young was able to locate supporting documentation for 86% of the 12,617 transactions it reviewed, representing 93% of the total dollar value of those transactions, which was approximately $1.1 million. Tr., June 9, 2003, a.m., at 75:5-76:19, 77:6-19 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 2, Ex. B-1, Ex. B-2 (Defs.' Ex. 156).

152. The fact that sufficient supporting documentation could not be found with respect to a small percentage of the transactions reviewed by Ernst & Young does not suggest that such transactions were erroneous, only that adequate supporting documentation could not be found; rather, given that a large percentage of the transactions reviewed were successfully linked to supporting documentation, it is likely that supporting documentation existed at one time also for those transactions for which no support could be found. Tr., June 9, 2003, a.m., at 76:20-77:5 (J. Rosenbaum).

153. Ernst & Young's analysis demonstrates that the documents collected pursuant to Paragraph 19 are sufficient contemporaneous evidence that 86% of the transactions reviewed by Ernst & Young, representing 93% of the dollar value of those transactions, did occur and were recorded in ledgers. Tr., June 9, 2003, a.m., at 56:23-57:2 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 2, 7 & Exs. B-1, B-2 , C. (Defs.' Ex. 156).

154. Except for one $60.94 collection that was erroneously credited to an individual whose account number was similar to that of the intended recipient, Ernst & Young found no indication that there were any transactions that had not been recorded in the available IIM ledgers. Tr., June 9, 2003, a.m., at 57:3-7, 78:11-79:2 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 2 (Defs.' Ex. 156). Ernst & Young discovered the single error by performing

an analysis of the expected payments that should have been made and those that were actually made pursuant to the relevant lease. Tr., June 9, 2003, p.m., at 31:11-39:22 (J. Rosenbaum).

155. The results of Ernst & Young's work in verifying transactions and linking them to supporting documentation have been recorded in a software tool developed by Interior referred to as the Virtual Ledger. Tr., June 9, 2003, a.m., at 79:3-80:3 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 1-2 (Defs.' Ex. 156). The Virtual Ledger contains a listing of the accounts reviewed by Ernst & Young, along with links to a listing of transactions for each of those accounts, and to a listing of supporting documentation for each of the transactions in each account. Tr., June 9, 2003, a.m., at 79:8-80:3 (J. Rosenbaum).

156. After linking the supporting documents to transactions, Ernst & Young compared each transaction to its supporting documents to determine whether the ledger transaction accurately reflected the amount indicated by the supporting documentation, and to identify any variances between the calculated amount based on the collection and the actual amount posted to the IIM account. Tr., June 9, 2003, p.m., at 51:16-52:18 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 7-8 & Ex. C (Defs.' Ex. 156).

157. For the $1.1 million in total transaction value that Ernst & Young reviewed, the total net variance was $3,235.18, or less than 1% of the total transaction value. Tr., June 9, 2003, p.m., at 53:14-54:1 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at Ex. C (Defs.' Ex. 156). Of 452 individual variances discovered, 401 were for $1.00 or less, and approximately 270 were off by approximately one penny, which was most likely due to rounding differences. Tr., June 9, 2003, p.m., at 54:2-9 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at Ex. C (Defs.' Ex. 156).

158. As part of its analysis, Ernst & Young also performed an "expected versus actual" comparison, i.e., it compared available lease information to transaction listings by reviewing the available farming and oil/gas leases, analyzing payments due under such leases (which were then multiplied by the appropriate fractionated interests), and comparing those amounts against the amounts indicated in the ledgers. Tr., June 9, 2003, p.m., at 54:17-55:10 (J. Rosenbaum); Report of Joseph R. Rosenbaum, at 8-9 (Defs.' Ex. 156).

159. In connection with its lease analysis, Ernst & Young identified and analyzed 80% of the leases (representing 98% of the dollar value) relating to farm lease income, and 95% of the relevant oil and gas leases.[12] Tr., June 9, 2003, p.m., at 57:20-58:3 (J. Rosenbaum).

160. Ernst & Young researched each discrepancy it found in the lease comparison to ascertain whether there was an explanation for the discrepancy. Tr., June 9, 2003, p.m., at 55:11-56:1 (J. Rosenbaum). Where Ernst & Young could not find an explanation for differences between the amounts due under the relevant lease and the amount listed in the transaction ledger, the differences were noted as "Unexplained Differences." Id. at 55:21-56:1 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at Ex. D (Defs.' Ex. 156). The total unexplained difference between the expected lease payments and amounts reflected in the ledgers for all of the transactions in all of the accounts analyzed by Ernst & Young was $32.04, or .01%. Tr., June 9, 2003, p.m., at 57:11-13 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at Ex. D (Defs.' Ex. 156). Thus, as Ernst & Young concluded, the amounts shown in the leases were

[12] Ernst & Young's lease analysis with respect to oil and gas income included bonus and rental payments, but not royalties. Expert Report of Joseph R. Rosenbaum, at Ex. D (Defs.' Ex. 156).

accurately and appropriately reflected in the account ledgers. Tr., June 9, 2003, p.m., at 58:13-17 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at Ex. D (Defs.' Ex. 156).

161. Ernst & Young also verified the propriety of interest payments made with respect to the subject accounts by recalculating the interest using the interest factors that were applicable to the accounts at the time the interest was paid, and also comparing the interest rates applied to the accounts with Treasury Bill rates in effect during the relevant time periods. Tr., June 9, 2003, p.m., at 62:16-63:18 (J. Rosenbaum). Ernst & Young, noting no material differences between the results of its interest recalculation and the interest actually credited to the accounts, confirmed that the interest payments were accurate. Tr., June 9, 2003, p.m., at 63:7-10 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 3 (Defs.' Ex. 156).

162. The interest rates applied to the accounts of the individuals examined by Ernst & Young were reasonable when compared against Treasury Bill rates in effect for those periods and, in fact, generally were greater than the Treasury Bill rates. Tr., June 9, 2003, p.m., at 63:11-18 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 3 (Defs.' Ex. 156).

163. Based on the analysis of Ernst & Young, there is no indication that the listing of transactions in IIM accounts for the named Plaintiffs and predecessors whose accounts it reviewed is not substantially accurate, or that the transactions recorded are not substantially supported by contemporaneous documentation. Tr., June 9, 2003, p.m., at 68:2-69:13 (J. Rosenbaum); Expert Report of Joseph R. Rosenbaum, at 3 (Defs.' Ex. 156).

(3) Tribal Trust Fund Reconciliation

164. Interior's previous work regarding tribal trust funds also supports the feasibility of the accounting set forth in Interior's Historical Accounting Plan. In the early 1990s, Interior

initiated a project to reconcile tribal trust fund activity occurring over about a twenty-year period. By 1996, the General Accounting Office ("GAO") reported that Interior's effort had verified over 218,000 non-investment tribal transactions totaling $15.3 billion. See Financial Management, BIA's Tribal Trust Fund Account Reconciliation Results, General Accounting Office Report No. AIMD-96-63, at 4 & 16 (May 1996) (Defs.' Ex. 160). Though documents were not located for all the tribal transactions recorded in the ledger, GAO indicated that the Bureau of Indian Affairs ("BIA") had identified about 20,000 boxes of accounting documents and lease records. See id. at 4. Arthur Andersen, the firm that performed the tribal trust reconciliation project, was able to trace 86% of the transactions to supporting documentation. Tr., June 20, 2003, p.m., at 84:11-85:8 (D. Lasater); see Arthur Andersen Tribal Trust Reconciliation Project (Defs.' Ex. 168). Arthur Andersen could not determine positively that the remaining 14% of transactions were recorded accurately, but this does not mean that 14% of the transactions were in error. Tr., June 20, 2003, p.m., at 87:5-88:1 (D. Lasater).

165. Although Plaintiffs' witness, Mr. Duncan, has regular business dealings with people who were involved with the tribal trust reconciliation project, Mr. Duncan did not inquire about the comparability of the tribal and individual Indian records. Tr., May 30, 2003, a.m., at 6:15-8:13 (D. Duncan). In fact, there are many similarities, and the same personnel administer both using similar systems. Tr., June 20, 2003, p.m., at 84:17-24, 89:16-91:15 (D. Lasater).

(4) Historians' Conclusions

166. The professional historians retained by OHTA to assist with Interior's efforts to provide accountings to IIM account holders are firmly of the view that sufficient IIM records are available for Interior to undertake the accounting described in their Historical Accounting Plan.

167. Edward Angel, an historian with "twenty years of experience as a professional historian examining [r]ecords of the Bureau of Indian Affairs," has found that "an enormous volume of documents exists that is potentially useful to an accounting of individual Indian moneys." Expert Report of Edward Angel, at 46 (Defs.' Ex. 60); see also Tr., June 12, 2003, p.m., at 34:18-35:7, 60:1-4 (E. Angel); Tr., June 16, 2003 p.m., at 10:1-3, 31:23-32:2 (E. Angel).

168. During his professional career, Dr. Angel has reviewed records of the Bureau of Indian Affairs in Record Group 75 at the National Archives and Federal Records Centers. Expert Report of Edward Angel, at 46 (Defs.' Ex. 60). While inspecting those records, he has found "IIM ledgers; leases; audits; reports on timber, grazing, oil and gas, mining, and other natural resources on Indian lands; reports on the banking and investment of individual Indian moneys; vouchers, bills of collection, annuity and per capita payment records; and other financial documents from the nineteenth and twentieth century that could be used in an historical accounting." Id.

169. In addition to the National Archives and Federal Records Centers, Dr. Angel is aware of other repositories that hold "significant volumes of materials potentially useful to an historical accounting. Expert Report of Edward Angel, at 47 (Defs.' Ex. 60). For example, Mr. Angel has examined records held at the Office of Trust Records in Albuquerque, New Mexico, which contains more than 30,000 boxes of materials acquired from Indian agencies, Federal Records Centers, and other BIA offices. Id. Among other documents, Dr. Angel and his colleagues found "IIM ledgers; IIM posting and control records; leases; investment reports; per capita payment data; journal vouchers, bills of collections, deposit tickets and other financial records; contracts; audit reports; savings bond transactions; disbursement data; interest posting

data; royalty reports; and other documents that could be used in an historical accounting to individual Indian account holders." Id.

170. Dr. Angel has also reviewed documents at BIA regional offices and agencies, and determined that "[t]hese facilities typically contain recent financial documentation relating to activities that directly affect the income of individual Native Americans." Expert Report of Edward Angel, at 47 (Defs.' Ex. 60).

171. Alan S. Newell, the President of HRA and a professional historian with almost 30 years experience working with federal Indian records, concluded based on his experience that "[t]here is a vast quantity of relevant historic federal data on Indian resource use and IIM accounting that [is] available for use in reconciling IIM accounts." Expert Report of Alan S. Newell, at 2 (Defs.' Ex. 141); see also Tr., June 17, 2003 p.m., at 112:18-113:23 (A. Newell).

172. Mr. Newell also concluded that Interior's Historical Accounting Plan "represents a reasonable and prudent approach to utilizing available federal documents in an effort to reconcile IIM accounts." Expert Report of Alan S. Newell, at 2 (Defs.' Ex. 141); see also Tr., June 18, 2003, a.m., at 42:17-44:13 (A. Newell). In contrast, "Plaintiffs' dismissal of the extant federal data, particularly that retained by the Bureau of Indian Affairs, is inappropriate methodology." Expert Report of Alan S. Newell, at 2.

(5) Treasury Records

173. The Department of the Treasury's ("Treasury's") database for retrieving Treasury checks on a going-forward basis became operational in April 2000 and continues to operate very successfully. Tr., May 13, 2003, a.m. at 8:24-9:1 (D. Hammond).

174. Treasury has the capability of doing broad searches of the vast range of Treasury securities. To accomplish that, however, such searches must be put into the context of time period, nature of security ownership, and nature of the record being looked for. Tr., May 13, 2003, a.m. at 13:8-12 (D. Hammond).

175. Treasury prepared a very comprehensive inventory of 14X6039 records. Tr., May 13, 2003, a.m. at 63:12 (D. Hammond).

176. The primary Treasury information relevant to Interior's Historical Accounting Plan is disbursement information and summary level balance information for particular time periods. Tr., May 13, 2003, a.m. at 78:2-5 (D. Hammond).

177. During the Phase 1 trial, Treasury was operating under a records retention schedule that required Treasury to maintain original checks for six years, seven months. After that, they were destroyed. Tr., May 13, 2003, a.m. at 89:13-18 (D. Hammond).

178. Digital images of checks are available for certain years. Tr., May 13, 2003, a.m. at 109:11-12 (D. Hammond).

179. Treasury has detailed information on securities records for several years. Tr., May 13, 2003, p.m. at 8:9-12 (D. Hammond).

180. Treasury has verified the accuracy of certain aspects of the inventory it has conducted of documents that it believes are necessary to support an accounting. Tr., May 13, 2003, p.m. at 15:25-16:1 (D. Hammond).

181. Treasury's summary level information will support the accounting balances reconstructed by Interior. Tr., May 13, 2003, p.m. at 20:14-17 (D. Hammond).

182. For the most part, Treasury has backup systems able to address inadvertent document destructions. Tr., May 13, 2003, p.m. at 68:17-20 (D. Hammond).

C. Interior Defendants' Fiduciary Obligations Compliance Plan

183. Interior Defendants' Fiduciary Obligations Compliance Plan addresses the fiduciary obligations at issue in this case.

184. On September 17, 2002, the Court ordered Interior to file "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." Cobell v. Norton, 226 F. Supp. 2d 1, 148 (D.D.C. 2002), vacated in part by No. 02-5374, 2003 WL 21673009 (D.C. Cir. July 18, 2003). On January 6, 2003, in accordance with this Court's Order of September 17, 2002, Interior Defendants filed the Fiduciary Obligations Compliance Plan. Interior's Plan (Defs.' Ex. 1); Interagency Procedures Handbook (Defs.' Ex. 2).[13]

185. The fiduciary obligations at issue in this case and addressed in the Fiduciary Obligations Compliance Plan are the "fiduciary duties declared by the Court in December of 1999 and listed in the 1994 Act." Cobell v. Norton, 226 F. Supp. 2d at 135. The fiduciary duty declared by the Court in December of 1999 is the duty under the 1994 Act to "provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d at 58; see 25 U.S.C.A. § 4011(a), (b).[14]

---

[13] The Handbook was attached as Exhibit 1 to the Fiduciary Obligations Compliance Plan, as filed with the Court on January 6, 2003.

[14] The Court declared five other statutory duties, but the Court of Appeals later held that they were "obligations that do not exist," and directed the Court to "amend its opinion on remand" to make clear the distinction between judicially enforceable duties and steps that might appropriately be taken to facilitate an accounting. Cobell v. Norton, 240 F.3d 1081, 1105-06

186. The "fiduciary duties . . . listed in the 1994 Act," 226 F. Supp. 2d at 135, as identified by the Court in 1999, are the duties to: 1) account for the daily and annual balance of all funds held in trust by the United States for the benefit of individual Indians; 2) provide all account holders with a periodic statement of performance; 3) perform an annual audit of all funds held in trust; 4) provide adequate systems for accounting and reporting trust fund balances; 5) provide adequate controls over receipts and disbursements; 6) provide periodic, timely reconciliations sufficient to assure accuracy of accounts; 7) determine accurate cash balances; 8) establish written policies and procedures for trust fund management and accounting; and 9) provide adequate staffing, supervision and training for trust fund management and accounting. See Cobell v. Babbitt, 91 F. Supp. 2d at 39-40; 25 U.S.C. §§ 162a(d)(1)-(7), 4011.

187. In compliance with the Court's September 17, 2002 Order, Interior Defendants' Fiduciary Obligations Compliance Plan addresses each of these "fiduciary obligations." Interior Defendants were not ordered to address in the plan filed on January 6, 2003 – and did not do so – any other fiduciary obligations it may have.

1. Interior's Initial Efforts To Achieve Compliance With The 1994 Act

188. The process leading up to Interior's Fiduciary Obligations Compliance Plan included the Strategic Plan to Implement the Reforms Required by the American Indian Trust Fund Reform Act of 1994 ("Strategic Plan"), as supported by the Needs Analysis Project Final Report from MACRO International ("MACRO"), the High-Level Implementation Plan ("HLIP"), and the Revised HLIP.

(D.C. Cir. 2001).

a. The Strategic Plan/MACRO Study

189. The 1994 Act requires the Special Trustee to develop a "comprehensive strategic plan" for trust management reform. 25 U.S.C. § 4043(a)(1) (2001). The first Special Trustee, Paul Homan, submitted his Strategic Plan to the Secretary and Congress in April 1997. "Among other things, the plan called for the reorganization of Indian trust fund management and the centralization of record-keeping, changes that may have required legislative authorization." Cobell v. Norton, 240 F.3d 1081, 1091 (D.C. Cir. 2001).

190. The MACRO study was done to support the Strategic Plan, which included a provision to remove the entire trust from the Department of the Interior. The MACRO approach was similar to, but not as in-depth as, the current As-Is analysis conducted by Interior. Tr., June 25, 2003, p.m., at 37:23-38:20 (R. Swimmer); Tr., June 27, 2003, a.m., at 75:11-76:8 (R. Swimmer). The MACRO study involved field interviews and examination of trust processes. MACRO study at i (Pls.' Ex. 290); Tr., June 27, 2003, a.m., at 53:9-55:22 (R. Swimmer). The MACRO study concluded that major problems with the existing trust system included a lack of accounting and control of land, and some of those problems still exist. MACRO study at ii (Pls.' Ex. 290); Tr., June 27, 2003, a.m., at 55:23-57:3 (R. Swimmer).

191. The MACRO study recommended a single trust organization with management control over resources and financial assets, as well as implementation and operation of a new IT infrastructure, both of which are still needed today. Tr., June 27, 2003, a.m., at 57:19-25 (R. Swimmer).

b. HLIP/Revised HLIP

192. Interior Secretary Babbitt's plan, HLIP, issued in July 1998, implemented portions of the Strategic Plan. It identified specific subprojects, or tasks, that were to be completed in reforming trust management practices. HLIP was modified by Revised HLIP, which was issued on February 29, 2000.

193. When Mr. Swimmer arrived, concerns existed about the HLIP process, which consisted of eleven specific tasks, and the possibility that each of the individual tasks could be completed without accomplishing trust reform. For example, the probate backlog could be cleared, but it would reoccur because the business processes giving rise to the backlog hadn't been reformed. Tr., June 25, 2003, p.m., at 22:24-23:19 (R. Swimmer). The HLIP did not fully consider the interconnection between projects and the continuity of the reform process. Tr., July 1, 2003, p.m., at 77:11-79:24 (R. Swimmer). The HLIP also did not take into account the effects of fractionation, which makes the trust almost unmanageable. Tr., June 25, 2003, p.m., at 23:23-24:6 (R. Swimmer).

194. The HLIP was a reasonable plan and did accomplish some notable reform efforts, including re-engineering of MMS; successful implementation of the Trust 3000 system, which Interior calls the Trust Fund Accounting System ("TFAS"); work on trust systems architecture, and development of trust policies and procedures. Tr., June 25, 2003, p.m., at 25:5-26:1 (R. Swimmer); Tr., May 12, 2003, a.m., at 40:5-15 (R. Fitzgerald).

195. Everything described in the HLIP is included in the business processes or goals and objectives of the Comprehensive Trust Management Plan, Tr., June 25, 2003, p.m., at 31:20-32:10; 39:1-5 (R. Swimmer), and can be traced from the HLIP to the Comprehensive Trust

Management Plan. "Crosswalk" between HLIP and Comprehensive Trust Management Plan (Defs.' Ex. 316); Tr., July 1, 2003, p.m., at 74:9-90:20 (R. Swimmer); Tr., July 2, 2003, a.m., at 3:14-4:7, 5:19-10:7 (R. Swimmer).

196. As Director of the Office of Indian Trust Transition, Mr. Swimmer was also responsible for preparing the Quarterly Reports submitted to the Court, beginning with the Eighth Report. Tr., June 25, 2003, p.m., at 21:23-22:3 (R. Swimmer). Mr. Swimmer revised the Quarterly Report drafting process by designating program managers who have specific responsibility for a particular section of the report based on their involvement in the trust reform process and requiring each program manager to draft, substantiate, discuss, and participate in finalizing his or her section of the quarterly report. Tr., June 25, 2003, p.m., at 26:2-27:15 (R. Swimmer).

197. As Interior began to move to a more comprehensive approach to trust reform, it expanded the information contained in the Quarterly Reports beyond simply reporting on the status of HLIP tasks. Tr., June 25, 2003, p.m., at 24:12-25: 4 (R. Swimmer).

2. Development of Interior's Fiduciary Obligations Compliance Plan

198. Interior's Fiduciary Obligations Compliance Plan, which focuses on Interior's individual Indian trust fund accounting obligations under the 1994 Act, is part of a much larger effort, which is embodied in Interior's Comprehensive Trust Management Plan.

a. Comprehensive Trust Management Plan

199. In January 2002, the Secretary asked Mr. Swimmer, who was then Director of the Office of Indian Trust Transition, to work on putting together a comprehensive trust management plan that would not only incorporate HLIP issues but also include a broader array of trust-related

initiatives. Eighth Quarterly Report at 50 (Defs.' Ex. 43); Tr., June 25, 2003, p.m., at 24:12-25:4 (R. Swimmer); Tr., June 26, 2003, a.m., at 62:6-13 (R. Swimmer); Tr., July 2, 2003, a.m., at 40:1- 41:18 (R. Swimmer). The Comprehensive Trust Management Plan was finalized in March 2003. Tr., June 25, 2003, p.m., at 30:15-18 (R. Swimmer).

200. In late 2001 and early 2002, Electronic Data Systems Corporation ("EDS"), a consultant hired by Interior to give an independent assessment of various trust management activities, issued several reports evaluating Interior's practices. See DOI Trust Reform: Trust Reform – Final Report and Roadmap, January 24, 2002 (Defs.' Ex. 22); DOI Trust Reform: Trust Reform, Observations and Recommendations, December 6, 2001 (Defs.' Ex. 23); DOI Trust Reform: Interim Report and Roadmap for TAAMS and BIA Data Cleanup, November 12, 2001 (Defs.' Ex. 24); DOI Trust Reform: TAAMS/BIA Data Cleanup Recommendations: "For Comments" Report, October 31, 2001 (Defs.' Ex. 25); DOI Trust Reform: TAAMS/BIA Data Cleanup Observations, October 10, 2001 (Defs.' Ex. 26). Building upon the recommendations from the EDS reports, the Comprehensive Trust Management Plan was developed beginning in early 2002 by a group that initially consisted of people in BIA and OST, and later expanded to include "all of the agencies of Interior that deal with any manner of the trust," including MMS, OHTA, and others. Tr., June 25, 2003, p.m., at 29:14-25 (R. Swimmer).

201. The initial work on the Comprehensive Trust Management Plan developed goals and objectives for trust management activities; these goals and objectives were shared with a tribal subcommittee, which generally agreed with them. Tr., June 25, 2003, p.m., at 30:5-14 (R. Swimmer); Tr., June 30, 2003, a.m., at 27:18-28:16 (R. Swimmer). The Comprehensive Trust Management Plan was designed to satisfy the 1994 Act requirement for a strategic plan and also

provide a plan to guide trust reform and trust management in the future. Tr., June 25, 2003, p.m., at 30:1-4 (R. Swimmer).

202. The Comprehensive Trust Management Plan was not submitted on January 6, 2003, because, in light of the September 17 Order, Interior broke off from its Comprehensive Trust Management Plan efforts (which were well underway) to complete that portion of overall trust reform dealing with individual Indian trust funds and trust fund management, which is reflected in the Fiduciary Obligations Compliance Plan. Tr., June 25, 2003, p.m., at 48:9-19 (R. Swimmer).

(1) Reorganization is Intended to Focus and Consolidate Interior's Trust Operations

203. As work progressed on the Comprehensive Trust Management Plan, it became apparent that the goals and objectives could not be attained without a different organizational structure to resolve the existing problem that each office did its own thing; this reorganization is "an integral part" of the Comprehensive Trust Management Plan. Tr., June 25, 2003, p.m., at 30:19-31:10 (R. Swimmer). Prior reorganization attempts had not been acceptable to the tribes or Congress. Tr., June 25, 2003, p.m., at 30:19-24 (R. Swimmer).

204. The As-Is study was conducted by extensive discussions throughout Interior and the twelve BIA regions with subject matter experts, tribal leaders, and others. Fiduciary Obligations Compliance Plan at 7 (Defs.' Ex. 1), Reorganization Materials Provided to Tribal Task Force Members at 1 (Defs.' Ex. 3); Tr., June 27, 2003, a.m., at 43:22-48:19 (R. Swimmer). During the consultation process, individuals and tribes had the opportunity to comment on the reorganization. Tr., July 1, 2003, p.m., at 60:12-63:12 (R. Swimmer). Under the reorganization,

BIA and OST would work closely to administer fiduciary activities for the Indian trust, individual and tribal. Tr., June 25, 2003, p.m., at 35:15-25 (R. Swimmer).

205. The reorganization will result in a structure similar to that in a private bank in which the trust and non-trust activities are segregated so that it is possible to focus efforts on fiduciary activities. Tr., June 25, 2003, p.m., at 36:9-19 (R. Swimmer).

(a) BIA – Focus on Trust Duties

206. Under the Comprehensive Trust Management Plan, all BIA activities relating to the trust would be segregated under line authority, so that BIA employees who have trust responsibilities could focus their efforts on trust duties rather than trust and other responsibilities. This reorganization is intended to change the culture from treating trust as "a program activity" to treating it as "a fiduciary duty activity." Tr., June 25, 2003, p.m., at 34:24-35:14, 36:1-19 (R. Swimmer); Tr., June 26, 2003, a.m., at 76:10-17 (R. Swimmer).

207. Under the Comprehensive Trust Management Plan, BIA would have deputy superintendents for trust and deputy regional directors for trust activities. Tr., June 25, 2003, p.m., at 35:17-20 (R. Swimmer). Numerous people at Interior are committed to resolving the issue of the adequacy of BIA management so that the trust reform effort will be successfully implemented. Tr., May 12, 2003, a.m., at 18:17-19:7 (R. Fitzgerald).

(b) OST – Statutory Oversight Duties Plus Financial Asset Management

208. Under the Comprehensive Trust Management Plan, the Office of the Special Trustee ("OST") would increase its oversight activities and focus on the trust beneficiaries by

having trust administrators and trust officers working in the field with their BIA counterparts. Tr., June 25, 2003, p.m., at 35:15-25 (R. Swimmer).

209. As part of reorganization, an Audit and Review Branch has been established within OST to assess internal controls at the agencies as well as compliance with policies, procedures, and regulations. Tr., June 30, 2003, a.m., at 54:5-56:1 (R. Swimmer); Tr., June 30, 2003, p.m., at 52:25-55:5 (R. Swimmer).

(c) Beneficiary-Oriented Focus – Local, Regional Offices to be Staffed with OST/BIA Trust Personnel

210. The Comprehensive Trust Management Plan is intended to change the way the trust operates by creating the type of relationship with regard to beneficiaries that is seen in private trusts, in part by creating a whole new division of "trust officers" under the direction of the Special Trustee who would be located at agencies and would deal directly with beneficiaries. Defs.' Ex. 27 at 2.5.1; Tr., June 25, 2003, p.m., at 32:24-34:23 (R. Swimmer).

211. Trust reform will result in increased levels of staffing. Tr., June 26, 2003, a.m., at 68:9-14 (R. Swimmer).

(2) Reengineering Trust Business Processes – As-Is and To-Be Analyses

212. The trust reform process outlined in the Comprehensive Trust Management Plan requires movement from where Interior is now with regard to trust processes – the "As-Is" component – to identifying how trust processes and administration will be re-engineered to permit effective trust administration – the "To-Be" model. Tr., June 25, 2003, p.m., at 31:11-19 (R. Swimmer).

213. Each of the core trust processes is under the control of a "process sponsor" who is responsible for thoroughly understanding the process and its variations and for developing the "To-Be" version of the process and who will be held accountable. Tr., June 25, 2003, p.m., at 44:25-47:9 (R. Swimmer).

(a) As-Is Analysis is Completed

214. The As-Is study, Defs.' Ex. 18, is "a very comprehensive and exacting study," conducted in conjunction with EDS, of eight trust business processes – beneficiary services, probate, title, appraisal, cadastral survey, surface asset management, subsurface asset management, and accounting management (individual assets, tribal assets, and investments) – to identify how the processes are currently being done and the reasons for variances across 85 agencies and field offices and twelve regional offices within BIA as well as MMS and BLM. Comprehensive Trust Management Plan at 6.2 (Defs.' Ex. 27); Tr., June 25, 2003, p.m., at 36:20-37:22 (R. Swimmer). It was completed by March 2003. Tr., June 27, 2003, a.m., at 79:25-80:5 (R. Swimmer).

(b) To-Be Analysis is Underway

215. The To-Be portion of the Comprehensive Trust Management Plan will take the core business processes identified in the As-Is study and, with the assistance of Interior's knowledge and experience across the country as well as that of consultants, identify the best possible business practices and develop a model for how the trust business should be run, including any exceptions necessary because of particular factors such as local or tribal law. Comprehensive Trust Management Plan at 6-4 (Defs.' Ex. 27); Tr., June 25, 2003, p.m., at 43:6-44:20 (R. Swimmer).

216. The To–Be process will result in the development of benchmarks and time lines by the process managers for reforming the business processes identified in the As-Is report. Tr., June 25, 2003, p.m., at 38:21-39:24 (R. Swimmer).

217. The To-Be process is expected to be completed in Spring 2004, and implemented by the end of 2004 or early 2005, but the To-Be models of the core trust business processes are already underway and will be introduced in pilot agencies before then. Tr., June 25, 2003, p.m., at 47:11-48:8 (R. Swimmer); Tr., June 27, 2003, a.m., at 80:6-81:8 (R. Swimmer).

(3) Ongoing Monitoring/Improvement of Trust Operations

218. The Comprehensive Trust Management Plan, unlike HLIP, provides not only for accomplishment of tasks but also for processes that will prevent problems from recurring. Tr., June 25, 2003, p.m., at 41:22-42:16 (R. Swimmer).

219. Trust reform is an ongoing process that will involve continuous improvement and further development of the business practice models. Tr., June 27, 2003, a.m., at 82:9-83:6 (R. Swimmer); Comprehensive Trust Management Plan at 11 (Defs.' Ex. 27); Tr., June 30, 2003, a.m., at 35:1-36:11, 37:4-38:2 (R. Swimmer).

220. Interior recognizes that accomplishing trust reform will require a significant change in Interior's culture, and the Comprehensive Trust Management Plan reflects Interior's commitment to making the necessary changes to permit trust processes to be carried out in a fundamentally different way throughout all offices and bureaus involved in trust operations. Comprehensive Trust Management Plan at 6-5 (Defs.' Ex. 27); Tr., June 25, 2003, p.m., at 90:4-92:17 (R. Swimmer); Tr., June 26, 2003, a.m., at 76:10-17(R. Swimmer).

b. Relationship Between Comprehensive Trust Management Plan and Fiduciary Obligations Compliance Plan

221. The major differences between the Comprehensive Trust Management Plan and the Fiduciary Obligations Compliance Plan are that the Comprehensive Trust Management Plan reflects that Interior is a trustee not only for the individual Indian trust but also for the tribal trust and that the Comprehensive Trust Management Plan reflects trust reform initiatives relating to land and natural resources management, not just funds management. Tr., July 2, 2003, a.m., at 10:8-11:8 (R. Swimmer).

222. The January 6, 2003 Fiduciary Obligations Compliance Plan uses that portion of the Comprehensive Trust Management Plan that "deals with funds, with just the funds accounting – the collection of the funds, the investment, disbursement of the funds." Tr., June 25, 2003, p.m., at 32:11-19 (R. Swimmer).

223. It is "a condensed plan dealing with the funds of the trust," Tr., June 26, 2003, a.m., at 62:14-19 (R. Swimmer), which responds to the Court's September 17, 2002 Order requiring Interior's plan for trust funds management and various standards related to that. Tr., June 30, 2003, a.m., at 4:4-5:13 (R. Swimmer).

224. The Comprehensive Trust Management Plan contains "virtually everything" that is in the Fiduciary Obligations Compliance Plan, together with other components of the overall trust reform plan that relate to tribal trust issues and natural resource management and the linkage between different plan components. Tr., July 1, 2003, p.m., at 63:16-65:4 (R. Swimmer).

3. Key Components of the Fiduciary Obligations Compliance Plan

225. The Fiduciary Obligations Compliance Plan is a stand-alone document regarding trust funds management – from identifying ownership through collection, investment, and distribution of funds. Interior's Plan (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 48:23-49:9 (R. Swimmer).

226. The Fiduciary Obligations Compliance Plan details the processes underway to reform Interior's trust funds management operations. See Interior's Plan at 17-100 (Defs.' Ex. 1). Interior's trust reform is guided by "applicable federal statutes, Interior regulations, the Departmental Manual, Office of Management and Budget (OMB) circulars, Department of Treasury guidelines, generally accepted accounting and auditing standards, its employees' and consultants' experience and expertise, as well as other sources of relevant fiduciary practices." Id. at 15.

227. Interior's Fiduciary Obligations Compliance Plan, as part of the comprehensive trust reform effort, has two key components. First, Interior will restructure and consolidate trust management and administration within the BIA and the OST, with BIA concentrating on managing the land and natural resources held in trust and OST continuing to exercise its statutory trust oversight functions while assuming greater responsibility for financial management, receipt, and disbursement of trust funds and records management. Interior's Plan at 5, 44-77, 81-82 (Defs.' Ex. 1); see also, e.g., Eleventh Quarterly Report at 29-30 (Defs.' Ex. 45); Twelfth Quarterly Report at 29 (Defs.' Ex. 46); Thirteenth Quarterly Report at 39 (Defs.' Ex. 47).

228. Second, now that the As-Is analysis has been completed, Interior is developing the To-Be model for conducting all future trust operations by adopting the existing best practices and

re-engineering the ones that are not. Interior's Plan at 9, 36-43 (Defs.' Ex. 1); see also, e.g., Eleventh Quarterly Report at 3, 6, 29-30, 33-38 (Defs.' Ex. 45); Twelfth Quarterly Report at 10-11, 47-48 (Defs.' Ex. 46); Thirteenth Quarterly Report at 43-48 (Defs.' Ex. 47).

229. It is important to note that significant progress has already been made on a number of Interior's trust reform initiatives. For example, Interior is already substantially in compliance with one of the most significant components of any trust operation – one that directly relates to the accounting obligation at issue in this lawsuit. Interior currently can reliably and predictably account for current funds received into and disbursed from the TFAS, a state-of-the-art trust accounting and investment system that is widely used in private trust operations, and that is subject to regular third-party trust audits. Interior's Plan at 44-62 (Defs.' Ex. 1); see also, e.g., Eleventh Quarterly Report at 64-65 (Defs.' Ex. 45); Twelfth Quarterly Report at 62 (Defs.' Ex. 46); Thirteenth Quarterly Report at 60 (Defs.' Ex. 47). As Interior's Fiduciary Obligations Compliance Plan notes, however, although TFAS can handle and account for all funds that flow in and that are disbursed, it is only as good as the information that flows into it, and it is the ongoing process of identifying and collecting IIM revenues, verifying account and beneficiary data, transmitting information regarding receipts and disbursements, and improving related trust processes that is the focus of Interior's Comprehensive Trust Management Plan. Interior's Compliance Plan at 3, 44, 46, 53 (Defs.' Ex. 1).

a. Current Accounting/TFAS

230. Under the Fiduciary Obligations Compliance Plan, "Current Accounting" refers to that portion of the process involving TFAS, where the funds have already been collected and deposited, and BIA has provided documentation to OST regarding which specific accounts the

funds belong in and to whom they should be disbursed. Interior's Plan at 44 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 75:2-25 (R. Swimmer).

231. With the exception of any adjustments which may be needed to TFAS opening balances as a result of the historical accounting, the current accounting system is in balance. Tr., June 25, 2003, p.m., at 76:1-5 (R. Swimmer).

232. Interior is currently providing quarterly reports to beneficiaries, but they do not yet identify the underlying asset from which the income arises; Interior's trust reform process includes development of an automated process for verifying and reporting the underlying assets. Fiduciary Obligations Compliance Plan at 44 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 76:6-77:20 (R. Swimmer).

233. TFAS accurately maintains information. Tr., May 2, 2003, p.m., at 28:16-18 (P. Homan). TFAS is a good system, but its auditors have not issued a "clean" opinion because they are uncomfortable with the information flowing into the system. Tr., May 8, 2003, p.m., at 36:22 -37:3 (R. Fitzgerald).

b. Current Ownership, Collection, Deposit and Transfer

234. Under the Fiduciary Obligations Compliance Plan, Interior will identify the current ownership of trust property and of income from that property and ensure that the correct amount of funds are collected, transferred to Treasury, and deposited into the proper account. Interior's Plan at 17 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 55:20-57:7 (R. Swimmer).

235. The data quality and integrity initiative includes creating an accurate and complete OST file for each IIM account holder and making sure that all data relating to IIM account holders are consistent and accessible for all applications throughout Interior ("data cleanup").

Tr., June 25, 2003, p.m., at 62:15-64:6 (R. Swimmer); Tr., June 30, 2003, p.m., at 59:4-60:19 (R. Swimmer); Tr., July 1, 2003, p.m., at 79:25-81:22 (R. Swimmer); see also "Crosswalk" Between HLIP and the Comprehensive Trust Management Plan at 3 (Defs.' Ex. 316).

236. Data cleanup, beginning with the HLIP, is intended to eliminate duplicate accounts, standardize account-holder names, and generally consolidate account-holder information. Tr., June 26, 2003, p.m., at 36:3-38:9 (R. Swimmer). The status of data cleanup has been reported in the ninth through thirteenth quarterly reports.[15] Quarterly Reports, Nine to Thirteen (Defs.' Exs. 43, 44, 45, 46, 47); Tr., July 2, 2003, a.m., at 18:3-39:16, 41:19-44:14 (R. Swimmer).

237. Interior, with the assistance of outside contractors, developed critical data elements that needed to be cleaned up and maintained in that cleaned-up state. Tenth Quarterly Report at 45 (Defs.' Ex. 44); Eleventh Quarterly Report at 47 (Defs.' Ex. 45); Tr., July 2, 2003, a.m., at 21:10-25:14; 41:19-44:14 (R. Swimmer). Data cleanup efforts are now focused on pilot agencies until Interior's new IT architecture is in place, as reported in the Thirteenth Quarterly Report (Defs. Ex. 47). Tr., July 1, 2003, p.m., at 82:5-84:25 (R. Swimmer); Tr., July 2, 2003, a.m., at 24:23-39:7, 41:19-44:14 (R. Swimmer).

(1) Title Systems

238. Interior's multiple systems for recording title do not preclude obtaining the necessary title information. Tr., June 25, 2003, p.m., at 57:8-58:14 (R. Swimmer); Tr., June 26, 2003, p.m., at 43:11-23, 52:3-6 (R. Swimmer). Because the two Interior land-related systems

[15] It has also been reported in the Fourteenth Quarterly Report, filed with the Court on August 1, 2003.

(LRIS and IRMS) operated independently, the information they contain is not necessarily consistent and the title system is not sufficient given today's technology. Tr., June 26, 2003, p.m., at 38:11-39:12, 43:1-23 (R. Swimmer).

239. Under the Comprehensive Trust Management Plan, Interior will implement a single title recording system, based on the title module used with the TAAMS system, to ensure consistency of information across regions. Tr., June 25, 2003, p.m., at 58:15-60:6 (R. Swimmer); Tr., June 26, 2003, p.m., at 43:16-23, 51:25-52:12 (R. Swimmer).

240. Although there may be inaccuracies, and the systems currently lack internal controls, that does not mean that all of the title data are inaccurate. Tr., June 26, 2003, p.m., at 43:24-44:15, 45:8-46:4, 46:14-23 (R. Swimmer).

241. BIA is the source of title records for Indian lands, and BIA's title reports are accepted and relied on by third parties. Tr., June 26, 2003, p.m., at 49:3-51:9 (R. Swimmer).

242. When the To-Be model is implemented, Interior expects that short-term leases would be recorded on an automated database at the agency, whereas documents affecting title would be recorded in a formal title system in the Land Title Record Office, similar to the way such documents are handled in a county recorder's system. Tr., June 30, 2003, p.m., at 66:25-71:15 (R. Swimmer).

(2) Collections/Accounts Receivable

243. Collections are currently being handled in a number of different ways throughout Interior, but the necessary collections information can still be obtained. Tr., June 25, 2003, p.m., at 60:7-61:6 (R. Swimmer).

244. Even though it is improper not to have a system to account for monies that are due, the absence of an accounts receivable system in the past did not necessarily increase the risk of non-collection; implementation of an accounts receivable system will allow management to monitor collection more closely. Tr., June 26, 2003, a.m., at 78:15-81:23 (R. Swimmer).

245. Under the Comprehensive Trust Management Plan, Interior will implement a consistent collections and receivables system across regions. Tr., June 25, 2003, p.m., at 60:19-61:9 (R. Swimmer). As an interim step, Interior will implement a lockbox system so that payments will be deposited directly. Tr., June 25, 2003, p.m., at 61:10-21 (R. Swimmer).

246. Interior is examining the different practices that would need to be accommodated in a standardized accounts receivable system, and is talking with the contractor who already operates TFAS to determine whether another module could be incorporated into that system. Tr., June 30, 2003, a.m., at 49:14-53:18 (R. Swimmer).

247. OST has asked Interior's IG to take over the audit function and to expand it beyond an audit of TFAS accounting to include collection of revenues and review of internal controls relating to collections. Audit of TFAS (Defs.' Ex. 315); Tr., July 1, 2003, p.m., at 72:14-74:2 (R. Swimmer); Tr., July 2, 2003, p.m., at 43:12-45:12 (R. Swimmer).

248. Interior has a high level of confidence in TFAS (OTFM's Trust 3000 system) with regard to the accuracy of transactions and daily and annual balances once cash is received and processed into the system. Interior is working to resolve concerns regarding the front-end processes of collecting and processing cash before the transaction makes it into TFAS, and expects to expand the current TFAS audit to include the entire cash collection process. Tr., June 4, 2003, p.m., at 91:23-94:1 (J. Cason).

c. Universal Functions

249. Interior's trust reform process includes "universal support functions" – workforce planning (training, staffing, policies and procedures), information technology, and records management – which are necessary to all of the trust business processes. Fiduciary Obligations Compliance Plan at 78 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 81:23-83:10 (R. Swimmer). These tasks have been carried over from the HLIP and developed further in connection with the Comprehensive Trust Management Plan. "Crosswalk" Between HLIP and the Comprehensive Trust Management Plan (Defs.' Ex. 316); Tr., July 2, 2003, a.m., at 3:14-4:7, 5:19-8:3 (R. Swimmer).

250. The status of IT security is reported in Interior's Quarterly Reports, and Mr. Cason is involved in the reporting process. Tr., June 4, 2003, a.m., at 34:22-39:22 (J. Cason). Interior has had an enterprise architect on staff and working on trust-related IT systems architecture for the last nine to twelve months. Tr., June 4, 2003, a.m., at 45:16-46:23 (J. Cason).

251. Records management has implications for both historical accounting and trust reform – the goal is not just to get the records for historical accounting purposes, but also to do a better job creating and managing records so that they can be retrieved more easily in the future. Tr., June 4, 2003, a.m., at 39:23-40:16 (J. Cason).

d. Fractionation

252. Fractionation makes it increasingly difficult and costly to administer increasing numbers of small accounts with very little activity; no private trust would do so. Tr., June 25, 2003, p.m., at 83:22-84:15, 86:1-87:7 (R. Swimmer); Tr., June 26, 2003, a.m., at 75:19-76:9 (R.

