

1 UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF COLUMBIA
 3 ELOUISE PEPION COBELL, et al., : Civil Action 96-1285
 4 Plaintiffs :
 5 v. : Washington, D.C.
 6 DEPARTMENT OF THE INTERIOR, : Wednesday, December 20, 2006
 7 et al., :
 8 Defendants : 2:30 p.m.

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 9 TRANSCRIPT OF STATUS CONFERENCE
 10 BEFORE THE HONORABLE JAMES ROBERTSON
 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

11 For the Plaintiffs: DENNIS GINGOLD, ESQUIRE
 12 LAW OFFICES OF DENNIS GINGOLD
 1275 Pennsylvania Avenue, N.W.
 13 Ninth Floor
 Washington, D.C. 20004
 (202) 662-6775
 14
 15 ELLIOTT H. LEVITAS, ESQUIRE
 WILLIAM E. DORRIS, ESQUIRE
 16 KILPATRICK STOCKTON, L.L.P.
 1100 Peachtree Street
 Suite 2800
 17 Atlanta, Georgia 30309-4530
 (404) 815-6450
 18
 19 WILLIAM AUSTIN, III, ESQUIRE
 KEITH HARPER, ESQUIRE
 KILPATRICK STOCKTON, L.L.P.
 20 607 14th Street, N.W.
 Suite 900
 21 Washington, D.C. 20005
 (202) 585-0053
 22
 23 DAVID C. SMITH, ESQUIRE
 KILPATRICK STOCKTON, L.L.P.
 24 1001 West Fourth Street
 Winston-Salem, North Carolina 27101
 25 (336) 607-7392

1 For the Defendants: ROBERT E. KIRSCHMAN, JR., ESQUIRE
 2 JOHN WARSHAWSKY, ESQUIRE
 MICHAEL QUINN, ESQUIRE
 J. CHRISTOPHER KOHN, ESQUIRE

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3 U.S. Department of Justice
4 1100 L Street, N.W.
Washington, D.C. 20005
(202) 307-0010

5
6 JOHN STEMPLEWICZ, ESQUIRE
Senior Trial Attorney
7 U.S. Department of Justice
Commercial Litigation Branch
Civil Division
8 Ben Franklin Station
P.O. Box 975
9 Washington, D.C. 20044
(202) 307-1104

10
11 GLENN D. GILLET, ESQUIRE
U.S. Department of Justice
Commercial Litigation Branch
12 Civil Division
P.O. Box 875
13 Ben Franklin Station
Washington, D.C. 20044
14 (202) 514-7162

15
16 STUART E. SCHIFFER, ESQUIRE
DEPUTY ASSISTANT ATTORNEY GENERAL
U.S. Department of Justice
17 Civil Division
Washington, D.C. 20530
(202) 512-3306

18
19 For Edith Blackwell: AMY BERMAN JACKSON, ESQUIRE
TROUT CACHERIS, PLLC
1350 connecticut Avenue, NW
20 Suite 300
Washington, D.c. 20036
21 (202) 464-3312

22
23 Court Reporter: REBECCA STONESTREET
Official Court Reporter
Room 6415, U.S. Courthouse
24 333 Constitution Avenue, N.W.
Washington, D.C. 20001
(202) 354-3249

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by computer-aided transcription.

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1 P R O C E E D I N G S

2 THE COURT: Years ago I showed up for the first
3 deposition in a little anti-trust case that somebody had filed
4 in a courthouse in Meridian, Mississippi, and the deposition was
5 set for the post office, as you do in those smallish towns in
6 the South. And I walked in to the room in the post office -- or

7 actually, there were a bunch of lawyers, a whole bunch of
8 lawyers in this room, and the plaintiff's lawyer walked in,
9 looked around at 10 or 15 lawyers sitting in this room, and he
10 said, lord, somebody ought to give me an award for bringing all
11 you people to town. And that's kind of the way I feel looking
12 at this group.

13 Call the case, Al.

14 COURTROOM DEPUTY: This is Civil Action Number 96-1285,
15 Cobell et al. versus Gover, et al. If counsel would please
16 identify themselves for the record.

17 THE COURT: No, we won't do it that way. When you
18 stand up to speak, you can identify yourself and you must
19 identify yourself. But we're not going to have everybody
20 identify themselves. Thank you, Al.

21 I set this status conference for one purpose and one
22 purpose only, not to rule on a lot of motions, not to hear a lot
23 of arguments, and frankly not to accomplish much of anything
24 except for us all to look at each other and get a sense of where
25 we're going. Because, as is obvious, the case has now been

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1 assigned to me, maybe, and what I hope to accomplish this
2 afternoon is quite limited. What I hope to accomplish is to
3 hear from you-all what your idea is of where you think we should
4 be going and on what kind of timetable from this point forward.

5 Now, I understand that a cert petition was filed, I
6 believe today in the Supreme Court, seeking a writ of certiori
7 to the Court of Appeals on the question -- on the order which is
8 the order that puts me in this case. So I don't know how long
9 this will take to resolve. I think it would be unwise of me to
10 do anything very dispositive or determinative while that cert
11 petition is pending. That doesn't mean that we can't at least

12 begin to get started with the process of organizing where we
13 would go if the cert petition were denied.

14 Now, I have only one or two things to say and then I'm
15 really going to give the floor to you-all. And they're purely
16 housekeeping matters. The order assigning me to this case was
17 document number 3278 in the docket of this Court. Our court
18 dockets usually number in the low 40s or 50s. You've got 100
19 times that many docket entries in this case already.

20 I'm not really fond of piling on docket entries in our
21 case, nor am I fond of imposing on the clerk's office the
22 obligation to mail out copies of orders and other things from
23 this Court to people who have not registered for the Court's
24 electronic case filing system. The current docket entry has a
25 lot of names of people who are lawyers who are still apparently

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1 receiving mail matter from this Court. Fair notice: That's
2 going to stop.

3 Anybody who is of counsel in this case or appearing in
4 this case has to enter an appearance -- has to get a CM/ECF
5 log-in and password and receive information electronically,
6 because we're simply not going to mail anything more out of
7 here.