Swimmer). Many of the IIM accounts are so small as to be meaningless even to the beneficiaries. Tr., May 8, 2003, p.m., at 69:12-16 (R. Fitzgerald).

253. Fractionation is an issue that Congress needs to resolve, and more work is needed; under the Indian Land Consolidation Act project as currently funded, for example, the rate of fractionation still results in fractionated interests accumulating more rapidly than Interior can arrange for them to be purchased. Tr., June 25, 2003, p.m., at 87:8-89:14 (R. Swimmer).

254. Fractionation will ultimately have to be resolved through some form of buyout in which small accounts can be closed and small interests in property acquired. Tr., June 25, 2003, p.m., at 88:13-89:14 (R. Swimmer).

255. Fractionation issues have been reported to the Court in quarterly reports beginning with the Eighth Report to the Court. Tr., June 25, 2003, p.m., at 89:23-90:3 (R. Swimmer).

4. IIM Account Administration Standards are Described in the Fiduciary Obligations Compliance Plan and the Comprehensive Trust Management Plan

256. This Court ordered Interior Defendants to describe in their Plan "the standards by which they intend to administer the IIM trust accounts . . . ." Cobell v. Norton, 226 F. Supp.2d 1, 162 (D.D.C. 2002) (emphasis added). Accordingly, Interior Defendants' Fiduciary Obligations Compliance Plan describes standards governing IIM account administration without specifically addressing related matters, such as trust asset management. The standards governing the broader range of Indian trust activities are set forth in the Comprehensive Trust Management Plan and the As-Is study, which were offered as trial 1.5 exhibits to provide context for the development and substance of the Fiduciary Obligations Compliance Plan.

257. In articulating the standards this Court required to be addressed, the Fiduciary Obligations Compliance Plan starts with the 1994 Act itself. Interior's Plan at 13-15 (Defs.' Ex. 1). However, the applicable standards are not limited to the 1994 Act; they include various others statutes[16] that relate to trust funds accounting activities. Accordingly, the Plan describes these standards along with its discussions of the corresponding activities. See id. at 25-26 (funds collection, deposit, and transfer processes), 48 (accounting for and reporting trust fund balances), 52-53 (controls over receipts and disbursements), 59-60 (annual audits), 64-68 (records management), 79-80 (staffing and workforce planning), 86-87 (computer and business systems architecture), 93-94 (electronic records security) (Defs.' Ex. 1).

258. In addition to specific statutory and regulatory requirements, the Fiduciary Obligations Compliance Plan incorporates "other sources of relevant fiduciary practices" and the Secretary's trust principles. Interior's Plan at 15, 48 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 51:1-52:9 (R. Swimmer); Tr., June 30, 2003, a.m., at 58:1-7, 65:22-66:14 (R. Swimmer). The Secretary's trust principles were first articulated in a Secretarial Order, Defs.' Ex. 314, and were subsequently incorporated into the Departmental Manual at 303 DM 2 (Defs.' Ex. 28**),** Tr., July 1, 2003, p.m., at 66:25-68:2 (R. Swimmer).

259. Richard Fitzgerald, whom Plaintiffs offered as an expert witness on trust standards, Tr., May 8, 2003, p.m., at 23:9, participated in drafting some of the provisions regarding standards as set forth in the Fiduciary Obligations Compliance Plan. Tr., May 8, 2003, p.m., at 47:4-18. He believes that, when read in conjunction with the Secretary's trust principles

---

[16] Use of "statutes" herein in connection with a description of standards is not intended to exclude, to the extent they apply, other sources of guidance and direction, such as treaties, court orders, and regulations.

and other Department publications, the Fiduciary Obligations Compliance Plan allows Interior to fulfill applicable common-law trust duties, such as the duty of loyalty. Tr., May 12, 2003, a.m., at 8:19-10:17. Mr. Fitzgerald, who has been employed in the Office of the Special Trustee since December 1996, testified that, through Interior's trust training program, there is a growing sense among Interior's work force that the Indian trust, like every trust, is unique to its circumstances but also has some universal guiding principles. Tr., May 8, 2003, p.m., at 65:6-24. However, he also testified that the Secretary should look first to the statutory responsibilities applicable to the administration of the trust. Tr., May 8, 2003, p.m., at 60:5-8.

260. In addition to describing the IIM trust funds accounting standards required by the Court's September 17, 2002 Order, Interior has identified specific statutory and regulatory requirements applicable to the broader range of activities that encompass management of the Indian trust. As noted above, these standards are set forth in detail in the Comprehensive Trust Management Plan and the As-Is study. See Comprehensive Trust Management Plan at 22-23, 3-29 – 3-31 (Table 3-2), Appendix C (Defs.' Ex. 27); As-Is Trust Business Model Report at Appendix F (Defs.' Ex. 18); Tr., June 25, 2003, p.m., at 52:10-54:10 (R. Swimmer); Tr., June 26, 2003, p.m., at 63:9-25 (R. Swimmer); Tr., June 30, 2003, a.m., at 56:16-24, 65:11-21, 70:14-71:5 (R. Swimmer).

5. Feasibility of Interior's Trust Reform Efforts

261. Plaintiffs' own expert witness testified that Interior's Comprehensive Trust Management Plan is a reasonable plan if it can be implemented. Once it is implemented, as with any plan, weak points can be identified, and good management will address those weak points

and bring about the necessary change, Tr., May 8, 2003, p.m., at 41:9-19; 43:20-23 (R. Fitzgerald).

262. Plaintiffs' expert also testified that Interior's Fiduciary Obligations Compliance Plan is a reasonable plan to carry out the Department's fiduciary duties if the plan can be implemented. Tr., May 12, 2003, a.m., at 17:5-13 (R. Fitzgerald).

263. OTFM leaders have a very well developed sense of the responsibilities of a trustee. Tr., May 12, 2003, a.m., at 35:8-15 (R. Fitzgerald).

264. Instead of the TAAMS experience, in which Interior looked for a quick fix and tried to conform a new IT system to the existing business processes within different offices and ended up "los[ing] control of the program," the Comprehensive Trust Management Plan is based on a careful analysis, through the As-Is and To-Be processes, before implementing trust reform. Tr., June 25, 2003, p.m., at 68:22-71:22 (R. Swimmer).

265. Interior's plan includes hiring new staff, including trust officers, who will be trained to carry out trust functions; once hired, "they are not likely to be terminated by a subsequent administration." Tr., June 25, 2003, p.m., at 42:7-43:5 (R. Swimmer).

266. With regard to past unsuccessful trust reform initiatives, completion of HLIP tasks did not yield a result that Interior was happy with. Interior chose not to continue down the same path of quick fixes but instead worked on identifying standard best practices and implementing systems to reflect those practices. Tr., June 5, 2003, a.m., at 67:21-73:17 (J. Cason).

267. Interior's ability to complete its trust reform process and do so in a timely fashion depends upon Congress's willingness to fund the process. Tr., June 25, 2003, p.m., at 67:15-68:21 (R. Swimmer), Tr., June 26, 2003, a.m., at 69:5-14 (R. Swimmer). Interior continues to

work on acquiring the funds necessary and to demonstrate success in the use of already-appropriated funds. Tr., June 25, 2003, p.m., at 92:18-93:8 (R. Swimmer). The current administration has sought and obtained substantially increased funding for trust activities: the first Special Trustee had a budget of $15-$20 million; the budget today exceeds $200 million. Tr., June 25, 2003, p.m., at 40:10-41:12 (R. Swimmer).

268. The budget cycle for FY 2005 is currently underway, and Interior hopes to get funding for additional trust staff as part of that process; the budget process for FY 2006 will begin soon. Tr., June 25, 2003, p.m., at 66:19-67:14 (R. Swimmer).

269. Congressional funding of trust reform is complicated by budgetary constraints, increased competition for funds, and the perception that the appropriation of funds for trust reform deprives Interior of funds to fulfill other Indian-related needs. Tr., June 25, 2003, p.m., at 84:16-85:25 (R. Swimmer).

6. Plaintiffs' Compliance Plan is Deficient

270. Plaintiffs' Compliance Action Plan Together With Trust Standards ("Plaintiffs' Compliance Plan" or Plaintiffs' Plan"): 1) does not explain how it would bring Interior into compliance with its specific trust fund accounting obligations under the 1994 Act; 2) provides no consideration of applicable trust standards other than common law trust standards; 3) does not acknowledge, much less evaluate, the effect of Interior's co-existing statutory obligations on the operation of the IIM Trust; 4) does not recognize the need for a change in existing statutory authority before implementation; 5) does not recognize the need for a change in existing appropriations before implementation; 6) makes no provision for handling the small dollar accounts without imposition of an administrative fee; 7) contains unrealistic time frames for

implementation; and 8) does not recognize that its implementation would result in the unauthorized termination of BIA personnel. See Plaintiffs' Plan (Pls.' Ex. 51).

7. Plaintiffs' Compliance Plan is Not Feasible

271. Plaintiffs' assert that "[t]he divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration . . . within 180 days" of the "Trust Manager" being appointed. Plaintiffs' Plan at 42 (Pls.' Ex. 51) at 42. Plaintiffs' Plan requires "[s]egregate[d] administration of IIM trust records from tribal and other DOI records" and "the separation of trust assets from all other tribal and DOI assets." Id. at 42, 44.

272. Plaintiffs' Plan does not provide for tribal involvement or consultation in the operation and management of the IIM trust. Indeed, its explicit call for separation of tribal and IIM trust functions, id. at 42, 44, would eliminate the current tribal role and involvement in operation of the IIM trust.

273. Plaintiffs' Plan would include replacing all trust personnel affected by the current litigation with "new and independent trust administration management solely to administer the Individual Indian Trust;" the new positions, in an unspecified organizational structure and without any indication of what level these positions would occupy within Interior and the Civil Service, would consist of ten titled positions, at least 30 new Probate Judges, an "Independent Audit Committee," and unspecified numbers of supporting staff. Plaintiffs' Plan at 33-35, 38 (Pls.' Ex. 51).

274. Plaintiffs' Plan contains no cost estimates, and no proposed budget for implementation. Tr., May 9, 2003, a.m., at 20:23-22:21, 25:19-21 (P. Homan).

275. The Plaintiffs also propose actions without regard to whether they overlap partially or completely with initiatives already commenced by Interior, including evaluating and potentially replacing computer systems that support trust operations, Plaintiffs' Plan at 37 (Pls.' Ex. 51); promulgating a comprehensive records retention policy and addressing records held by third parties to the extent necessary to support an accounting, id. at 38, 40, 41-43, 45-46; identifying and locating beneficiaries, including the so-called "whereabouts unknown" account holders, id. at 38; eliminating the backlog of probate cases, id. at 38-39; identifying and developing information regarding trust assets to the extent necessary to conduct an accounting, id. at 39, 40; reviewing the role of and need for new cadastral surveys to support an accounting, id. at 40; consulting with the Office of the Comptroller of the Currency regarding the extent to which its principles would provide useful guidelines regarding the required accounting, id. at 43; independently auditing trust balances and operations, id. at 43-44; providing accurate and complete account statements to IIM account holders, id. at 46; and properly monitoring and investing IIM funds, id. at 47. Any unnecessary duplication of efforts would only result in further delay as initiatives are disrupted, personnel are changed, and the learning process begun over again.

276. Also, as Plaintiffs' lead expert has stated, "I don't believe a receiver . . . in any way, shape, or form will ultimately solve the problem[.]" Tr., May 6, 2003, a.m., at 42:10-43:10 (P. Homan).

277. Paul Homan served as the Special Trustee for American Indians from September 1995 through January 7, 1999. Tr., May 1, 2003, a.m., at 52:13-16 (P. Homan). Mr. Homan's personal knowledge as to Interior's trust operations and the data he relied on to provide his

opinion is anywhere from three to six years old. Tr., May 6. 2003, p.m., at 20-22; Tr., May 7, 2003, a.m., at 6:8-7:2 (P. Homan). His information is thus stale and often does not reflect current conditions at Interior.

278. Mr. Homan has many potential biases and conflicts that call into question his neutrality. Mr. Homan is a good friend and has also had prior commercial business dealings with Plaintiffs' counsel, Dennis Gingold. Tr., May 9, 2003, a.m., at 8:17-12:3 (P. Homan). Mr. Homan had prior business contacts with Elouise Cobell, the lead plaintiff, while Mr. Homan was President of Riggs Bank when Ms. Cobell approached Riggs Bank to explore the option of privatization of management of the IIM trust. Tr., May 9, 2003, a.m., at 12:22-15:21 (P. Homan). During Mr. Homan's tenure as Special Trustee, he attempted to hire Mr. Gingold as his legal counsel. Tr., May 9, 2003, a.m., at 18:20-19:11 (P. Homan).

279. Mr. Homan lacks sufficient expertise in many of the topics on which he testified. Mr. Homan does not possess an accounting degree, Tr., May 1, 2003, a.m., at 28:12-29:2, is not a certified public accountant, Tr., May 7, 2003, a.m., at 41: 11-13, 45:9, and is not professionally qualified to render an accounting opinion, Tr., May 7, 2003, a.m., at 51:15-18; he is not a historian, Tr., May 1, 2003, a.m., at 85:22-25; he is not a trust lawyer, Tr., May 5, 2003, a.m., at 75:16-17; and he is not a statistician, Tr., May 1, a.m., at 84:17-25 (P. Homan).

D. Treasury Has Been Meeting Its Duties As A Trustee

280. On July 6, 1999, Treasury filed a stipulation that listed several activities it committed to undertake in the future to fulfill its role as a trustee for IIM money. Cobell v. Babbitt, 91 F. Supp. 2d at 34. Treasury has been meeting its duties as a trustee by satisfying each of the July 1999 stipulations.

281. On December 21, 1999, the Court held that Treasury committed a single breach of its trust responsibilities by destroying IIM trust materials "after their age exceeded six years and seven months, without regard to the fact that the United States (through its trustee-delegates) has not rendered an accounting of plaintiffs' IIM trust money." Cobell v. Babbitt, 91 F. Supp. 2d at 50.

282. The Court ordered Treasury to file quarterly status reports setting forth and explaining the steps that Treasury would take to rectify this breach of trust and to bring itself into compliance with its duty to retain necessary IIM-related trust documents. Id. at 58-59.

283. Treasury timely filed quarterly reports on March 1, 2000; June 1, 2000; September 1, 2000; December 1, 2000; March 1, 2001; June 1, 2001; September 4, 2001; December 3, 2001; March 1, 2002; June 3, 2002; August 30, 2002; December 2, 2002; and February 28, 2003. These reports describe Treasury's progress toward compliance with this Court's December 21, 1999 Order.

284. During closing arguments, Plaintiffs' counsel noted Treasury's success at meeting the obligations imposed by the Court. "Treasury has distinguished itself. At the outset, Treasury fought very hard about being a true defendant in this case. They took rational positions, they made the best arguments they could, they lost, and then they took what this Court ordered to heart. They made the changes." Tr., July 8, 2003, a.m., at 12:19-24 (D. Gingold).

1. Stipulations 1, 2, and 3

285. Treasury satisfied Stipulations 1, 2, and 3 by enhancing the retrievability of check and electronic payment records.

286. In Stipulation 1, Treasury acknowledged that its system did not allow Treasury to search for and retrieve IIM checks drawn on Treasury without predicate information (check symbol and serial number) from Interior. Cobell v. Babbitt, 91 F. Supp. 2d at 34.

287. As promised in Stipulations 2 and 3, Treasury developed two new systems to enhance the retrievability of check and electronic payment records. These systems are the OTFM Data Entry System ("ODES") and the OTFM Activity Tracking System ("OATS"), both of which became operational April 21, 2000. ODES and OATS enable Treasury to retrieve, by payee name or other unique identifier, information about checks issued to and/or negotiated by IIM beneficiaries from and after April 2000. In addition, OATS enables Treasury to retrieve information about electronic funds transfer payments ("EFT") payments issued to IIM beneficiaries, by payee name or other unique identifier. Treasury's Statement Regarding the Court's September 17, 2002 Opinion and Order in Cobell, et al. v. Norton, et al. ("Treasury's Statement"), at 2 (Jan. 6, 2003).

2. Stipulations 4 and 5

288. Treasury satisfied Stipulations 4 and 5 by submitting revised record retention schedules to the National Archives and Record Administration ("NARA").

289. In Stipulations 4 and 5, Treasury agreed to consult with Interior to identify all IIM-related records maintained or created by Treasury, to evaluate those records in terms of utility for accounting purposes, and to submit revised retention schedules to the NARA for approval. Cobell v. Babbitt, 91 F. Supp. 2d at 34. Treasury met each of these commitments. Treasury's Statement at 2-3; Tr., May 12, 2003, p.m., at 30:15-21 (R. Fitzgerald).

290. On November 3, 2000, NARA published notice of the proposed schedules for comment in the Federal Register. 65 Fed. Reg. 66,264, 66,266 (Nov. 3, 2000).

291. By letter dated February 20, 2003, NARA provided a response to the proposed revised retention schedules that Treasury submitted to NARA at the end of September 2000. NARA stated that its "appraisers agree that the dispositions and retention periods stated in the proposed schedules meet the business needs of Treasury and provide adequate retention periods to protect the legal rights of the American people and the U.S. government, as well as document government accountability." NARA stated that it would hold in abeyance the approved schedules "pending further developments in the *Cobell* case." Thirteenth Quarterly Report on Actions Taken by the Department of the Treasury to Retain IIM-Related Documents Necessary for an Accounting at 2 (Feb. 28, 2003).

3. Stipulation 6 And The Document Retention Requirements Of The Court's August 12, 1999 Order.

292. Treasury has substantially satisfied Stipulation 6 and the document retention requirements of the Court's August 12, 1999 Order.

293. On August 12, 1999, the Court ordered Treasury to retain certain IIM-related documents. This order incorporated Treasury's Stipulation 6.

294. Treasury stresses the importance of document retention by issuing regular reminders to its employees and agents of the obligations imposed in the August 12, 1999 Order. Copies of these reminders are filed with the Court as part of the quarterly reports. See, e.g., First Quarterly Report on Actions Taken by the Department of the Treasury to Retain IIM-Related Documents Necessary for an Accounting, at Annexes 1-21 (Mar. 1, 2000).

295. In addition to regular reminders, Treasury has put in place a strong system for keeping track of and retaining IIM documents. Tr., May 13, 2003, p.m., 51:1-4 (D. Hammond). As part of this system, Treasury incorporates "within every senior manager's performance standards that touches on IIM related activities a trust-related litigation performance objective for dealing with the retention of documentation." Tr., May 13, 2003, p.m., at 51:25, 52:1-4 (D. Hammond).

296. Treasury's system for retaining IIM documents includes the Federal Reserve banks. In addition to periodic reminders, Treasury has "conducted a number of training sessions and awareness sessions, both with counsel within the Federal Reserve as well as with operational personnel. . . . And in addition we put in place a firm approval process such that if a Federal Reserve wanted to destroy a document that it had to come up through – it had to be described, and it had to flow up through an approval process in order – prior to its destruction, and be specifically authorized by a central person at the Bureau of Public Debt at the time." Tr., May 13, 2003, p.m., at 37:7-17, 21 (D. Hammond).

297. "[T]he Board of Governors of the Federal Reserve System, which has the oversight responsibility for the banks, and branches, and their operations, have taken [document retention] incredibly seriously, and have participated in making sure that they have affirmative compliance." Tr., May 13, 2003, p.m., at 48:24-25, 49:1-3 (D. Hammond). The Court observed, "When the Federal Reserve Board of Governors gets into an issue like that and says, let's make sure that we are compliant, that is government at its best." Tr., May 13, 2003, p.m., at 49:9-11 (D. Hammond).

298. Although Treasury has not achieved perfection by retaining every document covered by the August 12, 1999 Order, Treasury has strived "to build a system that effectively not only provides for the retention but also for the reporting and identification of [errors] as soon as we are aware of them." Tr., May 13, 2003, p.m., 51:8-11 (D. Hammond). The Court observed, "Obviously plaintiffs in a case like this always want perfection. But I want reasonable action by the government, and that is the kind of thing that I hope you are striving for as well. You cannot avoid all human errors, I know." Tr., May 13, 2003, p.m., 50:20-24. (Judge Lamberth).

299. When a document retention error has occurred, Treasury has held people accountable and has "taken affirmative steps each and every time to deal with either the personnel related issues or to deal with the structural or management issues of any of our events." Tr., May 13, 2003, p.m., at 50:9-11, 15-18 (D. Hammond).

4. Stipulation 7

300. Treasury satisfied Stipulation 7 by enhancing IIM investment earnings.

301. In Stipulation 7, Treasury agreed to allow Interior's Office of Trust Funds Management ("OTFM") to make "as of" investments for deposits whose amounts are not immediately known, resulting in additional interest being earned on trust funds that OTFM administers. Cobell v. Babbitt, 91 F. Supp. 2d at 34. Treasury satisfied this stipulation in July 1999. Treasury's Statement at 4.

302. To further assist OTFM in maximizing earnings on the funds, Treasury has, as of November 16, 2001, waived the $1,000 minimum increment investment requirement for IIM

investments, allowing OTFM to invest increments as small as one penny. Treasury's Statement at 4.

5. Stipulation 8

303. Treasury satisfied Stipulation 8 by completing a study of IIM check negotiation practices.

304. In Stipulation 8, Treasury agreed to study IIM check negotiation practices to determine the average time between issuance and negotiation of IIM checks. Stipulation of the Department of the Treasury, at 3 (July 6, 1999). Treasury completed this study in May 2000, provided a copy to Interior, and filed a copy with the Court as part of the Second Quarterly Report on Actions Taken by the Department of the Treasury to Retain IIM-Related Documents Necessary for an Accounting, at Attachment K.

E. Plaintiffs Knew Or Should Have Known Of Their Claims Prior To October 1, 1984[17]

1. Each Plaintiff Knew Or Should Have Known

a. Elouise Cobell (filed under seal)

b. James LaRose (filed under seal)

c. Thomas Maulson (filed under seal)

d. Penny Cleghorn (Mildred Cleghorn) (filed under seal)

2. Information Demonstrating That Plaintiffs Knew Or Should Have Known

[17] Although the Court's Memorandum and Order dated April 28, 2003 denied Defendants' Motion for Partial Summary Judgment Regarding the Statute of Limitations and Laches, Defendants wish to preserve the issue for appeal.

a. Public Reports Cited and Relied Upon By Plaintiffs' January 6, 2003 Plan

305. Papers filed and submitted by Plaintiffs in this case relied upon a plethora of Government reports and documents that, according to Plaintiffs, demonstrate that the Government violated its IIM obligations that are at issue in this case. Many of those reports were issued publicly prior to October 1, 1984, thus putting the public – including Plaintiff class members – on notice of their claims.

306. For, example, on January 6, 2003, Plaintiffs filed *Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust* (hereafter, "Plaintiffs' Revenue Model"), Defs.' Ex. 50, which cited and relied upon public reports referenced below, which were published as much as eighty years before Plaintiffs filed suit.

The 1915 Report

307. In 1915, the Joint Commission of the Congress of the United States to Investigate Indian Affairs (63rd Cong., 3d Sess.) received a report relative to "Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs" (hereafter, the "1915 Report to Congress"). Defs.' Ex. 255. Plaintiffs' Revenue Model, at 23 (Defs.' Ex. 50) quotes the following language (among other language) from the 1915 Report: "It is impossible with present methods for the officials of the Indian Office to keep in personal touch with the many varied transactions and the constantly changing status of property and funds." (emphasis omitted).

The 1929 Comptroller General Report to the Senate

308. Plaintiffs' Revenue Model, at 24 & n.49 (Defs.' Ex. 50), cites a February 25, 1929 Report to the President of the Senate, entitled "Report of the Amount of Funds of the Indians,

the Investment Thereof, the Rate of Interest Thereon Together With Comments Pertinent to the Uses Made of Such Funds" (hereafter, the "1929 Comptroller General Report to the Senate"). Defs.' Ex. 256. Plaintiffs' Revenue Model, at 24 (Defs.' Ex. 50), characterizes the 1929 Comptroller General Report to the Senate this way: "A Report to the President of the Senate States Revenues and Expenditures Could Not be Examined (1929)." The 1929 Comptroller General Report to the Senate, Defs.' Ex. 256, states, at 115: "While property accountability is provided for in the accounting system, it was observed that at many of the [BIA] agencies the records are not properly maintained, entries not being current and otherwise incomplete."

The Meriam Report - 1928

309. Plaintiffs' Revenue Model, at 4-5 & n.5 (Defs.' Ex. 50), cites Lewis Meriam, The Problem of Indian Administration (The Johns Hopkins Press, Baltimore, Maryland, 1928) (the "Miriam Report"), at 438-39 (marked for identification as Defs.' Ex. 257). [18] Plaintiffs' Revenue Model, at 4 (Defs.' Ex. 50), states that the Miriam Report "was published in 1928 and is one of the earliest public reports that found that Indian trust data is wholly unreliable and utterly useless as an accurate measurement of anything, except to confirm the manifest neglect and malfeasance inherent in Indian trust management . . . ." (emphasis added).

[18] At trial, Defendants offered the Meriam Report, which was marked for identification as Defs.' Ex. 257. The Court refused to admit it into evidence, apparently because it is a treatise containing hearsay. Defendants, however, did not offer it for the truth of the matters asserted but, rather, merely offered it to show pre-1984 awareness of and notice to the public (including Plaintiff class members) of allegations of mismanagement or other wrongdoing in connection with the IIM trust. Therefore, Defendants respectfully assert that the exhibit should have been admitted into evidence for that purpose.

Comptroller General 1982 Report to Congress

310. Plaintiffs' Revenue Model, at 24 n.50 (Defs.' Ex. 50), cites a report submitted to Congress in 1982 by the Comptroller General, entitled, "Major Improvements Needed in the Bureau of Indian Affairs' Accounting System" (hereafter, the "Comptroller General 1982 Report to Congress"), Defs.' Ex. 258. Plaintiffs' Revenue Model, at 24 (Defs.' Ex. 50), characterizes the Comptroller General 1982 Report to Congress as follows: "The GAO Reports the BIA Has Lost Accountability for Trust Funds, the Data is Unreliable, BIA Has Lost Control of Receipts and Disbursements, and BIA Has Not Discharged Its Fiduciary Duties (1982)."

311. The Comptroller General 1982 Report to Congress, Defs.' Ex. 258, states:

> Operating deficiencies preclude the proper discharge of trustee responsibilities (at 13).
>
> The BIA's "automated accounting and finance system does not provide for accountability for the more than $900 million of Indian trust funds managed by the Bureau. The system lacks the internal controls necessary to assure that receipts are properly accounted for and disbursements made only in proper amounts to entitled persons (id.).
>
> The local offices we visited did not maintain adequate controls over cash receipts (id. at 14).
>
> The local offices also did not maintain adequate controls over cash disbursements and related blank Government checks . . . . There was no assurance that disbursements were made in proper amounts to entitled persons and that funds had not been misappropriated (id. at 15).

b. Public Reports Cited and Relied Upon By Plaintiffs' Answers to Interrogatories (filed under seal)

c. Other Pre-1984 Comptroller General Reports That Asserted IIM Trust Violations

312. Other public Government reports also discussed the Government's alleged failure to properly handle IIM accounts long before October 1, 1984.

November 1955 Audit by Comptroller General Regarding
BIA's Administration of Individual Indian Moneys (Defs.' Exs. 84 and 275).

313. In November 1955, the Comptroller General issued an audit report, Defs.' Exs. 84 and 275, which states:

> Disbursements of individual Indian moneys are not always supported adequately (at 5). Our audit disclosed certain deficiencies in accounting for IIM, such as overdrafts in individual Indian money accounts, subsidiary records not in agreement with general ledger control accounts, and the total of the cash balances in the Bureau's general ledger accounts not in agreement with the cash balance reported by the Treasury at June 30, 1955 (id. at 6).

December 14, 1956 Letter With Report from the Comptroller General (Defs.' Ex. 276)

314. On or about December 14, 1956, the Comptroller General issued a letter and report to the Committee on Appropriations, United States House of Representatives, setting forth findings of the General Accounting Office with regard to various civil departments and agencies of the Government. Defs.' Ex. 276. With regard to the Bureau of Indian Affairs, the report states, at 28, in part:

> Poor accounting
>
> > In our report on audit of the Bureau of Indian Affairs, submitted to the Congress on March 9, 1955, and in reports to the Commissioner of Indian Affairs, we pointed out a number of deficiencies in the administration of individual Indian moneys and recommended that the Bureau take action to insure that regulations set forth in the Indian Affairs Manual be followed closely. . . . Our audit in 1955 disclosed that some progress had been made in correcting the deficiencies, but serious weaknesses still existed in varying degrees at the locations visited. These included disbursements of individual Indian moneys without adequate support, deficiencies in accounting for cash and bonds and in the computation and distribution of interest income, and other weaknesses in internal procedures.

Defs.' Ex. 276, at 28.

March 1966 Report

315. On March 11, 1966, the Comptroller General submitted to the Congress a letter and report (the "March 1966 Report") entitled, "Need for Improvements In the Management of Moneys Held in Trust for Indians." Defs.' Ex. 277. The letter states, at 1, "[h]erewith is our report on the need for improvements in the management of moneys held in trust for Indians by the Bureau of Indian Affairs, Department of the Interior." The March 1966 Report states, at 12, "Trust assets not recorded[.] The Aberdeen and Billings [Indian Service Special Disbursing Agents] did not record all trust funds for which they were accountable."

d. Congressional Testimony

1981 Hearings Before the Select Committee on Indian Affairs

316. In a series of congressional committee hearings in 1981, witnesses publicly revealed allegations that the Government was not properly handling IIM accounts. The Select Committee on Indian Affairs, United States Senate (97th Cong. 1st Sess.) held a series of three hearings on "Federal Supervision of Oil and Gas Leases on Indian Lands." The first two hearings were on February 27, 1981 (in Billings, Montana) and April 6, 1981 (in Washington, D.C.). Defs.' Exs. 278 and 279. At the February 27, 1981 hearing in Billings, Montana, one of the witnesses, James Henry (Chairman of the Turtle Mountain Band of Chippewa) offered a statement that included the following, regarding oil and gas producing wells on allotted land of members of his tribe: "Seven years ago, I came out to meet with [BIA] Fort Belknap and Fort Peck agencies, and at that time, they – in fact, they admitted that they had failed in their trust responsibility to properly administer those lands . . . ." Defs.' Ex. 278, at 26.

317. The third hearing occurred on June 1, 1981 (in Albuquerque, New Mexico). Defs.' Ex. 280. The June 1981 Hearing included:

A statement by Senator John Melcher that a prior, February 27, 1981 hearing "revealed that the [U.S. Geological Survey's] gross inability to account for the production of oil on Federal and Indian leases over a period of years has been very pervasive and continuous." See June 1981 Hearing Excerpts, at 1 (Defs.' Ex. 280).

The April 13, 1979 report from the Comptroller General entitled, "Oil and Gas Royalty Collections-Serious Financial Management Problems Need Congressional Attention," discussed supra. Defs.' Ex. 268, at 58 et seq.

A statement of Richard Tecube, Vice President, Jicarilla Apache Tribe, who stated: "While the hearing is concentrating primarily on oil theft, we feel that it is an indicator of a much larger problem of leasing on Federal lands; many problems are involved. . . . One is leasing; second is accounting; the third problem is recordkeeping . . . ."

Id. at 141.

February 21, 1984 Congressional Testimony by Mr. Old Person

318. On February 21, 1984, Plaintiff Earl Old Person ("Mr. Old Person") provided testimony in hearings before a subcommittee of the Committee on Appropriations, House of Representatives (98th Cong., 2d Sess.) (Defs.' Ex. 281), in which he testified, at 331:

We [the Blackfeet Tribe] do have people that own individual lands. We have – we look to these lands mainly for income purposes. Whether it is individually or tribal.

A lot of our individual landowners receive very little income from these lands because of the way it is managed. I think it was concurred by the committee that came out investigating and kind of going over the various programs on Indian reservations.

They found that in one of the areas, our land base was not adequately being cared for. I just want to read one of their findings. It says, "Our review of Reservation land records maintained by the BIA and Tribe disclosed that land records are duplicative, inaccurate, and incomplete. Basically, we concluded that BIA's commitment to improve the Tribe's land records and to eliminate costly duplications has been insufficient and disregards the importance of this trust responsibility."

e. Pre-1984 Media and Other Popular Sources Of Allegations of IIM Trust Violations

319. Had the Court admitted into evidence the media articles offered by Defendants,[19] those articles would have shown that allegations of Government mishandling of IIM accounts were widely publicized long before 1984. Although they were not admitted into evidence, Defendants describe them in order to further demonstrate for the record the significance and purpose of these exhibits. In 1928, the journal AMERICAN INDIAN LIFE published an article, *Now It Can Be Told* (marked for identification as Defs.' Ex. 282) which stated at 1, "[t]he Comptroller General, on request of the Senate Committee and under authority of both Houses of Congress, has begun a probe of the Indian Bureau's handling of Indian trust moneys. More will be told of these investigations below." After referring to a dispute over the coverage of "tribal reimbursable debts," in a report by the Institute for Government Research, the article, at 16, continues:

> Almost as little will the seeker learn about the more important, and more scandalous, handling of individual Indian trust moneys by the Indian Bureau. $25,000,000 and upward of individual Indian trust income is handled each year by the Bureau, under no

---

[19] Defendants offered at trial three newspaper articles which were marked for identification, including the 1928 article, *Now It Can Be Told*, from the journal AMERICAN INDIAN LIFE (marked for identification as Defs.' Ex. 282), the December, 1978 article*, Suit Charges BIA Misappropriates Indian Funds,* published in WASSAJA A NATIONAL NEWSPAPER OF INDIAN AMERICA (marked for identification as Defs.' Ex. 283), and a November 20, 1983 article, *The New Indian Wars - Empty Promises, Misplaced Trust,* from the DENVER POST EMPIRE MAGAZINE, (marked for identification as Defs.' Ex. 284). The Court did not admit these newspaper articles into evidence, apparently based upon a ruling that they contain hearsay. Defendants, however, did not offer the articles for the truth of the matters asserted in them but, rather, offered them merely to show pre-1984 awareness of and notice to the public (including Plaintiff class members) of allegations of mismanagement or other wrongdoing in connection with the IIM trust. Defendants respectfully assert that these exhibits should have been admitted into evidence.

regulation of law, with no review by the courts and no accounting to any authority whomsoever.

320. In December, 1978, the American Indian Historical Society published volume 6, number 11 of WASSAJA A NATIONAL NEWSPAPER OF INDIAN AMERICA, which included an article, *Suit Charges BIA Misappropriates Indian Funds* (marked for identification as Defs.' Ex. 283). The article states in pertinent part, at 1:

> Oklahoma City, Oklahoma. A lawsuit charging the Bureau of Indian Affairs has misappropriated Indian funds has been filed here in U.S. District Court.
>
> The class action suit claims that the BIA office in Anadarko, Ok. "improperly handles money held in trust for Indians."
>
> * * *
>
> The plaintiffs in the suit are three Oklahoma Indians who have had money held in trust by the BIA. They seek a full accounting of all monies held in trust on behalf of Indians and payment to the Indians of all interest due from the investments.
>
> Amos E. Black III, Anadarko attorney, is one of four lawyers representing the Indians. "The suit stems from the practice of the BIA of holding oil and gas and grazing land lease bonuses paid to restricted Indians while the lease agreements are finalized, Black stated.
>
> "The BIA acts as a trustee for many individual Indians in agreements of this type . . .
>
> * * *
>
> **Further, investments are not made through standard procedures, Black contended, guaranteeing the highest interest return. "This is an abuse of the BIA role as trustee," Black said.**
>
> The attorneys are calling for a thorough investigation of the use of funds held by the BIA for Indians, and an explanation of how the money is invested, where it is invested, and how much interest has been earned over the past years.

(emphasis in original).

321. On November 20, 1983, the DENVER POST published its EMPIRE MAGAZINE, which included an article by John Aloysius Farrell, *The New Indian Wars - Empty Promises,*

Misplaced Trust (marked for identification as Defs.' Ex. 284). Among other things, the article, at 17, quotes an attorney for the Native American Rights Fund as saying, "The BIA breached its trust responsibility in approving [] commercially unreasonable agreements." The article also states, at 22, as follows regarding oil leases on Indian property: "Once negotiations are complete, there are serious flaws in the federal government's efforts to ensure that oil is not stolen from Indian lands, and that royalties are paid promptly and in full – as *The [Denver] Post* detailed in an extensive series of investigative reports throughout 1981."

f. Pre-1984 Litigation Asserting Trust Violations

322. A number of pre-1984 published opinions in prominent federal lawsuits further disclosed to the public instances in which the Government was said to have failed to carry out IIM duties properly. For example, on or about April 16, 1971, the Court of Claims issued its decision in Capoeman v. United States, 440 F.2d 1002 (Ct. Cl. 1971), which indicated that an Indian holding an interest in allotted land asserted that the Government as trustee improperly deducted charges from the proceeds of timber sales. Id.

323. On or about April 15, 1980, the Supreme Court issued its decision in United States v. Mitchell, 445 U.S. 535, 536-37 (1980), which recited that individual Indian allottees sued the Government, alleging mismanagement and breach of its fiduciary duty regarding forests and timber sales on the allotted land.

324. On or about October 21, 1981, the Court of Claims issued its decision in Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), which was affirmed by the Supreme Court in a decision issued on or about June 27, 1983, 463 U.S. 206 (1983), and each of those decisions

recited the allegations by individual allottees that the Government had breached its fiduciary obligations in connection with individual Indian allotted land.

325. For the foregoing reasons, prior to October 1, 1984, the Plaintiffs and other members of the class knew or should have known of their claims for an accounting covering any period on or prior to that date.

F. Deposition Testimony Proffered By Plaintiffs Is Not Relevant To The Phase 1.5 Proceeding.

326. At the conclusion of the trial, Plaintiffs sought to introduce deposition testimony elicited from several Interior officials, including Former Acting (now Deputy) Special Trustee for American Indians Donna Erwin, BIA Chief Information Officer Dominic Nessi, and one contractor, Jeremy Katz, a computer consultant. All of these witnesses, except Mr. Katz, are employees of the Department.

327. Defendants objected to admission of Mr. Katz's testimony on the ground that Plaintiffs made no showing that Mr. Katz was unavailable to testify at trial, and as an independent contractor, his testimony cannot qualify as a party admission of the Department. Even if admissible, his testimony would be of little relevance to the issues the Court must address for this Phase 1.5 trial.

328. The deposition testimony that Plaintiffs offer from Dom Nessi and Mr. Katz is not entitled to any weight for purposes of this trial. All of the testimony concerns computer security issues and was given two years ago, in 2001, before Special Master Balaran as part of his initial assessment of computer security. See generally Jeremy Katz Depo. Tr. (June 11, 2001) (Pls.' Ex. 314); Dominic Nessi Depo. Tr. (June 14, 2001) (Pls.' Ex. 321); Dominic Nessi Depo. Tr. (Aug.

8, 2001) (Pls.' Ex. 322). At most, the testimony outlines weaknesses in computer systems security that existed two years ago. See, e.g., Dominic Nessi Depo. Tr., at 97:23-98:19 (Aug. 8, 2001) (Pls.' Ex. 322) (discussing TAAMS system security). Plaintiffs have made no showing that this testimony accurately depicts the current state of affairs.

329. To the extent Plaintiffs rely on the existence of computer security weaknesses in the past as proof that IIM records are corrupt, Plaintiffs failed to carry their burden. Plaintiffs did not present any witness or adduce any evidence at trial to show that data corruption had, in fact, actually occurred or that it had occurred to such a degree as to prevent an historical accounting altogether.

330. The proffered deposition testimony of Donna Erwin is even less relevant to the trial issues. Plaintiffs have proffered large excerpts of Ms. Erwin's testimony from three different days of deposition in December 2002 and February 2003. See generally Donna Erwin Depo. Tr. (Dec. 20, 2002) (Pls.' Ex. 315); Donna Erwin Depo. Tr. (Feb. 12, 2003) (Pls.' Ex. 316); Donna Erwin Depo. Tr. (Feb. 13, 2003) (Pls.' Ex. 317). Virtually all testimony proffered from her February depositions concerns events surrounding the scheduling of her December 2002 deposition and has no bearing whatsoever on any trial issue. See, e.g., Donna Erwin Depo. Tr., at 424:4-20 (Feb. 12, 2003) (Pls.' Ex. 316) (concerning discussions with Justice counsel); Donna Erwin Depo. Tr., at 699:7-10 (Feb. 13, 2003) (Pls.' Ex. 317) (question by SMM Kieffer about who prepared Ms. Erwin for her December deposition).

331. When the Court ordered further examination of Ms. Erwin in February, it was based upon the underlying consideration that the "credibility of a key witness" would be relevant at trial. Memorandum and Order of Feb. 5, 2003 at 14. In the intervening months, however,

Ross Swimmer was appointed, confirmed, and testified at trial as the new, permanent Special Trustee. Ms. Erwin was not called as a witness at trial, so the issue of her credibility is academic at best.[20]

332. Although Plaintiffs have offered still other deposition testimony of Ms. Erwin from her December 20, 2002 examination, her substantive testimony from that period adds little to the analysis here. This trial concerns the plans put forward by Interior on January 6, 2003; Ms. Erwin's December testimony preceded those plans, however, and so is temporally inadequate.

II. PROPOSED CONCLUSIONS OF LAW

A. This Court's Authority Is Constrained By Established Principles Governing Judicial Review Of Agency Action And The Separation Of Powers Concerns.

1. This Court's authority to review Interior's Historical Accounting Plan and Fiduciary Obligations Compliance Plan is constrained by well-established principles governing judicial review of agency action and by separation of powers concerns that underlie these principles.

2. In its 1999 decision, this Court declared that Defendants' accounting duties under the 1994 Act were judicially enforceable and that, as a result of failures occurring over a century, agency action had been unlawfully delayed. The Court retained jurisdiction for five years, and required that Defendants: (1) file quarterly status reports; (2) file a revised High Level Implementation Plan for coming into compliance with its statutory duties; and (3) provide

[20] Moreover, Plaintiffs sought to introduce her deposition testimony as a "party admission." To the extent, however, that Plaintiffs cite testimony concerning her personal conduct, it cannot, by definition, qualify as an admission of a party. (Notably, Ms. Erwin was represented by private counsel at the February 12 and 13 depositions.)

additional information as required by the court or requested by Plaintiffs. Cobell v. Babbitt, 91 F. Supp. 2d at 59.

3. In affirming this Court's 1999 declaratory judgment, which it believed provided "relatively modest" relief, Cobell v. Norton, 240 F.3d 1081, 1109 (D.C. Cir. 2001), the Court of Appeals did not sanction a radical departure from settled principles of judicial review, nor did it authorize a judicial takeover of trust fund management. To the contrary, the Court of Appeals emphasized final agency action will occur – and thus may be reviewed by this Court – when the accountings for IIM account holders are completed. Id. at 1110 ("Presumably, the district court plans to wait until a proper accounting can be performed, at which point it will assess appellants' compliance with their fiduciary obligations."). Thus, final agency action is not the plan for conducting an accounting, but the end product - the statement of account, which will be reviewable when any applicable administrative remedies are exhausted.

4. The Court of Appeals also made clear in its 2001 opinion that the judicially enforceable duty at issue is not "to take the discrete individual steps that would facilitate an accounting," but the provision of the accounting itself. Cobell v. Norton, 240 F.3d at 1106. While failure to take various subsidiary actions might be evidence of the failure to perform this duty, the Court of Appeals determined that they were not themselves enforceable obligations, and required this Court to amend its opinion accordingly. Id. at 1105-06 (stating that "defendants should be afforded sufficient discretion in determining the precise route they take").

5. In remanding this case for further proceedings, the Court of Appeals emphasized that it "expect[ed] the district court to be mindful of the limits of its jurisdiction." 240 F.3d at 1110. The Court observed:

> It remains to be seen whether in preparing to do an accounting the Department takes 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; beyond that, supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction.

Id.

6. These admonitions reflect settled law. Although courts have power to review agency action (or inaction) and to declare it unlawful or inadequate pursuant to the standards articulated in the Administrative Procedure Act, "that authority is not power to exercise an essentially administrative function." Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 21 (1952). The "guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare." Id. at 20.

7. Thus, after declaring agency action unlawful (or unreasonably delayed), courts may not seek to control the processes by which an agency fulfills its Congressionally-mandated functions on remand. See United States v. Saskatchewan Minerals, 385 U.S. 94, 95 (1966) (per curiam) (invalidating district court order that precluded ICC from reopening evidence on

remand).[21] These limitations reflect the respective allocation of powers to the executive and judicial branches.

8. In accordance with these principles, the Court of Appeals recently vacated the appointment of Joseph Kieffer as Special Master-Monitor, stating that such judicial intrusion into the internal affairs of an Executive Branch agency "simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." Cobell v. Norton, No. 02-5374, 2003 WL 21673009, at *12 (D.C. Cir. July 18, 2003).

9. A court cannot insert itself into the agency's decision-making process by imposing additional procedural – much less, substantive – requirements on agencies beyond those mandated by statute. As the Supreme Court stressed in Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978), the judiciary may not dictate to agencies the methods and procedures of needed inquiries on remand because "[s]uch a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" Id. at 545 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

---

[21] See also Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev. 505, 564-65 (1985) (stating that "because the essence of the executive function is the exercise of discretion, a court transgresses the separation of powers when it dictates that an agency take one particular action instead of others within its discretionary prerogative," but that "when a court merely orders an agency to act, leaving the choice of action to the agency's discretion, no trespass occurs"); Catherine Zaller, Note, The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1), 42 Wm. & Mary L. Rev. 1545, 1548 (2001) (observing that the Senate Judiciary Committee report of May 1945 on a draft version of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq., "noted that the authority granted to the judiciary under the [APA's] judicial review clause did not allow the courts to strip agencies of discretion in determining how an agency should carry out legislation[;] . . . [r]ather, the Senate simply wanted the court to direct the agency to act without dictating what process the agency should use" (footnote omitted)).

These principles apply even where an agency has unquestionably delayed in taking appropriate action. See In re Barr Laboratories, Inc., 930 F.2d 72, 74 (D.C. Cir. 1991).

10. Likewise, even in exceptional cases in which an agency has flagrantly disregarded a congressionally-mandated deadline for rulemaking, the appropriate judicial role is to retain jurisdiction and require periodic progress reports until the agency has completed the required action. See, e.g., In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 556 (D.C. Cir. 1999) (retaining jurisdiction and requiring semi-annual progress reports from the Mine Safety and Health Administration until it issued final regulations); see also Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986) (recognizing agency "discretion to determine in the first instance" how to bring itself into compliance); Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 81 (D.C. Cir. 1984) (retaining jurisdiction pending FCC's resolution of underlying issues).

11. These principles harmonize with the rule that judicial review under the APA is limited to the administrative record. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. [§] 706, to the agency decision based on the record the agency presents to the reviewing court.").

12. Thus, courts generally may not conduct de novo proceedings to test the legitimacy of agency action after the fact, much less determine the initial course of agency action. Whether or not Defendants' fiduciary obligations elevate the level of scrutiny applied to agency action after it is completed, they do not authorize judicial intervention in the initial process by which a

coordinate branch of the government decides on a plan of action and executes that action. See Lincoln v. Vigil, 508 U.S. 182, 195 (1993).

13. Accordingly, the Secretary of the Interior may not be reduced to the role of making proposals to the Court to be evaluated along with plans from Plaintiffs. Nor is it permissible for the Court to dictate how Interior is to perform the historical accounting, much less how Interior is to manage the entire trust fund system – a program with hundreds of employees and a budget in the hundreds of millions of dollars. It is the Secretary who must work with Congress to establish the funding for trust reform, and who must calibrate the utility of various options and the availability of resources.

14. A court – which is not politically accountable for its actions – cannot properly assume the Secretary's role. That is the teaching of decisions establishing the limits on judicial control over the actions of coordinate branches of government. See Lewis v. Casey, 518 U.S. 343, 349 (1996) ("[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."); Missouri v. Jenkins, 515 U.S. 70, 132 (1995) (Thomas, J., concurring) ("The separation of powers imposes additional restraints on the judiciary's exercise of its remedial powers . . . . There simply are certain things that courts, in order to remain courts, cannot and should not do."); Barr Laboratories, 930 F.2d at 74 (recognizing that judicial review is informed by "respect for the autonomy and comparative institutional advantage of the executive branch").

15. In light of these principles, and inasmuch as the judicially enforceable duty at issue is the production of account statements to IIM account holders, judicial review prior to final agency action must be limited to, at most, determining whether Interior's plans are "so defective

that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d at 1110.

16. In making such a determination, the Court must afford deference to the choices made by Interior in its plans. Congress is the settlor of the IIM trust, and Interior, as the trustee-delegate, must comply with the settlor's directions embedded in the numerous statutes that touch upon the IIM trust.

17. To the extent Congress's directions are ambiguous or might cause conflicts, Interior's interpretations and efforts to harmonize competing interests should be accorded the usual deference given to a trustee in administering its trust responsibilities. See Tr., June 3, 2003, p.m., at 74:18-76:18, 78:19-79:1 (J. Langbein).[22] This deference is particularly important

[22] Defendants tendered John H. Langbein, Sterling Professor of Law and Legal History at Yale University, as an expert on "trust matters and equity matters relating to trust." Tr., June 2, 2003, a.m., at 65:18-23. In addition to teaching courses on ERISA, pensions, trusts and estates at Yale, Professor Langbein has held faculty chairs or other academic appointments at some of the most renowned legal institutions in the world, including the University of Chicago, Stanford University, the University of Michigan, Oxford University and the Max Planck Institute in Germany. Expert Report of John H. Langbein, Exhibit A at 1 (Defs.' Ex. 37). He has authored numerous scholarly articles on the subject of trusts and fiduciary practices. Id. at 14-16. He has served as a testifying expert and/or consulting expert on trust and fiduciary practices in scores of cases. Id., Exhibit C at 1-6.

He holds a law degree magna cum laude from Harvard and an L.L.B. and Ph.D. from Cambridge University in England. Tr., June 2, 2003, a.m., at 38:4-39:11 (J. Langbein).

Professor Langbein has especially distinguished himself as a Uniform Law Commissioner, as a gubernatorial appointee, serving continuously since 1984. From 1991 to 1997, he chaired the Commission's probate and trust division. He was a reporter and principal drafter of the Uniform Prudent Investor Act (1994), which today governs fiduciary investing in 38 states and the District of Columbia. Langbein Expert Report at 4 (Defs.' Ex. 37). He has been a member of the drafting committee for the Uniform Trust Code of 2000 and the Uniform Probate Code; he also participated in work on the Uniform Principal and Income Act, the Uniform Custodial Trust Act, and the Uniform Testamentary Additions to Trust Act. Tr., June 2, 2003, a.m., at 57:1-7 (J. Langbein). He has served as an adviser on the Restatement (Third) of Trust, as well as the Restatement of Property: Donative Transfers. Tr., June 2, 2003, a.m., at 54:2-14 (J. Langbein). Professor Langbein has appeared in a series of training videos for bank

in circumstances where Interior, as trustee, must make decisions about how to allocate scarce resources to comply with its various responsibilities. See, e.g., Tr., June 3, 2003, a.m., at 33:12-34:19, 39:9-18, 67:20-68:8 (J. Langbein).

18. In addition, to the extent that any of the applicable statutes are ambiguous, Interior's interpretations of the statutes entrusted to its administration would ordinarily be given due deference under Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

19. In Cobell v. Norton, 240 F.3d at 1101, the D.C. Circuit indicated that "Chevron deference is not applicable in this case," basing its "departure from the Chevron norm," id., on the canon of statutory construction that requires that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Id. (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)). But the D.C. Circuit's decision antedates Chickasaw Nation v. United States, 534 U.S. 84 (2001), in which the Supreme Court found that the canons of statutory construction are not mandatory rules, but merely guides that can sometimes come into conflict with each other. Id. at 94. Thus the canon requiring statutes to be construed in favor of Indians may be offset by other statutory construction guides, such as the canon which cautions against interpreting tax exemptions into statutes that do not clearly express such exemptions. Id. at 95.

20. Interior's Historical Accounting Plan sets forth a methodology that will enable Interior to comply fully with its obligation to conduct an historical accounting of IIM funds, and

---

trust officers concerning certain fiduciary practices, particularly fiduciary investing. Tr., June 2, 2003, a.m., at 42:23-44:15 (J. Langbein). He has acquired tremendous experience on trust matters and equity matters relating to trust through his teaching, scholarly research, consulting work and this public service, and is one of the foremost experts on trust and fiduciary matters today. See Tr., June 2, 2003, a.m., at 31:20-32:8; 54:15-55:8 (J. Langbein).

in no sense does it describe or contemplate steps that would delay rather than accelerate provision of the required accounting. See Section II.C., infra. But even if the Court were to determine that Interior's Plan was so defective that it would necessarily delay rather than accelerate the ultimate provision of an adequate accounting, the Court could not enter a "structural injunction" or otherwise dictate the manner in which the accounting is to be performed; rather, in accordance with the principles set forth above, the Court would have to remand the matter back to the agency to permit it to bring itself into compliance with its obligations. Courts may not exceed constitutional and statutory limits on the judicial authority by specifying how Executive Branch agencies must fulfill their legal obligations, rather than simply requiring them to do so.

21. As the judicially enforceable duty at issue is not "to take the discrete individual steps that would facilitate an accounting," but the provision of the accounting itself, Cobell v. Norton, 240 F.3d at 1106, this Court's authority does not extend to oversight and direction of Interior's performance of all fiduciary obligations. This is not an "institutional reform" case, and judicial intrusion into the internal affairs of an Executive Branch agency "simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." Cobell v. Norton, 2003 WL 21673009, at *12.

22. As the Court is not empowered to oversee the details of the government's management of the Indian trust fund program, judicial review of Interior's Fiduciary Obligations Compliance Plan must be limited to, at most, the detection of "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d at 1110.

23. Because it is the Secretary of the Interior, rather than the Court or the Plaintiffs, who must determine the manner in which the historical accounting is to be performed and the IIM trust is to be managed, the plans submitted by Plaintiffs on January 6, 2003 may not be considered or adopted by the Court.

B. Plaintiffs Must Establish That Interior's Plans Describe Steps So Defective That They Would Necessarily Delay Rather Than Accelerate The Ultimate Provision Of An Adequate Accounting.

24. As ordered by the Court on September 17, 2002, Interior Defendants were required to produce "a plan for conducting a historical accounting of the IIM trust accounts" and "a plan for bringing themselves into compliance with the fiduciary obligations that they owe to the IIM beneficiaries." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002). Interior Defendants complied with this direction on January 6, 2003, when they filed with the Court, and served upon Plaintiffs, (1) their Historical Accounting Plan for Individual Indian Money Accounts, and (2) their Fiduciary Obligations Compliance Plan.

25. The burden of persuasion – and the ultimate burden of proof at the Phase 1.5 trial – remains with Plaintiffs. See, e.g., Tr., April 29, 2003, at 5:25-6:1 ("the plaintiff has the ultimate burden"); Tr., July 8, 2003, p.m., at 30:8-9 ("[Plaintiffs] have got the burden"). As defined by the Court, the Phase 1.5 trial was about "the adequacy" of the plans filed by Interior Defendants. Tr., April 29, 2003, at 4:8-19, 5:6-7, 13-14.

26. As the Court in the Phase 1.5 proceeding is limited to determining whether Interior's plans constitute unreasonable delay, the ultimate burden on Plaintiffs was to prove that Interior's plans describe steps "so defective that they would necessarily delay rather than

accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d at 1110.

27. It is not enough for Plaintiffs to identify obstacles or to describe past failures and predict future concerns with implementation of an otherwise adequate plan. Plaintiffs must show that, under the existing circumstances, Interior's plans are defective and would necessarily delay an adequate accounting. Plaintiffs have not, and cannot, meet their burden. See Section II.C.5., infra.

28. Plaintiffs were given an opportunity to file their own historical accounting and compliance plans; they did so on January 6, 2003. Consideration of Plaintiffs' plans is "beyond the district court's jurisdiction." Cobell v. Norton, 240 F.3d at 1110. See Section II.A., supra.

29. However, if the Court were to consider Plaintiffs' plans, Plaintiffs also have the burden of proving that their plans would not delay the provision of an adequate accounting within the meaning of the 1994 Act. See 25 U.S.C.A § 4011(a), (b). It is impossible for Plaintiffs to satisfy that burden.[23]

C. Interior's Historical Accounting Plan Sets Forth A Methodology That Will Enable Interior To Comply Fully With Its Obligation To Perform An Historical Accounting.

1. Interior's Accounting Obligation Is Defined In The American Indian Trust Fund Management Reform Act Of 1994.

30. "Plaintiffs br[ought] this lawsuit to force the government to abide by its duty to render an accurate accounting of the money currently held within the IIM trust." Cobell v.

[23] Even if Plaintiffs could show that their plans would provide for an adequate accounting within the meaning of the 1994 Act, it would be improper for the Court to require Interior to adopt Plaintiffs' plans for the reasons explained in Section II.A., supra.

Babbitt, 91 F. Supp. 2d at 6. Plaintiffs asserted "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." Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998). Plaintiffs "ask[ed] this Court solely for a declaration of the defendants' trust duties and an accounting of money already existing in the [IIM] account[s]." Id. at 40. Plaintiffs sought this relief pursuant to the 1994 Act and the common law of trusts, but this Court dismissed their common-law claims. Cobell v. Babbitt, 91 F. Supp. 2d at 31.

31. Thus, as this Court has recognized, the Plaintiffs "seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C.A. § 4011." Cobell v. Babbitt, 91 F. Supp. 2d at 27; see also id. at 31 (dismissing Plaintiffs' common law claims). "The [C]ourt's review and [P]laintiffs' rights are derived from and determined by statute." Id. at 30.

32. The 1994 Act requires Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a).

33. On December 21, 1999, this Court entered a judgment declaring that the 1994 Act "requires defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d at 58.

34. The Court of Appeals affirmed most aspects of this Court's ruling, and stated that "'[a]ll funds' [in Section 4011(a)] 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)." Cobell v. Norton, 240 F.3d at 1102 (emphasis in original).

35. Although the term "historical accounting" does not appear in the 1994 Act, this Court explained its use of the term and the purpose of the historical accounting as follows:

> It is important to note that there is no difference between a "historical accounting" and an "accounting." . . . Any accounting of funds necessarily involves examining past transactions and events that could [affect] the current balance. In this opinion, the Court has predominantly used the term historical accounting to emphasize that the Interior Department must take past transactions into consideration to ensure that the current balances in the IIM trust accounts are accurate.

Cobell v. Norton, 226 F. Supp. 2d at 116 n.135. This is consistent with the suggestion of the Court of Appeals that one cannot "give a *fair* and *accurate* accounting of *all* accounts without first reconciling the accounts, taking into account past deposits, withdrawals, and accruals." Cobell v. Norton, 240 F.3d at 1102 (emphasis in original).

36. In other words, to fulfill its duty to account on a daily and annual basis for all funds that it holds in trust, Interior must first ensure that the current balances in the IIM trust accounts are accurate. That is the goal and purpose of the so-called "historical accounting" in this case.

37. In an April 28, 2003 Memorandum and Order, this Court defined the accounting required by the 1994 Act as follows:

> The Court . . . understands an 'accounting' of a trust to constitute a detailed report provided by a trustee for a beneficiary describing the trustee's conduct during the relevant time period, including a description of each item of property within the trust corpus, all items of property received into or disbursed from the trust, all income earned by the trust, and all expenses paid by the trust.

Cobell v. Norton, 260 F. Supp. 2d 110, 123 (D.D.C. 2003). This Court "explicitly 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." Cobell v. Norton, 240 F.3d at 1104.

38. The 1994 Act also includes a current accounting obligation. It requires Interior to account for the daily and annual balance of all funds it holds in trust and to provide a quarterly statement of performance to each IIM account holder that identifies: "(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." 25 U.S.C.A. § 4011(b).

39. To comply with the requirements of Sections 4011(a) and (b), Interior has determined that it must accomplish the following three objectives:

> 1) Historical Accounting - Interior must provide information that can be used to assess the accuracy of the current balance in each of the IIM accounts. . . .
>
> 2) Current Ownership, Collection, Deposit and Transfer - Interior must collect the correct fund amounts in a timely manner for the correct IIM account holders. This requires that Interior's programs have adequate systems for tracking the trust land ownership interests of account holders and for collecting the money that is owed to each account holder and depositing it in Interior's Trust Funds Accounting System ("TFAS"). Programmatic improvements must occur in Interior's land title and revenue collections systems. . . .
>
> 3) Current Accounting - Trust Funds Accounting System - Once the funds are collected, Interior must deposit them in the correct IIM account, properly credit interest earned to the account, and disburse from the account the correct amounts to the correct persons. . . .

Interior's Fiduciary Obligations Compliance Plan, at 2-3 (Jan. 6, 2003) (Defs.' Ex. 1). Interior's Historical Accounting Plan describes Interior's plan for accomplishing the first objective; Interior's Fiduciary Obligations Compliance Plan describes Interior's plan for accomplishing the second and third objectives.

a. The Statutory Historical Accounting Obligation Must Be Viewed In Light Of The Facts Available To Congress When It Enacted The 1994 Act.

40. This statutory historical accounting requirement must be viewed in light of the facts available to Congress when it enacted the 1994 Act. See Minneapolis & St. L. Ry. Co. v. United States, 361 U.S. 173, 187 (1959); Cosby v. United States, 8 Cl. Ct. 428, 438 n.16 (1985), aff'd, 795 F.2d 999 (Fed. Cir. 1986); see also South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 191 (1938) (legislative judgment presumed supported by facts known to the Legislature unless facts judicially known or proved preclude that possibility). Among those facts is that some Indian trust records are missing or irretrievable.

41. Legislative history reveals that Congress knew that "[m]uch needed documentation [was] missing, making reconciliation extremely difficult." H.R. Rep. No. 103-778, 103rd Cong., 2d Sess. 10 (1994), reprinted in 1994 U.S.C.C.A.N. 3467, 3469 (emphasis added).

42. Similarly, in June 1992, the General Accounting Office (GAO) reported:

> Since the trust fund reconciliation contract was awarded in May 1991, BIA and its contractor have determined that a full reconciliation of all tribal and Individual Indian Money accounts is neither possible nor cost-effective due to missing records, commingled tribal and individual Indian accounting records, poorly documented accounting transactions, and the volume of data to be reviewed.

BIA Has Made Limited Progress in Reconciling Trust Accounts and Developing a Strategic Plan 5 (U.S. General Accounting Office June 18, 1992) (Pls.' Ex. 139). This GAO report is cited in the well-known "Misplaced Trust" Report issued by the House Committee on Government Operations, which described BIA's costly efforts in the early 1990s to conduct a complete audit and reconciliation of all IIM accounts, and which in turn was discussed by the House Natural Resources Committee in its report accompanying H.R. 4833, the bill ultimately enacted as the 1994 Act. H.R. Rep. No. 103-778, at 10 (discussing Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499, 102d Cong., 2d Sess. (1992) ("Misplaced Trust Report")).

43. Prior to 1994, Comptroller General reports dating back to 1929 informed Congress of instances in which documentation supporting IIM account transactions was incomplete. See e.g., Defs.' Ex. 256, at 115; Defs.' Ex. 275, at 20; Defs.' Ex. 276, at 28.

44. Because Congress enacted the 1994 Act with the understanding that some trust records were missing or irretrievable, Congress must have intended that compliance with the 1994 Act's accounting requirements could be achieved despite such limitations.

b. The Statutory Historical Accounting Obligation Is Constrained By Congressional Limitations, Including Appropriation Limits.

45. Interior's accounting obligations (and, indeed, all of its trust responsibilities) are constrained by congressional limitations, including appropriation limits. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." OPM v. Richmond, 496 U.S. 414, 425 (1990).

46. An agency may not spend more money than Congress appropriates to it. The Anti-Deficiency Act, 31 U.S.C. § 1341, forbids "officer[s] and employee[s]" of the federal government from authorizing an obligation or expenditure exceeding an appropriation, or in advance of an appropriation.[24] See generally Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1171 (Fed. Cir. 1995) ("[A]n agency may not spend more money for a program than has been appropriated for that program . . . ."). The Anti-Deficiency Act provides agencies more than just general guidance. The law also requires agencies to promulgate regulations restricting obligations to the amount of appropriations and apportionments. 31 U.S.C. § 1514.

47. Along with the restraints imposed by the Anti-Deficiency Act, agencies must comply with the Purpose Statute, 31 U.S.C. § 1301(a). This law requires that "[a]ppropriations . . . be applied only to the objects for which the appropriations were made except as otherwise provided by law." Id. Therefore, Interior, like every federal agency, is constrained not only by how much money Congress appropriates to it, but also by the requirement that it spend appropriated funds in accordance with the purpose for which the appropriations were made.

48. Interior's discharge of its responsibility to perform an accounting of IIM funds (and all of its trust responsibilities) is subject to these constraints. Expert Report of John H.

---

[24] The Anti-Deficiency Act is not without teeth. Agency heads must report violations to the President and Congress. 31 U.S.C. § 1517(b); 31 U.S.C. § 1351. Such transmittals to the President and Congress must report "all relevant facts and a statement of actions taken." Id. Violators face adverse personnel actions, including "suspension from duty without pay or removal from office." 31 U.S.C. § 1349(a). Furthermore, violators are subject to criminal penalties of a fine up to $5,000 and imprisonment up to two years. 31 U.S.C. § 1350.

Langbein, at 4 (Defs.' Ex. 37). Because Congress is the settlor of the individual Indian trust, see id.; Tr., June 2, 2003, p.m., at 53:13-14, 59:5 (J. Langbein), the common law of trusts is subordinate to congressional direction, including funding legislation.[25] Expert Report of John H. Langbein, at 6 (Defs.' Ex. 37); Tr., June 2, 2003, p.m., at 100:2-4 (J. Langbein); Tr., June 3, 2003, p.m., at 39:25-40:1 (J. Langbein).

49. The Department of the Interior, unlike a private trustee, depends on annual appropriations from Congress, Tr., June 2, 2003, p.m., at 67:4-13 (J. Langbein); Tr., June 3, 2003, a.m., at 12:25-13:10 (J. Langbein), and may expend funds only to the extent that Congress has appropriated them. Tr., June 3, 2003, a.m., at 67:4-6 (J. Langbein); Tr., June 3, 2003, p.m., at 38:17-18 (J. Langbein).

50. Funding constraints may suspend or modify an agency's statutory obligations. See Forest Guardians v. Babbitt, 174 F.3d 1178, 1188-89, 1193 (10th Cir. 1999) (requiring Interior to take action because congressional funding moratorium had ended); Environmental Def. Ctr. v. Babbitt, 73 F.3d 867, 871 (9th Cir. 1995) (stating that, while appropriations restriction did not repeal Secretary's duty, it "prevent[ed] him from taking final action . . . at this time"); N.Y. Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966) (per curiam) (stating that "failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements").

---

[25] Even the common law would dictate this result because the common law prudence standard, which underlies many common law trust duties, is situational; that is, the applicable standard is that of a reasonable person similarly situated. Thus, the prudence standard applicable to Interior would be that of similarly situated federal agencies facing similar congressional restraints and co-existing statutory obligations. Expert Report of John H. Langbein, at 4, 6-7 (Defs.' Ex. 37); Tr., June 3, 2003, p.m., at 40:4-7 (J. Langbein).

51. Failure of Congress to sufficiently fund a particular trust activity undertaken by Interior operates as a constructive suspension of that activity.[26] Tr., June 3, 2003, a.m., at 19:23-25, 20:2-5, 56:1-5 (J. Langbein); Tr., June 2, 2003, p.m., at 94:5-10 (J. Langbein). Accordingly, funding shortages can operate as a defense to an allegation that a trustee failed to discharge immediately duties that might otherwise apply. Tr., June 3, 2003, a.m., at 4:6-11 (J. Langbein).

52. Courts may not order an agency to obligate funds contrary to congressional funding restraints. "It is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation . . . . Nor can it be contended that a court may appropriate funds from which an obligation may be made." Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992) (per curiam) (internal citations omitted). Furthermore, "[i]t is a well-settled matter of constitutional law that when an appropriation has lapsed or has been fully obligated, federal courts cannot order the expenditure of funds that were covered by that appropriation." City of Houston, Tex. v. HUD, 24 F.3d 1421, 1424 (D.C. Cir. 1994).

53. Congressional authorization for a program does not permit an agency to carry out that program in the absence of appropriations to fund it. County of Vernon v. United States, 933 F.2d 532, 534-35 (7th Cir. 1991) (Corps of Engineers could not continue a project when Congress did not fund it after its authorization). Interior is not free to use funds Congress

---

[26] "[T]he mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." N.Y. Airways, 369 F.2d at 748 (internal citations omitted); accord Environmental Defense Center, 73 F.3d at 871 ("The appropriations rider does not remove this statutory duty; instead, it only temporarily removes the funds available for carrying out the duty."). Thus, congressional funding decisions may have "the effect of suspending prior statutory" duties without "suppress[ing] such duties." Tr., June 3, 2003, p.m., at 7:7-9, 8:9-11 (J. Langbein).

provides for one trust activity for another trust activity without Congressional approval. Tr., June 26, 2003, p.m. at 67:14-68:24 (R. Swimmer).

2. Interior's Historical Accounting Plan Describes An Accounting for All Funds Held In Trust By The United States For The Benefit Of An Individual Indian Which Are Deposited Or Invested Pursuant To The Act Of June 24, 1938.

54. Interior's Historical Accounting Plan comports fully with the unambiguous language of the 1994 Act, which requires an accounting of "all funds" which are "held in trust by the United States for the benefit of . . . an individual Indian" and "which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a) (emphasis added). The scope of the accounting described in the Plan is consistent with the scope of the accounting prescribed by the statute.

a. Interior's Historical Accounting Plan Provides For An Accounting Of "Funds," As Required By The 1994 Act.

55. That the accounting required by the 1994 Act is an accounting of IIM funds, rather than of land or other assets from which funds are generated, is clear from the plain language of the statute, which requires the Secretary to account for "all *funds* held in trust."[27] 25 U.S.C.A. §

---

[27] The term "all funds" also appears in Sections 102(c) and 103(a) of the 1994 Act. In both instances, it is clear in context that the term has a current balance connotation. Section 102(c) provides that "[t]he 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 individual Indian which are deposited or invested pursuant to the Act of June 24, ..." 25 U.S.C.A. § 4011(c) (emphasis added). Section 103(a) provides that "*[a]ll 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 Indian tribes shall be invested . . . in public debt securities. . . ." 25 U.S.C. § 161a (emphasis added). "[T]here is a presumption that where the same words are used in different parts of an act, and where the meaning in one instance is clear, other uses of the word in the act have the same meaning as that where the definition is clear." Wilson v. Brooks Supermarket, Inc. (In re Missionary Baptist Foundation of America, Inc.), 667 F.2d 1244, 1246 (5th Cir. 1982).

4011(a) (emphasis added). Accordingly, this Court entered a declaratory judgment that the 1994 Act requires "defendants to provide plaintiffs an accurate accounting of all *money* in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell v. Babbitt, 91 F. Supp. 2d at 58 (emphasis added); see also Cobell v. Norton, 226 F. Supp. 2d at 116 ("[T]he defendants must provide plaintiffs an accurate accounting of all *money* in the IIM trust.") (emphasis added).

56. The IIM trust contains only funds; it does not contain all assets held in trust for the benefit of individual Indians. Not all trust assets generate monies that are placed in IIM accounts. Nor are the trust assets that do generate monies themselves transferred into the IIM trust. The corpus of the IIM trust is the money that is deposited in the accounts, not the underlying trust assets that generate those funds.

57. As the required accounting is of IIM funds, and the property within the trust corpus is money, the accounting should include a complete transaction history, including funds received into or disbursed from the trust, interest earned, and expenses paid. See Cobell v. Norton, 240 F.3d at 1102; Cobell v. Norton, 260 F. Supp. 2d at 123.

58. Interior's Historical Accounting Plan states that, at the end of the historical accounting process, each IIM account holder will be provided with a Historical Statement of Account that reflects "how much money was credited to [the] account and from what sources, the amount of interest credited to [the] account, and the disbursements made from the account." Interior's Historical Accounting Plan, at 2 (Defs.' Ex. 55).

59. Although the accounting required by statute is an accounting of "funds" rather than "assets," Interior's Historical Accounting Plan goes further. At the end of the historical

accounting process, Interior "intends to be in the position to provide the IIM account holder with information regarding their land assets as of December 31, 2000 . . . [and] [i]n the future, Interior intends to provide a listing of trust assets along with a report on the management of the funds generated from those assets and from other sources with each quarterly statement." Interior's Historical Accounting Plan, at 2 (Defs.' Ex. 55).

b. Interior's Historical Accounting Plan Provides For An Accounting Of Funds "Held In Trust By The United States" As Required By The 1994 Act; Direct Payments To Indian Landowners Are Not Within The Scope Of The Accounting Provisions Of The 1994 Act.

60. The 1994 Act requires Interior to account for funds "held in trust by the United States . . . which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a). Funds that were never received by the United States because they were paid directly to Indian landowners, guardians, private trustees, and the like are neither "held in trust by the United States" nor "deposited or invested pursuant to the Act of June 24, 1938,"[28] and therefore, the statutory duty to account does not extend to such funds. This conclusion is consistent with this Court's ruling that the 1994 Act requires Interior Defendants "to provide plaintiffs an accurate accounting of all money in the IIM trust *held in trust for the benefit of plaintiffs*, without

[28] Interior's regulations do not permit the deposit of "direct pay" funds into an IIM account unless the direct payment cannot be effectuated. The regulations provide that Interior "will not accept funds from sources that are not identified in the table in § 115.702 for deposit into a trust account." 25 C.F.R. § 115.703. The table in 25 C.F.R. § 115.702 includes only those direct pay funds that have been returned by mail to the payor as undeliverable. 25 C.F.R. § 115.702 (Interior "must accept proceed[s] on behalf of . . . individuals from . . . [f]unds derived directly from trust lands, restricted fee lands, or trust resources that are presented to the Secretary, on behalf of the . . . individual Indian owner(s) of the trust asset, by the payor *after being mailed to the owner(s) as required by contract (i.e. direct pay) and returned by mail to the payor as undeliverable.*" (emphasis added)).

regard to when the funds were *deposited*." Cobell v. Babbitt, 91 F. Supp. 2d at 58 (emphasis added).[29]

61. Direct payments to beneficiaries are unknown to the world of private trusts, see Tr., June 2, 2003, p.m., at 72:18-74:13 (J. Langbein), but the individual Indian trust is a "unique animal," Tr., June 3, 2003, p.m., at 72:22 (J. Langbein), and direct-pay leases must be viewed in that light.[30] Interior's longstanding direct payment practice accommodates the desires of trust beneficiaries and is consistent with the intent of the General Allotment Act that "the allottee, and not the United States, . . . [would] manage the land." United States v. Navajo Nation, 123 S. Ct. 1079, 1092 (2003) (quoting United States v. Mitchell, 445 U.S. 535, 543 (1980)).

62. Case law, opinions of the Solicitor, Department of the Interior regulations, and GAO reports confirm that, for purposes of the accounting requirements of the 1994 Act, direct payments differ fundamentally from funds deposited into IIM accounts.

63. In Chisholm v. House, 160 F.2d 632 (10th Cir. 1947), Interior, as trustee for Indian allottees of land, sued a lessee to recover payments the lessee made to third parties while allegedly knowing of an invalid conveyance of the Indians' rights. The payments were made

---

[29] For these reasons, Interior's Historical Accounting Plan does not contemplate accounting for payments third parties have made directly to individual Indian landowners. See Tr., June 4, 2003, p.m., at 29:13-15, 38:17-22 (J. Cason). However, because Plaintiffs contend that Interior must account to them for direct payments, a discussion of the issues surrounding the direct payment practice is necessary.

[30] Plaintiffs' witness, Richard Fitzgerald, testified that "trusts in general . . . are very, very flexible. They can serve all sorts of purposes. So one of the things that you have to find out to begin with is, what is the purpose of the trust." Tr., May 8, 2003, p.m., at 27:23 - 28:2 (R. Fitzgerald).

under the terms of oil and gas leases, approved by the Secretary,[31] providing for direct payment to the allottees and their successors in interest. The court held that the rents and royalties thus paid were not restricted funds, and accordingly, the United States lacked standing to sue for their recovery. Id. at 642.

64. The Chisholm decision makes clear the distinction between income from restricted property paid directly in accordance with the terms of an approved lease and future or anticipated income not yet paid. The former must be treated as unrestricted funds while the latter retains the restricted character of the associated real property. See II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1949, 1965 WL 12755 (Sol. Gen.) (Feb. 17, 1965) ("Barry Memo") (Attachment A).[32] As a result of the Chisholm decision, Interior revised its leasing regulations to permit the United States to sue for breach of contract and, in its discretion, to recapture supervision over direct payments. Id.

---

[31] As a general rule, see 25 U.S.C. § 415, the Secretary of the Interior must approve direct-pay leases, but Plaintiffs' closing argument statement, Tr., July 8, 2003, p.m., at 35:13-18 (D. Gingold), that the Secretary also negotiates such leases is not only unsupported by the record, but also not entirely accurate. While it is likely that Interior does negotiate some of these leases, the record contains no evidence that it negotiates all or even a large percentage of them, by number of leases, dollar amount, or otherwise. Published court opinions reveal many examples of Indian landowners negotiating their leases, including substantial transactions, or being actively engaged in the process. See, e.g., Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996); Segundo v. City of Rancho Mirage, 813 F.2d 1387 (9th Cir. 1987); Warr v. United States, 46 Fed. Cl. 343 (2000); Wright v. United States, 32 Fed. Cl. 54 (1994); see also Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir. 2002) (tribe negotiated); Gila River Indian Community v. Waddell, 967 F.2d 1404 (9th Cir. 1992) (same); Sangre de Cristo Development Co. v. United States, 932 F.2d 891 (10th Cir. 1991) (same).

[32] The Barry memo addressed a question relating to contracts between individual Indians and real estate brokers. The question arose because of the great income-producing value of lands belonging to members of the Agua Caliente Band of Mission Indians.

65. Authorizing lessors to receive direct payments from third parties renders Interior's accounting to the lessors for such payments anomalous, if it were even possible. No mention of Interior accounting to direct-pay lessors is made in Chisholm, the Barry Memo, or the departmental regulations. Plaintiffs are wrong in claiming that another memo from the Interior Solicitor, see II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1890 (1960 WL 12652) (Nov. 1, 1960) ("Stevens Memo") (Pls.' Ex. 251), supports their theory that Interior must account to them for direct payments.

66. The Stevens Memo addresses the Secretary's potential enforcement of claims against lessees for failure to pay amounts due. The U.S. Geological Survey had expressed concerns that direct-pay lease arrangements did not allow it to verify the accuracy of payments made by oil and gas lessees. In light of those concerns, the Stevens Memo opines that an administrative decision "*may* involve a change in the present accounting procedure" to allow verification of the accuracy of lease payments.[33] Id. (emphasis added). Thus, the purpose of the accounting procedure that the Stevens Memo addressed was to help identify claims against lessees, which is not the purpose of the accounting procedure at issue in this case, i.e., to account to beneficiaries for funds held in trust on their behalf.

---

[33] In cross-examining Associate Deputy Secretary James Cason, Plaintiffs' attorney read virtually the entire Stevens Memo into the record. Tr., June 4, 2003, p.m., at 32:9-35:20 (D. Gingold). However, counsel's reading was not completely accurate, as he replaced "may involve a change in the present accounting procedure" with "must involve a change." Id. at 35:14 (emphasis added). The subsequent questioning of Mr. Cason concerning the memo must be read in light of that error. See id. at 35:21-37:13. Similarly, in cross-examining historian Edward Angel, Plaintiffs' counsel read of the same part of this sentence as "involves a change." Tr., June 16, p.m., at 104:2-3 (K. Harper).

67. Indeed, notwithstanding the Geological Survey's proposed elimination of the direct payment practice, the General Accounting Office recommended that Interior use direct payments to Indian lessors whenever possible to effect economies in BIA. Report on Review of Selected Activities at Certain Locations, Bureau of Indian Affairs, Department of the Interior, October 1959, at 5-6 (U.S. General Accounting Office July 1960) (Defs.' Ex. 186);[34] see also Audit Report to the Congress of the United States, Administration of Individual Indian Monies by Bureau of Indian Affairs, Department of the Interior 26 (Comp. Gen. Nov. 1955) (Defs.' Ex. 84) (stating that the direct pay policy, "if effectively carried out by area and agency officials, should reduce considerably the number of IIM accounts").

68. When Interior revised its surface leasing regulations in 2001, it sought comments on whether to continue to provide for direct payment to Indian landowners. See Proposed Rule - Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held In Trust, 65

---

[34] The copy of the 1960 GAO report filed as an exhibit with the Court included only pages 1 through 3. At page 6, the report notes as follows:

> To overcome the objections raised by the Geological Survey regarding its inability to determine whether the Indian landowners are being paid royalties properly if lessee companies do not submit the royalty checks to the Survey, we suggest that the lessee companies be requested to transmit to the Survey, along with the production reports, a listing of the checks issued for each lease.

Report on Review of Selected Activities at Certain Locations, at 6 (Attachment B). Direct payment data provided by lessees, while potentially useful to monitor lessee performance , has absolutely no bearing on "funds held in trust" or "deposited or invested" by the United States within the meaning of the 1994 Act.

Fed. Reg. 43,874 (July 14, 2000) (Defs.' Ex. 175).[35] Consistent with the majority of comments it received, Interior continued the direct payment practice in the final rule, explaining as follows:

> Consistent with the majority of comments, the final regulations continue to provide for direct payment to Indian landowners for leases on their trust lands, as long as direct payment is a specific term in the lease or permit. In order to ensure that the Secretary can properly enforce lease and permit payment terms, leases and permits authorizing direct payments must require that tenants maintain documentary proof of payment. Several respondents suggested that the Secretary should require that proof of payment be submitted to the agency with every direct payment. However, such a requirement would be inconsistent with historic practice and would result in an unsustainable drain on agency resources. Absent a system for tracking such notices, the requirement would not produce the desired goal of ensuring prompt enforcement of payment of trust income. Further, it would be far less effective than relying on the Indian landowner to advise the BIA immediately upon discovering that a payment has not been made and requesting enforcement assistance. Therefore, the final regulations provide that the Indian landowner notify the Secretary that a required payment has not been made. The Secretary then will take prompt and effective action based on that specific information. The Department continues to recognize the advantages to Indian landowners of direct payments. However, this advantage necessarily brings with it increased responsibility of Indian landowners to assist in the enforcement of non-payment of their leases and permits. With this regulatory change, Indian landowners who opt for and negotiate direct payments are clearly notified of their responsibilities to notify the BIA of late payments. Similarly, tenants are notified both by these regulations and in the lease itself that documentary proof of payment will be necessary to

[35] In soliciting comments, the notice of proposed rulemaking suggested the possibility of a conflict between direct payment leases and the 1994 Act, see 65 Fed. Reg. at 43,880, and questioned "the compatibility of [direct] payments with the Secretary's legal obligation as trustee to obtain the information regarding payment history that is needed to perform the necessary accounting." Id. In answering this question, the final rule makes clear that direct payments lie outside the scope of the 1994 Act accounting requirements. See Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001) (Defs.' Ex. 176).

> demonstrate that a payment was timely made in the correct amount due, should there be any question about a payment.

Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001) (Defs.' Ex. 176).

69. The final rule also made clear that Interior was not taking on any obligation to manage or account for direct payments:

> The Department is not taking on any obligation to manage or account for funds paid directly to Indian landowners that are not actually held in trust by the United States. This is consistent with section 102(a) of the American Indian Trust Management Reform Act of 1994, 25 U.S.C. [§] 4011. Although we invited the public to comment on the question of accounting for direct payments, no specific recommendations were received beyond a general recommendation to collect proof of payment.

Id. (emphasis added).

70. Therefore, any issues that Interior's direct payment procedures might raise, such as whether its monitoring system is compatible with any obligation it may have to pursue potential claims, would be asset-management issues and, thus, outside the scope of this lawsuit. See Cobell v. Babbitt, 30 F. Supp. 2d at 40 n.18. As far as this lawsuit is concerned, it is only relevant that direct payments are neither held in trust by the United States nor deposited or invested within the meaning of the 1994 Act. Accordingly, Interior properly excludes direct pay transactions from its historical accounting plan.

c. Interior's Historical Accounting Plan Provides For An Accounting Of Funds "Deposited Or Invested Pursuant To The Act Of June 24, 1938" As Required By The 1994 Act.

71. The 1994 Act requires Interior to account for funds deposited after the Act of June 24, 19308. The Court of Appeals acknowledged this requirement when it held that Interior

Defendants must account for all funds, "irrespective of when they were deposited (*or at least so long as they were deposited after the Act of June 24, 1938*)." Cobell v. Norton, 240 F.3d at 1102 (emphasis added). Had Congress not intended to so delimit the accounting obligation, it would have omitted the phrase "deposited or invested pursuant to the Act of June 24, 1938" from the 1994 Act.

72. In accordance with the 1994 Act, Interior's Historical Accounting Plan anticipates that each eligible IIM account holder will receive a historical statement of account which includes the account history from the later of the inception of the account or June 24, 1938, until December 31, 2000 (unless the statute of limitations requires a different temporal limitation).[36]

[36] Interior's Historical Accounting Plan does not address certain questions about the enforceability of Plaintiffs' claims, although they may affect the scope of the accounting. Instead, Defendants addressed the effect of the statute of limitation and laches in a separate motion, see Defendants' Memorandum Of Points And Authorities In Support Of Motion For Partial Summary Judgment Regarding Statute Of Limitations And Laches ("Defendants' Motion Regarding Statute Of Limitations") (Jan. 31, 2003) (filed under seal), which the Court denied on April 28, 2003. As explained in Section II.D., infra, the scope of the historical accounting described in Interior's Historical Accounting Plan is necessarily limited to the extent the statute of limitations is ultimately determined to bar any of Plaintiffs' accounting claims. In particular, if the statute of limitations applies, it would, in conjunction with an applicable tolling provision, preclude all claims based on failures to account for transactions in IIM accounts prior to October 1, 1984. In that event, Interior's accounting obligation would extend only to the transactions in an IIM accounts from the inception of the account or October 1, 1984, whichever is later.

d. Interior's Historical Accounting Plan Provides For Historical Accountings To All IIM Account Holders With Accounts Open On Or After October 25, 1994.

(1) The 1994 Act Establishes Specific Accounting Obligations For Funds Held In Trust On Or After Passage Of The Act.

73. The "requirement to account" established by the 1994 Act applies to "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a) (emphasis added); see also Cobell v. Norton, 226 F. Supp. 2d at 116 n.135 (stating that the accounting owed by Interior "necessarily involves examining past transactions and events that could [affect] the current balance" and "the Interior Department must take past transactions into consideration to ensure that the current balances in the IIM trust accounts are accurate." (emphases added)). The 1994 Act confirms Interior's duty as trustee to account for the money it holds in trust for existing account holders.