8 Now, there are a couple of plaintiffs who I understand
9 at one point were pro se. Earl Old Person is listed as pro se,
10 but he's also listed as represented by Kilpatrick Stockton, and
11 they're going to get his copies. We're not going to mail
12 anything directly to Earl Old Person.

13 There's somebody named Eddie Jacobs who shows up as
14 receiving mail service, but I understand that plaintiff has been
15 terminated. Albert Lee Bynum is listed, but I believe that he

16 has a lawyer, and that's Nathaniel Owens, who is on line. So I
17 find no exceptions at all, and unless some special
18 representation is made, there will be no more mail service to
19 anybody in this case. It's all going to be electronic.

20 Now, I have had kind of a preliminary briefing in what
21 this case and has been all about from my predecessor in the
22 case. I don't pretend to have read anything close to 3278
23 docket entries, or even nine Court of Appeals opinions, although
24 I will have made my way through those in short order. But as I
25 said when I began, all I really want to accomplish today is to

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1 hear from counsel in any order that you think is appropriate -
2 don't stampede each other getting to the podium - to give me
3 your ideas of what should happen next and in what order.

4 Now, have you any agreement as to who goes first, or do
5 you just want to race to the podium? And please, as you speak,
6 do identify yourselves.

7 MR. GINGOLD: Good afternoon, Your Honor. My name is
8 Dennis Gingold. I'm counsel for the Cobell plaintiffs. With me
9 today are my co-counsel. I am not with Kilpatrick Stockton, but
10 everyone at counsel table except for John Echohawk is with
11 Kilpatrick Stockton. Elouise Cobell, the lead plaintiff in this
12 litigation, is with us. Ms. Cobell is at the end of counsel
13 table. She has flown in from Montana and will be flying back to
14 Montana. Mr. Echohawk is the executive director of the Native
15 American Rights Fund in Boulder, Colorado, and he also came in
16 for this proceeding.

17 Mr. Harper is co-counsel; he's a partner in Kilpatrick
18 Stockton; Mr. Levitas, a partner in Kilpatrick Stockton; Bill
19 Austin, a partner in Kilpatrick Stockton; Bill Dorris, also a
20 partner; and David Smith, a partner in Kilpatrick Stockton.

21 THE COURT: The record should reflect, by the way, and
22 as I look through the list of lawyers who are involved in this
23 case, I see an awful lot of people that I have known, some of
24 whom I sent Christmas cards to the other day, people I've known
25 for a long time.

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1 But David Smith I have known since he was a teenager
2 when we were in the same church out in Rockville, Maryland. And
3 he came to visit me last year before I had anything to do with
4 this case, and I was happy to see him then and I'm happy to see
5 him now. But I just want you to know that we have a friendly
6 but in no way a personal or business relationship that goes back
7 a long time.

8 Go ahead, sir.

9 MR. GINGOLD: In addition, Your Honor, Justin Guilder,
10 who is an associate in Kilpatrick Stockton recently has been
11 admitted to the Virginia bar, and I seek to move his admission
12 pro hac pending his application for admission to the D.C. bar.

13 THE COURT: Without objection, his admission will be
14 granted.

15 MR. GINGOLD: A couple of notes for the record.
16 Kilpatrick Stockton does not represent Mr. Old Person;
17 therefore, they are not appropriate to be receiving his mail.

18 Secondly, Your Honor, Mr. Jacobs, to our knowledge, has
19 not been terminated. We know there are motions pending that
20 Mr. Jacobs has filed, some of which we have opposed, some of
21 which defendants have opposed, but to my knowledge, Your Honor,
22 no decision has been made with regard to any of the motions
23 filed by Mr. Jacobs.

24 THE COURT: Is Mr. Jacobs a pro se plaintiff?

25 MR. GINGOLD: No, he is not. Mr. Jacobs is a member of

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1 the class, and he appears to be seeking to appear with respect
2 to his own issues based on a number of matters that he discussed
3 in his motions, and I think to a certain extent both the
4 government and we do not completely agree with what he has
5 stated in his motions. I'm trying very carefully not to deal
6 with the substantive issues.

7 THE COURT: No, I understand. And I appreciate that.

8 All right. So I will reinstate Mr. Jacobs and Mr. Old
9 Person to the mail list, and they will be the only occupants of
10 the mail list unless I hear otherwise from anybody else.

11 MR. GINGOLD: Your Honor, with regard to the petitions
12 for writ of certiori, two were filed, one with respect to the
13 reassignment decision and one with respect to the information
14 technology security preliminary injunction. Neither decision of
15 the Court of Appeals was stayed. The mandates were issued;
16 reassignment of this case has been effected to you. Plaintiffs
17 would like this case to move forward. We believe 10 and a half
18 years is a long time to be in active litigation.

19 This Court has noted that there are nearly 3300 filings
20 in this case. Our clients would like to move forward
21 expeditiously for a fair resolution, and that is reflected in
22 the order of appointment, and it's also reflected in the Court
23 of Appeals decision on the reassignment of Judge Lamberth.

24 THE COURT: But it was your cert petition.

25 MR. GINGOLD: Yes, it is, Your Honor. But it isn't

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1 stayed. The mandate was issued and Judge Lamberth has been
2 divested of his jurisdiction in this case. When and how the

3 Supreme Court is going to react to the petition, nobody knows,
4 Your Honor. A lot of issues need to be discussed, we need to
5 proceed with this litigation, we need to move forward as quickly
6 as possible.

7 THE COURT: Okay. So even if I'm only the acting
8 judge, you want to move forward?

9 MR. GINGOLD: Your Honor, even if you're the acting
10 judge, we want to move forward.

11 THE COURT: All right.

12 MR. GINGOLD: And Your Honor, at least our
13 understanding of the issuance of the mandate isn't that you're
14 the acting judge, that you are the judge, and if in fact the
15 Supreme Court ultimately decides a reinstatement of Judge
16 Lamberth is appropriate, that's a separate event. So we don't
17 view you as the acting judge, Your Honor.

18 THE COURT: Okay.

19 MR. GINGOLD: Your Honor, we believe, based on the
20 mandate that has been issued, that it is important to move
21 forward with Phase II. It was emphasized by Judge Tatel in the
22 decision on reassignment that plaintiffs should avoid seeking to
23 hold accountable the individuals in the government who
24 plaintiffs believe are responsible for the conduct in this
25 litigation and the conduct of the management of the Trust.