74. The 1994 Act does not contain a retrospective element, such as requiring an accounting for all funds that "were" or "have ever been" deposited or invested.[37] Moreover, as

---

[37] Statutes are to be accorded only prospective application unless Congress has "directed with the requisite clarity that the law be applied retrospectively." INS v. St. Cyr, 533 U.S. 289, 316 (2001) (citing Martin v. Hadix, 527 U.S. 343, 352 (1999)).

> The standard for finding such unambiguous direction is a demanding one. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation."

Id. at 316-17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)) (brackets in original); see also United States v. Zacks, 375 U.S. 59, 65-67 (1963) (cited in Lindh v. Murphy, 521 U.S. at 328 n.4); Automobile Club v. Commissioner, 353 U.S. 180, 184 (1957); Graham v. Goodcell,

explained below, the language of the 1994 Act is determinative because it establishes specific accounting obligations that can only be performed for accounts in existence on or after the passage of the 1994 Act on October 25, 1994.

75. The 1994 Act contains two specific provisions relevant to the Secretary's accounting duties; both make sense only in the context of existing accounts. Section 101 of the 1994 Act is captioned "Affirmative Action Required." 1994 Act, Pub. L. No. 103-412, § 101, 108 Stat. 4239; H.R. Rep. No. 103-778, at 2 (Oct. 3, 1994); codified at 25 U.S.C. § 162a(d). Section 101(d) provides in relevant part:

> 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. . . .

25 U.S.C. § 162a(d).

---

282 U.S. 409, 416-20 (1931).

76. Congress's use of forward-looking language demonstrates that it did not intend that Section 101 of the 1994 Act apply to accounts distributed and closed prior to the enactment of the 1994 Act. For example, such closed accounts do not have "balances" to which to apply the duty to "[p]rovid[e] adequate systems for accounting for and reporting trust fund balances," 25 U.S.C. § 162a(d)(1), or the duty to "[d]etermin[e] accurate cash balances," 25 U.S.C. § 162a(d)(4), or the duty to "[p]repar[e] and supply[] account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis," 25 U.S.C. § 162a(d)(5). Nor do such accounts have current receipts or disbursements to which to apply the duty to "[p]rovid[e] adequate controls over receipts and disbursements." 25 U.S.C. § 162a(d)(2).

77. Section 102 of the 1994 Act, entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds," sets forth three specific accounting requirements. In subsection (a) (entitled "Requirement to Account"), it provides:

> 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 <u>are deposited or invested</u> pursuant to section 162a of this title.

25 U.S.C.A. § 4011(a) (emphasis added). Subsection (b) (captioned "Periodic Statement of Performance") provides:

> <u>Not later than 20 business days after the close of a calendar quarter</u>, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds <u>are deposited or invested</u> pursuant to section 162a of this title. 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.

25 U.S.C.A. § 4011(b) (emphasis added). Finally, subsection (c) requires the Secretary to conduct an annual audit of all funds held in trust and directs that the Secretary "shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit." 25 U.S.C.A. § 4011(c).

78. As with Section 101, Congress's use of forward-looking language in Section 102 confirms that Congress did not intend that Section 102 apply to accounts closed prior to the enactment of the 1994 Act. The periodic statement of performance mandated by Section 102(b) is to be provided "[n]ot later than 20 business days after the close of a calendar quarter," and the specific elements of the statement described in subsection (b) are to be provided "for the period concerned." 25 U.S.C.A. § 4011(b). It is, of course, impossible for the Secretary to provide such a statement for any calendar quarter ending prior to October 25, 1994, within twenty business days after the close of the calendar quarter. Insofar as retrospective application of the 1994 Act can only be mandated through a construction leading to this impossible and absurd result, such a construction is improper and must be rejected. See, e.g., FTC v. Ken Roberts Co., 276 F.3d 583, 590 (D.C. Cir. 2001) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)), cert. denied, 123 S. Ct. 99 (2002).

79. Section 102 is as significant for what it does not say as for what it does say. For example, Section 102 does not say that the Secretary shall account for all funds that "have ever been" or "were" deposited or invested pursuant to 25 U.S.C. § 162a. Instead, Congress specifically used the present tense and limited the requisite accounting to funds "which are

deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a)-(c) (emphasis added). If Congress had intended the 1994 Act's accounting requirements to apply to funds previously deposited or invested, or to closed accounts, it would have "directed with the requisite clarity that the law be applied retrospectively" to those funds or those closed accounts. INS v. St. Cyr, 533 U.S. at 316. No such direction is to be found within the accounting provisions of the 1994 Act. Sections 101 and 102 of the 1994 Act must be construed as applying only to IIM accounts existing on or after the enactment of the 1994 Act and not to IIM accounts that were distributed and closed prior to October 25, 1994.

(2) Legislative History Confirms Congress's Intent That The Specific Accounting Requirements Set Forth In The 1994 Act Apply To Those Funds Held In Trust On Or After The Date Of Enactment.

80. The legislative history accompanying the 1994 Act confirms that Congress never intended that the Secretary prepare an accounting for IIM accounts that had been distributed and closed prior to October 25, 1994.

81. In its report accompanying H.R. 4833, the bill ultimately enacted as the 1994 Act, the House Natural Resources Committee discussed the "Misplaced Trust" Report previously issued by the House Committee on Government Operations. H.R. Rep. No. 103-778, at 10. The Misplaced Trust Report described BIA's costly efforts in the early 1990s to conduct a complete audit and reconciliation of all IIM accounts and concluded that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices." Misplaced Trust Report, at 26. The Report continued:

> Obviously, 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. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, 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. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Id. (emphasis added and footnote omitted).

82. The Misplaced Trust Report's reference to the "300,000 accounts in the Indian trust fund," Misplaced Trust Report at 26, is particularly relevant. In its description of the IIM trust fund, the Misplaced Trust Report explained:

> The IIM trust fund is a deposit fund, usually not voluntary, for individual participants and tribes. It was originally intended to provide banking services for legally incompetent Indian adults and Indian minors without legal guardians. In addition to these fiduciary accounts, the IIM trust fund now contains deposit accounts for certain tribal operations and for some tribal enterprises. Approximately 300,000 accounts are held in the IIM trust fund.

Misplaced Trust Report, at 2 (emphasis added). Thus, its use of the present tense in describing how many accounts "are held" in the IIM trust fund makes clear Congress's focus on the then-existing trust accounts. See also H.R. Rep. No. 103-778, at 9 (legislative history also stated that "[t]he BIA is currently managing . . . nearly 337,000 separate IIM accounts" (emphasis added)).

83. Finally, as this Court noted in its 1999 opinion, Congressman Synar, the principal author of the Misplaced Trust Report, stated during a 1989 hearing of the House Subcommittee on Interior Appropriations:

> I'm going to tell you, speaking on behalf of myself and [Congressman] Yates and four Congresses, it is our clear intention

> – and let the Record show – it is our clear intention that these [Indian Trust] accounts will be reconciled and audited before there is any movement or transfer [of the funds]. If you interpret that any other way, or if your lawyers or your personnel do, you're interpreting it wrong.

Misplaced Trust Report, at 21 (footnote omitted), quoted in Cobell v. Babbitt, 91 F. Supp. 2d at 41. Congressman Synar's statement provides yet further indicia of Congress's intent during the debate which led to enactment of the 1994 Act. Congress was concerned regarding then-existing accounts; Interior could not "move" or "transfer" accounts no longer in existence. Thus, Congress clearly did not intend to mandate an historical accounting of accounts which no longer existed when the 1994 Act became law.

84. Because Interior's Historical Accounting Plan describes an accounting that extends to all of the funds for which Congress contemplated an accounting, Interior's plan to provide an accounting for accounts open on or after October 25, 1994 is proper as a matter of law.

e. Interior's Obligation To Perform An Accounting Does Not Extend To The Closed Accounts Of Deceased Predecessors Of IIM Account Holders.

85. As indicated in the Historical Accounting Plan, Interior "does not contemplate performing historical accounting work for the closed accounts of deceased predecessors" as part of the historical accounting effort for current IIM account holders. Interior's Historical Accounting Plan, at II-3 (Defs.' Ex. 55).

86. As an initial matter, Congress did not prescribe an accounting for accounts closed prior to the passage of the 1994 Act, as explained in Section II.C.2.d, supra.

87. Interior need not examine the transactions in the account of a deceased predecessor of a current IIM account holder in order to provide an accounting to the current account holder. As explained in Interior's Historical Accounting Plan, Interior intends not only to provide IIM account holders with statements of account activity, but also to assess the accuracy of those statements by reconciling them to supporting documentation, such as leases, contracts, and probate orders. An IIM account holder who wishes to contest the validity of such underlying transactions may do so in an appropriate proceeding, but not through a request for an accounting.

88. The validity of Indian probate determinations, which generally conclude one trust relationship and define a new one, must be challenged through applicable statutory and administrative regulations. Interior's probate proceedings have performed functions similar to that of state probate courts: determining the lawful heirs of deceased Indians while ensuring due process to interested parties, including the IIM account holders. Interior's probate procedures[38] comport with constitutional standards of due process. See Kicking Woman v. Hodel, 878 F.2d 1203, 1208 (9th Cir. 1989) (holding that Interior regulations afforded due process and a meaningful appeal and declining to engage in a substantive review of an Indian probate proceeding).

[38] Oklahoma state courts probating the estates of Members of the Five Civilized Tribes and the Osage tribe provide similar due process protections to prospective heirs. Okla. Stat. Ann. tit. 58, §§ 23, 25, 128, 281, 552, and 553 (West 2002).

89. Judicial review of probate determinations in federal court is available once administrative remedies have been exhausted.[39] Before seeking judicial review, however, a claimant must exhaust administrative remedies. Arenas v. United States, 197 F.2d 418, 422 (9th Cir. 1952) (Indian who did not file administrative appeal could not challenge administrative heirship determination); Mammedaty v. Kleppe, 412 F. Supp. 283, 284-85 (W.D. Okla. 1976) (failure to file timely notice of appeal with Board of Indian Appeals precluded judicial review).

90. Thus, probate determinations are the product of either administrative proceedings or state judicial proceedings that provide a full measure of due process to interested parties. In light of the comprehensive administrative and statutory scheme for review of probate decisions, it is proper for Interior to rely upon probate orders in the course of verifying the accuracy of the account activity to be reported to IIM account holders.

91. Account holders who wish to contest a probate order underlying an IIM account transaction must exhaust their statutory and administrative remedies and, if necessary, seek appropriate review in federal court (to the extent that they are not time-barred). With respect to state court probate decisions, the appropriate state court remedies must be sought in state court.[40]

---

[39] In 1990, Congress amended the Act of June 25, 1910 to allow judicial review of Indian probate decisions in federal court. See An Act To Make Miscellaneous Amendments To Indian Laws, and for Other Purposes, Pub. L. No. 101-301, § 12(c), 104 Stat. 206, 211 (1990).

[40] The status of the probate backlog has been reported to the Court in Interior's quarterly reports. The performance of the historical accounting is not dependent on resolving the probate backlog. Because distributions to the IIM account of a beneficiary are not made until a probate order is issued, each accounting statement will accurately reflect the transactions posted to the account as of the closing date of the historical accounting. When a probate proceeding is complete, the probate order will be used to post the appropriate transaction(s) to the heir's IIM account. Tr., July 2, 2003, p.m., at 54:24 - 56:13 (R. Swimmer) ("[W]hen the probate estate is completed, the probate order would be used to determine what those correct data element are for the heirs."). In any event, probate determinations are beyond the scope of Plaintiffs' claims in

3. The Methodology For The Historical Accounting Set Forth In Interior's Historical Accounting Plan Comports Fully With The Requirements Of The 1994 Act.

92. The methodology set forth in Interior's Historical Accounting Plan comports fully with the requirements of the 1994 Act. When the historical accounting is complete, Interior will be able to provide account holders with a transaction-by-transaction history of "past deposits, withdrawals, and accruals," Cobell v. Norton, 240 F.3d at 1102, and determine whether the current balance is correct in light of the account history. See Defendants' Proposed Findings of Fact, at § I.B.3., supra. Interior's Historical Accounting Plan also provides that Interior will take the additional step of assessing the accuracy of the account histories by reviewing supporting documentation using a combination of transaction-by-transaction and statistical sampling techniques. See id. Moreover, Interior intends to perform document-to-transaction history sampling to assess the completeness of the transaction histories data and numerous high-level system tests to assess the historical reliability of the IIM trust fund system as a whole. See id. at I.B.3.d., supra. Although not necessarily required by the 1994 Act, Interior believes these are prudent steps that will provide IIM account holders with the best available information about their accounts.

93. Thus, the goal of the historical accounting effort as described in Interior's Historical Accounting Plan is to provide each eligible IIM account holder, as soon as is practicable, with a transaction-by-transaction account transaction history *as well as* a statement regarding its accuracy. The plan describes an appropriate method for accomplishing this goal,

---

this lawsuit.

which will entail collecting relevant and available trust records and using those records to verify the accuracy of the account activity recorded in electronic and paper account ledgers. See Defendants' Proposed Findings of Fact, at § I.B.3., I.B.4, supra.

94. The Court of Appeals, noting that this Court "explicitly 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," confirmed that "[s]uch decisions are properly left in the hands of administrative agencies." Cobell v. Norton, 240 F.3d at 1104.

a. The Use Of Statistical Sampling Methodologies To Assess The Accuracy Of The Historical Accounting Statements Is Consistent With Congressional Aims Embodied In The 1994 Act And Promotes The Feasibility Of Interior's Historical Accounting Plan.

95. The use of statistical sampling methodologies in Interior's Historical Accounting Plan represents a reasonable exercise of the Secretary's discretion and is supported by the legislative history underlying the 1994 Act. In light of the tremendous time and cost associated with an effort to test the accuracy of each transaction in each account, and concern expressed by members of Congress about the length of time and level of funding required, Interior has developed an approach that will efficiently utilize available resources without compromising the accuracy of the results. See Defendants' Proposed Findings of Fact, at § I.B.3.b., supra.

96. Contrary to Plaintiffs' repeated – and erroneous – assertions, Interior's Historical Accounting Plan does not contemplate the use of statistical sampling techniques as a substitute for an accounting. Each IIM account holder will receive a detailed transaction-by-transaction history of "past deposits, withdrawals, and accruals." Cobell v. Norton, 240 F.3d at 1102. Statistical sampling methodologies will be used only as a tool for performing the additional step

of assessing the accuracy (by a review of supporting documentation) of certain subsets of land-based transactions in the account histories; the remaining transactions (including all Judgment and Per Capita Account transactions and land-based electronic transactions valued at $5,000 or more) will be individually reconciled to supporting documentation to assess accuracy.[41] The use of sampling for this purpose will "result in a [confidence][42] assertion" that will be included with each historical accounting statement. Tr., June 20, 2003, p.m., at 59:20-60:2 (D. Lasater); see Defendants' Proposed Findings of Fact, at § I.B.3.b., supra.

97. Statistical sampling is well-recognized by the courts as providing a reliable and acceptable method for auditing data and obtaining adjudicative evidence. For example, in Chaves County Home Health Service, Inc. v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991), the D.C. Circuit considered challenges by health care providers to the statistical sampling audit procedures which the Secretary of Health and Human Services ("HHS") employed to review Medicare payments. The providers argued that HHS was required to conduct individual claims adjudication and that its use of statistical sampling violated the Medicare statute and contravened procedural due process. The D.C. Circuit rejected these arguments, noting that the Medicare statute was silent regarding the use of sampling and holding that HHS's decision to utilize statistical sampling was permissible. Id. at 916-22.

---

[41] In addition, Interior's Historical Accounting Plan provides for the use of sampling to perform document-to-transaction testing to assess the completeness of transactions listings. See Defendants' Proposed Findings of Fact, at § I.B.3.b., supra.

[42] The word "competence" in the cited portion of the trial transcript is incorrect; the word should have been transcribed as "confidence."

98. Numerous other federal courts have similarly approved of the use of statistical sampling as a means for auditing records and establishing adjudicative facts. See, e.g., Hilao v. Marcos, 103 F.3d 767, 786 (9th Cir. 1996); Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 89-90 (2d Cir. 1991); Michigan Dep't of Educ. v. United States Dep't of Educ., 875 F.2d 1196, 1206 (6th Cir. 1989); Illinois Physicians Union v. Miller, 675 F.2d 151, 155 (7th Cir. 1982); Georgia v. Califano, 446 F. Supp. 404, 409-11 (N.D. Ga. 1977).

99. Case law endorses the use of statistical sampling generally, and the legislative history accompanying the 1994 Act supports its use in performing the historical accounting specifically. Congress enacted the 1994 Act after considering numerous reports and studies, including the Misplaced Trust Report described above. It reported on BIA's efforts in the early 1990s to audit selected IIM accounts – those maintained at three of the BIA's ninety-three offices. Misplaced Trust Report, at 24-26. The Report described "substantial difficulties in completing any IIM account phase I reconciliations" and enormous costs related to these efforts. Id. at 25-26; see also id. at 25 n.81 (subcommittee "is concerned by the enormity of [BIA] cost estimates to complete the IIM reconciliations"). The Misplaced Trust Report stated that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices," id. at 26, and concluded:

> Obviously, 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. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, 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. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Id. at 26 (emphasis added and footnote omitted).

100. As this Court has previously recognized, Congress enacted the 1994 Act "[b]ased largely on the findings made in Misplaced Trust." Cobell v. Babbitt, 91 F. Supp. 2d at 13. The legislative history underlying the 1994 Act confirms that Congress both recognized the impracticability of expending the money required for a review of the supporting documentation for every transaction in every individual Indian trust account and explicitly recognized the potential need 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." Misplaced Trust Report, at 26.

101. Simply put, Congress never mandated a transaction-by-transaction methodology for verifying the accuracy of every transaction constituting the IIM trust fund and, indeed, suggested that statistical sampling could provide a feasible alternative.[43] Interior's Historical Accounting Plan thoughtfully employs statistical sampling by combining a transaction-by-transaction verification of specific types and dollar levels of transactions with a verification of statistically valid samples of lower-dollar transactions. See Defendants' Proposed Findings of Fact, at § I.B.3.b., supra.

102. Interior's plan to provide statements and to verify transactions by sampling is consistent with professional auditing standards. For example, American Institute of Certified

---

[43] This Court has rejected an agency's use of statistical sampling where the statutory language and legislative history evinced a clear Congressional intent to prohibit its use. See United States House of Representatives v. United States Dep't of Commerce, 11 F. Supp. 2d 76, 97-104 (D.D.C. 1998) (rejecting the use of sampling to supplement the census headcount used for House apportionment based upon express prohibition in Census Act and unsupportive legislative history), appeal dismissed, 525 U.S. 316 (1999). No such prohibition is expressed or implied in the 1994 Act or its legislative history; indeed, the opposite is true.

Public Accountants' ("AICPA") guidance on auditing banks and trust departments provides that the current practice is for a trust department to provide a periodic statement – an "accounting" – to a customer that reflects the activity within the account. Tr., June 20, 2003, p.m., at 62:13-63:17 (D. Lasater). Under AICPA guidance, an auditor is to "perform sufficiently detailed tests to obtain reasonable assurance[44] that transactions and activities within the various types of trust accounts are being conducted properly." Id. at 63:18-64:22 (D. Lasater). Significantly – and contrary to Plaintiffs' groundless assertions – the AICPA audit guidance does not require 100 percent testing of account activity. Id. at 69:3-70:6 (D. Lasater). Rather, pursuant to Generally Accepted Auditing Standards, an auditor is required to collect sufficient competent evidentiary material to obtain reasonable assurance that financial statements are free of material misstatements. Id. at 66:23-67:17 (D. Lasater). Even Plaintiffs' witness, Mr. Duncan, concedes that it is appropriate to utilize sampling as an auditing procedure. Tr., May 29, 2003, p.m., at 41:4-8 (D. Duncan).

103. The sample size incorporated in Interior's Historical Accounting Plan is substantial, and is large enough to provide reasonable assurance to the Court and the parties regarding the reliability of the transactional listings and balances reflected in the individual account statements. See Defendants' Proposed Findings of Fact, at § I.B.3.b., supra. The error rate assumption underlying Interior's calculation of the sample size is reasonable in light of the discovered error rates noted in the Arthur Andersen Tribal Trust Reconciliation Project and the

[44] "Reasonable assurance" is a term of art in accounting and auditing literature. Tr., June 20, 2003, p.m., at 68:10-13 (D. Lasater).

Ernst & Young study performed by Joseph R. Rosenbaum. See id. at §§ I.B.3.b., I.B.4.c., supra.[45]

104. Using the sampling methodologies described in Interior's Historical Accounting Plan to assess the accuracy of the historical accounting statements will, at a sensible cost, expedite the historical accounting project without sacrificing reliability. In light of the tremendous time and cost associated with an effort to test the accuracy of each transaction in each account, and concern expressed by members of Congress about the length of time and level of funding required for such an effort, Interior's Historical Accounting Plan utilizes available resources efficiently without compromising the accuracy of the results. The use of the sampling methodologies described Interior's Plan is entirely consistent with the congressional aims embodied in the 1994 Act and promotes the feasibility of the Plan.

4. Interior's Historical Accounting Plan Is Feasible.

105. The Secretary of the Interior is committed to Interior's Historical Accounting Plan, Interior has been moving forward with the accounting efforts described in the Plan, and the Secretary prevailed upon the Office of Management and Budget to add $100 million to the fiscal year 2004 budget to permit the plan to go forward. Tr., June 5, 2003, a.m., at 75:16-76:24 (J. Cason). To the extent that Interior Defendants can control the factors affecting the Plan, they are committed to implementing it. Id.

---

[45] When Mr. Rosenbaum reviewed disbursement and collection transactions, he found no material differences between ledger entries and amounts reflected in supporting documents. See Defendants' Proposed Findings of Fact, at § I.B.4.c., supra. This provides further support for the reasonableness of Interior's use of an assumed error rate of 0 percent to 1 percent to develop its sampling plan. Tr., June 23, 2003, a.m., at 4:1-5:2 (D. Lasater).

106. Interior has engaged five national accounting firms, two historian firms which have specialized in Indian issues for many years, the largest commercial trust operator in the United States, and other consultants to assist with statistical matters, trust legal matters, and other areas pertaining to the historical accounting. See Defendants' Proposed Findings of Fact, at § I.B.4.a., supra. The consultants are actively engaged in performing the historical accounting work described in Interior's Historical Accounting Plan. See id. at § I..B.4.b., supra.

107. Interior has completed the accounting work for 16,821 Judgment Accounts with December 31, 2000 balances of approximately $48.5 million. Interior's Status Report to the Court Number Fourteen, at 34 (Aug. 1, 2003); see also Tr., June 4, 2003, a.m., at 23:23-25:3 (J. Cason). In addition, Interior has reconciled 117,425 transactions in Per Capita Accounts with a value of approximately $162 million. Interior's Status Report to the Court Number Fourteen, at 34. The historical accounting work for land-based accounts is also underway, as are records indexing and system testing projects. See Defendants' Proposed Findings of Fact, at §§ I.B.3., I.B.4.b., supra.

108. Contrary to the Plaintiffs' baseless assertions that an accounting is impossible because relevant records are unavailable, the experience of Interior and its consultants, including their experience with the named Plaintiffs' records, indicates that sufficient records are available to proceed with the historical accounting project. See Defendants' Proposed Findings of Fact, at § I.B.4.c., supra.

109. For example, the Paragraph 19 search and collection process demonstrated that sufficient records to conduct the historical accounting exist and are retrievable. See Defendants' Proposed Findings of Fact, at § I.B.4.c.(1), supra. The Ernst & Young analysis performed by

Joseph Rosenbaum confirms that sufficient data exists to perform an accounting for the named Plaintiffs (and their predecessors), and that Interior's IIM records related to their accounts are substantially accurate. See id. at § I.B.4.c.(2), supra. Interior's tribal trust fund reconciliation project further supports the feasibility of the accounting set forth in Interior's Historical Accounting Plan. See id. at § I.B.4.c.(3), supra.

110. The professional historians retained by OHTA to assist with locating records are firmly of the view that sufficient IIM records are available for Interior to undertake the accounting described in their Historical Accounting Plan. See id. at § I.B.4.c.(4), supra.

111. Interior's Historical Accounting Plan neither expects nor requires that all documents be found, see Tr., June 4, 2003, p.m., at 82:8-84:17 (J. Cason), and Interior has developed adaptive strategies to take into account record deficiencies, see id.; Interior's Historical Accounting Plan, at III-13 (Defs.' Ex. 55); Expert Report of Edward Angel, at 46 (Defs.' Ex. 60) ("[B]y making allowances for missing records, OHTA's plan both addresses gaps in the records and uses other historical records combined with the forensic abilities of skilled accountants to overcome those gaps."); see Defendants' Proposed Findings of Fact, at § I.B.3., supra.

112. Interior's Historical Accounting Plan describes an effort, already underway, that will bring Interior Defendants into compliance with their obligation to provide an historical accounting for "all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a). When the historical accounting work described in the Plan is complete, account holders will possess the best available information about the historical activity in their accounts, the

accuracy of the account activity recorded historically in the IIM trust fund system, and the reliability of the IIM trust fund system as a whole, and Defendants will have a sound basis for meeting their accounting obligations in the future. The historical accounting work described in the Plan stands a realistic chance of being funded by Congress, and, assuming adequate funding levels, will be completed in a reasonable period of time.

5. Plaintiffs Failed To Meet Their Burden To Establish That Interior's Historical Accounting Plan Describes Steps So Defective That They Would Necessarily Delay Rather Than Accelerate The Ultimate Provision Of An Adequate Accounting.

113. Plaintiffs have the burden to establish that Interior's Historical Accounting Plan describes steps "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting," Cobell v. Norton, 240 F.3d at 1110, and they have failed to satisfy that burden.

114. Plaintiffs called only one witness in rebuttal, Dwight Duncan. See generally Tr., July 2, 2003, p.m., at 96 (D. Duncan recalled). Plaintiffs attempted to attack Dr. Lasater's opinions and the Ernst & Young analysis during their rebuttal case, but their effort was largely unsuccessful.

115. Plaintiffs' witness Dwight Duncan lacks sufficient qualifications to advise the Court about Interior's sampling plan. Although Plaintiffs proffered Mr. Duncan as an expert on statistics, Mr. Duncan does not list statistics among the nine areas of expertise described on his curriculum vitae. Tr., May 28, 2003, p.m., at 78:4-79:25 (D. Duncan). In the two years preceding the trial, Mr. Duncan estimated that he spent only two percent of his professional time engaged in the designing of samples, id., at 81:1-82:8 (D. Duncan), and less than five percent of

his professional time engaged in the execution of samples. Id., at 82:9-25 (D. Duncan). Mr. Duncan's curriculum vitae does not indicate that he has taught any statistics classes, Id. at 86:9-16 (D. Duncan), nor has he published any books, articles, or other literature regarding statistical sampling. Id. at 87:4-6 (D. Duncan). Prior to this trial, Mr. Duncan had never testified as an expert about attribute sampling, Tr., May 29, 2003, p.m., at 43:25-44:3 (D. Duncan), or offered any professional opinions regarding noncoverage. Id. at 58:10-14 (D. Duncan).

116. Mr. Duncan has no familiarity with Generally Accepted Statistical Practices and does not know whether any of his opinions were prepared in accordance with such practices. Tr., May 28, 2003, p.m., at 105:18-24 (D. Duncan). When he was deposed in March, 2003, Mr. Duncan could not define the term "noncoverage," Tr., May 29, 2003, p.m., at 59:10-16 (D. Duncan), and could not define the K-S Test, Tr., May 28, 2003, p.m., at 95:7-19 (D. Duncan). Mr. Duncan has never personally utilized the K-S Test in his professional work. Tr., May 29, 2003, p.m., at 89:19-21 (D. Duncan).

117. In forming his opinions about Interior's sampling plan, Mr. Duncan did not review a single supporting document for any of the individual Indian money transactions. Tr., May 29, 2003, p.m., at 66:23-67:6 (D. Duncan). Nor, in forming his opinions about the sampling plan, did Mr. Duncan consider nonparametric tests, including the K-S Test. Id. at 86:2-9 (D. Duncan).

118. Mr. Duncan criticized Dr. Lasater's claims of an expected error rate "near zero" but never opined as to what he thinks the error rate actually will be. See Tr., July 2, 2003, p.m., at 96:12-97:11 (D. Duncan). Instead, he sought largely to undermine the studies upon which Dr. Lasater relies for his conclusions. See, e.g., Tr., July 3, 2003, a.m., at 3:16-4:7 (D. Duncan)

(agreeing that the validity of Dr. Lasater's opinions depend upon the accuracy of the Arthur Andersen Tribal Trust Fund reconciliation study and the Ernst & Young analysis).

119. Mr. Duncan's criticism of the Arthur Andersen report on the Tribal Trust reconciliation is superficial. He criticized Dr. Lasater for not looking at the audit work papers but conceded that he had never looked at them, either. Tr., July 3, 2003, p.m., at 58:5-8 (D. Duncan).

120. Mr. Duncan also critiqued the Ernst & Young analysis performed by Mr. Rosenbaum. Tr., July 3, 2003, a.m., at 70:20-24 (D. Duncan). Mr. Duncan's criticism, however, was based upon a reconstruction of Mr. Rosenbaum's database that Mr. Duncan had made with others. Tr., July 3, 2003, a.m., at 60:8-61:13, 61:24-62:8, 68:9-24 (D. Duncan). His critique necessarily involved expert opinion as to matters (such as forensic accounting, auditing and historical analysis) for which he was not qualified as an expert.

121. For example, Mr. Duncan contended that a certain document demonstrated that the Department of the Interior had charged administrative fees to IIM account holders. Tr., July 3, 2003, a.m., at 27:20-28:18 (D. Duncan) ("there are fees being charged to these accounts"). He later conceded he was not an historian and that he did not know anything about the history of the fees mentioned on the few documents he discussed. Tr., July 3, 2003, a.m., at 79:6-11 (D. Duncan). He demonstrated a similar lack of knowledge about other records he had reviewed as well. See, e.g., Tr., July 3, 2003, a.m., at 81:16-19, 88:16-25 (D. Duncan).

122. Mr. Duncan's review of the Ernst & Young analysis was preliminary and tentative. He commenced review of the Virtual Ledger only a few weeks prior to his rebuttal testimony. Tr., July 3, 2003, a.m., at 46:15-17 (D. Duncan) ("we have only had access to this

data for about three weeks. I have not gone through all -- multiple hundred thousand pages."). Mr. Duncan acknowledged that he had not had a chance to ask Mr. Rosenbaum about the discrepancies Mr. Duncan had perceived or whether Mr. Rosenbaum and his team could resolve them. Tr., July 3, 2003, a.m., at 76:4-77:9 (D. Duncan). He conceded that asking Mr. Rosenbaum about the documents would have been a good idea. See, e.g., Tr., July 3, 2003, a.m., at 84:19-21, 85:10-15 (D. Duncan). When asked to explain why, he testified:

> Well, you would sure like to know if -- first of all, I would like to know whether or not this was considered a supporting document. You can't tell that from the data that we were provided. It's my *assumption* that it's considered a supporting document because it's linked to something else, and roughly, the number of documents that were linked and the number of documents that were not linked -- in other words, didn't have any supporting documents -- are roughly similar to the percentages that Mr. Rosenbaum identified as supported and unsupported. So the *first assumption I have had to make is that any document that is linked was considered supported*.

Tr., July 3, 2003, a.m., at 84:23-85:9 (D. Duncan) (emphasis added). Thus, lacking Mr. Rosenbaum's insight, Mr. Duncan's critique at trial was based upon assumptions that he did not and could not verify. In other instances, he had to rely upon the opinion of other experts. See Tr., July 3, 2003, p.m., at 20:20-21:5 (D. Duncan).

123. Mr. Duncan did not even attempt to verify Dr. Lasater's calculation of sample size. Tr., July 3, 2003, p.m., at 70:2-8 (D. Duncan). Ultimately, Mr. Duncan conceded that even if his criticism of Dr. Lasater's expected "near zero" error rate were valid, the methodology could simply adjust by increasing the sample size, reducing the confidence level or lowering the precision of the sample to accommodate a different error rate. Tr., July 3, 2003, p.m., at 71:13-21, 72:6-13 (D. Duncan). As such, his rebuttal testimony has little weight.

D. Notwithstanding The Provisions Of Interior's Accounting Plan, The Statute Of Limitations And The Doctrine of Laches Bar All Claims For An Accounting Of Transactions In IIM Accounts From The Later Of The Inception Of The Account or October 1, 1984.

1. The Statute Of Limitations Applies To Claims Arising Out of Indian Trusts

124. 28 U.S.C. § 2401(a) supplies the applicable statute of limitations. That section states, in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

28 U.S.C. § 2401(a).

125. The statute of limitations is jurisdictional. Spannaus v. United States Dep't of Justice, 824 F.2d 52, 55 (D.C. Cir. 1987).

126. The tolling provisions in Interior's annual appropriations statutes since fiscal year 1991[46] do not preclude application of the statute of limitations. Cobell v. Babbitt, 30 F. Supp. 2d 24, 43- 44 (D.D.C. 1998) ("Cobell I"). Such statutes merely "stop[] the clock from commencing to run on the plaintiffs' viable claims as of October 1, 1990 . . . [b]ut cannot revive claims for which the clock stopped running long ago." Id. (footnote omitted). Accordingly, the six-year statute of limitations bars claims that accrued prior to October 1, 1984. See id. at 44 ("Any

[46] See, e.g., Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990) (stating that "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with the accounting of such funds")

claims that accrued before October 1, 1984, would have been time-barred before the enactment of the tolling provision in the 1990 appropriations act.").

127. Claims involving trusts accrue when the beneficiary first knows or should know of a breach. As stated in Bogert and Bogert, The Law of Trusts and Trustees § 951 at 629 (Rev. 2d ed. 1995) ("Bogert"), "[t]o give rise to a cause of action against which the Statute of Limitations can run there must be a breach of some duty owed by the trustee to the beneficiary, the most extreme form of which is complete repudiation of any obligation."[47] Thus,

> If the trustee violates one or more of his obligations to the beneficiary, or by words or other conduct denies that there is a trust and claims the trust property as his own, there obviously is a cause of action in favor of the beneficiary and any relevant Statute of Limitations will apply from the date when the beneficiary knew of the breach or repudiation, or by the exercise of reasonable skill and diligence could have learned of it.

Bogert § 951 at 630-34 (footnotes omitted). For example, "the trustee's denial of the beneficiary's right to information constitutes a breach of trust." Id. § 961 at 4.

128. This Court's Memorandum and Order dated April 28, 2003 ("April 28, 2003 Order"), Cobell v. Norton, 260 F. Supp. 2d 98, 105-07 (D.D.C. 2003), indicated that the statute of limitations to enforce a trustee's obligations does not begin to run until the trustee has repudiated the beneficiary's right to the benefits of the trust.[48] The Court relied on treatises on

---

[47] Although the common law of trusts between private parties does not establish the trust duties of the Government, which are defined only by statute and regulation, see United States v. Mitchell, 463 U.S. 206, 224 (1983), cases and treatises on the common law of trusts of private parties are instructive on how courts address trust issues.

[48] Earlier in this case, the parties agreed on the standard for determining when the statute of limitations begins to run: "[T]he plaintiffs' claims accrued when the plaintiffs knew or should have known that they had a valid right of action for trust mismanagement against the government." Cobell I, 30 F. Supp. 2d at 44 (emphasis added.)

trust law, but Bogert itself reveals that is not the law. The passage quoted above from Bogert states that if a trustee "violates one or more of his obligations . . . or by words or other conduct denies that there is a trust," the limitations period runs from when the beneficiary knew or should have known. Bogert § 951 at 630 (emphasis added). By using the disjunctive "or," Bogert establishes that either a violation of obligations or a repudiation (i.e., "words or other conduct den[ying] that there is a trust") is sufficient to trigger the statute of limitations. Further, Bogert states that "[t]o cause the Statute [of limitations] to begin running during the life of the trust there must be some unequivocal act in violation of the duties of the trustee or in repudiation of the trust, as where he declines to account to the beneficiary . . . ." Id. at 638 (emphasis added.) Again, Bogert's use of the disjunctive "or" indicates that repudiation is not necessary for the statute of limitations to run.

129. The Court also relied on cases such as Kosty v. Lewis, 319 F.2d 744, 750 (D.C. Cir. 1963), but that case is distinguishable because it involved a claim to obtain trust property (pension benefits) which, as discussed below, implicates a quite different rule from claims (such as those in this case) for mismanagement or other breaches of trust duties. The same holds true with regard to the cases cited by the Court in which claimants sought benefits under ERISA; they were seeking recovery of trust property.

130. As this Court acknowledged, the Federal Circuit has adopted an exception to the "rule," to the effect that repudiation is not necessary to commence the running of the statute of limitations with regard to "claims for damages that allege nonfeasance or misfeasance" as opposed to claims for recovery of the trust corpus. Cobell v. Norton, 260 F. Supp. 2d at 107

(citing Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565, 571 (1990)); see also Jones v. United States, 9 Cl. Ct. 292, 295 (1985), aff'd, 801 F.2d 1334 (Fed. Cir. 1986).

131. Although this Court stated that no other circuit apparently has adopted such a rule, see 260 F. Supp. 2d at 107, that exception has been applied elsewhere. See Harris Trust Bank of Arizona v. Superior Court, 933 P.2d 1227, 1231 (Ariz. App. 1996) (rule requiring termination or repudiation of trust in order for limitations period to begin applies only to claims for possession of trust property, not to claims over breach of trust duties) (quoting Jones v. United States, 801 F.2d at 1335-36)). Moreover, in a number of the other cases cited below, the courts found claims barred by the statute of limitations or laches, although the trustee's acts involved breaches but not "repudiations" of the existence of the trust.

132. Thus, case law and the quoted language from Bogert (supra) support the principle that, at least in cases of trust claims other than those for recovery of trust property, the statute of limitations runs from when the beneficiary knew or should have known of the trustee's alleged misfeasance or nonfeasance of duties. Because Plaintiffs' claims in this case arise out of allegations of misfeasance or nonfeasance, rather than for possession of trust property, repudiation was not necessary in order for the limitations period to run.

133. Alternatively, even if repudiation were necessary to commence the limitations period, the allegations of myriad acts of trust violations in this case would have been sufficient to constitute a "repudiation." See Al-Abood v. El-Shamari, 217 F.3d 225, 234 n.4 (4th Cir. 2000) (repudiation can consist of actions that "clearly contravene[] the fundamental notion of a trust and a trustee's duties"); Jones v. United States, 801 F.2d at1334, 1336 (Fed. Cir. 1986) ("A trustee may repudiate an express trust by words or, as in this case, by actions inconsistent with

his obligations under the trust"); Goodall v. Trigg Drilling Co., 944 P.2d 292, 297 (Okla. 1997) (Summers, J., concurring) (if beneficiary, who held a royalty interest in a well knew that it was producing and that he was not being paid by the trustee, that would be knowledge of the trustee's "repudiation," triggering the limitations period); Sippell v. Hayes, 189 Misc. 656, 663, 69 N.Y.S.2d 852, 858 (N.Y. Sup. Ct. 1947) (trustee's failure to make required payments constituted repudiation).

134. The better rule, as noted above, is that the limitations period began to run when Plaintiffs knew or should have known of allegations that the Government violated trust obligations. Specifically with regard to claims for an accounting, statutes of limitation begin to run when the plaintiff first knows or should know that the other party was not fully complying with its obligations regarding the handling of funds or property. See Chandler v. Lally, 31 N.E.2d 1, 3 (Mass. 1941) (trust beneficiaries' claim for an accounting was time-barred, where trustee refused a beneficiary's demand for an accounting prior to the limitations period, even though the trustee also said he would hold the fund for the beneficiary's wife and children; alternatively, the action was barred by laches because the beneficiaries waited "approximately a quarter of a century" to bring suit); Harvey v. Leonard, 268 N.W.2d 504, 516 (Iowa 1978) (trust beneficiary's claim for accounting was barred by laches where, for many years, plaintiff received statements of account that were not sufficiently detailed, but she failed to object); Kedzierski v. Kedzierski, 899 F. 2d 681, 684 (7th Cir. 1990) (claim was time-barred where, during a twenty-

five-year period, trustee sometimes failed to make required payments, and beneficiary occasionally demanded an accounting, to no avail).[49]

135. Many of the facts of the cases cited above are similar to the allegations in this case: Alleged refusals to provide accountings (Chandler and Kedzierski), insufficiently detailed statements of account (Harvey), the making of occasional, inconsistent payments (Kedzierski), the beneficiary's protests but failures to sue in time (Kedzierski, Glovaroma and Potlatch). Those courts held that the claims for accountings were time-barred.

136. Statutes of limitations apply with equal force to Indian trust claims, including claims for breach of fiduciary duty under the same statutory scheme at issue in this case. See Jones v. United States, 801 F.2d at 1335 (claim by Indian holder of an interest in land pursuant to the General Allotment Act of 1887 was time-barred); Nichols v. Rysavy, 809 F.2d 1317, 1328 (8th Cir. 1987) (claims by descendants of Indian allottees for, inter alia, breach of fiduciary duty for conveying allotted trust land to the allottees, who later lost the property through sale or foreclosure, were time-barred by 28 U.S.C. § 2401(a)); Capoeman v. United States, 440 F.2d 1002, 1003-04 (Ct. Cl. 1971) (beneficiary's claim that Government, as trustee, improperly deducted certain charges from proceeds of timber sales on land allotted under the General

---

[49] See also Potlatch Oil & Ref. Co. v. Ohio Oil Co., 199 F.2d 766, 770 (9th Cir. 1952) (action for an accounting was time-barred, the claim having accrued when plaintiff demanded that defendant make changes regarding charges for oil development and operations, but defendant refused to do so and maintained the same course of conduct); Lawson v. Lawson, 524 F. Supp. 1097, 1098 (W.D. Pa.1981) (action for an accounting regarding liquidation of closely held business was barred by laches, where plaintiff should have known of his claim many years earlier, based upon "the absence of directors' meetings or any other signs of corporate life"), aff'd, 692 F.2d 748 (3d Cir. 1982); Glovaroma, Inc. v. Maljack Productions, Inc., 71 F. Supp. 2d 846, 857 (N.D. Ill. 1999) (claim for, among other things, an accounting of royalty payments was time-barred, such claim having accrued when plaintiff "first protested" the defendant's first royalty report).

Allotment Act of 1887, was time-barred; the court rejected the plaintiff's arguments that the statute of limitations could not apply to his trust claim or should not apply because of his status as an Indian).

137. Also, in Littlewolf v. Hodel, 681 F. Supp. 929, 941 (D.D.C. 1988), aff'd, 877 F.2d 1058 (D.C. Cir. 1989), Indian beneficiaries brought an action, inter alia, to require the Government to perform trust duties. The court rejected the beneficiaries' challenge to the statute of limitations, stating:

> to the extent that plaintiffs are asking for special treatment simply because they are Indians, that special treatment may not be afforded them. Courts have routinely subjected Indians' claims to statutes of limitations.
>
> Nor can plaintiffs argue that the limitations period is unreasonable because of the government's trust obligations, as statutes of limitation apply regardless of the existence of an Indian trust. Similarly, the fact that the allotments were held in trust neither makes plaintiffs' claims unknowable nor suggests that plaintiffs could not have sought advice during the past half-century about the nature of their claims. Any dependence on the Bureau of Indian Affairs or reliance on the government's trust obligations may excuse plaintiffs from an accusation of *laches* but it does not necessarily exempt them from, or render unreasonable, a statute of limitations that imposes a time limit on their ability to bring suit.

681 F. Supp. at 940-41 (citations omitted).

138. Other cases upholding the applicability of statutes of limitations to Indian trust claims or other claims involving allotted land include United States v. Mottaz, 476 U.S. 834, 851 (1986) (claim challenging Government's sale of plaintiff's interests in Indian allotments was time-barred; the Court held that "even for Indian plaintiffs," the waiver of sovereign immunity provided by a Government statute of limitations "'cannot be lightly implied but must be

unequivocally expressed'" (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990) ("Indian Tribes are not exempt from statutes of limitations governing actions against the United States"); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988) ("statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant"); Wardle v. Northwest Inv. Co., 830 F.2d 118, 124 (8th Cir. 1987) (statute of limitations barred claims for breach of fiduciary duty against the Government in administration of Indian allotment program).

139. Contrary to the weight of authority set forth above, a minority of cases suggest that, in some circumstances, claims involving Indian trusts should not be subject to the full force of statutes of limitations. For example, this Court's 1998 opinion, 30 F. Supp. 2d at 45 n.26, cited Loudner v. United States, 108 F.3d 896, 901 (8th Cir. 1997), which cited Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973), for the proposition that Indian-beneficiaries are under a lessened duty to discover their claims against the Government, for statute of limitations purposes.

140. Such cases state a little-held viewpoint that collapses under the weight of the many Supreme Court, courts of appeals, and other federal cases cited above, which apply the statute of limitations with full force in Indian trust cases. Moreover, the unusual principles stated in Loudner and Manchester Band are to no avail for Plaintiffs in this case.

141. First, even under the relaxed standard mentioned in those cases, the Plaintiffs still must be deemed to have known of their claims at the times discussed above, long before October 1, 1984. Loudner stated that trust beneficiaries are not "exempt" from the statute of limitation.

Indeed, Loudner and Manchester Band both adopted the same rule used by this Court, that the statute begins to run "when a trust beneficiary knows or should know of the beneficiary's claim against the trustee." Loudner, 108 F.3d at 901; see also Manchester Band, 363 F. Supp. at 1249. Loudner merely stated that a beneficiary's duty to discover claims is "somewhat lessened." 108 F.3d at 901.[50] Even if adopted here, that mild softening of the rule would not save Plaintiffs' claims, for, as shown below, the facts plainly demonstrate that the allegations of trust violations were so well known that even under a "somewhat lessened" duty, the Plaintiffs knew or should have known of them.

142. Manchester Band cited the generic principle that a statute of limitations does not run where there is a fiduciary relationship "until the relationship" is repudiated. 363 F. Supp. at 1249. But, as noted above, that principle does not apply where, as here, the claims are not to recover the trust corpus. Thus, as shown in the cases discussed above, alleged breaches of trust obligations start the running of the statute.

143. Second, Loudner and Manchester Band rely upon the archaic notion that all Indian people should be subject to a different standard because of "the necessity of dealing fairly with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty.'" Manchester Band, 363 F. Supp. at 1249 (quoting Dodge v. United States, 362 F.2d 810, 813 (Ct.

---

[50] Loudner also stated that the "beneficiary's duty to discover his or her claims against the trust is further diminished when the beneficiary has no idea that the trust even exists." 108 F.3d at 901. In Loudner, the plaintiff class consisted of descendants of a tribe that sought to share in a settlement fund, and the court found that many of those descendants did not even know of the fund. That point is inapplicable here, for clearly the Plaintiffs and the class knew of the trust and of the allegations of breach (see below).

Cl. 1966) (per curiam)). But even if such a patronizing view had any merit in past ages, it lost its force long before this suit was filed.[51]

144. The named Plaintiffs are and for many years before 1984 were well-educated, knowledgeable and fully capable of bringing an action on their claims long before 1984. Moreover, the argument rests upon the faulty premise that rules of law depend upon socioeconomic status. As stated in Littlewolf, "[t]o the extent that plaintiffs argue that their unfortunate socioeconomic circumstances make it inherently unreasonable for them to bring suit within the [applicable statute's] statute of limitations, that argument too cannot withstand scrutiny. Poverty and lack of education have never been deemed sufficient to render a statute of limitations unreasonable under the due process clause." 681 F. Supp. at 941 (footnote omitted).

145. The statute of limitations in 28 U.S.C. § 2401(a) "applies to all civil actions whether legal, equitable, or mixed." Kendall v. Army Bd. for Correction of Military Records, 996 F.2d 362, 365 (D.C. Cir. 1993); Spannaus, 824 F.2d at 55 (same); see also Sisseton-Wahpeton Sioux Tribe, 895 F.2d at 592 (Section 2401(a) "applies to equitable claims as well as claims for monetary damages" (citing Christensen v. United States, 755 F.2d 705, 708 (9th Cir. 1985)); Christensen, 755 F.2d at 707 (section 2401(a) applies to legal and equitable claims by Indians regarding their allotted land). Thus, Plaintiffs' claims for an historical accounting are governed by that statute of limitations.

---

[51] To the extent that cases such as Manchester Band rely upon the premise that all Indian people are under a "disability," 363 F. Supp. at 1248, which precludes their knowing of their claims, that is a gross and unfair overgeneralization that, like all stereotypes of ethnic and cultural groups, should be assumed to be false and, in fact, is false as revealed by the facts of this case.

2. The Doctrine of Laches Applies To The Claims In This Case

146. In addition, some courts have looked to the doctrine of laches, which traditionally was applied by courts in equitable actions in which statutes of limitations were inapplicable. As noted above, the distinction between legal and equitable actions, at least in the federal courts, mostly has disappeared with regard to limitations principles. See Geyen v. Marsh, 775 F.2d 1303, 1307 (5th Cir. 1985) (the Federal Rules of Civil Procedure "accomplished the merger of law and equity"). However, in the unusual instances in which no statute of limitations applies, federal courts have applied the doctrine of laches. Saffron v. Department of the Navy, 561 F.2d 938, 941 (D.C. Cir. 1977).

147. If, for any reason, the doctrine of laches were the applicable principle to assess the timeliness of Plaintiffs' claim for an accounting, that doctrine would bar the claim. For laches to bar a claim, there must be inaction by the claimant and a "change of position to their detriment on the part of the persons against whom the claim is asserted." Wohl v. Keene, 476 F.2d 171, 176 (4th Cir. 1973).

148. In this case, inaction by Plaintiffs is indisputable; they seek accountings presumably going back to 1887, but did not file suit until 1996. Plaintiffs have no good reason for such extreme delay. See infra.

149. Although the court in Littlewolf, 681 F. Supp. at 941, suggested in dicta that Indians' dependence or reliance on BIA or the government's trust obligations may overcome a laches defense, that point is not true in this case. The facts discussed below show that the Plaintiffs were well aware of the alleged violations of trust obligations over a period of decades;

they were not assuming that all was well merely because of the trust relationship. They are (and even then were) educated, sophisticated people capable of bringing suit long before the 1990s.

150. Nor can there be doubt that the passage of time since 1887 has operated to the Government's prejudice; that fact is manifest. The more than 115 years since the IIM allotment programs began have seen the deaths of innumerable Government personnel familiar with facts and records pertinent to transactions involving the IIM trust lands and accounts, at a minimum hampering the Government's ability to refute criticisms and challenges to the records it has and accountings it provides.

151. Laches applies in this case at least as much as in Carnahan v. Peabody, 31 F.2d 311, 313 (S.D.N.Y. 1929), in which descendants of a partner sued the estate of the other partner for an accounting of partnership assets, arising out of transactions that occurred over a century earlier. The court held the accounting claim was barred by laches:

> For a court at this time, after all possibility of adducing proof bearing upon the matters in controversy has gone, with the passage of more than a century, to attempt to determine the right to an accounting and thereupon to direct the defendants to account for the acts of their ancestors occurring over 100 years ago would be an unconscionable act of injustice. If the heirs and next of kin [of the partner] ever had a right to the accounting they now demand, the right has long since been abandoned by failure to assert it in any appropriate proceeding.

31 F.2d at 313.

3. The Class Member Knew Or Should Have Known About Their Claims Prior To October 1, 1984

152. The class members knew or should have known of such claims prior to October 1, 1984. In determining whether a plaintiff "should have known" of a claim, "the law assumes that

'the means of knowledge are the same thing in effect as knowledge itself.'" Mitchell v. United States ("Mitchell III"), 13 Cl. Ct. 474, 477 (1987) (quoting Wood v. Carpenter, 101 U.S. 135, 143 (1879)). As stated in Mitchell v. United States ("Mitchell I"), 10 Cl. Ct. 63, 67-68 (1986), "where there is reason to suspect there is reason to inquire and, therefore, ' [w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led'" Mitchell I, 10 Cl. Ct. at 67-68 (quoting Wood v. Carpenter, 101 U.S. at 141 (alterations in original)), modified on reconsideration, 10 Cl. Ct. 787 (1986) ("Mitchell II"). Further, "[e]ven rumors or vague charges may demand pursuit 'if of sufficient substance to arouse suspicion.'" Id. at 68 (quoting Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 143 F. Supp. 323, 331 (D. Del. 1956), aff'd, 244 F.2d 902 (3d Cir. 1957)).

153. Such rules are fully applicable to trust beneficiaries, although the threshold for inquiry may be higher in those instances, Mitchell I, 10 Cl. Ct. at 68, and such rules "apply with like force to Indian cases, including situations . . . where the United States stands in the position of a statutory trustee." Mitchell III, 13 Cl. Ct. at 477. Thus, "the Indian beneficiary of a trust, no less than any other, is charged with notice of whatever facts an inquiry appropriate to the circumstances would have uncovered." Mitchell I, 10 Cl. Ct. at 68 (quoting Menominee Tribe of Indians v. United States, 726 F.2d 718, 721 (Fed. Cir. 1984)).

154. Other courts similarly interpret the "knew or should have known" standard in a variety of cases, resulting in claims being time-barred, either under statutes of limitations or the laches doctrine. In City Nat'l Bank of Fla. v. Checkers, Simon & Rosner, 32 F.3d 277, 283 (7th Cir. 1994), the court applied that standard to a claim by a bank for fraud and negligence against an accounting firm that prepared misleading financial statements of a debtor, upon which the

bank relied. The court held that the mere fact that the debtor was unable to repay its loan on time "should have put [the bank] on notice" of a need to investigate why a debtor with such a seemingly large net worth defaulted, and whether the bank had causes of action against anyone, including the accountants. That triggered the running of the statute of limitations, causing the bank's claim to be time-barred. Id. at 284.

155. In Harvey v. Leonard, 268 N.W.2d 504 (Iowa 1978), the court quoted Bogert:

> A cestui que trust cannot sit idly by and close his eyes to what is going on around him. "One who would repel the imputation of laches on the score of ignorance of his rights must be without fault in remaining so long in ignorance of those rights. . . ." As a Pennsylvania court has said: "Laches is not excused by simply saying: 'I did not know.' If by diligence a fact can be ascertained the want of knowledge so caused is no excuse for a stale claim. The test is not what the plaintiff knows, "but what he might have known, by the use of the means of information within his reach, [which] the vigilance of the law requires of him."

268 N.W.2d at 514 (quoting Bogert at § 949 (2d ed. 1962)).

156. Particularly pertinent to this case, the Harvey court held that a claim for an accounting was untimely. For a number of years, the beneficiary received summary statements, which "were not in detailed form" and did not fully disclose all information about the trust property. However, because the beneficiary "accepted the statements of the trust in former years without complaint," her claim for further accountings at the trustee's expense was "barred by the operation of the doctrine of laches." 268 N.W.2d at 516.

157. In other contexts, the D.C. Circuit has adopted the "discovery rule," which provides that "if the injury is such that it should reasonably be discovered at the time it occurs, then the plaintiff should be charged with discovery of the injury, and the limitations period should commence, at that time." Connors v. Hallmark & Son Coal Co., 935 F.2d 336, 342 (D.C.

Cir. 1991) (union claim that employers failed to report and pay pension fund contributions accrued "when, in the exercise of due diligence, the [union's trustees] would become aware of the [the employer's] inaccuracies"); see also Norwest Bank Minn. Nat'l Ass'n v. FDIC, 312 F.3d 447, 452 & n.4 (D.C. Cir. 2002) (regarding latent injuries, "the right to sue is deemed to accrue when the wrong manifests itself in injury to the plaintiff" even if, at that time, "no more than nominal damages may be proved").

158. In a class action such as this, a number of factors demonstrate that the class knew or should have known of the claims. These factors include actual knowledge by some class members, public revelation of the alleged claims in Government hearings or publications, substantial "press attention," and public boards or forums discussing the issue. Mitchell I, 10 Cl. Ct. at 68-69 (proof that class members knew or should have know of the violations involving alleged mishandling of timber sales included the fact that dissatisfaction with the prices that BIA received for the timber was a "fact of life for some allottees," the timber sales were the subject of congressional hearings and a public report, and dissatisfaction over the prices was expressed by a tribal council, and received "substantial press attention" (court noted three newspaper articles)).

159. Each of the class members (except perhaps those continuously under "legal disability or beyond the seas" (28 U.S.C. § 2401(a)) either knew or should have known, and, therefore, must be charged with knowledge, of their claims to trigger accrual of those claims, and, therefore, to begin the running of the statute of limitations long before October 1, 1984. Because those claims accrued prior to October 1, 1984, the six-year statute of limitation in 28 U.S.C. § 2401(a) ran out prior to October 1, 1990 – the date on which the statute of limitations arguably "stopped" running because of the tolling language in Interior's annual appropriations

acts. Therefore, Plaintiffs' claims for an historical accounting of any transactions, balances or other information from periods prior to October 1, 1984, are time-barred, and any challenges to the balances appearing in Interior's records as of October 1, 1984, are time-barred.

160. The facts discussed in Defendants' proposed findings of fact show that, long prior to October 1, 1984, the named Plaintiffs in particular and the Indian community in general must be deemed to have been sufficiently aware of the alleged violations of the Government's trust duties to give them notice under the Mitchell I standard that "where there is reason to suspect there is reason to inquire and, therefore, [w]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led." Mitchell I 10 Cl. Ct. at 67-68 (internal quotation marks omitted).

161. Plaintiffs' discovery responses and other evidence reveals that knowledge of the alleged breaches by Interior was so publicly discussed, revealed in numerous official Government reports, received substantial media attention, was addressed in congressional hearings, media coverage, and was the subject of prior reported lawsuits, that all IIM trust beneficiaries (except those excused under 28 U.S.C. § 2401(a)) must be deemed to have known of these alleged breaches. A number of public, Government-issued reports between 1915 and 1983 discussed allegations that BIA was not properly carrying out trust obligations. Even Plaintiffs cited a number of these reports in their discovery responses and in their January 6, 2003 plan as proof of violations of trust duties regarding IIM accounts, including many of the precise duties listed in Plaintiffs' Complaint.

162. Having conceded that these public reports reveal the alleged violations of trust duties, Plaintiffs cannot now deny that the reports – when published between 1915 and 1983 –

gave the IIM beneficiaries contemporaneous notice of the allegations. Plaintiffs cannot have it both ways, claiming that such reports prove violations, but arguing that the public – including class members – was not on notice of them. Thus, the beneficiaries "knew or should have known" of their claims at that time. In addition to the public reports cited by Plaintiffs, other General Accounting Office reports to Congress during the 1950s and in 1966 alleged violations by Interior.

163. In 1981 and early in 1984, Congress held hearings on issues pertaining to, among other things, Indian trusts. Included in those hearings were allegations of Interior's violations of its trust obligations regarding allotted lands. In fact, Plaintiff Earl Old Person testified at the February 21, 1984 hearing, in which he complained about Interior's failure to properly manage individual Indian lands, and asserted that BIA kept improper land records.

164. Over the years, newspaper and journal articles have reported that BIA allegedly violated its trust obligations regarding IIM trust monies. Thus, the public, including the IIM beneficiaries must be deemed to have known of such alleged violations of trust duties.

165. The courts have also found that other public legal proceedings involving similar allegations against a defendant provide the sort of notice that starts the limitations clock running. For example, in Sprint Communications Co. v. FCC, 76 F.3d 1221, 1229 (D.C. Cir. 1996), the court found that plaintiff's administrative challenge was time-barred because it was filed more than two years (the applicable statute of limitations for such complaints) after another company had filed an administrative challenge that asserted similar violations.

166. In this case, well before October 1, 1984, a number of IIM beneficiaries filed lawsuits (resulting in reported decisions) that asserted that the Government committed violations

of IIM trust obligations. This includes the reported cases of Capoeman, 440 F.2d at 1002 (reported in 1971) and the decisions in Mitchell, including the 1980 decision of the Supreme Court, 445 U.S. at 535, and the 1981 decision of the Court of Federal Claims, 664 F.2d 265.

167. The types of evidence discussed above are precisely the type that led the court in Mitchell I, 10 Cl. Ct. at 68-69, to hold that a class of trust beneficiaries knew or should have known of their claims.

168. The facts thus demonstrate that the Plaintiffs, and the rest of the class knew or should have known of the alleged trust violations at least decades before this suit was filed. Because the now-living class members must be charged with knowledge of the alleged violations, and their claims are thus time-barred, a fortiori any deceased trust beneficiaries' claims must be time-barred.

169. If a claim accrued during a beneficiary's lifetime, he or she had six years to bring suit. Even if the claim survived the beneficiary's death, his personal representative was bound by the limitations period and the laches doctrine.

170. For the reasons discussed above, those claims are time-barred. If the claim did not accrue during a beneficiary's lifetime, it could not arise after his death. Therefore, even if the claims of living beneficiaries did not accrue until after October 1, 1984, that would mean that those beneficiaries who had died by that date had no claims during their lifetimes and, of course, no claims could arise after their deaths.

4. Claims Based On Failures To Report Or Account For Transactions Or Periods Prior To October 1. 1984, Are Time-Barred

171. As a result of the statute of limitations or the doctrine of laches, any claims for accountings of transactions or balances prior to October 1, 1984, are time-barred, and Defendants cannot be required to account for such transactions.

172. In a continuing legal relationship, new and separate causes of action may arise repeatedly, each time the defendant breaches its duty. The courts have so held in a variety of cases involving trusts, other fiduciary obligations, and other legal relationships. In such cases, the statute of limitations and laches applies to bar those claims that arose prior to the applicable limitations period.

173. For example, in Mitchell II, 10 Cl. Ct. at 788, Indian allottees sued for mismanagement of timber sales on allotted land, including the failure to regenerate land on which timber was cut. The court held that the duty to regenerate the land was a "continuing duty," which "means that on each day the BIA failed in its duty to regenerate a given stand, there arose a new cause of action. And those causes of action which arose in the six-year limitations period may be sued upon." Id. (emphasis added).

174. In Gruby v. Brady, 838 F. Supp. 820, 824, 830 (S.D.N.Y. 1993), participant-beneficiaries of a union pension fund brought a class action suit against the trustees for breach of fiduciary duty and mismanagement of the fund by, e.g., failing to monitor the fund's financial condition, paying out excessive benefits, and giving faulty information to participants. The court held that, although the trustees had a continuous obligation to perform their fiduciary duties, "the defendants' failure to do so gave rise to a new cause of action each time the Fund was injured,

that is, each time excessive benefit payments were made." Id. at 831 (emphasis added). Thus, those causes of action that occurred more than six years earlier were time-barred. Id.

175. In Cherokee Nation of Oklahoma, 21 Cl. Ct. at 572, plaintiffs sought damages, asserting that the Government breached its fiduciary duties by failing to survey tribal lands, failing to evict trespassers, and other mismanagement. Such allegations were deemed to assert a "continuing wrong," which could allow plaintiff to "recover for the [six year] statutory period, but not beyond."

176. Barash v. Estate of Sperlin, 271 A.D.2d 558, 559, 706 N.Y.S.2d 439, 440 (2000), involved a claim against an estate for withheld profits. The withholding of profits was "a continuing wrong which accrued anew each time the defendants collected income and profits from the allegedly co-owned property and failed to give the proper percentage thereof to the plaintiff." Barash, 271 A.D.2d at 559 (emphasis added.) Thus, plaintiff's claims were timely only as to those proceeds collected during the applicable limitations period. Id.

177. The same result obtains in cases involving back pay or overtime pay. In Adams v. Hinchman, 154 F.3d 420 (D.C. Cir. 1998) (per curiam), federal employees sought review of the Comptroller General's decision denying their claims under the Fair Labor Standards Act. The court held that such claims for back pay or overtime "are continuing claims, a separate cause of action accrues each payday. A six-year statute of limitations means that an employee could recover six years of back pay or overtime compensation dating from the time he or she first filed suit." Adams v. Hinchman, 154 F.3d 420, 422; see also Friedman v. United States, 310 F.2d 381, 385 (Ct. Cl. 1962) ("where payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought").

178. In the present case, even if Interior was obligated to provide a report of each transaction (e.g., income and disbursements) involving each IIM account, every instance in which Interior failed to do so "gave rise to a new cause of action." Gruby v. Brady, 838 F. Supp. at 831. The same is true if Plaintiffs assert that Interior was obligated to periodic accountings, or to provide better and more accurate statements of account. Each alleged failure to do so was a separate, distinct violation that gave rise to a new cause of action. Claims based upon such alleged failures that occurred before October 1, 1984, are time-barred.

179. Based upon these principles, claims for accountings related to any transactions or periods of time prior to October 1, 1984, are time-barred. Plaintiffs cannot escape this result by arguing that all past transactions must be reviewed and reported in order to determine the correct current balances. The law is clear that a plaintiff cannot circumvent the statute of limitations by pointing to financial consequences during the limitations period that result from breaches that occurred before the limitations period.

180. For example, in Brown Park Estates-Fairfield Dev. Co. v. United States, 127 F.3d 1449 (Fed. Cir. 1997), low-income housing providers alleged that HUD breached housing assistance contracts by failing to make proper rent adjustments for a number of years. Those breaches, however, occurred outside the limitations period (i.e., more than six years before suit) and, therefore, were time-barred. Id. at 1455. Plaintiffs sought to avoid that result by arguing that, because of those earlier miscalculations in rent adjustments, HUD used the wrong base numbers to calculate rent adjustment in later years (during the limitations period). In other words, plaintiffs asserted, HUD made rent adjustments in subsequent years that depended on the allegedly erroneous figures from earlier years. Id. at 1457-58. Therefore, plaintiffs claimed

entitlement to a recalculation, including a recalculation of the earlier years' figures. Id. at 1453, 1458. The court rejected that argument and affirmed dismissal of plaintiffs' claims. Id. at 1459. The court reasoned that, even though a time-barred claim may have continuing "ill effects" later on, that does not revive the claim or allow recovery for those ill effects. Id. at 1456, 1459.

181. The same analysis applies to Plaintiffs' argument that, in order to provide them with correct current balances, any errors or omissions that might have occurred in the past must be found and corrected. But if any errors or omissions occurred before October 1, 1984, claims on those are time-barred. The fact that they might have continuing "ill effects" that make today's balances higher or lower does not revive those time-barred claims or make them actionable. To hold otherwise would, in effect, render the statute of limitations a nullity, for it could always be avoided by a plaintiff's claiming that he is not seeking to litigate stale claims, merely asking for correct current balances. See Fitzgerald v. Seamans, 553 F.2d 220, 230 (D.C. Cir. 1977) (holding that "the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule").

182. In Miele v. Pension Plan of New York State Teamsters Conference Pension Plan & Retirement Fund, 72 F. Supp. 2d 88 (E.D.N.Y. 1999), the court also rejected efforts to avoid the statute of limitations. A pension fund participant sued the plan trustees, alleging that they miscalculated his benefits by disregarding his contributions during an earlier time when he received workers' compensation benefits. Id. at 93-94. The court found his claim accrued when the trustees rejected his arguments that his benefits had been miscalculated, and thus were time-barred. Id. at 99. Plaintiff argued for later accrual dates, asserting that every payment he

received was incorrect because it was based upon the old (time-barred) miscalculations, and thus, a new claim accrued every time the fund made a payment to him. Id. at 100. The court rejected that argument, holding that a time-barred wrong does not remain actionable by pointing to "ill effects that continue to accumulate over time." Id. at 102.

183. In effect, plaintiff in Miele was arguing for the same outcome as Plaintiffs in this case: Reviving claims for old errors in an account by asserting that they must be corrected in order to obtain correct recent and current balances. That argument was rejected in Miele and must be rejected in this case.

a. Claims for Historical Accountings of IIM Accounts That Were Closed Before October 1, 1984 Are Barred by Limitations or Laches

184. If any class members held accounts that were closed before October 1, 1984, claims for an accounting of those accounts would be completely time-barred. Under the principles discussed above, those class members knew or should have known of trust violations before October 1, 1984. Once their accounts closed and no further transactions occurred, no further causes of action for an accounting arose. Thus, all of their claims for an accounting pre-dated October 1, 1984. They had six years to bring suit. For this group, that period expired before October 1, 1990. Thus, their claims for an accounting became time barred.

b. IIM Accounts That Existed Both Before and After October 1, 1984, May Receive An Accounting Only of Transactions and Balances In Those Accounts After That Date

185. Those class members with IIM accounts that existed before and after October 1, 1984, may obtain an accounting only for the period since October 1, 1984.[52] At most, upon each transaction or "each day" (Mitchell II, 10 Cl. Ct. at 788), a separate and distinct cause of action for an accounting arose. They had six years to bring each such cause of action. Those that pre-date October 1, 1984, are time-barred. Therefore, no accounting is due them for any transactions or balances prior to October 1, 1984. The balances shown in Interior's records as of October 1, 1984, cannot be challenged; any claims over those balances accrued prior to that date and are time-barred.

c. IIM Accounts That Existed Only After October 1, 1984, May Receive an Historical Accounting of Transactions and Balances After That Date

186. Those who held accounts only after October 1, 1984, may obtain an accounting for the balances and transactions after that date.

5. Equitable Tolling Does Not Apply

187. As discussed above, limitations periods are not equitably tolled merely because a claim involves a trust relationship or is brought by Indians in a trust relationship. Nor does this case otherwise warrant equitable tolling of the statute of limitations. In Irwin v. Department of

[52] The question of survivability of a federal claim is a question of federal law. However, for any action to survive and be brought by a personal representative (in the absence of a controlling statute providing such a right), it must have accrued in favor of the decedent during his or her lifetime. Thus, where no potential claim accrued to a beneficiary/account holder during his or her lifetime, no claim existed to survive for the benefit of the decedent's heirs.

Veterans Affairs, 498 U.S. 89, 95-96 (1990), the Court recognized that equitable tolling is potentially available in claims against the Government, but that federal courts typically have imposed that remedy "only sparingly."

188. Equitable tolling, the Supreme Court noted, does not apply "where the claimant failed to exercise due diligence in preserving his legal rights," or "to what is at best a garden variety claim of excusable neglect." Irwin, 498 U.S. at 96 (even though plaintiff's lawyer was out of the country at the time that an EEOC notice was received at his office, this was insufficient to equitably toll the limitations period that ran from date the notice was received); see also Washington v. Washington Metrop. Area Transit Auth., 160 F.3d 750, 753 (D.C. Cir. 1998) ("The court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances") (quoting Smith-Haynie v. District of Columbia, 155 F.3d 575, 579-80 (D.C. Cir. 1998)).

189. Even if Plaintiffs alleged that the Government committed "fraud," that would not avoid the statute of limitations. In Wood v. Carpenter, the Court held that "[a] party seeking to avoid the bar of the statute [of limitations] on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." 101 U.S. at 141.

190. Also, in Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), overruled in part on other grounds, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), the D.C. Circuit stated:

> The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim. A key aspect

> of a plaintiff's case alleging fraudulent concealment is therefore proof that the plaintiff was not previously on notice of the claim he now brings. By "notice," we refer to an awareness of sufficient facts to identify a particular cause of action, be it a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice – based on hints, suspicions, hunches or rumors – that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.

Hobson, 737 F.2d at 35 (emphasis added).

191. In Sprint Communications, the court stated that, even if the "defendant fraudulently concealed material facts related to its wrongdoing," the fraudulent concealment doctrine will not apply if "the defendant shows that the plaintiff would have discovered the fraud with the exercise of due diligence." 76 F.3d at 1226. To show this, the "defendant must show that the plaintiff had 'something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment.'" Id. (quoting Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1989)).

192. These principles demonstrate that the doctrine of fraudulent concealment does not apply here. First, as the court in Hobson noted, the fraudulent concealment doctrine only applies "absent laches or negligence on plaintiff's part." 737 F.2d at 33. As shown in above, laches is present in this case.

193. Second, Plaintiffs were "previously on notice of the claim [they] now bring[]," Hobson, 737 F.2d at 35, thus precluding equitable tolling. This is established by depositions testimony of the named Plaintiffs, indicating their long-standing awareness of their claims, and by the numerous pre-1984 agency reports, substantial media coverage, and other litigation that

documented and disclosed to the entire Indian community and the rest of the public sufficient allegations of trust violations to require that Plaintiffs file suit prior to October 1, 1984. Thus, not only did the Government not actually conceal the claim for an accounting, but, on the contrary, that claim was manifestly self-revealing. Thus, the limitations clock began to run before October 1, 1984, and it ran out before the tolling period began on October 1, 1990.

194. No facts in this case meet the standard for equitable tolling, particularly in light of the length of time over which the allegations of trust violations have been publicly aired and known. "The test of due diligence measures the plaintiff's efforts to uncover his cause of action against what a reasonable person would have done in his situation given the same information." Richards v. Mileski, 662 F.2d 65, 71 (D.C. Cir. 1981). All the facts necessary to allege that the Government supposedly had repudiated its trust obligations and that, therefore, an accounting was due, were public knowledge before October 1, 1984, and must be deemed known to the Plaintiffs. Nothing more needed to be done to "uncover [the] cause of action," id., because it already was uncovered. Equitable tolling is inapplicable where a party "had the means of discovery in his power." Wood v. Carpenter, 101 U.S. at 141. The facts discussed above demonstrate that Plaintiffs had ample notice of their claims, particularly of their claims for an accounting, before October 1, 1984.

E. The Court Must Reject Plaintiffs' Plan for Determining Accurate Balances in the Individual Indian Trust.

195. As explained above, the judicially enforceable duty at issue in this case is the production of account statements to individual IIM account holders, and judicial review prior to final agency action must be limited to, at most, determining whether Interior's Historical

Accounting Plan (or subsequent plans for the historical accounting) describes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting. See Cobell v. Norton, 240 F.3d at 1110.

196. Under well-established principles governing judicial review of agency action and the separation of powers concerns that underlie these principles, it is the Secretary of the Interior, rather than the Court or the Plaintiffs, who must determine the manner in which the historical accounting is to be performed and the IIM trust is to be managed. See Defendants' Proposed Conclusions of Law at § II.A., supra. Accordingly, the plans submitted by Plaintiffs on January 6, 2003 may not be considered or adopted by the Court.

197. However, even if the Court could properly consider Plaintiffs' Revenue Model, the plan must be rejected because no competent evidence was submitted to support it. Moreover, it is a thinly disguised claim for money damages[53] rather than a plan for conducting an historical accounting, it conflicts with the requirements of the 1994 Act and this Court's previous orders, and is based entirely on the false assumption that insufficient IIM trust records are available to undertake the historical accounting.

---

[53] In its Pretrial Order, the Court denied Defendants' motion in limine to exclude Plaintiffs' Revenue Model and all evidence offered in support of that plan. Pretrial Order at 2 (Apr. 29, 2003). In its interlocutory ruling, the Court stated: "Contrary to defendants' arguments, Plaintiffs' January 6 Plan is not a model for calculating damages, but a model for conducting an historical accounting of the individual Indian money (IIM) trust that seeks to shift the burden to defendants to determine a method for distributing the undisbursed funds in the trust to each IIM beneficiary." Id. Now that the Phase 1.5 proceeding is complete, the Court is able to reevaluate this conclusion in light of the record evidence.

1. No Competent Evidence Supports Plaintiffs' Plan

198. The only evidence proffered by Plaintiffs in support of their plan was the testimony of individuals they retained and sought to qualify as expert witnesses. Their testimony, however, is not admissible and is otherwise incompetent.

a. Strict Standards Apply To The Admissibility Of Expert Testimony

199. The admissibility of expert testimony at trial depends on whether the substance of that testimony satisfies the reliability and relevance requirements set down by the Supreme Court in the cases of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). In Daubert, the Supreme Court stated:

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

509 U.S. at 592-93 (footnotes omitted) (emphasis added); see also Kumho Tire, 526 U.S. at 147 (confirming that Daubert principles apply to non-scientific experts).

200. The Supreme Court has articulated a number of factors for a court to consider in deciding whether expert evidence is admissible:

- "Ordinarily, a key question to be answered . . . will be whether it can be (and has been) tested." Daubert, 509 U.S. at 593.
- "Another pertinent consideration is whether the theory or technique has been subjected to peer review or publication." Id.

- "Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation . . . ." Id. at 594 (citations omitted).

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

See also Groobert v. President and Directors of Georgetown College, 219 F. Supp. 2d 1, 6 (D.D.C. 2002) (listing factors that trials courts may apply in assessing reliability).

201. In this Circuit, expert testimony must also satisfy a two part test of admissibility:

> To evaluate expert testimony, the Federal Rules of Evidence provide that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702. Interpreting this provision, we apply a two-part test for determining the admissibility of expert testimony: the witness (1) must be qualified, and (2) must be capable of assisting the trier of fact.

Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207, 1211 (D.C. Cir. 1997) (citing Exum v. General Electric Co., 819 F.2d 1158, 1163 (D.C. Cir. 1987)) (emphasis added) (brackets in original).

202. It is thus the Court's responsibility to make the admissibility determination as the "gatekeeper" under Daubert and Kumho Tire. Such determinations are not factual issues in dispute to be decided by the trier of fact. Fed. R. Evid. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court"). The issue of admissibility of an expert opinion is not itself,

therefore, an appropriate subject for expert testimony. See Fed. R. Evid. 702 (permitting expert testimony if it will assist the "trier of fact").

b. The Court May Not Delegate Its Gatekeeper Function And Therefore May Not Admit Expert Testimony Concerning Whether The Testimony Of Proffered Experts Is Admissible Under Daubert/Kumho Tire

203. Plaintiffs proffered Dwight J. Duncan as an expert, in part, to testify as to the underlying reliability and relevance of the methodologies relied upon in Plaintiffs plan – the very same methodologies about which Plaintiffs' other proposed experts would be asked to opine. For example, Mr. Duncan's report assesses the methodologies employed in Plaintiffs' Plan – GIS data overlays, reliance on other supposed experts, and historical data – and for each category concludes that the methodology is both "reliable" and "relevant." Duncan Report, at Secs. 5.2.4 (GIS data overlays), 5.3.4 (reliance on other purported experts), and 5.4.4 (historical data) (Pls.' Ex. 37). Mr. Duncan concludes that the "methodologies employed in the Plaintiffs' Plan are based on scientific knowledge, are applied appropriately, and are reliable and relevant in evaluating the issues before the Court in this matter." Duncan Report, at Sec. 6.0 (Pls.' Ex. 37) (second opinion).

204. Because the Court may not delegate its gatekeeper function, expert advice about reliability and relevance of other proffered testimony does not assist the Court. In Daubert, the Supreme Court explains that "the *trial judge* must determine at the outset, pursuant to Rule 104(a) [of the Federal Rules of Evidence] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 509 U.S. at 592 (emphasis added) (footnote omitted).

205. Similarly, in Kumho Tire, the Court notes that in "Daubert, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant but reliable.' The initial question before us is whether [Daubert's] basic gatekeeping obligation applies only to 'scientific' testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony." 526 U.S. at 147 (quoting Daubert, 509 U.S. at 589) (emphasis added). Thus, a court may not delegate this gatekeeper obligation by reliance upon expert opinion concerning reliability or relevance of other expert testimony.

206. In addition, because the Daubert question is one of law and not of fact, expert testimony is – by definition – incapable of assisting the trier of fact on this issue, which is the second prerequisite for expert witness use in this Circuit. Burkhart, 112 F.3d at 1211.

207. Even if such "gatekeeper" testimony were arguably appropriate, Mr. Duncan also fails the first prerequisite: he is not qualified to testify about whether Plaintiffs' methodologies satisfy Daubert.

208. He lacks any education or training either in law or the technical fields that are drawn upon by Plaintiffs' methodologies. Mr. Duncan's two college degrees are in economics. Duncan Report, Appendix A at 8 (Pls.' Ex. 37). Mr. Duncan's resume identifies him as "an economist who also holds the Chartered Financial Analyst designation and has over nine years of experience in economic and financial consulting." Duncan Report, Appendix A at 1 (Pls.' Ex. 37).

209. At trial, Mr. Duncan conceded that he has never previously participated in, much less attended court to observe, a Daubert/Kumho Tire hearing. Tr., May 28, 2003, a.m., at 73:13-74:21 (D. Duncan).

210. Mr. Duncan also conceded that he had not individually reviewed the methodologies employed by (1) Dr. Wright or Questa Engineering with regard to oil and gas revenues, Tr., May 29, 2003, p.m., at 18:5-19:4 (D. Duncan); (2) Mr. Stinnett or Pincock, Allen and Holt with regard to the minerals revenues, id. at 20:16-20:21 (D. Duncan); or (3) Mr. Gabriel with regard to the use of GIS, id. at 24:7-24:11 (D. Duncan). He also conceded that he is not in a better position than Mr. Stinnett to testify about the reliability of Mr. Stinnett's methodology. Tr., May 29, 2003, p.m., at 21:11-14 (D. Duncan).[54]

211. With respect to relevance, Mr. Duncan admitted that he did not explicitly apply the relevancy standard outlined in Federal Rule of Evidence 401 and could not actually opine as to whether his relevancy standards satisfy the requirements of Rule 401. Tr., May 29, 2003, p.m., at 8:5-9:2 (D. Duncan). Thus, even if the Court were authorized to consider such evidence as part of its "gatekeeper" function, Mr. Duncan lacks the qualifications to testify about it.

[54]Mr. Stinnett's testimony has no probative value. He has no experience in any project to reconstruct a mine's production. Tr., May 20, 2003, a.m., at 41:1-10 (L. Stinnett). Indeed, as far as Mr. Stinnett was concerned, the assignment Plaintiffs' counsel gave him was an "oddball assignment." Tr., May 20, 2003, a.m., at 41:14-16 (L. Stinnett). He has never before undertaken a project such as the one he undertook in this case, Tr., May 20, 2003, p.m., at 59:12-18 (L. Stinnett), and has done nothing to test the reliability of his methodology. Tr., May 20, 2003, p.m., at 58:25-59:6 (L. Stinnett).

c. Richard Fasold's Testimony About His Model Fails to Satisfy the Daubert/Kumho Tire Standard

212. Plaintiffs offered Richard Fasold[55] as an expert witness to testify concerning the methodology behind the model proposed by Plaintiffs in their alternative plan, and considering that testimony in light of the Daubert/Kumho Tire standards, it is clear that the Court should not rely on Mr. Fasold.

213. Mr. Fasold was responsible for preparing a model that Plaintiffs outline in their January 6 plan and which they championed at trial as an alternative to the historical accounting that Plaintiffs have complained the Secretary of the Interior is statutorily obligated to render. Plaintiffs claim that their model "quantif[ies] the monies generated from individual Indian trust lands." Plaintiffs' Revenue Model at 39. It is not, as Mr. Fasold conceded at trial, an accounting "in and of itself," Tr., May 14, 2003, p.m., at 12:25-13:3 (R. Fasold), but he touts it as a method for determining "revenues derived from individual Indian trust lands and other individual Indian trust monies from 1887 to the present without relying on information generated by the Department of the Interior, to the extent possible." Report of Richard E. Fasold at 1 (Feb. 28, 2003) ("Fasold Report") (Pls.' Ex. 35); see Tr., May 14, 2003, p.m., at 6:16-7:3 (R. Fasold). Mr. Fasold also provided his opinion with regard to financial models. Tr., May 14, 2003, p.m., at 6:16-6:21 (R. Fasold).

214. Mr. Fasold's entire approach is wholly unique and apart from anything he had ever done before. He prepared a model to estimate revenues generated from Indian trust lands that "to

---

[55] Mr. Fasold's testimony should be rejected for the additional reason that he and Mr. Gingold, Plaintiffs' counsel, have been jointly engaged in various businesses for decades. His testimony can hardly be considered impartial or objective.

the extent possible" disregarded Interior Department records relating to those revenues. Tr., May 14, 2003, p.m., at 6:16-7:3 (R. Fasold). Mr. Fasold's own deposition testimony - which he reaffirmed at trial - confirms the unusual nature of such an assignment:

> Q. I have put up on the Elmo [Mr. Fasold's March 21, 2003 Deposition transcript], and this is page 91. And I'm reading from lines four through 16.
>
> > "Question, in the course of all the work you have done outside of the Cobell case, have you ever, particularly with respect to companies that you for example come in to try to turn around, have you ever come in and just wholly rejected the company's accounting data and relied exclusively on third-party data instead?"
> >
> > "Answer, no."
> >
> > "Question, so would it be fair to say that the methodology that is described in your background section is one you have never employed in any other context?"
> >
> > "Answer, yes, I think that is fair to say."
>
> That was your testimony then?
>
> A. That is correct.
>
> Q. And that was truthful, wasn't it?
>
> A. Yes.

Tr., May 14, 2003, p.m., at 11:24-12:24 (R. Fasold).

215. Mr. Fasold's model is not sufficiently defined. First, it is an amalgamation of various methodologies to generate estimates for revenues. The methodologies typically, though not uniformly, vary depending on the revenue stream. See Plaintiffs' Revenue Model at 39-41. This variation is confirmed by Table 1 in Plaintiffs' Revenue Model, which describes the various methodologies to ascertain "natural resource extraction monies estimated." Id. at 40-41. In two

cases, "oil and gas" and "hard rock minerals," the Revenue Model lists two different methodologies; in an "Other" category, the model lists no methodology at all. Id. at 41 (Table 1).

216. Moreover, Mr. Fasold's methodology remains in flux. His report (in the "Methodology" statement) warns:

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

Fasold Report, at 2. Mr. Fasold's model is unreliable, because it is a unique approach and is not sufficiently defined.

217. Mr. Fasold relies on multiple methods to estimate revenues associated with oil and gas and mining revenues, including Geographic Information System ("GIS") data overlays and natural resource experts. See Plaintiffs' Revenue Model at 41 (Table 1). He apparently relies primarily on GIS data overlays, except where "GIS data are not available." Fasold Report, at 2. Mr. Fasold describes his use of GIS data overlays as "begin[ning] with digitized map information as a base." Id. at 1. He "overlays" additional GIS data for the purpose of estimating production data – not on allotted lands -- but within entire Indian reservation boundaries. Id. at 1. Mr. Fasold then relies upon other purported experts to generate estimates of production and pricing, again with respect to an entire Indian reservation. Id. at 1-2. Because the resulting data are all aggregated by reservation, Mr. Fasold uses a ratio that he developed in order to fashion some proportion of the total revenues that he allocates to allotted lands. Id. at 2.

218. Although the use of GIS data to assemble, store, manipulate, and display geographically referenced information has become mainstream,[56] Mr. Fasold's use is novel because it would use GIS data overlays as a critical component for revenue-estimation.

219. Under Daubert and Kumho Tire, Plaintiffs have the burden of demonstrating the reliability of this novel approach but they did not discharge that burden. See also Bourjaily v. United States, 483 U.S. 171 (1987).

220. Mr. Fasold has never previously used GIS overlays as part a financial model. Tr., May 14, 2003, p.m., at 19:14-15 (R. Fasold); Tr., May 15, 2003, p.m., at 100:19-22 (R. Fasold).[57] Matthew Gabriel, Plaintiffs' witness on GIS use, testified that he was aware, "second hand" and from a "web search," of the use of GIS in another litigation, but was not aware of the purpose for which GIS was used. Tr., May 16, 2003, p.m., at 87:13-25. Thus, to Mr. Gabriel's knowledge, Cobell is the only litigation in which GIS data overlays are proposed as a revenue-estimation process.