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1 We read with great concern and seriousness the language
2 of Judge Tatel. We also read, however, that the judge pointed
3 out that it was important for the government to rise above the
4 deplorable conduct, and with plaintiffs seek an expeditious and
5 fair resolution of these proceedings. We take to heart the
6 decisions of the courts, and we hope to follow them as well as

7 we can. Therefore, we seek to move forward, Your Honor.

8 Phase II of this litigation has never been tried.

9 Further delay will exacerbate the problems that currently exist.
10 I'm not going to go into the details because it isn't fair at
11 this point, as this Court has noted the extensive record and the
12 fairly short period of time the matter has been before it.

13 However, it is important, because members of our class,
14 and it's estimated to be approximately a half a million
15 Individual Indian Trust beneficiaries today, from most of the
16 tribes west of the Mississippi, from allotments that originally
17 were made in 1887 and thereafter pursuant to federal statute,
18 where Trust responsibilities were imposed on the United States
19 government at its request, and those responsibilities have
20 involved the management of Individual Indian Trust lands and
21 natural resources and complete and exclusive control over the
22 individuals' funds that are generated from those resources. We
23 have Trust beneficiaries who have died over the years of this
24 litigation. As a matter of fact, Your Honor, many thousands of
25 the members of the class have died. Many of our clients need

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1 the Trust funds. It's their money. This is not an entitlements
2 program.

3 Therefore, we believe it is imperative to move forward.
4 The record is voluminous, Judge Lamberth has made many findings
5 with regard to the key issues in this case. The findings in
6 this case have not been set aside, the law of the case is what
7 it is.

8 Therefore, we would like to move forward, Your Honor,
9 if the Court could set a trial date for the trial of the
10 Phase II issues, because the liability of the United States
11 government was established on December 21st, 1999, Your Honor,

12 almost eight years to the day of where we are today, or seven
 13 years. We also had it affirmed by the Court of Appeals. So the
 14 liability of the government has been established for some time.

15 The District Court declared and the Court of Appeals
 16 affirmed that the United States government is obligated to
 17 discharge its fiduciary duty and account for all funds for each
 18 Trust beneficiary, when the funds were deposited, and the
 19 accounting should include deposits, withdrawals, and accruals.
 20 That has never been disputed. That decision was never appealed
 21 to the Supreme Court. There have been numerous appellate
 22 decisions dealing with interlocutory appeals on various issues,
 23 but the fiduciary obligation to account is firm and established
 24 in these proceedings.

25 Therefore, as the Court of Appeals noted on

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1 February 23rd, 2001, the date the District Court's decision was
 2 affirmed, undue delay has already occurred. While the Court
 3 should allow sufficient time for the government to render a
 4 proper accounting, if in fact there's further undue delay, if in
 5 fact the problems that were identified which have been described
 6 in superlative terms in many opinions both by the District Court
 7 and Court of Appeals, if those problems persist, then in fact
 8 the District Court should move forward and take further action.

9 Your Honor, this Court is sitting as a chancellor in
 10 equity, it is not just sitting as a District Court reviewing an
 11 Administrative Procedure Act matter. This is a matter in equity
 12 because we have sought to enforce the Trust obligations that are
 13 owed and have been owed to our clients. We don't know how many
 14 clients there are, Your Honor - we've never seen a complete list
 15 of the Trust beneficiaries - but they're estimated today to be

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16 approximately half a million.

17 The class certification was determined on February 4th,
18 1997 for basically all past and present Individual Indian Trust
19 beneficiaries. The Trust was established in 1887. Past
20 beneficiaries go back to 1887, Your Honor, many of whom have
21 died, but that doesn't mean they're not members of the class.
22 Because they are. And that doesn't mean their heirs don't have
23 a significant legitimate invested interest as well in the funds
24 that were deposited in those original accounts that were not
25 transmitted to the predecessors, and the interest, and therefore

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1 have not been paid over to our clients. That is a requirement.
2 They're our clients' funds and they have been withheld.

3 We have sought an accounting, which is a form of
4 equitable relief. There are various forms of equitable relief,
5 Your Honor. And this is important to note; it is in 1999, in
6 one of the more recent cases, that the Supreme Court pointed out
7 that the District Court does sit as a chancellor in equity. In
8 the Grupo Mexicano case, it specifically pointed out that unless
9 Congress explicitly to the contrary restricts the powers of the
10 District Court, then this Court is sitting as a chancellor in
11 equity to do justice, to provide the flexibility.

12 Therefore, Your Honor, with the time that has elapsed,
13 many years since the declaratory judgment and since the
14 affirmance, many years since the Trust Reform Act of 1994 which
15 reaffirmed and codified certain of the Trust duties, including
16 the accounting duty that's owed to our clients, it is time we
17 move forward, and we move forward with a remedies proceeding.

18 And we believe that it's appropriate to begin on or
19 about June 10th of 2007. That June 10th, however, is a Sunday.
20 That would be the 10th -- or the 11th anniversary date of this

21 litigation, so therefore Monday the 11th would be appropriate to
 22 commence the Phase II proceeding. We would expect the
 23 proceeding, over approximately a four-month period, would be
 24 able to address the key issues with regard to Phase II of these
 25 proceedings, and we can move forward to an expeditious and fair

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1 resolution.

2 THE COURT: What relief would you be seeking at the end
 3 of a four-month trial that began in June?

4 MR. GINGOLD: Well, if in fact the government is able
 5 to put on its proofs -- because the accounting that has been
 6 defined by the Court of Appeals repeatedly, I believe not only
 7 did the judge identify it in Cobell 5, which was the
 8 December 21, 1999 decision, declaring the government in breach
 9 of trust and the fiduciary obligation to account, but it was
 10 also restated in Cobell 6, which is a Court of Appeals decision
 11 on February 23rd, 2001, and then again restated in Cobell 12,
 12 which was a decision which remanded the first -- let's say the
 13 first two preliminary injunctions back to the District Court for
 14 the 59-day evidentiary hearing that we had the summer of 2005.
 15 That is the government puts on proofs, and it proves -- and as
 16 trustee it puts on proof of an accounting of all funds for each
 17 Trust beneficiary from the inception of the Trust.