221. No evidence exists of any independent peer review of Mr. Fasold's model. The only reviews cited by Mr. Fasold were by Mr. Duncan, a consultant retained by Plaintiffs'

---

[56] An overview regarding the application of GIS technology can be found on the United States Geological Survey web site at www.erg.usgs.gov/isb/pubs/gis_poster.

[57] Mr. Gabriel, who testified for Plaintiffs regarding use of GIS technology spoke clearly about its inadequacies for Plaintiffs' purposes. He stated that he did not know whether the database on which he relied had been studied for accuracy. Tr., May 18, 2003, p.m., at 88:1-9 (M. Gabriel). He testified that he has "no way of knowing" how accurate his results are, Tr., May 18, 2003, p.m., at 88:14-17 (M. Gabriel), and that if a mine "point" fell near a reservation boundary, he could not determine whether it was within the reservation or outside it. Tr., May 18, 2003, p.m., at 89: 7-12 (M. Gabriel). Interestingly, Plaintiff's timber expert, Dr. McQuillan eschewed reliance on GIS data, opting instead to rely on actual data – in his case, data maintained by the Bureau of Indian Affairs. Tr., May 27, 2003, a.m., at 36:9-24, 37:2-8, 73:6-17 (A. McQuillan).

counsel, and Freeman & Mills, a consulting firm apparently retained and paid by Mr. Fasold's firm. Tr., May 14, 2003, p.m., at 21:4-22:5 (R. Fasold); Tr., May 15, 2003, p.m., at 109:3-110:23 (R. Fasold). Such reviews plainly do not meet the independent publication and peer review discussed in Daubert and Kumho Tire. Various elements of the methodology may have been individually peer reviewed in other settings, but Mr. Fasold was unaware of whether these various methodologies, as he had recombined them, had been reviewed by anyone other than Plaintiffs' paid consultants. Tr., May 14, 2003, p.m., at 21:13-22:5 (R. Fasold).[58]

222. Mr. Fasold's testimony also confirmed that he could not provide any measure to quantify the degree error associated with the use of his methodology. Tr., May 14, 2003, p.m., at 22:21-23:16 (R. Fasold). Thus, the reliability of the model supported by Mr. Fasold is both untested and undetermined and is not admissible under Daubert or Kumho Tire.

223. In addition to the failure of the methodology as a whole, certain component parts of Mr. Fasold's model are not reliable even when standing alone. For situations in which GIS data overlays are not "feasible," the model turns to hired natural resource experts to collect research on revenues from the allotted lands in question. Plaintiffs' Revenue Model at 40; see Fasold Report, at 2 (Pls.' Ex. 35).

224. For some of the oil and gas revenues in his analysis, Mr. Fasold relies upon Questa Engineering, "oil and gas experts retained by the Plaintiffs, [which] have developed a methodology to identify oil and gas production, rents and bonuses, on Indian lands . . . ." Fasold Report, at 3 (citing Report of John D. Wright (Feb. 28, 2003) (Pls.' Ex. 34)). Dr. Wright and

---

[58] Review solely by Plaintiffs' paid litigation consultants generally does not convey the sense of scientific reliability contemplated in Daubert. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995) (Daubert II).

Questa Engineering, Plaintiffs' Oil and Gas witnesses, have only been on the project since December 2002 and all of their work is preliminary. Tr., May 15, 2003, p.m., at 106:14-107:8 (R. Fasold).

225. Mr. Fasold was unaware of any effort to test the overall validity of using Dr. Wright's methodology for calculating oil and gas revenues. Tr., May 15, 2003, p.m., at 110:18-23 (R. Fasold). Mr. Fasold was also unaware of any effort to subject Dr. Wright's methodology to peer review. Tr., May 15, 2003, p.m., at 110:24-111:5 (R. Fasold). Dr. Wright's methodology has not been published, either. Tr., May 15, 2003, p.m., at 111:6-12 (R. Fasold). Given these circumstances, no basis exists for this Court to find that the oil and gas analysis is reliable under Daubert and Kumho Tire.

226. Similar problems of proof exist with respect to the hard rock minerals witnesses retained by the Plaintiffs. They engaged Pincock Allen & Holt and an affiliate mining consultant, Landy Stinnett, to develop a methodology to identify hard rock mineral production on Indian lands. Fasold Report, at 5 (citing Report of Landy A. Stinnett (Feb. 28, 2003) (Pls.' Ex. 38)). At trial, Mr. Fasold acknowledged that Mr. Stinnett used average prices, rather than actual prices in his methodology for estimating coal revenues and that average prices could vary from actual prices by as much as 50 percent. Tr., May 15, 2003, p.m., at 111:13-112:3 (R. Fasold).

227. Even if this gross potential for error could be corrected or overlooked, Mr. Fasold's testimony provided no basis to find Stinnett's mineral analysis is reliable under Daubert and Kumho Tire. Mr. Fasold was not aware of any effort to test the validity of Mr. Stinnett's methodology, to subject it to peer review, or whether it had been published. Tr., May 15, 2003, p.m., at 114:19-115:14 (R. Fasold).

228. Plaintiffs' timber sale valuation is equally unreliable and inapposite. Plaintiffs' Revenue Model and Mr. Fasold rely exclusively upon the work of Dr. Alan McQuillan for information regarding "timber volume and values on individual Indian trust beneficiaries' lands." Fasold Report, at 5; see Plaintiffs' Revenue Model at 41 (Table 1).

229. Professor McQuillan used two different forms of date for his timber analysis. Tr., May 16, 2003, a.m., at 31:4-33:13 (R. Fasold). For his analysis of the period 1887 to 1998, Professor McQuillan wanted to spend two years to study timber sales, but did the work over the summer of 2000. Tr., May 16, 2003, a.m., at 32:25-33:11 (R. Fasold). For his analysis of the period from 1999 to 2002, Professor McQuillan used a special methodology to estimate timber sales that he described as being "a very crude methodology." Tr., May 16, 2003, a.m., at 35:25-36:2 (R. Fasold).

230. Again, as Mr. Fasold was unaware of whether Professor McQuillan's specific methodology employed in this case for estimating timber revenues had been peer reviewed, Tr., May 16, 2003, a.m., at 39:3-6 (R. Fasold), and unaware of any method that was used or could be used for calculating the rate of error associated with Professor McQuillan's analysis of timber revenues, Tr., May 16, 2003, a.m., at 39:24-40:3 (R. Fasold), Plaintiffs' timber analysis cannot withstand scrutiny under Daubert and Kumho Tire.

231. Plaintiffs' Revenue Model and Mr. Fasold's analysis purport to rely upon "Historical Data" for two other revenue categories, land leases and land sales. Plaintiffs' Revenue Model at 41 (Table 1) and Fasold Report, at 6-8. The methodology, however, is equally unreliable, and likewise fails to meet the requirements of Daubert and Kumho Tire.

232. For example, Mr. Fasold performed his land lease revenues analysis by often combining individual and tribal revenues, "making it difficult to calculate the IIM portion." Pls.' Ex. 35 at 6, n.8; Tr., May 16, 2003, a.m., at 40:25-41:3 (R. Fasold). For his land lease analysis, Mr. Fasold used estimates for years where separate IIM revenue data was not available, by using various "data points" and averaging the revenues in between those data points. Tr., May 16, 2003, a.m., at 42:10-53:19 (R. Fasold); Pls.' Ex. 35 at 7. Mr. Fasold conceded that his methodology for generating land lease revenues will result in potential errors, given its use of estimates. Tr., May 16, 2003, a.m., at 57:6-17 (R. Fasold). As with the other portions of Plaintiffs Revenue Model, Mr. Fasold's methodology for land lease analysis has not been the subject of peer review by anyone other than Plaintiffs' paid consultants. Tr., May 16, 2003, a.m., at 56:25-57:5 (R. Fasold).

233. As for land sales, Mr. Fasold's land sales analysis utilizes no actual land sales data for individual allottees from 1935 to the present. Tr., May 16, 2003, a.m., at 59:2-20 (R. Fasold). Mr. Fasold conceded that for the years 1935 to the present, the land sales revenues generated by his analysis are "entirely estimates" and "not actual data," Tr., May 16, 2003, a.m., at 60:25-61:4 (R. Fasold); Pls.' Ex. 35 at 8.

234. Mr. Fasold is unaware of any effort to determine the error rate of Mr. Fasold's methodology for estimating land sale revenues after 1935. Tr., May 16, 2003, a.m., at 62:17-63:2 (R. Fasold). In arriving at Mr. Fasold's methodology for estimating land sales revenues, Plaintiffs decided not to compile land sales documents. Tr., May 16, 2003, a.m., at 61:5-7 (R. Fasold). And again, Mr. Fasold's methodology for this model component has not been the

subject of peer review by anyone other than Plaintiffs' paid consultants. Tr., May 16, 2003, a.m., at 62:8-16 (R. Fasold).

235. Finally, the methodology behind "Other" revenue category in Plaintiffs' model (Plaintiffs' Revenue Model at 41 (Table 1); Fasold Report, at 8-9 (Pls.' Ex. 35)), succumbs to the same fate of insufficiency. In his report, Mr. Fasold admits that "[n]o reliable methodology has been found for determining revenues from annuities, water rights, settlements, judgments and per capita payments, rights-of-way, aggregates (construction materials) and any other unidentified categories." Fasold Report, at 8 (Pls.' Ex. 35). He then proceeds to value "Other" revenues as the difference between revenues identified in the July 2002 Interior Department report to Congress "and the total of all other revenues identified by the Plaintiffs' experts." Id. at 8-9. In common parlance, the number is not an estimate but merely a "plug" figure – a tautology of sorts. Insofar as Mr. Fasold concedes that "Other" revenue is not based on any reliable methodology, id. at 8, this Court cannot admit his opinion as to "Other" revenues under Daubert and Kumho Tire.

236. In short, the evidence of record is insufficient to determine the reliability of Mr. Fasold's methodology and numerous components of Plaintiffs' Revenue Model. Federal Rule of Evidence 702 permits a court to allow a qualified expert to testify if some scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, but only "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the fact of the case." Fed. R. Evid. 702 (emphasis added).

237. The Supreme Court has made appropriate scrutiny and knowledge about an expert's methodology the sine qua non of "reliability." The absence of such a foundation makes

proffered expert testimony conjectural in nature and insufficient to provide a basis for "a quick, final, and binding legal judgment – often of great consequence – about a particular set of events in the past." Daubert, 509 U.S. at 597.

2. Plaintiffs' Plan Provides A Methodology For Calculating Damages Rather Than A Methodology For Conducting An Historical Accounting.

238. Plaintiffs' Revenue Model is a disguised claim for alleged money damages as is evident, first, from Plaintiffs' own assertion that an accounting is impossible: "[T]he accounting owed by the United States government and ordered by this Court is impossible." Plaintiffs' Revenue Model at 3 (Pls.' Ex. 50). With this principle of impossibility as its central premise, Plaintiffs' Revenue Model describes a method for calculating damages rather than providing the accounting required by the 1994 Act.[59]

239. Plaintiff's Revenue Model is not – by their own admission – a plan for conducting the accounting required under the 1994 Act and, thus, does not comply with the Court's Order of September 17, 2002, authorizing Plaintiffs to file their own plan for conducting the historical accounting. See, e.g., Tr., May 14, 2003, p.m., at 12:25-13:13 (R. Fasold) (stating that Plaintiffs' model will not produce a historical accounting for IIM account holders); Tr., May 29, p.m., at 37:4-13 (D. Duncan) (same); Tr., May 16, 2003, p.m., at 39:8-19 (R. Fasold) (stating that the final product of Plaintiffs' model will not be an historical accounting). Plaintiffs' Plan, therefore, is irrelevant and must be rejected.

---

[59] For example, Plaintiffs' Plan does not even attempt to address this Court's finding that "[a]ny accounting of funds necessarily involves examining past transactions and events that could effect [sic] the current balance." Cobell v. Norton, 226 F. Supp. 2d at 116 n.135.

240. Plaintiffs' Revenue Model contains numerous references to alleged breaches of fiduciary duty by the United States – in particular, mismanagement of the underlying IIM trust assets, and misappropriation of IIM trust funds – that are traditional claims for money damages. For example, Plaintiffs allege that the United States permitted "23 natural resources companies to underpay royalty obligations that they owed for the production of oil and gas on Indian trust lands." Plaintiffs' Revenue Model at 12 (Pls.' Ex. 50). Similarly, they assert that "[i]ndividual Indian [t]rust [f]unds [h]ave [b]een [m]isappropriated."[60] Id. at 10. Such claims of mismanagement of the underlying IIM trust assets and misappropriation of IIM trust funds are

[60] In support of this claim, Plaintiffs rely on snippets of information so far removed from any context that it is all but impossible to assess their true import. For example, Plaintiffs' extensive citation of the July 7, 1999 trial transcript of the Commissioner, Financial Management Service, is particularly misleading as it suggests that various concerns they raised regarding the Department of the Treasury's management of IIM funds have yet to be addressed. However, Treasury entered a stipulation on July 6, 1999, which "allows Interior to invest any available funds omitted from its overnight investment request as if they had been invested the previous business day." Cobell, 91 F. Supp. 2d at 22. Likewise, "Treasury agreed [during the trial] to conduct a study of its IIM trust check negotiation practices," id. at 23, and it filed this Study with the Court on June 1, 2000, see Financial Management Service, Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks ("Study of Check Negotiation Practices") (May 31, 2000), filed as Att. K to Second Quarterly Report on Actions Taken by the Department of the Treasury to Retain IIM-Related Trust Documents Necessary for an Accounting (June 1, 2000). Indeed, Plaintiffs themselves refer to this study in an unrelated discussion, in which they observe that "[the Study of Check Negotiation Practices] found such checks totaled approximately $177 million" and that, "[n]otwithstanding time period differences, th[is] figure is grossly inconsistent with the July 2002, Department of Interior Historical Accounting Plan which reports $336.6 million of disbursements from 1/1/99-12/31/99." See Plaintiffs' Revenue Model at 51 n.99 (Pls.' Ex. 50). Plaintiffs conclude from this discrepancy that "only a fraction of the receipts of the Individual Indian Trust were disbursed in 1999." Id. One obvious explanation for this "discrepancy," however, is that, as the very language quoted by Plaintiffs reveals, the Study of Check Negotiation Practices determined that approximately $177 million in "'IIM U.S. Treasury checks [were] issued.'" Id. (quoting Study of Check Negotiation Practices (emphasis added)). In contrast, Interior's July 2002, Accounting Plan "reports $336.6 million of disbursements," id. (emphasis added), rather than $336.6 million in IIM U.S. Treasury checks, thus including electronic funds transfers in its calculation of total disbursements.

clearly claims for money damages, rather than relief which can be afforded under the APA, and are thus beyond this Court's jurisdiction.[61]

241. These claims also contradict Plaintiffs' own statements about the scope of this lawsuit. Indeed, precisely because these claims sound in law and are therefore beyond the Court's jurisdiction, Plaintiffs themselves have previously insisted that "this action is not one to review the United States' management of the underlying trust assets" to preserve jurisdiction in this Court. Plaintiffs' Revised Memorandum of Points and Authorities in Support of Motion for Class Certification, at 6 (Jan. 14, 1997) (emphasis added).

242. Furthermore, in holding that this is an APA action to enforce the right to an accounting rather than an action for money damages, the Court made a point of striking the following allegations from Plaintiffs' Complaint:

> (1) '[T]he true totals would be far greater than those amounts, but for the breaches of trust herein complained of.' . . . ;
> (2) '[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries.' . . . ;
> (3) 'and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted.' . . . ;
> (4) 'Failure to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence.'

30 F. Supp. 2d at 40 n.18 (quoting Plaintiffs' Complaint) (internal citations omitted).

---

[61] Apparently recognizing that their claims of misappropriation and fraud have no place in this litigation, Plaintiffs attempt to sweep these into their argument concerning the destruction of IIM trust records. Thus, Section A of their plan appears under the nonsensical heading, "Indian Trust Data is Subject to Adulteration, Misappropriation and Fraud." Plaintiffs' Revenue Model at 8 (Pls.' Ex. 50). Clearly, as later pages reveal, it is not trust records, but trust funds, which Plaintiffs claim were misappropriated and subject to fraud.

243. Plaintiffs go further and supply the method for calculating such damages. Plaintiffs' Revenue Model is, in their own words, designed "to quantify the monies generated from individual Indian trust lands ('Allotted Lands')." Plaintiffs' Revenue Model at 39 (Pls.' Ex. 50).

244. Rather than using IIM trust records to identify the transactions that passed through particular IIM accounts, Plaintiffs' Revenue Model purports to estimate aggregate IIM funds. Accordingly, Plaintiffs' plan concludes with a discussion of the reliability of the proxies used to estimate monies generated by allotted lands, which reads as if it were drawn from a brief filed in a suit for money damages. See id. at 53-55. In fact, in this discussion, Plaintiffs expressly rely upon excerpts from two damages treatises. Id. at 54-55 & Exs. 42, 43 (citing and quoting from 2 R. Dunn, Recovery of Damages for Lost Profits (5th ed. 1998), and P. Gaughan, Measuring Commercial Damages (2000)).

245. Finally, as is typical in damages class actions, Plaintiffs propose to rely on a (yet unspecified) mechanism for distributing the aggregate monies they have calculated by means of their various estimating techniques. Thus, Plaintiffs do not purport to identify the particular individuals to whom the aggregate funds belong and the precise amount to which each of these (unidentified) individuals is entitled.

246. Instead, they devote a total of three short paragraphs of their fifty-five page filing to the all-important question of "distribution," and the only guidance they have to offer is that they "have discussed the requirements of the [distribution] project with prospective experts and believe that qualified experts can be retained." Plaintiffs' Revenue Model at 52 (Pls.' Ex. 50). In short, rather than advancing a plan for accounting to individual IIM account holders, they

assure the Court that unidentified experts will appear with some unidentified yet superior method of assigning particular amounts of money to particular individuals – and thus divide up what are in essence money damages.

247. Plaintiffs' experts Richard Fasold and Dwight Duncan confirmed that Plaintiffs' Revenue Model will not provide an historical accounting to IIM account holders. Tr., May 14, 2003, p.m., at 12:25-13:13 (R. Fasold); Tr., May 16, 2003, p.m., at 39:8-19 (R. Fasold); Tr., May 29, p.m., at 37:4-13 (D. Duncan). Indeed, Mr. Fasold conceded that even if a disbursement rate was determined for IIM accounts, and Plaintiffs' Revenue Model was subsequently applied, the output would not generate an account statement for any IIM account holder, but would merely generate a total aggregate dollar amount that purportedly remains undisbursed. Tr., May 16, 2003, a.m., at 73:4-14 (R. Fasold). Plaintiffs' Revenue Model does not even attempt to address disbursements. Tr., May 14, 2003, p.m., at 13:10-13, 14:15-15:2 (R. Fasold).

3. Plaintiffs Do Not Have A Damages Claim in this Action

248. This Court previously considered whether it had subject matter jurisdiction over Plaintiffs' suit and concluded that it did. Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998). In reaching this conclusion, the Court recognized the potential for confusion between Plaintiffs' purported claims for equitable relief, i.e., for an accounting, and a damages claim (which would have been beyond this Court's subject matter jurisdiction):

> In determining whether the United States has consented to be sued in a federal district court in this case, the crucial issue becomes whether the plaintiffs' requested retrospective remedy of an accounting is an equitable, specific claim, or whether it is simply a money damages claim in disguise. Given the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, the Court holds that the retrospective

> allegations of the Complaint seek solely an accounting. Thus, the plaintiffs do not seek money damages.

Id. at 39 (emphasis added).

249. Later, this Court reiterated its conclusion that it possessed subject matter jurisdiction to entertain Plaintiffs' claims. Cobell v. Babbitt, 91 F. Supp. 2d at 24 ("Plaintiffs have alleged various statutory violations, and, in substance, the focus of their claims is to enforce the statutory right to an accounting."). This Court has thus conclusively determined that Plaintiffs cannot pursue a damages claim in this action.

4. Adoption of Plaintiffs' Revenue Model Would Divest this Court of Subject Matter Jurisdiction

250. In its prior rulings, this Court made clear that it does not possess subject matter jurisdiction to entertain damages claims brought by Plaintiffs. See, e.g., Cobell v. Babbitt, 30 F. Supp. 2d at 39. Rather, through the Tucker Act, Congress expressly addressed subject matter jurisdiction as to damages claims:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2003).[62]

---

[62] In limited circumstances, Congress has provided, through the "Little Tucker Act," that federal district courts have original jurisdiction concurrent with the Court of Federal Claims over damages claims against the United States, provided the claims are not in excess of $10,000 and are not brought pursuant to the Contract Disputes Act. 28 U.S.C. § 1346(a)(2) (2003). To date, Plaintiffs have not asserted that they seek to rely upon the Little Tucker Act as a basis for federal district court jurisdiction. In the event Plaintiffs choose to amend their complaint to seek damages pursuant to the Little Tucker Act, such claims, of course, would be subject to the $10,000 statutory limit on damages claims. Such a change would also require proof that each

251. Ordering Interior to follow the damages methodology in Plaintiffs' Plan would be the equivalent of amending Plaintiffs' Complaint to include a damages claim. Adoption of Plaintiffs' Revenue Model would thus divest this Court of jurisdiction and require transfer of the action to the Court of Federal Claims. Because Plaintiffs' Revenue Model is a model for a damages calculation in a case without a damages claim – and before a Court with no jurisdiction to entertain one – Plaintiffs' Revenue Model is not related to any justiciable claim in this action, and must be rejected.

5. Plaintiffs' Plan Is Not An Accounting Plan And Is Fundamentally Flawed.

252. Congress enacted the 1994 Act with full awareness that some trust records were missing or irretrievable, and thus compliance with the 1994 Act's accounting requirements cannot be dependent on access to each and every trust document that has ever existed. See Defendants' Proposed Conclusions of Law, at § II..C.1.a., supra. Similarly, in its 2001 opinion, the D.C. Circuit was cognizant of Plaintiffs' allegations that underlying records for an accounting may be unavailable, but the court nonetheless adhered to the concept of an accounting:

> The government's broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.

Cobell v. Norton, 240 F.3d 1081, 1105 (D.C. Cir. 2001).

---

member of the class qualifies for such jurisdictional treatment.

253. Plaintiffs' Revenue Model seeks to calculate damages through models and estimation techniques, and in so doing, notably disregards the direction of Congress, this Court, and the court of appeals that Defendants must complete an accounting. Plaintiffs' plan simply reflects their election to pursue damages, rather than the statutory right to an accounting.

254. But whether or not Plaintiffs' Revenue Model is viewed as a claim for damages, it is not a plan for conducting the historical accounting required by the 1994 Act. If, as Plaintiffs allege, the historical accounting is impossible, and therefore Interior is unable to comply with the 1994 Act, Plaintiffs may not force Interior to adopt their Revenue Model in lieu of compliance with the statutory accounting requirements. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (quoting Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929)).

255. The 1994 Act contains a very specific accounting requirement: Interior must "account for the daily and annual balance" of particular funds held in trust. 25 U.S.C.A. § 4011(a). This Court has opined that "[a]ny accounting of funds necessarily involves examining past transactions and events that could effect [sic] the current balance," Cobell v. Norton, 226 F. Supp. 2d at 116 n.135, and has defined a trust accounting as "a detailed report provided by a trustee for a beneficiary describing the trustee's conduct during the relevant time period, including a description of each item of property within the trust corpus, all items of property

received into or disbursed from the trust, all income earned by the trust, and all expenses paid by the trust," Cobell v. Norton, 260 F. Supp. 2d at 123.

256. Plaintiffs' Revenue Model will not enable Interior to account for the daily and annual balance of relevant funds, does not involve an examination of past transactions that could affect the current balance for any IIM account, and will not result in the provision of accounting statements to individual account holders. Inasmuch as Plaintiffs' Revenue Model cannot be viewed as a plan for bringing Interior into compliance with its statutory accounting obligation, it is not properly before the Court whether or not it is deemed a disguised damages claim.

257. Furthermore, Plaintiffs' Revenue Model is based on the fundamentally flawed premise that, because gaps exist in the Indian trust records available to do an historical accounting, it is preferable to rely entirely on estimating techniques, rather than to use existing records to perform the accounting work and to rely on forensic accounting methods to address gaps in the records, as Interior plans.

258. Plaintiffs not only fail to support their claim, in effect, that guesswork is preferable to Interior's document-based method, but admit that their Plan does not describe an accounting and thus by definition complies with neither the requirements of the 1994 Act nor the Court's September 17, 2002 Order permitting Plaintiffs to file "a plan for conducting a historical accounting." Cobell, 226 F. Supp. 2d at 162.

259. Pursuant to the 1994 Act, Interior is obligated to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of . . . an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C.A. § 4011(a). Interior's Historical Accounting Plan entails gathering relevant and available trust records and

using these records to verify the accuracy of the account activity in the various kinds of IIM accounts. Thus, Interior's Historical Accounting Plan uses actual trust records to assess the accuracy of account activity and departs from this method only when necessary to fill gaps in the records and when considerations of cost and timeliness leave no other reasonable choice.

260. In sharp contrast, Plaintiffs' Revenue Model relies entirely on various estimating techniques. An approach that uses actual trust records (to the extent these are available) is necessarily superior to one based almost entirely on assumptions and extrapolations. Not only is this point self-evident, but it is also made very clearly by one of the main sources on which Plaintiffs rely: Paul Stuart, Nations Within A Nation, Historical Statistics of American Indians ("Stuart") (1987); see Plaintiffs' Revenue Model at 5 (Pls.' Ex. 50). The paragraph cited by Plaintiffs concludes with the following sentence, which they understandably fail to include in their analysis: "[O]ne either uses such data as may be available and learns something, however inadequate, or abjures such data and learns nothing." Stuart at 2 (internal quotation marks omitted).

261. Because the United States is the trustee of the IIM trust fund, trust records within its possession or control constitute the best source of records for undertaking an historical accounting. Nonetheless, claiming that "individual Indian trust data available from the trustee-delegate" is "missing, unreliable, incomplete and misleading," Plaintiffs state that their "Plan has sought to use other data sources in every instance possible."[63] Plaintiffs' Plan, at 39. Plaintiffs

[63] To the extent even Plaintiffs require concrete data to plug into their various estimating techniques, their plan is remarkably imprecise about the actual source of this data. Moreover, despite their asserted effort to avoid relying on "individual Indian trust data available from the trustee-delegate," it is clear that their plan relies significantly on such government data. See, e.g., Plaintiffs' Revenue Model at 44-45 nn. 88, 90-92, 94-95 (Pls.' Ex. 50) (citing reports issued by

avoid relying on IIM trust records by relying instead on "methodologies" that seek to estimate in sweeping style the aggregate revenues or royalties generated by the (estimated) sum total of allotted lands.[64]

262. Plaintiffs' method of calculating aggregate oil and gas royalties is representative of their plan's approach. First, for any given reservation, they "estimat[e] historical production volumes" of oil and gas. Id. at 42. Second, they "apply[] historical price estimates" to this estimated volume and thereby derive the reservation's estimated total revenues from oil and gas. Id. Third, "by applying historical royalty rates to total revenues," they estimate the reservation's total royalties from oil and gas. Id. Fourth, they estimate the percentage of land on the reservation[65] that is allotted and thereby derive an "allotted land percentage." Id. at 41-42. Finally, they multiply total oil and gas royalties by this allotted land percentage and thereby derive their estimate of the sum total of oil and gas royalties on that reservation's allotted lands.

---

the U.S. Geological Survey, the U.S. Bureau of Mines, and the Secretary of the Interior); id. at 47 (stating that "the following sources were used," inter alia, to estimate "[r]evenue from timber production derived from Allotted Lands:" "Narrative Annual Reports of the Indian Commissioner," "BIA agency reports from the National Archives," "Forestry section of the Annual reports," "Annual forestry and grazing reports").

[64] Plaintiffs concede that their model would not capture all forms of revenues from the Allotted Lands. Plaintiffs' Revenue Model at 50-51 (Pls.' Ex. 50). Thus, Plaintiffs' plan includes a category of revenues captioned "Other" which the plan quantifies "as the difference between the Department of Interior's estimate of total monies generated from Allotted Lands as presented in the Department's July 3, 2002 Report to Congress and Plaintiffs' quantification of monies generated from Allotted Lands . . . ." Id. at 51.

[65] Given the extraordinarily vague language that Plaintiffs' plan employs, the precise meaning of the term "allotted land percentages," on which Plaintiffs' plan greatly relies, is unclear. It appears that this term refers to the (estimated) percent of land per reservation that is allotted. It is possible, however, that Plaintiffs intend "allotted land percentages" to refer to the (estimated) percent of Indian land throughout the United States that is allotted.

263. Plaintiffs' basic methodology is fundamentally flawed. First, it fails to take into account whether rights to a resource are, in fact, owned by individual allottees, the tribe, or some other non-Indian entity. In other words, as described above, Plaintiffs' proposal is to estimate the total royalties from a resource earned on reservation land and then to multiply this amount by an "allotted land percentage," thus assuming that rights to the resource are necessarily spread pro rata among all the reservation's landowners (individual allottees, the tribe, and others). This assumption is patently false.[66]

264. Second, Plaintiffs' Plan would produce inaccurate results in estimating royalties from oil and gas production because it fails to distinguish between the ownership of surface and sub-surface rights. For example, the 1919 Indian Appropriations Act provided that "any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct." 4 Charles J. Kappler, Indian Affairs: Laws & Treaties 208 (Government Printing Office, 1929). As a result of this statute, the tribe may own mineral rights even where the surface rights for the land on which the production well is located belong to an individual allottee. Thus, Plaintiffs' methodology of simply applying a ratio of allotted to unallotted land would lead, on reservations such as the Blackfeet, to gross inaccuracies

[66] Consider, for example, the Nez Perce Indian Reservation in Idaho. As of 1996, of the reservation's total acreage, 85,248 acres were tribally owned, 48,298 acres were held in allotments, 36,950 acres were held in federal trust, and a striking 664,752 acres were owned by non-Indians. See Veronica E. Velarde Tiller, American Indian Reservations and Trust Areas 338 (U.S. Department of Commerce, 1996) (Defs.' Ex. 203). Because Plaintiffs' methodology would fail to take into account the exact location of resources, such as mines, on the Nez Perce reservation – and would thus fail to determine the rightful owners of any proceeds from these mines – it would lead to grave errors in estimating royalties specifically attributable to allotted lands.

in estimating aggregate allotted oil and gas royalties belonging to the reservation's IIM account holders.

265. Third, Plaintiffs' Plan not only falsely assumes that rights to the proceeds from any given resource are necessarily spread pro rata among all the reservation's landowners, but also wrongly presumes that "historical royalty rates" provide a sound basis for estimating a reservation's total royalties from that resource. Consistent with the highly vague and imprecise nature of their entire Revenue Model, Plaintiffs nowhere explain the basis on which they propose to calculate "historical royalty rates," but presumably this term refers to an average of rates paid for a particular resource at a particular time. There is little reason to conclude, however, that such an average can serve as a viable proxy for royalties actually paid on reservation lands, because royalty rates for resources found on Indian land are frequently established not by market forces, but instead by regulations issued by the Department of the Interior. See, e.g., Royalty Management, 30 C.F.R. §§ 206.50 et seq. (Indian Oil); 30 C.F.R. §§ 206.171 et seq. (Indian Gas).

266. In short, Plaintiffs' Revenue Model ignores legal, economic and historical reality and thus is unsuited to accomplish the accounting of "funds . . . deposited or invested," 25 U.S.C.A. § 4011(a), that Defendants owe to IIM trust account holders. Plaintiffs' Revenue Model is, in all but name, a claim for money damages, rather than a method for accounting to IIM account holders. It proposes that the Court declare that Defendants owe allottees, as a body, immense sums of money, which Plaintiffs' representatives will worry about distributing at some later date, in some as yet undetermined manner.

267. Plaintiffs' Revenue Model not only fails to comport with Defendants' obligation to account, but also constitutes relief that is beyond the scope of this Court's jurisdiction and that Plaintiffs represented to the Court they did not seek. See Cobell v. Babbitt, 30 F. Supp. 2d at 39 (holding that the Court has jurisdiction over this litigation pursuant to the APA's waiver of sovereign immunity, only upon concluding that, "[g]iven the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, . . . the plaintiffs do not seek money damages").

6. Plaintiffs' Plan Is Premised On The False Assumption That Insufficient IIM Trust Records Are Available To Undertake An Historical Accounting.

268. Plaintiffs' argument that an historical accounting is impossible and that the Court must therefore adopt their plan hinges on their claim that the necessary IIM trust records simply do not exist. Accordingly, they devote approximately 70% of their plan (the first thirty-eight pages) to their effort to establish that the requisite IIM trust records are lacking. Nowhere in these thirty-eight pages, however, do Plaintiffs identify any specific types of records that are lacking to accomplish any particular component of the historical accounting. Instead, they cobble together, in anecdotal fashion, snippets of quotes from various sources identifying deficiencies in Interior's preservation and maintenance of trust records. That deficiencies exist simply does not demonstrate that the information needed to undertake a reliable historical accounting, as described in Interior's Historical Accounting Plan, is lacking.

269. Plaintiffs boldly assert that "[d]uring the 116 years of Trust management and administration, the majority of source and related Trust documents have been destroyed." Plaintiffs' Revenue Model at 16 (Pls.' Ex. 50). In support of this extraordinary assertion,

Plaintiffs cite ten instances in which Defendants have reported document destruction to the Court. No doubt recognizing that ten cases in which particular sets of documents were destroyed fails to establish the destruction of the "majority" of all IIM trust records that ever existed, Plaintiffs then observe in a footnote that the poor conditions in which some trust records have been kept demonstrates that "massive and un-quantifiable amounts of Trust records have been lost." Id. at 16 n.28.

270. Interior acknowledges that some IIM trust records have been lost and others have not been maintained in conditions best suited to ensure their preservation. However, the fact that some IIM trust records have been lost or maintained in poor conditions does not establish that "the majority of source and related Trust documents have been destroyed." Furthermore, Plaintiffs' lengthy citation of reports issued by the Special Master in April 2002 to sustain their claim that IIM trust records "continue to be at risk of destruction" to the extent they were in the past is disingenuous. Id. at 18. As Plaintiffs are well aware, Interior has made substantial improvements since April 2002 in its trust records program. See Letter from Alan L. Balaran, Special Master, to Amalia D. Kessler, U.S. Department of Justice, at 2 (December 2, 2002) (Defs.' Ex. 161) (stating that Interior's Office of Trust Records "has undergone a dramatic improvement").

271. Plaintiffs' assertion that "The Government's Own Consultants State that Massive and Un-quantifiable Amounts of Individual Indian Trust Records Have Been Destroyed Since the Creation of the Trust," Plaintiffs' Revenue Model, at 17 (Pls.' Ex. 50), is also unsubstantiated.

Plaintiffs base this broad claim on a highly selective reading of a Report[67] produced by one of Defendants' consultants, in which they isolate out of context various statements concerning incidents of document destruction. Contrary to their claim that this Report reveals the destruction of massive amounts of IIM trust records, the Report's central thrust is that, while clear evidence of document destruction by Executive Branch agencies exists, little evidence exists that the destroyed documents included IIM trust records. See, e.g., Pls.' Ex. 96, at EY0002332 ("[W]ithout documentation specifying that sundry Indian trust fund records actually were destroyed by fire, or by other means associated with inadequate guardianship, or by any involuntary instrument, one cannot be certain that such destruction took place." (emphasis added)), EY0002345 ("Although the historical record demonstrates diligence and regularity with respect to destruction [pursuant to an 1889 act mandating destruction of "useless papers"], the Executive Departments of the Federal government . . . were typically imprecise with regard to what they were recommending for destruction."), EY0002349 ("None of these reports [concerning documents submitted for destruction] appears to have included Indian trust fund documents in general and individual Indian moneys reports in particular."), EY0002352 (stating that even after the passage of a 1934 statute creating the National Archives and repealing the 1889 Useless Papers Act, "the ensuing years produced little specificity with regard to items proffered for destruction"), EY0002361 (stating that the Bureau of Indian Affairs' first records

[67] To be precise, and as Interior Defendants have previously noted, the Report that Plaintiffs term the 'Useless Papers Report' (Pls.' Ex. 96) (EY0002325-EY0002455) is actually a compilation of two separate Morgan and Angel reports that was mistakenly produced to Plaintiffs as a single report in the November 16, 2001 response to Plaintiffs' discovery request to Ernst and Young. See Defendants' Opposition to Plaintiffs' February 15, 2002 Motion for Sanctions and a Contempt Finding Pursuant to Fed. R. Civ. P. 56(g), at 17 (filed Mar. 1, 2002).

disposition schedule "specifically excluded disposal of 'Indian Service Special Disbursing Agent' records or 'originals'"), EY0002363 ("[A]t least by 1945 the GAO had developed instructions that would have prevented the destruction of Indian trust records.").

272. Plaintiffs' assertion of wholesale destruction of IIM trust records is ultimately belied, however, by the simple fact that Interior has found sufficient records to commence the historical accounting set forth in their Plan. See Defendants' Proposed Findings of Fact, at §§ I.B.4.b., I.B.4.c., supra. The experience of Interior and its contractors, including their experience with the named Plaintiffs' records, demonstrates that sufficient records are available to proceed with the historical accounting project. See id. at § I.B.4.c., supra.

273. In denying the Plaintiffs' pre-trial motion for partial summary judgment, the Court found that Plaintiffs had "failed to direct the Court to any evidence that, if uncontroverted, would entitle them to a directed verdict that the amount of funds held in the IIM accounts cannot be ascertained because of the loss, destruction, and corruption of the trust records." Cobell v. Norton, 260 F. Supp. 2d at 130. Plaintiffs also failed to satisfy this burden at trial.[68] The evidence presented at the Phase 1.5 trial establishes that sufficient records are available to proceed with the historical accounting work as described in Interior's Historical Accounting Plan.

---

[68] Furthermore, Plaintiffs' attempt to raise negative inferences or presumptions based upon the availability of historical trust records is premature in this phase of the case. Regardless of the applicability of such rules to private trustees, the question of their propriety in the context of a government trust is more complex. Cf. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 419 (1990) ("From our earliest cases, we have recognized that equitable estoppel will not lie against the government as it lies against private litigants."). Accordingly, Defendants request an opportunity to submit full briefing on this subject should the Court choose to address it as part of Phase 1.5.

a. Plaintiffs' Argument That Properly Indorsed Checks And Signature Cards Are Required To Verify Disbursements Is Not Ripe And, In Any event, Is Unfounded.

274. In attacking Interior's Historical Accounting Plan, Plaintiffs assume that a cancelled check and proof of proper indorsement is required to support a disbursement. See, e.g., Tr., July 8, 2003, a.m., at 43 (D. Gingold). Plaintiffs' argument presumes that Defendants will bear the burden of proving all disbursements from the IIM trust accounts, but such issues – if relevant at all outside a damages context – are premature at this stage of the litigation and not properly before the Court in the Phase 1.5 proceeding.[69]

275. Plaintiffs' argument disregards the law of negotiable instruments, which entitles the government to rely upon certain presumptions relevant to the amount of proof necessary for an adequate accounting. These presumptions may be overcome only on a disbursement-by-disbursement basis.

276. For example, the government may presume that signatures on a check are valid. Federal regulations require an institution accepting a check from a person other than the payee to determine if that person is authorized and has the capacity to indorse and negotiate the check. 31 C.F.R. § 240.11. When the check is presented to Treasury for payment, the presenting bank and the indorsers guarantee that all prior indorsements are genuine and authorized. 31 C.F.R. § 240.5. Because of these duties and guarantees, evidence that a check was paid proves that the

[69] If the Court determines that this issue is pertinent to the Phase 1.5 proceeding, Defendants request an opportunity to submit full briefing on the subject. Because Plaintiffs have raised the issue repeatedly throughout the Phase 1.5 proceeding, Defendants address it briefly here.

check was delivered and properly negotiated. There is no need to examine the indorsements – a check cannot be negotiated without them, and the law presumes that indorsements are valid.

277. Federal regulations on Treasury checks are consistent with provisions in the Uniform Commercial Code, which provides:

> In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized . . . .

U.C.C. § 3-308(a). The official comment to Section 3-308 explains that the presumption is based on the fact that forged or unauthorized signatures are very uncommon.

278. The government may also presume that a properly mailed check was delivered. Hagner v. United States, 285 U.S. 427, 430 (1932). The presumption of delivery attaches when the government presents evidence of the procedures it regularly follows when addressing and mailing a check. See Godfrey v. United States, 997 F.2d 335 (7th Cir. 1993); In re East Coast Brokers and Packers, Inc., 961 F.2d 1543, 1545 (11th Cir. 1992); Capital Data Corp. v. Capital Nat'l Bank, 778 F. Supp. 669, 675 (S.D.N.Y. 1991).

279. Thus, evidence that a check was mailed and paid proves that the check was delivered and properly negotiated. There is no legal need to examine the indorsements because the law presumes that indorsements, if any, are valid. If the government does not have a copy of an indorsed check, it does not mean that the check was not appropriately delivered and paid. Tr., May 13, 2003, a.m., at 104:13-105:14 (D. Hammond).

280. Plaintiffs' argument also disregards that, in assessing the reliability of a disbursement, a court may "take account of circumstantial evidence, which, if of sufficient weight, demonstrates the disbursement went for the stated purpose and was properly disbursed." Red Lake Band v. United States, 17 Cl. Ct. 362, 407 (1989) (citations omitted). Many courts have held that vouchers and other documentation are sufficient to establish the disbursement of Indian trust funds.[70] See, e.g., White Mountain Apache Tribe of Arizona v. United States, 9 Cl. Ct. 1, 12 (1985) (ordering defendants to provide disbursement vouchers to prove disbursements in response to plaintiffs' request for a supplemental accounting); Blackfeet and Gros Ventre Tribes v. United States, 32 Ind. Cl. Comm. 65, 87 (1973) (requiring the government to produce "vouchers, reports, or other proof as may be available" in order to credit itself in an accounting with the delivery of goods and services to beneficiaries); see also Pueblo of San Ildefonso v. United States, 35 Fed. Cl. 777, 792 (1996) (providing that precise correspondence between the disbursements claimed and the supporting documentation is not required, but finding insufficient proof of disbursements due to a tenuous connection between vouchers and disbursements).

281. Interior's Accounting Standards Manual (Defs.' Ex. 59) contains guidelines that the OHTA will use in performing the historical accounting. The Manual provides that a negotiated check, an electronic fund transfer, or, if the payee is not the account holder, an authorization for disbursement are the preferred ("Level One") documents for verifying disbursements. See Interior's Accounting Standards Manual at 2.0-1 (May 9, 2003) (Defs.' Ex.

---

[70] Similarly, some state statutes identify types of supporting documents that may establish a disbursement from a trust account. See, e.g., Code Ga. Ann. § 53-7-180 (vouchers and affidavits); Miss. Code Ann. § 91-9-5 (vouchers); N.J. Stat. Ann. § 4:87-4 (vouchers); N.C. Gen. Stat. § 28A-21-1 (vouchers or verified proof in lieu of vouchers); N.D. Cent. Code § 49-04-20 (vouchers or receipts); Vt. Stat. Ann. § 26-26 (vouchers).

59). If these primary documents are not available, the Accounting Standards Manual provides that secondary ("Level Two") documents, such as checks without proof of negotiation, disbursement schedules, journal vouchers and check registers, may be used to verify a disbursement, but instructs accountants "to use professional judgment to determine the sufficiency of the Level Two documents for meeting the purposes of the Historical Accounting." Id. at 2.0-1 n.1. These guidelines are appropriate, and accord with relevant law.

F. Interior's Fiduciary Obligations Compliance Plan Will Enable Interior to Comply Fully with its Accounting Obligations Under the 1994 Act.

282. As discussed above, the Court only has jurisdiction to review Interior's Fiduciary Obligations Compliance Plan for the purpose of determining whether it is so defective that it will necessarily delay Interior Defendants' progress towards complying with their obligation to account, as defined by the 1994 Act. Interior's Fiduciary Obligations Compliance Plan describes an approach that will bring Interior into full compliance with its obligation to account for funds it holds in trust for individual Indians. Thus, by definition, it is not so defective as necessarily to cause delay.

283. In developing their Fiduciary Obligations Compliance Plan, the Interior Defendants necessarily took into account not only the requirements of the 1994 Act as interpreted by this Court, but also co-existing statutory obligations, budgetary constraints imposed by Congress, and the obligation to consult with tribes and consider tribal sovereignty and the priorities to be accorded to tribal rights of self-governance and self-determination.

284. Interior's Fiduciary Obligations Compliance Plan represents Interior's considered and expert judgment as trustee of the best means of harmonizing disparate – and, at times,

competing – statutory, congressional, presidential, tribal, and trust interests and obligations while accomplishing the trust reform necessary to bring itself into compliance with the 1994 Act's accounting obligations. Interior's Fiduciary Obligations Compliance Plan minimizes further delay by anticipating and, to the extent possible, resolving potential issues associated with the statutory, congressional, tribal, and trust framework within which trust reform must be accomplished.

285. Interior's approach is based on the recommendations of outside business experts, who first studied what has not worked in the past and then developed and recommended an organized, systematic process that stands a realistic chance of success. It is a process that is already well underway, and one about which the Interior Defendants have informed Plaintiffs, the Court, and Congress. The approach has current funding to continue. In sum, Interior's Fiduciary Obligations Compliance Plan describes a realistic approach to trust reform to bring Interior into full compliance with its accounting obligations under the 1994 Act. And it has a realistic chance of funding.

286. Interior's past attempts to reform trust management were not "sufficiently designed and integrated to produce . . . material and long-term improvement in performance." Fiduciary Obligations Compliance Plan at 6 (Defs.' Ex. 1). In rethinking its approach to trust fund reform in light of that experience, Interior rejected "the impulse to offer quick fixes." Id.

287. Based on Interior's experience and given the complexity of the trust framework and related obligations, Interior decided to systematically and methodically examine existing trust processes to determine what works and what does not, to select best practices, to revise those practices that are not, and to continue monitoring the trust practices put in place to confirm

that they remain best practices. This business-oriented approach to trust reform, whereby Interior's Fiduciary Obligations Compliance Plan proposes a thorough understanding of all trust fund management processes before reforming them, comports with the guidance provided by Congress "that an assessment of organization, staffing, and operations should come first, to provide a basis for planning," that "all elements of [Interior's] trust fund financial systems should be considered," that "all trust fund policies and procedures should be reviewed and revised, as appropriate," and that "the framework and a strategic plan need to fully address actions necessary to ensure that [Interior] has a reliable trust fund accounting system." "Misplaced Trust Report" at 53-54 (Defs.' Ex. 178).

288. Defendants' reform initiatives are taking place in the context of the Indian Self-Determination Act and Education Assistance Act of 1975, as amended, which confirmed the major shift in United States policy from a guardian-ward type relationship with tribes to a government-to-government relationship and that clarified congressional intent that tribes manage not only their own trust assets but also have a role in the management of assets of their individual citizens. See Indian Self-Determination & Education Assistance Act of 1975, 25 U.S.C. § 450 et seq. (Defs.' Ex. 31); see also Executive Order No. 13175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 67249 (Defs.' Ex. 30); Annual Funding Agreements under the Tribal Self-Governance Act Amendments, 25 C.F.R. Pt. 1000 (Defs.' Ex. 32); 512 DM 2 at §§ 2.1-2.4 (articulating Interior policy toward tribes) (Defs.' Ex. 29). Tribes are thus not only trust beneficiaries but also governmental entities with jurisdiction over tribal and individual lands (and the assets thereon) and providers of trust services, including trust services directly related to individual Indian trust accounts. As a result, trust reform considerations in this case

must include the extent to which tribal management and administration will be affected and tribal interests will be implicated. These considerations reflect the existing statutory framework within which the trusts must operate.

289. The time frames for Interior to accomplish specific reform-related tasks, see, e.g., Fiduciary Obligations Compliance Plan at 50-51, 54, 58, 62, 76, 77, 83, 84, 94 (Defs.' Ex. 1), were developed after taking into account Interior's experience, advice from outside experts, statutory constraints, existing budget and appropriation requirements, the need for consultation with Congress and tribes, and Interior's considered judgment of the time required to implement large-scale institutional changes.

290. Interior's restructuring effort is based on the business principle that trust operations should be handled, to the extent possible, separately from Interior's non-trust operations. See Fiduciary Obligations Compliance Plan at 5 (Defs.' Ex. 1); see also, e.g., Eleventh Quarterly Report at 29-30, 33, 37-38 (Defs.' Ex. 45). Unlike private trusts and banks that separate their trust and non-trust operations, however, Interior's ability to restructure its trust operations is subject to existing statutory requirements and constraints, including budgetary considerations as dictated by congressional appropriations.

291. Interior's Fiduciary Obligations Compliance Plan utilizes the existing statutory trust organization mandated by Congress. In the 1994 Act, Congress created the Office of the Special Trustee for American Indians 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," to "ensure that reform of such practices in the Department is carried out in a unified manner," and to "ensure the implementation of all reforms necessary for the proper

discharge of the Secretary's trust responsibilities to Indian tribes and individual Indians." 1994 Act § 301.

292. The Interior Defendants, as they provide trust services, proceed with trust reform, and develop their Plan, are no different from any other government entity engaged in official operations – they are bound by appropriations law. "The use of any government resources – whether salaries, employees, paper, or buildings – to accomplish [a task] would entail government expenditure. The government cannot make expenditures, and therefore cannot act, other than by appropriation." EDC v. Babbitt, 73 F.3d 867, 871-72 (9th Cir. 1995) (because of appropriations rider, "lack of available appropriated funds prevents the Secretary from complying with the [Endangered Species] Act."). The Court as well as the Executive Branch is bound by the constraints imposed by the congressional control of the appropriations process. OPM v. Richmond, 496 U.S. 414, 425 (1990); see also 31 U.S.C. § 1341 (Defs.' Ex. 33) (generally prohibiting government officers and employees from entering into a contract or incurring an obligation before an appropriation is made and from making or authorizing expenditures that exceed existing appropriations), id. at § 1342 (Defs.' Ex. 33) (generally prohibiting government officers and employees from accepting "voluntary" services).

293. Any major restructuring – including creating a new organization within Interior, changing or displacing existing functions, or undertaking extensive and costly reform processes – requires Congressional coordination. The continuing and active role of Congress in Interior's trust management and administration, and thus in its ability to reform trust management, is reflected in, for example, frequent congressional hearings, and in exchanges between Interior and members of Congress. Interior sought and obtained approval from the congressional

appropriations committees for the reprogramming of existing appropriations necessary to fund in the short term the reorganization envisioned under the trust management plan. Fiduciary Obligations Compliance Plan at 82 (Defs.' Ex. 1).

294. Whether under common law trust standards or some other operable standards, trust reform initiatives must be considered in light of what a similarly situated trustee would be able to accomplish. Absent Congressional action, a receiver, a monitor, the Court, and any one else is subject to the same legislative and budgetary constraints as Interior. Whatever Interior, the Court, or Plaintiffs might think of existing statutory and budgetary constraints, they exist and cannot be ignored or eliminated. Neither Interior nor the Court can appropriate funds or bypass Congress.

295. Even if the Court is cautious about accepting Interior's assertion that this trust reform initiative, unlike past ones, will result in an operational system, the Court cannot ignore the Executive Branch's discretion, as trustee, to determine how best to carry out its trust function. The fact that a subsequent administration might opt for a different approach is part of the nature of the Executive Branch.

1. IIM Trust Account Administration Standards

296. Interior Defendants' Fiduciary Obligations Compliance Plan complies with this Court's Order that their plan "shall describe, in detail, the standards by which they intend to administer the IIM trust accounts, and how their proposed actions would bring them into compliance with those standards." Cobell v. Norton, 226 F. Supp. 2d 1, 162 (D.D.C. 2002), vacated in part by No. 02-5374, 2003 WL 21673009 (D.C. Cir. July 18, 2003). By limiting this requirement to standards for administration of accounts, the Order and the resultant Plan

provisions are consistent with the scope of the relief sought in the complaint and the duty declared by the Court, i.e., to account, pursuant to the 1994 Act, for funds currently held in IIM trust accounts.

297. Plaintiffs' own expert on trust standards, Richard Fitzgerald, opined that the Secretary of the Interior should look first to the statutory responsibilities applicable to the administration of the trust. Tr., May 8, 2003, p.m., at 60:5-8. On this point, no relevant disagreement exists between the opinions of Plaintiffs' trust standards expert, Mr. Fitzgerald, and defendants' trust standards expert, Professor Langbein. No reason exists to reject the uncontroverted testimony of these experts.[71] Interior's Plan describes in detail the applicable statutory responsibilities, and Plaintiffs have not brought to the Court's attention any that the Plan has omitted or inadequately described.

298. While Plaintiffs appear to argue that Interior's Plan fails to place sufficient emphasis on common-law principles, they have not shown that the common law would impose, in regard to trust funds accounting, anything more than or different from the statutes Interior identifies in its Plan. Plaintiffs have stated that the 1994 Act requirements are fully consistent with common law accounting requirements. To the extent that principles from the common law of trusts inform, or even govern, administration of IIM trust accounts, Mr. Fitzgerald opined that, when read in conjunction with the Secretary's trust principles and other Department publications, the Plan allows Interior to fulfill common-law trust duties, such as the duty of loyalty. Tr., May

---

[71] Plaintiffs' other expert on trust matters, Paul Homan, wrote as follows: "As a non-lawyer, I will leave the legal rebuttal to Mr. Langbein's and apparently DOI's legal position on which fiduciary standards should prevail in the administration of the Individual Indian trust to others." Expert Report of Paul Homan at 19 (Pls.' Ex. 36).

12, 2003, a.m., at 8:19-10:17. Moreover, in the final analysis, the prudence norm of the common law of trusts would require that the principles Plaintiffs espouse adjust for the uniqueness of the individual Indian trust and the co-existing statutory obligations Interior must satisfy.

a. Many Factors Differentiate the Individual Indian Trust From Private Trusts

299. The individual Indian trust is a "unique animal." Tr., June 3, 2003, p.m., at 72:22 (J. Langbein). Due to the individual Indian trust's unusual nature, the standard of care that would apply to the trustee presents "an absolutely unique situation" and one that is "completely new." Tr., June 2, 2003, p.m., at 48:3-5 (J. Langbein).

300. It would be inappropriate to equate the individual Indian trust with a private trust. "[T]he IIM trust bears remarkable differences" from a private trust. Tr., June 2, 2003, p.m., at 58:15-16 (J. Langbein). It is "preposterous" to contend otherwise. Tr., June 2, 2003, p.m., at 71:21 (J. Langbein). The large number of differences between the individual Indian trust and an ordinary private trust include the following:

301. First, federal statutes set forth the individual Indian trust's terms. Tr., June 2, 2003, p.m., at 59:8-12 (J. Langbein). Also, many federal statutes, e.g., the Freedom of Information Act, govern the federal agency-trustee but not the private trustee. Tr., May 12, 2003, p.m., at 76:22-77:7 (R. Fitzgerald).

302. Second, a government agency serves as the trustee. Tr., June 2, 2003, p.m., at 61:16-20 (J. Langbein). This results in unique limitations and obligations on the trustee, such as: civil service rules that can limit personnel hiring and firing decisions; fixed pay and salary grades

that can limit recruitment; and requirements to deposit funds in the Treasury that potentially lower investment yields.

303. Third, the individual Indian trust assets are not diversified (the trust is concentrated in real estate holdings). Tr., June 2, 2003, p.m., at 63:17-66:25 (J. Langbein). By comparison, the duty of prudence prevailing in the private sector would require diversification. Tr., June 2, 2003, a.m., at 52:3-7 (J. Langbein); Tr., June 2, 2003, p.m., at 65:21-66:4 (J. Langbein).

304. Fourth, Congress funds the individual Indian trust's administration. Tr., June 2, 2003, p.m., at 67:3-7 (J. Langbein). Private trustees usually charge fees to cover the cost of administering the trust. Tr., June 2, 2003, p.m., at 67:3-25 (J. Langbein). Here, trust administration is dependent upon Congress. Tr., June 2, 2003, p.m., at 67:9-25 (J. Langbein).

305. Fifth, the individual Indian trust has exceptional longevity, Tr., June 2, 2003, p.m., at 68:11-22 (J. Langbein), which leads to problems – such as a large number of accounts – that simply do not occur in the private sector. Tr., June 2, 2003, p.m., at 68:11-70:15 (J. Langbein). The sheer number of account holders for the individual Indian trust is "staggering." Tr., June 2, 2003, p.m., at 69:16 (J. Langbein). By comparison, the average duration of trusts at one private trust company was around 15 years. Tr., June 2, 2003, p.m., at 68:16-69:1 (J. Langbein).

306. Sixth, the individual Indian trust is not regulated by shareholders or an outside agency. Thus, no external influence disciplines this trust. Tr., June 2, 2003, p.m., at 70:16-71:11 (J. Langbein).[72]

307. Seventh, the trustee here may not resign from the trust. Tr., June 2, 2003, p.m., at 72:14-17 (J. Langbein).

308. Eighth, the trust beneficiary – the allottee – is allowed to use and manage the trust property, e.g., pursuant to "direct pay" leases and contracts. Tr., June 2, 2003, p.m., at 72:18-74:9 (J. Langbein). One "never see[s] such a thing in a private trust administration." Tr., June 2, 2003, p.m., at 74:2-3 (J. Langbein).

309. Ninth, the individual Indian trust engages with sovereign tribes to serve as contract agents for individual Indian trust administration. Tr., June 2, 2003, p.m., at 75:1-18 (J. Langbein). This difference is particularly unusual; it "would be most extraordinary to find any trust instrument – any effort by the settlor to limit the purveyors of services to the trust." Tr., June 2, 2003, p.m., at 76:9-11 (J. Langbein).

310. Because of these many differences, one cannot simply graft private standards onto the individual Indian trust.[73] "[P]laintiffs may [not] simply claim that they are the beneficiaries

---

[72] In the case of a commercial trust regulated by the OCC, if the trust consistently operated in the red and lost money on thousands of accounts it maintained, as the individual Indian trust does as currently configured, the OCC would not hesitate to issue a cease-and-desist order because such practices could pose a risk to the bank's capital. Tr., May 12, 2003, p.m., at 57:17-58:14 (R. Fitzgerald).

[73] For example, in the Supreme Court's recently issued Navajo Nation opinion, the Secretary's role was to approve a trust property lease between a tribal trust beneficiary and a private company. The Secretary was not held to owe a duty of candor to the tribal beneficiary. Tr., May 12, 2003, p.m., at 78:17-20 (R. Fitzgerald).

of a trust relationship with the United States and therefore invoke all of the rights that a common law trust entails." Cobell v. Babbitt, 91 F. Supp. 2d at 29. The standards applicable to Interior's operation of the trust, as set forth in the Fiduciary Obligations Compliance Plan, are statutory,[74] supplemented by other sources, including common law, when the statutory guidance is not sufficient. Interior's Plan at 13-14 (Defs.' Ex. 1); Tr., June 25, 2003, p.m., at 49:10-50:25 (R. Swimmer); Tr., June 26, 2003, p.m., at 61:23-62:25 (R. Swimmer).

b. Statutes Function as the Trust Instrument in the Case of the Individual Indian Trust

311. Congress is the functional equivalent of settlor of the individual Indian trust and the Executive Branch is the trustee-delegate. See Expert Report of Professor Langbein at 6 (Defs.' Ex. 37). Acts of Congress are the trust instruments which "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." United States v. Mitchell, 463 U.S. 206, 224 (1983) (Mitchell II). "[I]t is the statutes and regulations that create and define the enforceable trust relationship." Cobell v. Babbitt, 91 F. Supp. 2d at 30. The Secretary of the Interior has limited authority to set trust standards because they must come primarily from Congress. Tr., June 25, 2003, p.m., at 54:24-55:8 (R. Swimmer).

---

[74] Plaintiffs' critique of Interior's Plan relies heavily on certain statutes and regulations, including Comptroller of the Currency standards, the Sarbanes-Oxley Act, and the National Banking Act, which apply to private institutions. Tr., May 1, 2003, p.m., at 9:10-13, 30:8-23, 65:1-13, 100:10-19, Tr., May 3, 2003, p.m., at 8:3-9, 31:13 - 32:6-21, 34: 3-13, 78:13-24; Tr., May 5, 2003, p.m., at 8, 92-93; Tr., May 6, 2003, a.m., at 17:11-12; Tr., May 6, 2003, p.m., at 55:18-21; Tr., May 7, 2003, a.m., at 21:13 - 22:21 (P. Homan). However, as Plaintiffs' expert, Paul Homan, conceded, these statutes and regulations do not apply to the Defendants' trust obligations. Tr., May 6, 2003, p.m., at 55:5-8, 74:7-25; Tr., May 7, 2003, a.m., at 21:13-24:6, 70:12-73:10; Tr., May 7, 2003, p.m., at 7:20-8:14 (P. Homan).

312. It is not uncommon for a trust instrument to be subject to amendment by the settlor. Tr., June 2, 2003, p.m., at 61:8-11 (J. Langbein). Congress, as settlor, retains the right to amend the trust instrument by further enactments. In the case of the individual Indian trust, enactment by Congress of other statutes and laws, including appropriations measures that affect the ability of the trustee delegate to carry out prescribed duties, operate as amendments to the trust instrument. Professor Langbein explained that "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 59:25-60:4.

c. Common Law Trust Standards are Default Standards that May Apply When No Statute Governs Or Affects the Trust Issue In Question

313. For the individual Indian trust, "Congress is the settlor, and the terms are imbedded in statute, and those terms prevail over the trust default law" cited by the Plaintiffs. Tr., June 2, 2003, p.m., at 99:20-22 (J. Langbein). Common law duties may apply "whenever you don't have a statutory responsibility to apply to the trust." Tr., June 30, 2003, a.m., at 56:25-57:25 (R. Swimmer). For example, the Restatement of Trusts "is a body of law that applies in the absence of more particular directions from the settlor in the trust instrument." Tr., June 2, 2003, p.m., at 41:13-15 (J. Langbein). With respect to Interior's obligation to account for IIM funds, section 102 of the 1994 Act, which specifies in detail the funds to be accounted for and the information to be provided to beneficiaries, provides more particular directions than the Restatement, which merely recites a general duty "to keep and render clear and accurate accounts

with respect to the administration of the trust." Compare 25 U.S.C.A. § 4011 with Restatement (Second) of Trusts § 172 (1959).

314. The common law of trusts is default law which must yield to any contrary or more particular terms set forth in the trust instrument – in this instance, Acts of Congress – that defendants are obliged to obey.[75] See Expert Report of Professor Langbein at 5-7 (Defs.' Ex. 37). The statutory obligations work like the terms of the trust instrument in the law of private trusts. Id. at 6. The Uniform Trust Code provides that "[t]he terms of a trust prevail over any provision of" the common law codified therein, subject to enumerated exceptions not relevant here. Expert Report of Professor Langbein at 5 (quoting Unif. Trust Code § 105(b) (2000)) (Defs.' Ex. 37); see also Unif. Prudent Investor Act of 1994 § 1(b) ("The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust"). The Court must look to the statute or regulation establishing the trust relationship to determine the nature of the specific obligations owed, rather than simply applying all of the common-law trust duties. See, e.g., White Mountain Apache Tribe v. United States, 123 S. Ct. 1126, 1133 (2003) (citing Mitchell II, 463 U.S. at 224-26); see also Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 573 (1990) (the relationship between the United States and Indians "is not comparable to a private trust relationship").

---

[75] The Secretary has a duty of loyalty to the beneficiaries, which is often modified by statute. Tr., June 26, 2003, p.m., at 61:13-22 (R. Swimmer). The Secretary has duties to exercise reasonable care and skill for beneficiaries, to preserve the trust property, to enforce claims, and to defend claims against the trustee, all as subject to and modified by statutes and regulations. Tr., June 27, 2003, a.m., at 4:7-5:4 (R. Swimmer). The Secretary has duties to protect and preserve all information relevant to the individual Indian trust and to maintain adequate records, all as subject to and modified by statutes and regulations. Tr., June 27, 2003, a.m., at 10:3-11:24 (R. Swimmer).

d. Common Law Standards Would Adjust to the Distinctive Characteristics of the Individual Indian Trust

315. Under common law, two fundamental standards applicable to trustees are the duty of loyalty and the duty of prudence. Tr., June 2, 2003, p.m., at 41:16-42:11 (J. Langbein). How these duties actually apply in practice, however, is determined by reference to the trust instrument, the specific circumstances attending the trust, and applicable law. See, e.g., Tr., June 2, 2003, p.m., at 41:16-42:11, 47:16-22, 51:14-18, 52:22-24, 60:21-61:3,78:22-79:1 (J. Langbein).

316. Common-law or "default" trustee duties can be modified or even waived. See, e.g., Tr., June 2, 2003, p.m., at 50:23-51:13 (J. Langbein). "[E]ven the loyalty rule, which is the most fundamental rule of trust law, is waivable by the settlor. . . ." Tr., June 2, 2003, p.m., at 50:25-51:1 (J. Langbein); see also id. at 52:24 (the "instrument itself may alter the prudence norm").

317. The duty of prudence requires a trustee to act with "such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . ." Restatement (Second) of Trusts § 174 (1959). This "prudence norm" underlies most of the common law duties. Expert Report of Professor Langbein at 6 (Defs.' Ex. 37). The prudence norm of trust law, however, is the standard of care of a reasonable person similarly situated. Id. Thus, the prudence norm for Interior's administration of the individual Indian trust must take into account both "the distinctive circumstances of this trust" and "the budgetary, institutional, and operational constraints under which this trustee must operate." Expert Report of Professor Langbein at 6-7 (Defs.' Ex. 37).

G. The Court Must Reject Plaintiffs' Compliance Plan Together with Applicable Trust Standards

318. In stark contrast to Interior's Fiduciary Obligations Compliance Plan, the Plaintiffs' Compliance Plan provides no systematic, detailed guidance regarding the specific actions to achieve the trust reform necessary for compliance with Defendants' accounting obligations under the 1994 Act. Plaintiffs' Plan simply does not "fully address actions necessary to ensure that [Interior] has a reliable trust fund accounting system." "Misplaced Trust Report" at 54 (Defs.' Ex. 178). Plaintiffs' Plan perhaps describes the skeletal outline of a legislative proposal, but it is neither realistic nor lawful under existing law.

319. At best, Plaintiffs' Compliance Plan imposes hopelessly unrealistic deadlines on new personnel in new offices, provides no guidance to those personnel regarding the tasks assigned to them, and reveals an astonishing lack of familiarity with the trust-related processes and the measures necessary to reform them. At worst, Plaintiffs' Compliance Plan fails to address the complexities of the Interior Defendants' relationship with Congress, tribes, and account holders, and utterly ignores the Interior Defendants' coexisting obligations, including statutes, Executive Orders, tribal consultation, and the annual appropriations process. See, e.g., Plaintiffs' Plan at 33 (Pls.' Ex. 51) ("immediately appoint new and independent trust administration management solely to administer the Individual Indian Trust") (emphasis omitted), id. at 42 ("Segregate administration of IIM trust records from tribal and other DOI records," because "divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration.")

320. Even if the Plaintiffs' Compliance Plan were not so legally defective, it is nonetheless unacceptable because the additional time and effort required to address and resolve just the unanswered questions[76] arising from the small subset of alleged trust obligations that the Plaintiffs concentrate on would "necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell, 240 F.3d at 1110.

321. The Plaintiffs' Compliance Plan, with its piecemeal and non-detailed approach, reflects not only a failure to learn from Interior's experience with trust reform but also a failure to heed the clear congressional guidance that a plan is fatally flawed when it proposes, inter alia, "hir[ing] additional staff . . . without first analyzing how these staffing changes might impact on an overall strategic plan," failing to consider "whether the short-term corrective actions will be consistent with short- and long-term corrective actions developed for the strategic plan," omitting "key elements of a strategic plan," and neglecting to "plan for reviewing the current trust financial management systems and procedures even though such studies are necessary to support appropriate action." "Misplaced Trust Report" at 53-54 (Defs.' Ex. 178). The Plaintiffs thus fail to propose "a resolute action plan necessary to solve the structural problems that have besieged the financial management of the Indian trust fund for decades and provide a meaningful blueprint for hard-nosed application of sound management practices." Id. at 54.

322. Notwithstanding this Court's prior ruling that "Plaintiffs cannot simply announce that this is a 'trust case' and therefore conclude that the government owes all typical trust duties under the common law," Cobell, 52 F. Supp. 2d at 27 n.15, that is precisely the premise of the

[76] Even after forty-four days of trial, no specific details are available for how reform would be accomplished under Plaintiffs' Compliance Plan and how that reform will lead to compliance with the 1994 Act and the Interior Defendants' coexisting obligations.

Plaintiffs' Compliance Plan. Their Plan begins not with the statute under which they sought relief, but with a recitation of various common law "[t]rustee [s]tandards and [d]uties." See Plaintiffs' Plan at 16-25 (Pls.' Ex. 51). Although Plaintiffs assert and, indeed, concede, that those trust standards are "consonant with the precepts of" the 1994 Act, id. at 29, they then proceed to propose reform actions and measure them solely against the common law trust standards rather than against the specific statutory requirements associated with performance of the accounting, id. at 32-47.

323. The Court has forbidden this approach. As this Court has already recognized and reiterated, standard trust law duties cannot be imported wholesale and applied to Interior simply because the IIM funds for which the accounting is sought are held in trust. See Cobell, 91 F. Supp. 2d at 29 ("it does not follow . . . that plaintiffs may simply claim that they are the beneficiaries of a trust relationship with the United States and therefore invoke all of the rights that a common law trust entails." (discussing case law)); see also Cobell, 226 F. Supp. 2d at 151 n.161 ("the federal government's fiduciary obligations may not be coextensive with those of an ordinary trustee"); Cobell, 52 F. Supp. 2d at 27 n.15.

324. In addressing trust reform, the Plaintiffs and the Court, like the Interior Defendants, are bound by existing statutory and budgetary requirements. By proposing a new, but only vaguely defined trust organization, separating the management and administration of IIM trust operations from that for tribal trust, and requiring significant but unfunded expenditures to accomplish this new trust operation, the Plaintiffs' Compliance Plan violates existing statutory and budgetary constraints.

325. Any major restructuring – such as that envisioned by either of the parties' compliance plans, and particularly the Plaintiffs' proposal to create and staff a trust organization and to separate trust functions – requires Congressional approval, either from Congress as a whole should existing statutes need to be changed, or from Congressional appropriators should existing appropriated funds need to be substantially reprogrammed. Furthermore, under the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342 (Defs.' Ex. 33), government agencies can neither retain personnel nor enter into contracts with third parties without having the necessary funding in place.

326. Unlike a private trustee, the Defendants cannot commit to expenditures that have not been authorized and cannot impose structures or practices that are inconsistent with Congressional guidance provided in statutes and budgets, including the budget justifications and program descriptions on which Congress relies in enacting appropriations. The Defendants (like the Plaintiffs and the Court) cannot disregard Congressional direction regarding trust-related activities and must take the need for Congressional approval into account in all aspects of planning and budgeting for all significant undertakings, trust related or otherwise. The Plaintiffs' Compliance Plan reflects no such considerations and acknowledges no such realities.

327. Plaintiffs' radical approach to trust reform – trust reform without regard to the framework of applicable laws and Congressional direction in trust-related decisions – is a far cry from the "middle ground" chosen by Congress when it restructured and reorganized trust operations in the 1994 Act. See 91 F. Supp. 2d at 41 (discussing "middle ground" chosen by Congress).

1. Plaintiffs' Plan Conflicts with the Statute Creating the Office of the Special Trustee

328. In Title III of the 1994 Act, Congress created the Office of the Special Trustee for American Indians 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," and "ensure that reform of such practices in the Department is carried out in a unified manner," and "ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities to Indian Tribes and individual Indians." 1994 Act § 301. Furthermore, the Special Trustee "shall ensure continuation of the Office until all reforms identified in the strategic plan have been implemented to the satisfaction of the Special Trustee," at which point written notice must be given to the Secretary and Congress before the Office is terminated. 1994 Act § 302(c)(1). OST still exists, and the Plaintiffs' Compliance Plan therefore violates these statutory requirements.

329. The Plaintiffs propose the "immediate[] appoint[ment of] new and independent trust administration management solely to administer the Individual Indian Trust," including a new "Trust Manager and staff . . . to bring the individual Indians trust into compliance." Plaintiffs' Plan at 33-34, 37 (emphasis omitted) (Pls.' Ex. 51). No statutory authorization for creation of this new and independent "trust administration management" is cited, no organizational structure is provided, and no explanation is given regarding the fate of the Office of the Special Trustee. Under the Plaintiffs' view of "conflict," id. at 33, 42, 44, OST would necessarily be conflicted out of continuing to provide trust oversight because it is not independent but instead reports to the Secretary, see Cobell, 91 F. Supp. 2d at 52 ("If Congress

truly wanted an independent trustee to oversee trust management . . . then Congress surely would have explicitly restricted the Secretary's powers over the Special Trustee and his office."), because it is implicated in this litigation, and because it oversees and makes decisions that affect both individual and tribal trusts.

330. In drafting the 1994 Act, Congress could have chosen an organizational approach different from the current trust structure; instead, it chose to retain the existing structure under the Secretary, with the addition of the Office of the Special Trustee. "[T]he Office of the Special Trustee, and its congressionally created structure, was Congress's considered judgment as to how [to] help try to solve the IIM administration problems." Cobell, 52 F. Supp. 2d at 29. Congress's "considered judgment" cannot be ignored.

2. Plaintiffs' Plan Conflicts with Congressionally Authorized Joint Trust Administration

331. The Plaintiffs' Plan requires "[s]egregate[d] administration of IIM trust records from tribal and other DOI records" and "the separation of trust assets from all other tribal and DOI assets." Plaintiffs' Plan at 42, 44 (Pls.' Ex. 51). Congress has long known that individual and tribal trust assets are being administered together, because Interior each year submits budget requests to Congress which make the joint administration clear.

332. Congress could have chosen to separate the management and administration of individual and tribal trust assets, but it did not do so and has not, to date, indicated a belief that such a separation is necessary. Indeed, Congress explicitly vested responsibility in the Office of the Special Trustee for oversight of all trust assets, whether tribal or individual. 1994 Act § 301. The continuing joint administration of individual and tribal trusts is consistent with congressional

indications of a strong preference to avoid duplicating programs and program functions. Neither the Plaintiffs nor this Court can alter the existing trust structure that Congress created or act in anticipation of future congressional action.

3. Plaintiffs' Plan Conflicts with Interior's Personnel Obligations

333. A Court order requiring Interior's trust-related hiring decisions to be made according to the specific requirements and criteria articulated by the Plaintiffs for "unconflicted" trust personnel would violate the authority of the President, and, by delegation, the Secretary, to make hiring decisions on behalf of the Executive Branch.[77]

334. To the extent that a Court order requiring the Interior Defendants to appoint a "Chief Legal Officer" would, in accordance with the Plaintiffs' Plan, contemplate vesting responsibility for all trust-related litigation in that new position, Plaintiffs' Plan at 35, 38-39, 44-45 (Pls.' Ex. 51), that responsibility would violate statutes governing litigating authority, which is vested in the Department of Justice. See 28 U.S.C. §§ 516-519; see also 5 U.S.C. § 3106 (generally barring the head of an Executive department from "employ[ing] an attorney or counsel for the conduct of litigation" and requiring referral to the Department of Justice).

---

[77] Plaintiffs assert in a footnote, with no explanation or discussion, that they "do not believe it is necessary to depart from the ordinary, applicable Indian preference policy of the Department of the Interior" in establishing and staffing the "new and independent trust administration" program within Interior to administer the individual Indian trust. Plaintiffs' Plan at 33 n.43 (Pls.' Ex. 51). First, based on the conflict principles that the Plaintiffs seek to import from private trust law in support of their Compliance Plan, it would seem likely that tribal and class members would be conflicted out of the administration of such a system, in which case the Indian hiring preference would be to little or no avail. Second, the Plaintiffs fail to explain how such large-scale immediate hiring of personnel could, as a practical matter, be consistent with application of the "ordinary, applicable Indian preference policy."

4. Plaintiffs' Plan Does Not Address Tribal Consultation Or Compliance with Existing Law and Policy Regarding Tribal Involvement in Trust Operations

335. The requirement that Interior "[s]egregate administration of IIM trust records from tribal and other DOI records" because "divergent interests of individual Indian trust beneficiaries and tribal leaders require the complete separation of trust administration," Plaintiffs' Plan at 42 (Pls.' Ex. 51), interferes with sovereign relations between Interior and tribes, particularly with regard to those tribes that have assumed some of the Secretary's responsibilities related to the administration and management of tribal and individual trust accounts. To the extent that the Plaintiffs' Plan precludes tribes from entering into such arrangements in the future, it violates the Congressional mandate to encourage tribes to play increasingly active roles in the administration and management of trust assets for both the tribe and individual members of the tribe. See 25 U.S.C. §§ 450 et seq. (Defs.' Ex. 31); Executive Order No. 13175 (Defs.' Ex. 30); 25 C.F.R. Pt. 1000 (Defs.' Ex. 32).

336. Furthermore, notwithstanding the Plaintiffs' willingness to focus on the process by which Interior developed its Fiduciary Obligations Compliance Plan, the Plaintiffs' own plan does not address the issue of tribal consultation or assert that its contents were in any way a result of tribal consultation.

5. Plaintiffs' Plan Fails to Provide for a Thorough Assessment of, or Familiarization of New Personnel with, Existing Trust Business Practices Before Requiring New Personnel to Accomplish Tasks that Will Require Detailed Knowledge of Existing Trust Operations

337. Although the Plaintiffs' Plan requires the retention of a number of new "unconflicted" personnel not previously connected with trust operations at Interior, it provides no

guidance to that new staff regarding how and where this "new and independent trust administration management" intended "solely to administer the Individual Indian Trust" would fit into Interior's overall organizational structure. See Plaintiffs' Plan at 33–35 (emphasis omitted) (Pls.' Ex. 51). The Plaintiffs' Plan simply lists the results that those personnel are supposed to achieve without in any way describing the process necessary to accomplish those results, without providing sufficient time to understand the current processes and personnel, without addressing the possibility that some of the goals and timetables for achieving those results may not be feasible, and without contemplating any process similar to Interior's "As-Is" and "To-Be" assessments of core trust business processes. In essence, Plaintiffs' Plan proposes a quantum leap to a fully functional trust system without any intermediate steps.

338. The Plaintiffs propose a quick fix without a sufficient foundation, an approach that Interior has rejected as unworkable and ill-advised and that Congress has likewise condemned, see "Misplaced Trust Report" at 53-54 (Defs.' Ex. 178). Notwithstanding Plaintiffs' desire for quick trust reform, a system that has experienced well-documented difficulties for over one hundred years cannot be corrected by a Court order to fix problem A in 60 days and problem B in 180 days, Plaintiffs' Plan at 38-40, 42, 43 (Pls.' Ex. 51), without building into the process the sufficient time and planning necessary to develop a thorough understanding of problem A and problem B and to comply with other applicable statutory, congressional, and governmental requirements. Interior's Fiduciary Obligations Compliance Plan provides that time; Plaintiffs' Plan does not.

339. Plaintiffs' Compliance Plan, by leaping into trust reform without a methodical and systematic approach, will "necessarily delay rather than accelerate the ultimate provision of an

adequate accounting," Cobell, 240 F.3d at 1110, when, inevitably, deadlines are missed and unanticipated but otherwise foreseeable obstacles are encountered.

6. Plaintiffs' Plan Raises Issues Beyond the Scope of Their Case

340. Plaintiffs propose a number of actions that relate to the management and administration of trust assets, including actions intended to prevent "trespass, wasting, or improper exploitation" of trust assets, Plaintiffs' Plan at 39 (Pls.' Ex. 51), and actions "to make trust property and all other trust assets productive, to enforce claims on behalf of individual Indian trust beneficiaries, and to take affirmative action to preserve trust property," id. at 44-45. These particular actions are beyond the scope of this case and the authority of this Court because they relate to the general management and administration of trust assets and natural resources rather than to compliance with the accounting obligations under the 1994 Act.

341. Finally, because Plaintiffs assert that an historical accounting of the kind required by the 1994 Act and ordered by the Court is not possible, by definition their Compliance Plan would not result in compliance with the 1994 Act accounting requirements.

H. The Court Lacks Authority To Enter A "Structural Injunction" Or Appoint A Receiver.

1. The Injunctive Relief Contemplated By The Court Would Exceed Constitutional Limits On The Judicial Authority.

342. In its September 17, 2002 Order, the Court scheduled the present "Phase 1.5 trial," stating that it would "encompass additional remedies with respect to the fixing the system portion of this case and approving an approach to conducting a historical accounting of the IIM trust accounts." Cobell v. Norton, 226 F. Supp. 2d at 162. The court specified that it "will grant further injunctive relief to make the defendants correct the breaches of trust declared by the Court

and stipulated to by the defendants back in 1999." Id. at 146-47. Specifically, the Court stated that it "plans on entering a structural injunction in this case." Id. at 146 n.154. The Court stated that the goal of such injunctions is "'not merely to halt a single wrongful practice, but to halt a group of wrongful practices by restructuring a social institution such as a mental hospital, school, or prison.'" Id. (quoting Dobbs, Law of Remedies (2d ed.) at § 7.4(4)).

343. As set forth at length in Section III.A., supra, this Court's authority to review Interior's plans is constrained by well-established principles governing judicial review of agency action and the separation of powers concerns that underlie these principles. In light of these principles, and inasmuch as the judicially enforceable duty at issue is the production of account statements to individual IIM account holders, judicial review prior to final agency action must be limited to, at most, determining whether Interior's January 6 plans (or subsequent plans) describes steps so defective that they would necessarily delay rather than accelerate the provision of an adequate accounting.

344. The injunctive relief contemplated by the Court would exceed constitutional and statutory limits on the judicial authority by specifying how Executive Branch agencies must fulfill their legal obligations, rather than simply requiring them to do so. Id. Such judicial intrusion into the internal affairs of an Executive Branch agency "simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." Cobell v. Norton, 2003 WL 21673009, at *12.

2. The Constitution Does Not Permit Appointment Of A Receiver Over The IIM Trust.

345. As injunctive relief specifying how Defendants must fulfill their legal obligations is impermissible, judicial assumption of the Secretary of the Interior's trust duties through the appointment of a receiver is plainly prohibited. Nonetheless, the Court concluded in its September 17, 2002 opinion that it was empowered to appoint such a receiver in this case, see Cobell v. Norton, 226 F. Supp. at 135-47, and advised the parties at trial that it was actively considering such an appointment. See Tr., May 6, 2003, a.m., at 39:13-23 ("[A]ppointment of a receiver . . . is one of th[e] options I'm going to entertain.").

346. The testimony presented at the Phase 1.5 trial demonstrates that Interior has made significant progress in laying the groundwork for long-term trust reform, and has begun implementation of a reasonable and credible plan to complete the historical accounting work in approximately five years. Appointment of a receiver over the IIM trust not only is factually unwarranted, but is legally proscribed by the Constitution.

a. The Appointments Clause.

347. The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

348. "[T]he Appointments Clause of Article II is more than a matter of 'etiquette or protocol;' it is among the significant structural safeguards of the constitutional scheme." Edmond v. United States, 520 U.S. 651, 659 (1997). Under this clause, courts of law can never appoint principal officers, and can appoint inferior officers only when Congress has expressly vested them with power to make such appointments.

349. "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." Buckley v. Valeo, 424 U.S. 1, 126 (1976). That a receiver with the authority to manage the IIM trust system and to develop and implement trust reform would "exercis[e] significant authority pursuant to the laws of the United States," id., and, therefore, be an officer – either principal or inferior – within the meaning of the Appointments Clause is plain.

350. As this Court has recognized, the Secretary of the Interior is a principal officer. Cobell v. Norton, 226 F. Supp. 2d at 140. In its September 17, 2002 contempt opinion, this Court stated that a court-appointed receiver would be an inferior officer because his or her work would be "'directed and supervised at some level by others who were appointed by Presidential nomination,'" namely this Court. Id. (quoting Edmond, 520 U.S. at 662-63).

351. The necessary implication of the Court's decisions is that the Court itself would be assuming the duties of an Executive Branch Cabinet Secretary, an action that cannot be reconciled with separation of powers principles, as discussed below. In any event, if the Court is correct that a receiver would be an inferior officer, the Court may not appoint a receiver unless

"Congress [has] by Law vest[ed] the Appointment . . . in the Courts of Law."[78] U.S. Const. art. II, § 2, cl. 2.

352. Congress has not vested appointment of a receiver to administer and manage the IIM trust system in the courts of law; indeed, it has not granted the courts authority to appoint receivers to assume operation of *any* Executive Branch agencies. Cf. 28 U.S.C. § 1361 (authorizing mandamus relief against officers and agencies but not the appointment of receivers to assume their duties). Because Congress has enacted no statute vesting the appointment of a receiver over an Executive Branch agency in the courts of law, the appointment of a receiver to administer and manage the IIM trust system would be impermissible under the Appointments Clause of the Constitution.

353. This Court has already opined that the Appointments Clause does not bar appointment of a receiver because cases in which courts have appointed receivers over state and local (or private) institutions "demonstrate that federal district courts are vested with the power to appoint a receiver to ensure compliance with its orders." Cobell v. Norton, 226 F. Supp. 2d at 140-41; see also id. at 135-37. That courts may exercise their equitable powers to appoint receivers in cases not implicating the United States Constitution, however, has no bearing on whether the appointment of a receiver to assume the trust responsibilities of the Secretary of the Interior comports with the Appointments Clause.

354. The Appointments Clause does not limit a district court's exercise of equitable power to appoint a receiver to perform the duties and functions of a state or local officer, and

[78] If the Court is incorrect – that is, if a receiver over the IIM trust would be a principal officer – the Appointments Clause does not permit such an appointment by the courts of law. U.S. Const. art. II, § 2, cl. 2.

federal separation of powers concerns are not implicated when a state or local institution is placed in receivership. The appointment of a receiver to assume the Secretary of the Interior's IIM trust responsibilities would violate the Appointments Clause as well as the separation of powers doctrine inherent in Articles I, II, and III.

355. This Court further stated in its September 17, 2002 contempt ruling that "the Supreme Court itself has recognized that 'courts have long participated in the appointment of court officials such as United States commissioners or magistrates.'" Id. at 141 (quoting Morrison v. Olson, 487 U.S. 654, 679 n.16 (1988)). But, in those instances, the Supreme Court cited the express statutory authority vesting such appointments in the courts of law. See Morrison, 487 U.S. at 679 n.16 (citing Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) ("The Act of May 28, 1896, 29 Stat. 184, . . . authorized each district court to appoint United States commissioners. . . .") and 28 U.S.C. § 631(a) ("The judges of each United States district court . . . shall appoint United States magistrates. . . .")). No similar statutory authority vests appointment of a receiver to assume the Secretary of the Interior's trust responsibilities in the courts of law.