18 We are aware of the destruction of documents. The
 19 record - I'm not going to go into detail because it isn't fair
 20 at this point in time - massive destruction of documents over
 21 many years, for different reasons, whether you're dealing with
 22 hard copy documents before the beginning of the electronic era
 23 in 1984 or the problems with regard to the integrity and
 24 corruption of documents since the electronic era because of the

25 absence of sufficient or adequate security for the information

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1 technology systems.

2 Nevertheless, rules of evidence apply, and
3 nevertheless, the government as trustee is required to put on
4 proofs, and plaintiffs make exceptions to those proofs, as any
5 accounting in equity works. And that's been restated again by
6 both Judge Lamberth in his opinion that was affirmed, and in the
7 Court of Appeals on at least two occasions in these proceedings.

8 Your Honor, in the event this Court would determine
9 during the course of the proceeding that the government is
10 unable to provide an accounting of all funds for each Trust
11 beneficiary, no matter what methodology it selects, if it
12 chooses to go forward with something that fails, it failed to
13 make the proofs. Plaintiffs make the exceptions, and if, as we
14 suspect the proceeding would move forward, whether, Your Honor,
15 it's June 11th, 2007 or June 11th, 3007, we believe the same
16 result would occur.

17 Therefore, other equitable remedies should be
18 considered by this Court. Again, we're dealing with the
19 remedies phase. The liability has been established.
20 Consequently, other equitable remedies include disgorgement of
21 funds unlawfully held and not paid to the Trust beneficiaries;
22 equitable restitution, Your Honor, which as Justice Scalia
23 pointed out in the decision in Great West Life in 2002 is
24 different from restitution at law.

25 We are dealing with a recognition that the government

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1 has admitted both in filings with the District Court and in
2 testimony by government officials that approximately \$13 billion

3 in Individual Indian Trust funds has been collected. Without
4 regard to our view as to that, that is an admission that exists.
5 Those are funds that as part of an accounting would need to be
6 proven to have been paid to each Trust beneficiary in the
7 correct amount. We're dealing with a disbursement of funds and
8 the proof related to that.

9 We also have testimony in these proceedings that most
10 of the Treasury checks -- Trust beneficiaries are generally paid
11 by Treasury check. Most of the Treasury checks paid,
12 negotiated, or otherwise have been destroyed; therefore, there
13 are serious issues with regard to the proofs that must be put
14 forward. And Your Honor, it is a trustee's duty to put forward
15 the proofs, and if the trustee has caused the destruction or has
16 failed to prevent the destruction of the Trust record, all
17 inferences are against the trustee.

18 THE COURT: Okay. Now, hold it, hold it, Mr. Gingold.
19 The question was, what relief would you be seeking. And let me
20 see if I got it right, what you've said to me so far. Basically
21 what you want is a trial which you think will take about four
22 months in which it is the government's job to prove every nickel
23 they've paid to every beneficiary of the Trust by some method or
24 other.

25 And if they fail to do so, then you win, and what you

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1 win, in your view, is an equitable remedy that might be
2 disgorgement or might be equitable restitution. Right so far?

3 MR. GINGOLD: No, wrong so far, Your Honor.

4 THE COURT: Okay. Then either you need to be clearer
5 or I need to listen better.

6 MR. GINGOLD: I need to be clearer, Your Honor.

7 THE COURT: All right.

8 MR. GINGOLD: The remedy that we have sought among
9 remedies is an accounting. An accounting is an equitable
10 remedy, and it is declared by the District Court and affirmed by
11 the Court of Appeals as a fiduciary obligation. And it has also
12 been held that the government is in breach of that obligation.

13 THE COURT: Is an order for an accounting the end point
14 of this trial that you're talking about?

15 MR. GINGOLD: No, there's already been a declaratory
16 judgment of that.

17 THE COURT: Okay. Fine. That's what I thought.

18 MR. GINGOLD: Therefore, the question is, when do we go
19 to the accounting trial? That has not occurred over the many
20 years in this litigation. That is one of the two primary
21 objectives of this litigation. We are seeking to enforce the
22 Trust obligations of the United States. In part that includes
23 the discharge of the accounting duty that has been breached and
24 has been unduly delayed.

25 We also seek to rehabilitate and reform a broken Trust

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1 management system. That's the second component of this
2 litigation. The case at one point was bifurcated, Your Honor,
3 and that's a reason, in part, we are where we are today.

4 But we need to go forward with the trial with regard to
5 remedies, because if in fact the accounting cannot be discharged
6 in accordance with the terms of the declaration by the District
7 Court, then in fact other remedies need to be considered by this
8 Court if the accounting fails to be rendered.

9 So the first objective would be for this Court to
10 determine whether or not the accounting that has been declared
11 is discharged, and if in fact it is, that resolves the issues.

12 However the accounting results, Your Honor, whether the
13 accounting results in proofs that plaintiffs have received --
14 each plaintiff has received every nickel he's entitled to, that
15 would be the end of the accounting provision, Your Honor.

16 THE COURT: Right, right, right. But that begs the
17 question, because I think everybody in this room knows that that
18 accounting hasn't happened or hasn't happened yet.

19 My question, though, is, when does this finding occur,
20 either the finding that the accounting has not happened, or is
21 this the result of the trial or does this happen before the
22 trial?

23 MR. GINGOLD: Your Honor, we would anticipate that we
24 would move into an accounting trial, because it's a trial for
25 remedies --

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1 THE COURT: That's the trial you're talking about?

2 MR. GINGOLD: That's correct.

3 THE COURT: The June 10th trial you want is an
4 accounting trial?

5 MR. GINGOLD: June 11th, Your Honor.

6 THE COURT: June 11th.

7 MR. GINGOLD: Yes, we would anticipate that, Your
8 Honor. And once we are able to demonstrate, with the exceptions
9 that we would raise, that the accounting that has been declared
10 has not occurred -- for example, Your Honor, if it is an
11 accounting of all funds for each Trust beneficiary, if the
12 government is saying, we're only going to provide an accounting
13 for accounts that were opened on October 25th, 1994, the date of
14 the Trust Reform Act, one could argue that that couldn't
15 possibly provide an accounting of all funds to each Trust

16 beneficiary.

17 What's important, too, Your Honor, is this is a
18 commingled trust. The funds are deposited in common,
19 investments are made in common, funds have been deposited in a
20 particular account at Treasury, but funds have also found their
21 way into other accounts at Treasury. These are commingled funds
22 of hundreds of thousands of Trust beneficiaries.

23 In addition, Your Honor, the funds have been deposited
24 in commercial banks --

25 THE COURT: But back to my really basic question. This

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1 four-month trial that you're talking about, I think it's your
2 anticipation or your belief that at the end of four months of
3 trial, the government will not be able to render a satisfactory
4 accounting, and therefore you would be entitled to some relief.
5 Is that right?

6 MR. GINGOLD: Some equitable relief. That's correct.

7 THE COURT: And the equitable relief would include, I
8 think you told me, disgorgement as one potential way --

9 MR. GINGOLD: Correct.

10 THE COURT: -- or equitable restitution.

11 MR. GINGOLD: Correct.

12 THE COURT: And what else?

13 MR. GINGOLD: I think we would have to see how the
14 proceeding develops. One of the issues that we're going to have
15 to see is the evidence that the government has. It hasn't been
16 produced in that regard. The records of our clients, the
17 accuracy of the records. It chooses the methodology; whether
18 the methodology is statistically valid, whether the methodology
19 is valid from an accounting perspective, Your Honor. And, of
20 course, Your Honor, as the Court sitting in equity, would be

21 making those judgments. We don't know.

22 But, Your Honor, the four months that I'm suggesting is
23 not a four-month continuous period of time. Similar to the
24 59 days we had with regard to the information technology
25 security evidentiary hearing, we would expect we would know

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1 fairly soon whether or not the accounting that has been declared
2 is being discharged and whether the proofs are being made. We
3 could have a period of weeks, two to three weeks where the
4 government puts on its proofs, we make the exceptions; there
5 could be a period of time in between that where the parties and
6 the Court is evaluating how we're going.

7 But over a period four months, whether that involves 11
8 or 12 weeks of trial or eight weeks of actual trial, we can come
9 to a resolution with regard to the accounting or remedies
10 component of this proceeding. And once we do that, Your Honor,
11 then we could move on to the more difficult issues which involve
12 Trust reform.

13 In the interim, Your Honor, because of the findings
14 that were made by the Court in the IT security evidentiary
15 hearing, there is continued concern about the integrity of the
16 electronic Trust records, there is continuing concern about the
17 ability of the government as trustee to manage the Trust going
18 forward. If in fact the Trust records, which are the
19 cornerstone of the Trust, are not complete and accurate, it is
20 not possible for the United States government as trustee to
21 discharge its Trust duties, then it must discharge in accordance
22 with law and court order.

23 Therefore, we believe we need to go forward. The
24 critical element of a judge sitting in equity is the flexibility

25 to do equity, to understand the facts and fashion findings and

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1 relief that prevents further harm to the Trust beneficiaries is
2 reasonable, and allows for this case to reach an expeditious
3 resolution, something that has been emphasized by both the Court
4 of Appeals and Judge Hogan in the reassignment order.

5 So that's how we would expect to go forward. We would
6 expect to hear the government say, we're not ready and we don't
7 know when we're going to be ready for years. Your Honor, in
8 1998, on November 24th, the government said it would be ready to
9 go to trial in June of 2000. If you look at the record of these
10 proceedings, every time there is an effort to proceed with a
11 trial on the accounting issues and remedies akin to accounting,
12 it's always another two years, and there are always reasons for
13 it. Whether the reasons are stated as appropriations or
14 otherwise, it continues.

15 Your Honor, the problems that exist today are problems
16 caused by the trustee, the United States government, not caused
17 by our clients. The harm to our clients is irreparable and
18 real. Those findings have been made, those findings were not
19 challenged, those findings are established in these proceedings.

20 Therefore, Your Honor, we think it is critical, because
21 unless a date certain is set for this trial, we don't believe
22 this case will ever end, and you will have before you
23 approximately another 3300 filings 10 and a half years from now.
24 From my experience -- I've been practicing law for 32 years,
25 Your Honor, and from my experience, defendants always say

23

1 they're not ready to go to trial, and they prefer not to do it.
2 They need more time to prepare, and a rocket docket, you hear

3 that all the time.

4 Your Honor, we need a date certain. If there is no
5 date certain for a trial within a reasonable period of time, the
6 hope of the Court of Appeals for an expeditious resolution is
7 impossible, and the restatement of that hope in the order of
8 reassignment is not possible. There is no incentive on the
9 government to settle this case unless the government is going to
10 trial, and it may never settle this case.

11 But Your Honor, it is time for final judgment. This
12 Trust is 119 years old. There has been no accounting. We've
13 been in this litigation for 10 and a half years, and it's an
14 actively litigated case. We believe the proceeding should be a
15 single joint proceeding, because further interlocutory appeals
16 will further delay the situation.

17 So Your Honor, we need an accounting or remedies trial,
18 we need a complete trial. It will not work piecemeal, because
19 if it does, every time there's an interlocutory appeal, this
20 Court will be divested of jurisdiction. If you look at the
21 record of these proceedings, that's precisely what has happened.

22 So Your Honor, I cannot emphasize the importance of
23 setting a date certain enough.

24 THE COURT: Well, you've emphasized it pretty much
25 already. I think I got your point.

24

1 MR. GINGOLD: One last point with regard to contempt,
2 which there are many issues, and I presume that many of counsel
3 are here with regard to the potential contemnors.

4 The reason contempt actions were brought against
5 individuals was because orders were being violated. And it
6 happened frequently. I'm not going to go into the details and

7 I'm not going to mention any particular names. The record is
8 there for this Court to review. We're sensitive about the
9 criticism from the Court of Appeals about collateral
10 proceedings. We weren't seeking to substitute the effort to
11 reach the remedies portion of this case as opposed to just going
12 for contempt.