356. This Court has also opined that, "in addition to its inherent equitable powers (which the act creating the Court in the first instance conferred upon it), the All Writs Act provides this Court with the power to 'issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law.'" Cobell v. Norton, 226 F. Supp. 2d at 141 (quoting 28 U.S.C. § 1651(a)). However, while, as a general rule, "'the scope of a district court's equitable powers to remedy past wrongs is broad,'" Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (quoting Swann v. Charlotte-Mecklenberg Bd. of Educ.,

402 U.S. 1, 15 (1971)), a court's equitable powers may not be exercised in contravention of the Constitution. INS v. Pangilinan, 486 U.S. 875, 883 (1988) ("'[C]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" (quoting Hedges v. Dixon County, 150 U.S. 182, 192 (1893)).

357. A federal court may not, pursuant to its general equitable powers, appoint "Officers of the United States," U.S. Const. art. II, § 2, cl. 2, because the Appointments Clause provides the exclusive mechanism by which such officers may be appointed, and permits courts to appoint them only when authorized by an act of Congress. Buckley v. Valeo, 424 U.S. at 124-26.

358. Neither the All Writs Act nor "the act creating the Court in the first instance," vests appointment of receivers to manage Executive Branch agencies in the courts of law. If a federal court's equitable powers permitted it to circumvent the Appointments Clause, no real obstacle would preclude a federal court from replacing Cabinet-level officers with individuals more pleasing to the court under the guise of an exercise of equitable power.

359. As the D.C. Circuit recently held in this case, "[a] judicial claim to an 'inherent power' is not to be indulged lightly, lest it excuse overreaching '[t]he judicial Power' actually granted to federal courts by Article III of the Constitution of the United States, and the customs and usages that inform the meaning of that phrase." Cobell v. Norton, 2003 WL 21673009, at *10. Absent congressional authorization (and then only in the case of inferior officers) – which Congress has not provided – this Court is prohibited by the Appointments Clause from exercising even equitable or remedial powers to appoint a receiver to administer and manage the IIM trust system.

360. Moreover, even Congress could not authorize appointment of a receiver in this case. A statute vesting the Court with the power to appoint a receiver would be valid only to the extent that exercise of this appointment power would not be "incongruous" with the judicial power. See Ex parte Siebold, 100 U.S. 371, 398 (1879). Congress cannot vest appointment power in the courts when such power would be inconsistent with Article III and the proper judicial role. See id.

361. As discussed in more detail below in the context of separation of powers concerns, appointing a receiver through whom the Court would manage the IIM trust system would far transcend the proper judicial role. Accordingly, even if Congress had authorized the Court to appoint a receiver to manage the IIM trust system, the statute would impermissibly exceed constitutional limits on "incongruous" interbranch appointments.

362. In its September 17, 2002 opinion, this Court stated that cases in which courts appointed receivers over "prisons, schools, mental hospitals, water treatment plants, and child welfare centers belie" the argument that the Appointments Clause would not permit Congress to authorize appointment of a receiver in this case because it would be incongruous with the judicial power. Cobell v. Norton, 226 F. Supp. 2d at 141. The Court stated that appointment of receivers over public and private institutions to "remedy illegal conduct . . . clearly falls within the ambit of courts' everyday duty to decide cases and controversies." Id.

363. None of the cases cited by the Court, however, concerned appointment of a receiver to assume the responsibilities of an agency of the co-equal Executive Branch. As noted above, a court may not exercise its equitable power to craft remedies that contravene the Constitution. INS v. Pangilinan, 486 U.S. at 883 ("'[C]ourts of equity can no more disregard

statutory and constitutional requirements and provisions than can courts of law.'" (quoting Hedges v. Dixon County, 150 U.S. at 192)). By appointing a receiver, the Court would be doing much more than crafting a remedy (which, as a general matter, is congruent with the judicial power) - it would be assuming from the Executive Branch the responsibility for managing the IIM trust (which is not congruent with the judicial power, as explained more fully below).

364. The constitutional proscription on judicial appointments that are incongruous with the judicial power is not implicated when a court appoints a receiver over a state or local institution, as in the cases cited by the Court.

b. Separation Of Powers.

365. Even if the Appointments Clause did not preclude appointment of a receiver, such an appointment would contravene the separation of powers doctrine by permitting the court to intrude on functions entrusted to the other branches of the federal government and would exceed the Court's authority under Article III of the Constitution.

366. The doctrine of separation of powers seeks to prevent the aggrandizement of power in any one of the three branches of government. Morrison v. Olson, 487 U.S. 654, 693 (1988) ("[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976))). Although no reference to "separation of powers" is found in the text of the Constitution, the doctrine of separation of powers is enforced both as a general principle and through the application of several specific constitutional provisions, including the Appointments Clause and Articles I, II and III of the Constitution.

367. Articles I , II, and III establish Congress, the President and the judiciary and invest them, respectively, with authority to exercise the legislative, executive, and judicial powers of the United States. See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

368. Concern with maintaining separation of powers profoundly shaped the drafting of the Constitution and of Articles I, II, and III in particular. See Mistretta v. United States, 488 U.S. 361, 380 (1989) ("Madison, in writing about the principle of separated powers [in The Federalist No. 47], said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'"); INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility.").

369. The Supreme Court has consistently reaffirmed "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta, 488 U.S. at 380.

370. "Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable," and no branch of government may exercise authority that interferes with or usurps that delegated by the Constitution to one of its sister

branches. Chadha, 462 U.S. at 951 (citation omitted). Thus, general separation of powers concerns, as well as Articles I, II, and III, prohibit the judiciary from undertaking duties delegated by the Constitution to the Executive Branch.

371. Article II confers on the President the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This "broad power" is "conspicuously not granted to [courts] by the Constitution." INS v. Legalization Assistance Project of L.A. County Fed'n of Labor, 510 U.S. 1301, 1304-05 (O'Connor, Circuit Justice 1993). "[E]xecutive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Art[icle] III of the Constitution." Buckley, 424 U.S. at 123. This broad prohibition upon the courts' exercise of executive or administrative duties of a nonjudicial nature is designed "to maintain the separation between the Judiciary and the other branches of the Federal Government by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." Morrison, 487 U.S. at 680-81.

372. Thus, this Court's authority to appoint a receiver to manage an Executive Branch agency is limited by the federal courts' constitutionally prescribed role. The Constitution limits the authority of federal courts to "[t]he judicial power of the United States." U.S. Const. Art. III, § 1. "According to express provision of Article III, the judicial power of the United States is limited to 'Cases' and 'Controversies.'" Mistretta, 488 U.S. at 385; see also Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 816 (1987) (Scalia, J., concurring) ("The judicial power is the power to decide, in accordance with law, who should prevail in a case or controversy."). The key inquiry is whether the Court would exceed its Article III role "to adjudicate cases and controversies as to claims of infringement of individual rights" and intrude

upon the duty entrusted to the Executive of "'tak[ing] Care that the Laws be faithfully executed.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (quoting U.S. Const. art. II, § 3); see Morrison, 487 U.S. at 677-78 & n.15 ("In several cases, the Court has indicated that Article III 'judicial Power' does not extend to duties that are more properly performed by the Executive Branch."). By appointing a receiver over the IIM trust, the Court clearly would exceed its role.

373. In the rare cases in which the Supreme Court has upheld the judiciary's assumption of nonadjudicatory functions against a separation of powers or Article III challenge, it has emphasized that it was doing so only because the judiciary was not encroaching upon the constitutionally delegated functions of another branch, and the nonadjudicatory functions assumed by the judiciary were closely related to the mission of the judiciary.

374. In Mistretta v. United States, 488 U.S. at 361, for example, the Court held that Congress's creation within the judiciary of a Sentencing Commission to promulgate binding sentencing guidelines was not prohibited by the separation of powers doctrine because "Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary." Id. at 388. The Court noted that sentencing is a field in which the Judicial Branch has significant special knowledge and expertise, id. at 396, and in which the Executive Branch had never exercised the kind of authority vested in the Commission. Id. at 387 n.14. Particularly significant to the Court was that the Commission is an independent agency "not controlled by or accountable to members of the Judicial Branch." Id. at 393. The Court noted that the President's relationship to the Commission was "functionally no different" than if the Commission had been

located outside the judicial branch because Congress had empowered the President to appoint and remove Commission members. Id. at 387 n.14. Thus, the Court concluded that the statute did not aggrandize the authority of the Judicial Branch or deprive the Executive Branch of a power it once possessed. Id. at 395.

375. In Morrison v. Olson, 487 U.S. at 654, the Court offered similar reasons for upholding against a separation of powers challenge a statute authorizing a Special Division of judges to appoint and oversee an independent counsel. The Court held that the statute gave the Executive Branch sufficient control over the independent counsel to ensure that the President was able to perform his constitutionally assigned duties inasmuch as (1) the Attorney General had the power to remove the independent counsel for good cause; (2) no independent counsel could be appointed without a specific request by the Attorney General; and (3) a decision by the Attorney General not to request appointment of an independent counsel was unreviewable. Id. at 696. The Court suggested strongly that its decision would have been different had "the power to remove an executive official . . . been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." Id. at 692. Moreover, the Court determined that "the functions that the Special Division is empowered to perform are not inherently 'Executive,'" but generally passive (e.g., receiving reports) or, if requiring the exercise of judgment or discretion, "essentially ministerial," and "directly analogous" to functions performed by the judiciary in other contexts. Id. at 681. The Court noted that:

> in light of judicial experience with prosecutors in criminal cases, it could be said that courts are especially well qualified to appoint prosecutors. *This is not a case in which judges are given power to appoint an officer in an area in which they have no special knowledge or expertise, as in, for example, a statute authorizing*

> *the courts to appoint officials in the Department of Agriculture or the Federal Energy Regulatory Commission.*

Id. at 676 n.13 (emphasis added).

376. In contrast, court appointment of a receiver to assume the duties of the Secretary relating to the administration and management of assets of individual Indian trust beneficiaries would encroach impermissibly on the constitutionally appointed function of the Executive Branch. A court-appointed receiver is "an officer of the court" and has "no powers except such as are conferred upon him by the order of his appointment." Booth v. Clark, 58 U.S. (17 How.) 322, 331 (1854); accord Sterling v. Stewart, 158 F.3d 1199, 1201 n.2 (11th Cir. 1998). Such a receiver would actively exercise executive functions – functions that are in no sense "passive" or "ministerial" or analogous to functions ordinarily performed by the judiciary. The core constitutional function of the Executive Branch is to see that the laws are "faithfully executed," U.S. Const. art. II, § 3, and Congress has expressly entrusted the Secretary with the duty to "execute" the laws governing Indian trusts. That these executive and administrative duties have a fiduciary component in no sense transforms them into duties that are adjudicatory in nature. The D.C. Circuit recently made clear in this case that even the Court's appointment of a Court Monitor "entailed a license to intrude into the internal affairs of the Department, which simply is not permissible under our adversarial system of justice and our constitutional system of separated powers." Cobell v. Norton, 2003 WL 21673009, at *12.

377. Nor is the administration and management of the IIM trust system an area in which federal courts have any more special knowledge or expertise than they have with regard to the administration of programs in the Department of Agriculture or the Federal Energy

Regulatory Commission. See Morrison, 487 U.S. at 676 n.13. The Secretary is not an ordinary trustee; her trust duties include establishing policies and practices for myriad specialized functions such as trust land management and income collection; appraisal of trust lands; review of land transfers; oversight of grazing leases, timber leases, timber sales, oil and gas production, mineral production, and rights of way; and banking functions. Cobell v. Babbitt, 91 F. Supp. 2d at 9-11. If the Court removes these duties from the Executive in order to perform them itself through a receiver, the Court necessarily will be enmeshed in making discretionary decisions about the management and administration of the IIM trust system and about trust reform that are at the heart of the Executive Branch's constitutionally delegated duty.

378. Moreover, a receiver would be controlled by the Court and accountable only to the Court, stripping the President of the power to remove an executive official and removing any "means for the President to ensure the 'faithful execution' of the laws." Morrison, 487 U.S. at 692; see Mistretta, 488 U.S. at 393-94; cf. Bowsher v. Synar, 478 U.S. 714, 726 (1986) (holding that Congress may not exercise removal power over an officer performing executive functions); Myers v. United States, 272 U.S. 52, 63-64 (1926) (holding that Congress cannot divest the President of power to remove an Executive Branch officer who he was initially authorized to appoint).

379. If a receiver is appointed in this case, executive functions *currently performed* by the Executive Branch in accordance with the Constitution and congressional directives would be *removed* from the Executive Branch and *assumed* by the Judicial Branch. That would exceed the bounds of this Court's Article III authority, intrude upon the duty to "take Care that the Laws be faithfully executed" entrusted to the Executive by Article II, and contravene the doctrine of

separation of powers. See Lujan, 504 U.S. at 577; cf. Printz v. United States, 521 U.S. 898, 922-23 (1997) (holding that the Brady Act's transference of federal identity-checking authority to local law enforcement officials deprived the President of "meaningful . . . control" and thereby violated Article II's dictate that the President "take Care that the Laws be faithfully executed.").

380. In addition, the Court's appointment of a receiver would trench on the prerogatives of Congress, in which the Constitution vests "[a]ll legislative Powers." U.S. Const. art. I, § 1. As this Court recognized, Congress has expressly vested day-to-day supervision of trust reform in the Secretary, with the assistance of the Special Trustee. 25 U.S.C. §§ 162a(d) & 4011; see Cobell v. Babbitt, 91 F. Supp. 2d at 13 (stating that the American Indian Trust Fund Management Reform Act of 1994 "recognized and codified the trust duties of the Secretary of the Interior, as the primary trustee-delegate of the United States, toward the IIM trust.").

381. Congress introduced significant reform in the administration of Indian trust funds in the 1994 Reform Act. For example, the Act created the Office of Special Trustee for American Indians in the Department of the Interior, headed by a Special Trustee who reports directly to the Secretary. 25 U.S.C. § 4042(a). Notably, Congress implemented reforms that would improve the performance of the agencies *within* the Department of the Interior; it conspicuously did not shift trust duties to another agency, much less to the courts. See H.R. Rep. No. 103-778, at 8-9 (1994), reprinted in 1994 U.S.C.C.A.N. 3467, 3467-68 (explaining that the purpose of the bill was to "bring about better accountability and management of Indian trust funds *by the Department of the Interior*," that the bill sets out the *Secretary of [the] Interior's* responsibilities," and that the "Special Trustee would oversee and ensure that the reforms take place *throughout the Department of [the] Interior*." (emphasis added)). It is amply clear that

Congress did not intend to allow the Secretary to be stripped of her responsibility over Indian trust funds; rather, Congress ensured that the ultimate fiduciary trust responsibility remain with the Secretary.

382. Courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626 (1978); see also Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO, 451 U.S. 77, 97 (1981) ("[T]he authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978) ("While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' . . . it is equally – and emphatically – the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). This Court acknowledged as much in its June 7, 1999 opinion:

> Congress has clearly provided that the government is to act as trustee for the IIM monies. This court does not have the power to encroach upon that decision, as such action would violate the doctrine of separation of powers. Congress has created this trust, and only Congress may alter it. This court's duty, as in all other cases, is to interpret and judicially enforce these laws.

Cobell v. Babbitt, 52 F. Supp. 2d 11, 28 n.17 (D.D.C. 1999). Congress provided that the *Secretary* is to act as trustee-delegate of the government, and the Court does not have the power to encroach upon that decision by replacing her with a judicially appointed officer.[79]

---

[79] In its September 17, 2002 opinion, this Court stated that there is a "significant difference" between removing the United States as trustee and appointing a receiver to

383. In its September 17, 2002 opinion, this Court stated that separation of powers considerations would not bar appointment of a receiver over the IIM trust. Cobell v. Norton, 226 F. Supp. 2d at 141-45. To the contrary, the Court suggested that the separation of powers doctrine compels the empowerment of federal courts to place Executive Branch agencies into receivership: "[C]ourts' power to appoint a receiver over public institutions is an important structural safeguard in our tripartite constitutional system of government because it prevents the executive branch from placing itself over the judiciary and the legislature." Id. at 142. However, the Court's reasoning in support of this conclusion was flawed.

384. In its September 17, 2002 opinion, the Court relied frequently on the proposition that appointment of a receiver would not be inconsistent with the Court's Article III power because the Court "would still only be deciding, as it does in numerous other cases pending before it, what relief is necessary to remedy illegal conduct by the defendants," and "the cases . . . in which federal district courts appointed a receiver over a state agency demonstrate that courts can, consistent with Article III, grant such relief." Cobell v. Norton, 226 F. Supp. 2d at 143; see also id. at 143-44.

---

administer the IIM trust, and that this difference is "well recognized in the case law, and by commentators." Cobell v. Norton, 226 F. Supp. 2d at 145. The only difference discussed by the Court, however, is that "a receivership lasts only so long as is necessary to ensure that the trust is being administered properly, while the removal of the trustee or trustee-delegate is permanent." Id. The Appointments Clause, however, contains no exception for "temporary" appointments; rather, it is the exclusive mechanism for appointment of principal and inferior officers, regardless of their expected tenure. Similarly, "temporary" violations of separation of powers principles are impermissible violations nonetheless. See, e.g., Printz, 521 U.S. at 922-23 (holding that the Brady Act's temporary transfer of federal identity-checking authority to local law enforcement officials deprived the President of "meaningful . . . control" and thereby violated Article II's dictate that the President "take Care that the Laws be faithfully executed").

385. However, as explained above, by appointing a receiver over the IIM trust, the Court would not just be imposing an equitable remedy (which, as noted above, cannot be done in contravention of the Constitution), but would be assuming from the Executive Branch the responsibility for managing the IIM trust, a function that is incompatible with the proper judicial role. See Morrison, 487 U.S. at 677-78 & n.15 ("In several cases, the Court has indicated that Article III 'judicial Power' does not extend to duties that are more properly performed by the Executive Branch.").

386. Contrary to the Court's belief that cases in which courts appoint receivers over state and local institutions "provide an important starting point for assessing this Court's power under Article III, and its equitable power to remedy illegal conduct by defendants," Cobell v. Norton, 226 F. Supp. 2d at 145, such cases do not implicate federal separation of powers concerns.

387. Similarly, the Court returned repeatedly to the proposition that "[c]ourts do not appoint receivers over executive branch agencies or officials to usurp the power of the executive branch[;] [t]o the contrary, receiverships are only imposed as equitable relief after a particular executive official has demonstrated that she will not comply with the less intrusive remedies already granted by the court." Id. at 141; see also id. at 143 ("[Defendants' Article II argument . . . must fail [because] [b]y appointing a receiver, the Court would not be usurping the executive branch's authority and responsibility to ensure that the laws are faithfully executed. Rather, the Court would simply be granting the relief necessary to cure the defendants' continuing breach of its fiduciary obligations towards the IIM beneficiaries."); id. at 144 ("[C]ourts only appoint a receiver after the relevant executive official refuses to comply with the

orders of the court and correct the illegal condition that required relief in the first instance[;] [t]hat is, courts do not appoint receivers because they wish to take control of the functions normally performed by the executive branch; rather, courts take such action because the executive official has in effect declined to do so herself."). But whether or not a court is motivated by an intent to "usurp the power of the [E]xecutive [B]ranch," the Constitution does not permit judicial assumption of the duties of an Executive Branch official. As explained above, the Court's equitable powers do not provide a vehicle for skirting the mandates of the Constitution.[80] INS v. Pangilinan, 486 U.S. at 883; see also Cobell v. Norton, 2003 WL 21673009 at 10-12.

---

[80] Even if one could imagine a case in which no remedy other than receivership would be effective, "[t]here are numerous instances in which the Constitution leaves open the theoretical possibility that the actions of one Branch may be brought to nought by the actions or inactions of another[;] [s]uch dispersion of power was central to the scheme of forming a Government with enough power to serve the expansive purposes set forth in the preamble of the Constitution, yet one that would 'secure the blessings of liberty' rather than use its power tyranically." Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 817 (1987) (Scalia, J., concurring). The Founding Fathers recognized that the courts are not immune from this interdependence:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatsoever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Id. at 818 (quoting The Federalist No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961)). Courts have significant tools at their disposal to enforce their judgments, including, under appropriate circumstances, the contempt power. But the constitutional separation of powers doctrine does not permit the Judicial Branch to assume the responsibilities of Executive Branch officials through the appointment of receivers.

388. The Court stated that "to accept the defendants' self-serving interpretation of Article II . . . would mean that the federal courts could not appoint a receiver over, for example, a federal prison that was operated in violation of the Eighth Amendment, or the schools in the District of Columbia since the Supreme Court has held that the Fifth Amendment (as opposed to the Fourteenth Amendment) applies to those institutions." Cobell v. Norton, 226 F. Supp. 2d at 143. Appointment of a receiver over a federal prison may, indeed, raise the sort of constitutional problems addressed here, and certainly would violate the Constitution if the receiver purported to assume the Attorney General's statutorily assigned functions with regard to the Bureau of Prisons for the same reasons that assumption of the Secretary of the Interior's statutorily assigned functions with regard to the IIM trust is prohibited. The District of Columbia schools do not provide an analogy because the District of Columbia is not a "department of the Government of the United States but a Municipal Corporation." Barrett v. Young, 134 F. Supp. 106, 107 (D.D.C. 1951); see also Fernandez v. United States, 12 Cl. Ct. 764, 767 (1987) ("[T]he District of Columbia is not an agency or instrumentality of the United States."). Thus, federal separation of powers concerns are not implicated when an agency of the District of Columbia is placed in receivership, just as they are not implicated when state agencies are placed in receivership. See Halleck v. Berliner, 427 F. Supp. 1225, 1233-34 & n.10 (D.D.C. 1977) ("It is doubtful whether the doctrine of separation of powers applies with the same force to the governmental structure of the District of Columbia as it does to the federal government" inasmuch as "[t]he Constitution does not require the states to distribute the powers of government strictly in accordance with the separation of powers required by the Constitution for the national government.").

389. The Court also stated in its September 17, 2002 contempt opinion that appointment of a receiver would not strip the President of the power to remove an Executive Branch official because "a court appointed receiver is an officer of the Court, not the [E]xecutive [B]ranch," and "[e]ven if the Court appointed a receiver over the IIM trust, the President would still maintain the power to remove any official within the Department of the Interior . . . that he so desired." Cobell v. Norton, 226 F. Supp. 2d at 144. The Court found distinguishable cases such as Printz v. United States, 521 U.S. 898 (1997), which held that the Brady Act's transference of federal identity-checking authority to local law enforcement officials deprived the President of "meaningful . . . control" and thereby violated Article II's dictate that the President "take Care that the Laws be faithfully executed," Printz, 521 U.S. at 923; see Cobell v. Norton, 226 F. Supp. 2d at 144. This Court stated that, in such cases, "courts have held that 'the insistence of the Framers upon unity in the Federal Executive . . . would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.'" Cobell v. Norton, 226 F. Supp. 2d at 144 (quoting Printz, 521 U.S. at 922-23). But the power of the President is reduced no less if a court, rather than Congress, assumes the functions of the Executive Branch. Appointment of a receiver would remove authority from the President and place it, instead, in the hands of the Judicial Branch. And such an appointment would plainly strip from the President the power to remove an official performing functions delegated by the Constitution to the Executive and assigned by Congress to the Secretary of the Interior. That a receiver is "an officer of the Court, not the [E]xecutive [B]ranch," Cobell v. Norton, 226 F.

Supp. 2d at 144, is precisely the constitutional problem, not the constitutional panacea, as the Court assumes.

390. In its September 17, 2002 opinion, the Court also rejected Interior Defendants' argument that appointment of a receiver would trench on the prerogatives of Congress. The Court believed this to be "a statutory rather than constitutional question," and stated that "the 1994 Act (and the other applicable statutes) do not inhibit this Court's authority to appoint a receiver over the IIM trust." Cobell v. Norton, 226 F. Supp. 2d at 144; see also id. at 137-39. The Court further stated that "[t]he fact that Congress codified the Secretary of [the] Interior's status as trustee-delegate for the United States is by itself irrelevant." Id. at 144. But requiring an express congressional prohibition on the appointment of a receiver turns the constitutional presumption on its head. Following the Court's reasoning to its logical conclusion, the only check on the power of the Judicial Branch to assume the duties conferred by Congress on an Executive Branch official is Congress itself, which must expressly prohibit such an assumption of power. But the Court itself states in another portion of its opinion that even if the 1994 Act "does not inhibit [Plaintiffs'] ability to obtain . . . relief [in the form of a receiver], they "still must show that the appointment of a receiver does not violate the Constitution." Cobell v. Norton, 226 F. Supp. 2d at 138.

391. It may well be the case that "in virtually every case in which a receiver is appointed an executive branch official was originally tasked with carrying out the duties performed by the receiver," id. at 144-45, but when the official serves in the Executive Branch of the United States government, dislodging that official's statutory duties and vesting them instead

with an official appointed by the Judicial Branch contravenes the Appointments Clause, general principles of separation of powers, and Articles I, II, and III of the Constitution.

c. Appropriations Clause.

392. Even if the Appointments Clause, Articles I, II, and III of the Constitution, and the separation of powers doctrine did not bar appointment of a receiver over the IIM trust, the powers of such a receiver would be limited by the Appropriations Clause. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Under our system of separated powers, federal courts do not make fiscal policy, nor can they allocate resources of the United States based on judicial notions of equity or fairness.

393. As the Supreme Court has explained, the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." OPM v. Richmond, 496 U.S. 414, 428 (1990); City of Houston v. HUD, 24 F.3d 1421, 1428 (D.C. Cir. 1994) ("'Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute.'" (quoting Richmond, 496 U.S. at 424)).

394. Accordingly, the Appropriations Clause would limit a receiver's power to the extent that the receiver's duties (or the receivership itself) require the expenditure of money from the public fisc. "It is beyond dispute that a federal court cannot order the obligation of funds for

which there is no appropriation."[81] Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992); accord City of Houston, 24 F.3d at 1426. Thus, even if a receiver could be appointed to oversee the IIM trust system without violating other constitutional provisions, that receiver's powers would necessarily be circumscribed by the Appropriations Clause.

I. Because Interior's Historical Accounting Plan In No Sense Describes Steps So Defective That They Would Necessarily Delay Rather Than Accelerate The Provision Of An Adequate Accounting, Interior Must Be Permitted To Proceed With Its Plan.

395. The judicially enforceable duty at issue in this case is the production of account statements to individual IIM account holders. Defendants have demonstrated that Interior's Historical Accounting Plan describes a reasoned and appropriate approach for conducting the historical accounting required by the 1994 Act. In no sense does Interior's Historical Accounting Plan describe steps "so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d at 1110.

[81] In its September 17, 2002 contempt opinion, the Court stated that "[a]n order appointing a receiver would not be 'order[ing] the obligation of funds for which there is no appropriation,'" Cobell v. Norton, 226 F. Supp. 2d at 146, but the only explanation given is that "Congress has in the past and continues to fund the government's efforts to administer the IIM trust," and therefore "an order from this Court appointing a receiver would not encroach in any way on Congress' power regarding how much money to allocate to the administration of the IIM trust." Id. Yet, even apart from the constitutional problems, if a receiver would require appropriated funds to accomplish his or her mission, the receiver as well as this Court would necessarily be immersed in Interior's - and ultimately the President's – budget process. Such an unseemly scenario is but one example of the practical difficulties that would attend judicial management of Executive Branch functions even if the constitutional difficulties could be overcome.

Accordingly, the Court has no justification for interfering with Defendants' progress in fulfilling their statutory duties.

Dated: August 4, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
CYNTHIA L. ALEXANDER
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

PHASE 1.5 TRIAL ORDER

This matter coming before the Court for trial of Phase 1.5 of the above-captioned case, a bench trial was held beginning May 1, 2003 and concluding July 8, 2003. Based upon all the testimony and documents received and admitted into the evidence at the trial, the arguments of counsel on the briefs and in court, and the findings of fact and conclusions of law issued by the Court, it is hereby:

ORDERED, that the historical accounting and fiduciary compliance plans submitted by the Secretary of the Interior on January 6, 2003 should be and hereby are REMANDED to the Secretary for further proceedings in accordance with the American Indian Trust Fund Management Reform Act of 1994; and it is further

ORDERED, that a PARTIAL JUDGMENT be entered in favor of Defendants and against Plaintiffs with respect to any claims of the Plaintiff class for an accounting of Individual Indian Money ("IIM") transactions or balances prior to October 1, 1984, on the basis that they are time-barred and are not actionable. In that regard, the Secretary of the Interior may limit the historical accounting as follows: (1) With regard to any IIM accounts that were closed prior to October 1, 1984, no accounting is required; and (2) With regard to any IIM accounts that were open both before and after October 1,

1984, no accounting is required for any transactions or balances prior to October 1, 1984, regardless of what, if any, effect they might have had on the balances shown in Interior's records as of October 1, 1984; and it is further

ORDERED, that Plaintiffs' alternative plans, filed January 6, 2003, be rejected and that Plaintiffs' request for imposition of a remedial order be DENIED in all respects.

SO ORDERED this _____ day of _____, 2003.

_____

ROYCE C. LAMBERTH
United States District Judge

cc:

Sandra P. Spooner
John T. Stemplewicz
John Warshawsky
Michael Quinn
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
607 14th Street, N.W.
Box 6
Washington, D.C. 20005
Fax (202) 318-2372

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
Fax (202) 822-0068

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., NW
12th Floor
Washington, DC 20006
(202) 986-8477

Citation Found Document Rank 1 of 1 Databas
1965 WL 12755 (Sol.Gen.) FNAM-EX
(Cite as: 1965 WL 12755 (Sol.Gen.))

The United States Department of the Interior

(Solicitor General Opinion)

***1** LEASE OF RESTRICTED LAND - - FEDERAL SUPERVISION OVER RENTALS PAYABLE DIRECTLY TO LESSOR

72 I.D. 83

M-36671

February 17, 1965

Indian Lands: Leases and Permits: Generally - - Indian Lands: Allotments: Alienation - - Indian Lands: Competency - - Indians: Competency - - Indians: Contracts - - Secretary of the Interior

Where an approved lease of individually owned restricted Indian land provide for the direct payment of rentals to the owner or his legal representative (guardian or conservator), the rental payments must be treated as unrestricted funds as of the time of payment, but future or anticipated rentals are classed as restricted property over which the Secretary of the Interior may recapture supervision over the collection, care and disbursement. Any action of the leg representative (guardian or conservator) or of the guardianship court to obligate such future or anticipated rentals would be ineffective unless approv by the Secretary of the Interior.

MEMORANDUM

To: Secretary of the Interior
From: Solicitor
Subject: Supervision over the collection, care and disbursement of rentals payable directly to an Indian lessor or his legal representative under an approved lease of restricted land.

We have been asked to review the Sacramento Regional Solicitor's office memorandum dated January 7, 1964, addressed to the Area Director of the Bureau of Indian Affairs, Sacramento, California. The memorandum replies to a questi raised by the Director of the Palm Springs Indian Office on the application, i any, of R.S. S2103, as amended, 25 U.S.C. S81 (1958), to contracts made betwee individual Indians and real estate brokers. This question arises because of t great income producing value of certain restricted Indian lands belonging to members of the Agua Caliente Band of Mission Indians.

The General Allotment Act, 24 Stat. 388 (1887), 25 U.S.C. S348 (1958), as amended, and the Mission Indian Act, 26 Stat. 712 (1891), as amended, provided for the allotment of lands on the Agua Caliente (Palm Springs) Reservation in California. These acts state, "and if any conveyance shall be made of the lan set apart as herein provided, or any contract made touching same, # # # , such

Attachment A

conveyance or contract shall be absolutely null and void."

Also, in the Act for the Equalization of Allotments on the Agua Caliente (Palm Springs) Reservation in California, 73 Stat. 602 (1959), 25 U.S.C. S956 (a) (Supp. V, 1959-63), it is stated:

"Equalization allotments # # # shall not be subject to assignment, sale, o hypothecation or to any attachment or levy for claims or debts # # # without t written approval of the Secretary, and any such assignment, sale, hypothecatio attachment, or levy that has not been so approved by the Secretary shall be absolutely null and void."

It is also provided by statute that allotted Indian lands shall not be liabl to satisfy debts contracted prior to issuing a patent in fee simple to an allottee; [FN1] and that moneys derived from lease or sale of trust lands shal not be liable for payment of any debt arising during the trust period without approval of the Secretary of the Interior. [FN2]

***2** Recognizing that legitimate contracts have a place in carrying on and managing Indian affairs, Congress has by statute provided a set of rules under which valid contracts with Indian tribes and individual Indian allottees can b made.

25 U.S.C. S81, supra, sets forth requirements for the execution and approval of contracts with Indians and provides: "All contracts or agreements made in violation of this section shall be null and void. + + + " However, the langua of section 81 is limited to tribes of Indians and individual Indians not citizens of the United States. On May 15, 1964, The Regional Solicitor requested our view on the suggestion in his memorandum of January 7, 1964 that 25 U.S.C. S81 is applicable to contracts made by individual citizen Indians or by their guardians. We do not interpret section 81 as having any application contracts made by individual citizen Indians or by their guardians. It is the trust property that is subject to the plenary control of the Federal Governmen [FN3] not the contractual capacity of individual citizen Indians. However, the inapplicability of 25 U.S.C. S81 to a real estate broker contract does not mea that the Secretary lacks authority to invoke protective measures to safeguard the Indian interests.

We agree with the Regional Solicitor that (1) the appointment of a guardian conservator under section 4 of the Act for the Equalization of Allotments on t Agua Caliente (Palm Springs) Reservation in California, supra, does not distur the trust character of an allotment or the trustee responsibilities of the United States with respect to an allotment, and (2) any contract or approval thereof by court decree or any court decree which operates or purports to burd future income from an allotment in a way similar to the creation of a lien is ineffective under 25 U.S.C. SS348, 410 and 956 (a) supra, without the approval of the Secretary of the Interior.

It was anticipated at the time of the enactment of the Act for the Equalization of Allotments on the Agua Caliente (Palm Springs) Reservation in California, supra, that some of the allottees could be expected to receive a sizable income from long-term business leases and that many of the allottees (majority of whom are minors) lacked experience in handling their own affairs. The Secretary must invoke, to carry out the trust responsibility imposed by th various cited statutes, the appointment of a guardian or conservator under 25

U.S.C. S954, which states:

"The Secretary shall request the appointment of a guardian of the estate o all minor allottees and for those adult allottees who in his judgment are in need of assistance in handling their affairs in accordance with applicable Sta laws before making any equalization allotment or payment to such persons."

It is this provision which prompted the question raised by the Director of t Palm Springs Indian Office regarding payment to a guardian, with State court approval, of a real estate broker's fee to be taken out of future lease income to be derived from leases of trust lands.

***3** A guardian or conservator appointed under 25 U.S.C. S954 acquires no authority incompatible with or in derogation of the Secretary's responsibilities. The guardian has no authority to lease or to burden a trust allotment save as authorized and approved by the Secretary, and the only property of the ward that can be deemed to be within the control of the guardi or conservator, which derives from allotted trust lands, would be lease rental or other income therefrom which has been paid to the guardian or conservator i accordance with the terms of a lease or other contract bearing the requisite approval of the Secretary.

In the case of Chisholm v. House, 160 F. 2d 632 (10th Cir. 1947), it was hel that lease income paid directly to the lessor or his representative in accordance with the terms of an approved Indian lease of restricted land must classed as unrestricted property. The reasoning of the court was that the restrictions were removed by the Secretary's regulations, thus leaving the United States without standing to sue for an accounting of such income. The rationale of the decision is that the Secretary could provide by regulation fo retention of the right to sue for breach and could also provide for recapture Federal supervision over the collection, care, and disbursement of lease incom

As a result of this case the Department's regulations were revised and now contemplate suit by the United States for breach of contract (25 CFR 131.5(g) (1)) and also provide for discretionary recapture of supervision over the collection, care and disbursement of income (25 CFR 131.5 (h) (2)). The latte provision of the regulations, which is required to be contained in each lease, conclusively shows that a guardian's authority under a direct-pay lease cannot be extended to embrace future income without the approval of the Secretary. Otherwise stated, a guardian's authority over lease income attaches only upon its receipt by him in accordance with the terms of an approved lease. Future o anticipated income under a direct-pay lease is subject to Federal supervision and cannot, under 25 U.S.C. SS348, 410 and 956(a), be burdened or subjected to the satisfaction of any claim without the approval of the Secretary of the Interior. It is settled beyond debate, of course, that the direct income from trust allotment partakes of the character of the corpus of the allotment itsel and is subject to all the authorities and responsibilities of the trust undertaking relating to the allotment itself. United States v. Capoeman, 351 U.S. 1 (1956). It would necessarily follow that any action of the guardian or the guardianship court which undertook to bind lease income not yet in the han of the guardian would be ineffective unless approved by the Secretary.

To summarize, it is our view that income from individually owned trust property paid directly to a guardian in accordance with the terms of an approv

lease must be treated as unrestricted funds; but that future or anticipated income, not yet paid into the hands of a guardian, is classed as restricted property. Among the remedies and procedures available to safeguard the Indian interests are the following:

***4** 1. The institution of appropriate proceedings to set aside any action which purports to create a burden against future income in violation of the statutes cited above.

2. Appearance in guardianship proceedings in connection with hearings on petitions for allowance of fees and expenses. This is the type of action to which reference is made in the Assistant Secretary's letter of July 9, 1963, t the Chairman of the House Committee on Government Operations.

3. Resumption of supervision over the collection, care and disbursement o lease income as authorized by 25 CFR 131.5(h) (2).

It is believed that the foregoing will serve as an aid in delineating the respective spheres of authority and responsibility of the guardian and the guardianship court on the one hand, and the Secretary of the Interior on the other. Manifestly, there are administrative decisions to be made which are beyond the scope of this memorandum.

FRANK J. BARRY, Solicitor.

FN1 " # # # Provided, That the Secretary of the Interior may, in his discretio and he is authorized, whenever he shall be satisfied that any Indian allottee competent and capable of managing his or her affairs at any time to cause to b issued to such allottee a patent in fee simple, and thereafter all restriction as to sale, encumbrance, or taxation of said land shall be removed and said la shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. # # # S6 of the Act of Feb. 8, 1887, 24 Stat. 388, 39 as amended, 25 U.S.C. S349 (1958).

FN2 "No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt o or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior." Act of June 21, 1906, 34 Stat. 327; 25 U.S.C. S410 (1958).

FN3 Board of Commissioners of Creek County v. Seber, 318 U.S. 705, rehearing denied, 319 U.S. 782 (1943), and Spriggs v. United States, 297 F. 2d 460, cert den., 369 U.S. 876 (1962).

REPORT ON REVIEW
OF
SELECTED ACTIVITIES AT CERTAIN LOCATIONS
BUREAU OF INDIAN AFFAIRS
DEPARTMENT OF THE INTERIOR

OCTOBER 1959

UNITED STATES GENERAL ACCOUNTING OFFICE

JULY 1960

Attachment
B

Contents

FINDINGS AND RECOMMENDATIONS

BUREAU'S ADMINISTRATIVE COSTS COULD BE REDUCED IF LESSEE COMPANIES PREPARED AND DISTRIBUTED ROYALTY CHECKS TO COMPETENT INDIANS

The Bureau could reduce its administrative costs if arrangements could be made to have lessee companies prepare and distribute royalty checks to competent Indian landowners.

As part of its responsibility for the management of Indian trust property, the Bureau executes oil and gas leases on Indian lands and administers the distribution of revenues from these leases. At June 30, 1959, there were over 3,800 active oil and gas leases on individually owned (allotted) lands in the Anadarko Area. During fiscal year 1959, over $2,012,000 in royalties, bonuses, and related payments was received from these leases for distribution to Indian landowners.

Our review disclosed that about 70 percent of the almost 1,000,000 acres of individual Indian lands under the Bureau's supervision in the Anadarko Area was in multiple ownership. Also, our selective review of 71 oil and gas leases disclosed that 213, or 85 percent, of the total 249 individual owners of the lands involved had blanket authorization for disbursement of their funds. Under this authorization the Indian owners can receive their funds without request or additional Bureau approval because they are considered competent or capable of managing their trust income without supervision.

The multiple Indian heirship interests in the leases result in considerable administrative work by the Bureau because lessee companies normally prepare a monthly check for the royalties.

The Bureau must make frequent elaborate computations and entries to record the receipt and disbursement of the lease revenues to each Indian owner based on his fractional interest in the land.

To illustrate the considerable amount of administrative work that the Bureau must perform, on one of the leases we reviewed there were 69 Indians who jointly owned the land. Because of the multiple heirship interest in this lease, the fraction applied to the total royalties received for the month had a common denominator of 1,036,800. One of the owner's fractional interest in the land was $\frac{1,200}{1,036,800}$ and, when this fraction was applied to the total royalties received for that month, the owner received 10 cents. On another lease reviewed, royalty income of $3.81 was received for distribution to the 43 individuals owning fractional interests in the lease. All owners who received income received less than 1 dollar, and 25 individuals received less than 10 cents. After making such elaborate computations, the Bureau then records the amounts computed for each Indian's share to the appropriate individual Indian money (IIM) accounts. The funds are held in trust by the Bureau for the benefit of the Indians and are administered in a manner similar to a commerical banking operation. Many of the oil and gas payments are distributed to the Indians within a short time after they are credited to their accounts. Numerous entries and related administrative work are required to credit the royalties in the IIM accounts and to record subsequent disbursements. Moreover, the cost of administering the oil and gas leases will become increasingly difficult and costly as the number of heirs increases.

We noted that the lessee companies have been sending royalty checks to individual Indians of the Five Civilized Tribes of Oklahoma since September 1951. These direct payments are being made to those Indians who the Muskogee Area Director has determined do not need supervision over their lease revenues. As a result of using the direct payment method for the Five Civilized Tribes, the Bureau estimates about a $44,000 annual reduction in personnel costs for maintaining the IIM accounts, in addition to other savings in related supervisory and administrative costs.

In recognition of the benefits derived from direct lease payments, the Bureau had 25 CFR 172 amended in December 1954 to allow such payments to other Indians. However, because of the objections of the Geological Survey, direct payment procedures were not put into effect. We were advised by the Bureau that the Survey objected to the implementation of direct payments because it believed that it could not carry out its responsibility under 25 CFR 172 for determining and recording royalties due and paid unless the payments by the lessee companies were transmitted through the Survey.

We were advised that the Secretary of the Interior was considering the Bureau's request made in April 1956 that direct payments be allowed and that the Geological Survey be relieved of its responsibility for determining that royalties accruing to the benefit of the Indians have been paid.

We believe that a procedure providing for lessee companies to prepare and distribute royalty checks to competent Indians, as

is being done for members of the Five Civilized Tribes, would effect economies in the Bureau. To overcome the objections raised by the Geological Survey regarding its inability to determine whether the Indian landowners are being paid royalties properly if lessee companies do not submit the royalty checks to the Survey, we suggest that the lessee companies be requested to transmit to the Survey, along with the production reports, a listing of the checks issued for each lease.

Recommendation to the Secretary of the Interior

To effect economies in the Bureau's administration of Indian lands, we recommend that the Secretary require the Commissioner to make arrangements to have lessee companies prepare and distribute individual royalty checks to competent Indians.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on August 4, 2003 I served the foregoing *Interior Defendants' Proposed Findings of Fact and Conclusions of Law Following The Phase 1.5 Trial* by Prepaid First Class Mail with hand delivery of a courtesy copy the morning of August 5, 2003 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW
Box 6
Washington, D.C. 20005

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006

Service by Prepaid First Class Mail only upon:

Elliott Levitas, Esq
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

Earl Old Person (*Pro se*) (Per the Court's Order of April 17, 2003)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

K. P. Kingston

Kevin P. Kingston