13 But Your Honor, if you see documents have been
14 destroyed, misrepresentations have been made to the District
15 Court and to the plaintiffs, witnesses have been intimidated, we
16 don't believe institutions do it themselves; we believe there's
17 a human element involved.

18 But Your Honor, we believe it's important to move
19 forward with the substantive aspects of this case and not the
20 collateral proceedings, and hold those contempt -- except for
21 one thing, Your Honor. When you're looking at the contempt
22 motions and you're looking at the facts underlying the motions
23 for order to show cause, you're looking at spoliation of
24 documents and other misconduct that has caused significant
25 prejudice and hardship to plaintiffs. Whether you're looking at

25

1 e-mail that has been destroyed in violation of court order and
2 in breach of trust, or you're looking at hard copy documents
3 that have been destroyed, the fact of the matter is, Your Honor,
4 Trust documents have been destroyed and it's continued for some
5 time.

6 Therefore, Your Honor, whether or not this Court would
7 like to proceed with orders to show cause - and we would urge
8 Your Honor to keep them in suspense; they've been suspended for
9 years now - we believe the underlying facts which are
10 appropriate for consideration for issuing evidentiary sanctions
11 and adverse inferences don't go away. The facts exist; whether

12 or not this Court or any Court would like to view these actions
 13 as institutional and not personal to the individuals involved,
 14 we quite frankly don't care. It has happened, and we would like
 15 to see it stop, and we would like to see adverse inferences and
 16 other type of sanctions associated with that, without regard to
 17 holding the individuals accountable, Your Honor.

18 But generally speaking --

19 THE COURT: You want me to hold it in suspense, but you
 20 don't care whether we hold them accountable?

21 MR. GINGOLD: Yeah, we do.

22 THE COURT: That's a pretty delicate knife edge you're
 23 on there, counsel. Do you want these things withdrawn or not?

24 MR. GINGOLD: No, Your Honor. My point was this: I'm
 25 trying to walk the knife edge that you've described based on the

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1 language of the Court of Appeals decision in Cobell -- in the
 2 Cobell reassignment case. We are sensitive to the criticism
 3 that plaintiffs' counsel has --

4 THE COURT: The question is, how sensitive are you?

5 MR. GINGOLD: Your Honor, we're sensitive so long as we
 6 can reach a fair and expeditious resolution of these
 7 proceedings. If we can reach a fair and expeditious resolution
 8 of the proceedings, quite frankly, that's our goal here. If
 9 it's necessary to achieve that through contempt, we're willing
 10 to do that.

11 THE COURT: All right. Let me try some more
 12 translation, because we need understanding here. What I hear
 13 you saying is, what I hear you saying is, if I simply dismissed
 14 all of those contempt citation motions without prejudice, I
 15 suppose, you wouldn't scream too loudly about it, because what

16 you really want is to get on with a trial, and you don't want to
17 lose whatever effect the allegations of those motions have made
18 that might result in either spoliation rulings or rulings that
19 have to do with sanctions. Is that correct?

20 MR. GINGOLD: That's correct, Your Honor. How that is
21 done, I don't know how you would plan to do that.

22 THE COURT: You're not going to move for it, you just
23 wouldn't jump up and down if I did it.

24 MR. GINGOLD: Your Honor, if this Court set a date
25 certain for June 11th, 2007 for the remedies trial, we would

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1 jump up and down in glee, Your Honor.

2 However, Your Honor, if in fact -- when this Court gets
3 a chance to review the motions that are pending, and I'm not
4 going to make a substantive argument now because it isn't fair
5 to anybody, including this Court, you will see the issues that
6 are raised and the relationship to the declared fiduciary
7 duties, and you will see why we are concerned about those issues
8 and you will see why we were seeking to enforce the court
9 orders. I am not going to make an argument now because it just
10 isn't fair.

11 However, our goal is to represent the best interests of
12 our clients. We don't like people harming our clients, whether
13 those people are government officials or others. And that is
14 the concern that we have, and that's our goal. We would like to
15 keep it focused, we would like to move forward expeditiously,
16 and we would like to see a fair resolution.

17 That doesn't mean, Your Honor, that there should be any
18 vindication of what is in the record and the findings that have
19 been made by Judge Lamberth. Your Honor, Judge Lamberth, in our
20 opinion, is an outstanding judge who has done more for American

21 Indians in this country than any judge has done in 119 years of
22 this Trust. We are all dealing within the framework of the
23 judicial system, and we are dealing with those issues as well as
24 we can. This is a complicated case, but it is not that
25 complicated, because this is trust law principles.

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1 And in fact, when you look at the Supreme Court, the
2 Supreme Court says with regard to the Individual Indian Trust,
3 that the trust law that applies to private trustees applies to
4 the United States government unless Congress explicitly states
5 to the contrary.

6 THE COURT: This is at a level of generality that I
7 don't think we need. You know, one thing we're going to have to
8 do if we're going to move with anything like the dispatch you
9 want is to try to bite off shorter sentences. So I think I've
10 heard what I need to hear from the plaintiffs. It's time for me
11 to hear from the defendants.

12 MR. KIRSCHMAN: Thank you, Your Honor. My name is
13 Robert Kirschman, and I'm an assistant director in the
14 Department of Justice. With me today is Stuart Schiffer, Deputy
15 Assistant Attorney General; next to Mr. Schiffer is John
16 Stemplewicz, senior trial counsel. He's been on the litigation
17 team for several years. Chris Kohn is next to him; he's a
18 director in the commercial litigation branch. Glenn Gillett is
19 an attorney on the Cobell team from the Department of Justice;
20 he has handled IT security matters for us. Janet Goodwin is
21 counsel with the Department of the Interior.

22 We also have Tracy Hilmer, who is in an attorney from
23 the fraud section. Our fraud section is handling issues related
24 to contempt allegations. With her is John Warshawsky, another

25 trial attorney from the Department of Justice who is part of our

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1 litigation team. Paul Wolftyke (ph) is from the Department of
2 the Treasury, counsel for the Department of the Treasury, and
3 Michael Quinn also is another one of our litigation members from
4 the Department of Justice.

5 I would also like to point out, Your Honor, that James
6 Cason, Associate Deputy Secretary, is here today. He is
7 obviously with the Department of the Interior, and has worked
8 for many years on issues and matters that are relevant to this
9 litigation and the welfare of Native Americans.

10 Your Honor, regarding where we should go from here, it
11 is important to understand that the core claim of the plaintiffs
12 is an APA case. The Court of Appeals has made that very clear
13 in its most recent decisions and throughout the course of this
14 litigation.

15 It's also important to know what is the ultimate relief
16 plaintiffs have sought as set forth in their complaint. In the
17 recent July 2006 decision from the Court of Appeals, the Court
18 of Appeals made it very clear that the ultimate relief sought in
19 this case is an accounting of the IIM Trust. And they repeated
20 it later in the same opinion, that the ultimate relief sought by
21 the class members is the accounting.

22 In fact, Judge Lamberth, in an earlier decision, also
23 stated clearly that the single live cause of action here in this
24 case is the production of an accounting for the class members,
25 for the beneficiaries, and I refer the Court to 226 FRD 67 at

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1 77, where the Court -- this Court specifically considered that
2 issue on looking at earlier Court of Appeals decisions. That is

3 what we have here. That is what is in the complaint. It would
4 not be appropriate at this time or on June 11th, 2007 to hold a
5 trial as proposed by the plaintiffs. Because of the posture of
6 this case and the clear instruction and guidance from the Court
7 of Appeals, it is at this point that the Department of Interior
8 should be left to continue the accounting.

9 You've heard the phrase "destruction of documents"
10 several times this afternoon, but what the Court should be well
11 aware of is that the current history of this effort that the
12 Department of the Interior has continued to undertake over the
13 years includes the recovery of many, many documents. Our
14 quarterly reports and other documents make clear that through
15 the development, through the creation of a repository for
16 relevant Trust documents, there are many documents sufficient to
17 conduct the accounting, and the accounting work is taking place,
18 Your Honor.

19 In fact, one of the first things we believe the Court
20 should do is address submissions that have been pending before
21 the Court for many months, if not over a year, related to
22 historical statements of account that we had presented to
23 Judge Lamberth. These historical statements of accounts are
24 what the crux of the case is about. It is the ultimate relief
25 that plaintiffs have sought.

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1 The two submissions that are pending before the
2 Court -- actually, the third submission. Judge Lamberth had
3 already approved two submissions. So that historical statements
4 of account have already gone out in this case, but the two that
5 are still pending before the Court are the third submission that
6 the government filed on March 24th, 2005, and that submission

7 indicates that there are 28,100 historical statements that can
8 be mailed to beneficiaries.

9 The fourth submission was filed March 9th, 2006, and in
10 that we requested that Interior be allowed to mail 20,402
11 statements. And those submissions are pending. That's what
12 moves the case forward. Let Interior do its job.

13 There are three different types of accounts, Your
14 Honor, chiefly, and they are the per capita accounts, there are
15 judgment accounts, and there are land-based accounts. These
16 statements that are pending before the Court relate to the
17 per capita accounts and the judgment accounts. The statements
18 are prepared. Further, Interior is in the process of preparing
19 another submission that would now come to your attention in the
20 upcoming weeks or in a month or so.

21 So this is how we move the case forward. There are
22 statements of account, historical statements of account ready to
23 be presented to the beneficiaries.

24 THE COURT: Do you agree with Mr. Gingold that there
25 may be half a million individual beneficiaries?

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1 MR. KIRSCHMAN: We disagree on how large the class is.

2 THE COURT: Ballpark?

3 MR. KIRSCHMAN: We put the number more at 300,000, and
4 that's an estimate. But we do not include the same broad
5 definition as Mr. Gingold does in reaching his figure.

6 THE COURT: Well, you've told me that you have
7 28,000 historical statements, March '05; another 20,000,
8 March '06. I don't know how many you're proposing on filing in
9 the next week or month, you said, but that's another year.
10 That's fewer than 10 percent per year of the number of people
11 you think are involved. How long is it going to take to get all

12 this done?

13 MR. KIRSCHMAN: I cannot give you a set date, Your
14 Honor, on when it will be all completed. Of the judgment
15 accounts, 80 percent of those have been completed. Of the
16 per capita accounts, 91 percent have been completed.

17 And then we are left with the land-based accounts. At
18 this time the Department of the Interior, through the Office of
19 Historical Trust Accounting, are preparing and performing the
20 work necessary to prepare historical statements of account for
21 land-based accounts relevant to what is called the electronic
22 era; that is, the electronic era runs from 1985 to 2000. And in
23 the coming months, historical statements of account will be
24 prepared for those land-based accounts, and again, those
25 statements will number in the thousands.

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1 THE COURT: Do you take the position that there is no
2 such thing as a trial of an accounting case?

3 MR. KIRSCHMAN: There might be -- well, this is an APA
4 case, largely, with Trust implications. And so --

5 THE COURT: Well, it's an APA case or it's an
6 accounting case or it's both or it's a medley. The Court of
7 Appeals is not quite so clear as you think they were on whether
8 it's an APA case or an accounting case. It's either an
9 accounting case with APA overtones or it's an APA case with
10 accounting overtones, but it's clearly a mixture of the both.
11 You'll agree with that?

12 MR. KIRSCHMAN: Oh, certainly, Your Honor. And the
13 Court made clear that you have to examine the particular
14 circumstances.

15 But procedurally, there is no basis to have a trial

16 here when you can be provided the information and look at the
17 administrative record as it relates to the work of the
18 Department of the Interior and OHTA. And we provide that, and
19 we will be providing that through historical statements of
20 accounts and through quarterly reports and other monthly reports
21 that we are now required to make.

22 The issue of a Phase II trial is, one, at best
23 premature, and raises issues of jurisdiction, Your Honor.
24 Because a key point here is --

25 THE COURT: I know you've got a whole federal circuit

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1 jurisdiction issue. I mean, the whole question of whose got
2 jurisdiction over money issues is a big issue that's lurking --
3 it's sort of the elephant in the corner here, I think.

4 MR. KIRSCHMAN: Well, I don't think I heard the word
5 "money," but that's what plaintiffs ultimately will be seeking.

6 THE COURT: Disgorgement and equitable restitution,
7 they're not talking about anything but money.

8 MR. KIRSCHMAN: That's right, Your Honor. And what
9 you're talking about, in our view, clearly, are money damages,
10 and you would also have to address the account statements on an
11 individual basis. Many beneficiaries may be well satisfied with
12 the statements they received. There may be particular issues
13 regarding an individual historical statement of account. There
14 might be an issue of a transaction that was misstated or listed
15 in the wrong account, but those are individual issues not at all
16 suited to a class action that we have here.

17 If plaintiffs want to pursue relief outside of the
18 accounting, which right now, again, is the ultimate relief that
19 is before the Court, then they should be put to clearly say so,
20 and they should amend their complaint and make it clear what

21 they're now seeking, and we can address it in the normal fashion
22 that you do through pleadings. We wouldn't oppose having it
23 clearly set forth finally in writing, without rhetoric, being
24 the main source of this claim.

25 But it raises many issues, and a trial now does not

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1 behove anyone when the work is being done. So much of this
2 litigation has tied up the resources of the Department of the
3 Interior on collateral matters.

4 THE COURT: What is the government's -- I mean, I
5 understand a little bit of the difficulties the government has
6 had with this and the plaintiffs have had with this accounting
7 thing, and I don't -- I'm not for a moment inviting a long,
8 detailed discussion of it. But Mr. Gingold was suggesting that
9 there's more than one way to skin a cat here. I mean, there are
10 accountings that give every single person a statement of the
11 accounts going back to 1887, and there are other kinds of
12 accountings. I mean, there are statistical approaches to
13 accounting, there are -- you could take a sample and run an
14 accounting off of that, you could find out how much money has
15 been received over the last 119 years and how much money has
16 been paid out over the last 119 years in gross, and subtract A
17 from B or B from A and find out how much is left and what the
18 net present value of it is, and proceed from there. You could
19 do it that way, I think, and you might not have an accounting
20 that would make Bob Cratchit comfortable - merry Christmas, by
21 the way - but you would have at least some way of getting your
22 hands around this problem.

23 Now, what is the government's position here? Do we
24 have to have individual accountings for everything, or are you

25 game for some sort of much broader approach?

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1 MR. KIRSCHMAN: Your Honor, generally what you describe
2 is not the accounting contemplated by the '94 act. In fact,
3 it's a substitutionary remedy, where you're looking at
4 substituting dollars in place of the accounting. And again,
5 that's not what was contemplated by Congress.

6 Congress knew, by the way, Your Honor, clearly that
7 documents were destroyed in the early days. That's why the '94
8 act came to be. But they still said, do the accounting to the
9 best you can, and by the way, Congress controls the purse
10 strings, and as a settler determines how much work can be done
11 with each appropriation.

12 So that substitutionary -- largely, if I understand
13 what Your Honor was suggesting, that's a form of substitution.

14 THE COURT: It's not really a suggestion, it's a
15 question.

16 MR. KIRSCHMAN: Well, okay. What you've described,
17 then, as I understand it, would be substitutionary. It would be
18 a way to determine money damages in lieu of the accounting that
19 is contemplated by the '94 act, and that the Department of the
20 Interior is now performing.

21 So we don't see that as a resolution. I think that's
22 where we're heading with the suggestion of this trial on
23 June 11th, but that leads to many issues that we would like to
24 fully brief if it comes to that, especially in light of the
25 three most recent Court of Appeals decisions, but the entire

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1 litany of Court of Appeals decisions which address the fact that
2 to the extent the scope of the accounting is a question, the

3 language, the legislative language does not firmly address that.
 4 Therefore, you can't just look to the common law of trust for an
 5 answer, because it's not there. Because this is a unique case.
 6 What has been created is a unique trust.

7 So what did the Court of Appeals say? The Department
 8 of the Interior, the Secretary of the Interior is entitled to
 9 substantial discretion to make decisions as to the scope of the
 10 Trust and how the -- I'm sorry, the scope of the accounting. I
 11 misspoke. The scope of the accounting and how the accounting
 12 work will be performed. And that's where we're at.

13 THE COURT: Is he entitled to all the time he needs or
 14 wants?

15 MR. KIRSCHMAN: Your Honor, again, various factors
 16 control the timing. And the trustee, the Department of the
 17 Interior, the Secretary of the Interior, can only perform as
 18 much work as can be done, given the level of funding, given the
 19 complexity of the work, collection of the documents and
 20 performing the necessary accounting. It's not as much as the
 21 Secretary of the Interior wants, it's as much as it, the
 22 Department, needs in light of funding and what it learns.

23 The Department of the Interior has continued this work.
 24 While we spent the summer of 2005 in an IT security hearing,
 25 work continued, and work has continued during the course of the

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1 appeals. So the Department of the Interior looks forward in the
 2 coming months to report to you on what it has learned and how it
 3 is utilizing what it has learned to further its efforts in
 4 completing the accounting.

5 That's where we are, Your Honor. And there are
 6 tangential issues that have to be addressed. One of them has

7 already been mentioned, and that's the outstanding motions for
8 order to show cause related to contempt and sanctions. Many
9 people have had those hanging over their heads for quite a long
10 time now, and those do need to be addressed. Counsel suggested,
11 if I heard correctly, that those perhaps could be dismissed and
12 have inserted in their place adverse inferences. Well, we don't
13 think that's appropriate. But they should be addressed. The
14 motions have been hanging out there and have been pending and
15 hanging over people's heads for a very long time.

16 Also, another matter that has to be addressed, and we
17 would like to bring to this Court's attention, is the class
18 communication order that is standing out there. Because one of
19 the ways that Interior hopes to move forward on the accounting
20 is through the establishment of an administrative procedure
21 where issues that beneficiaries have related to the statements
22 they receive can be addressed administratively before they would
23 ever be brought to the Court's attention. The class
24 communication order that exists in this case is very detailed
25 and very strictly limits class communications.

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1 Regarding the draft regulations, though, Interior now
2 foresees a notice and comment period, and that would be
3 something we would have to bring to the Court's attention and
4 will be able to address with the involvement of plaintiffs'
5 counsel.

6 Another collateral issue that we believe should be
7 addressed promptly is the outstanding 2001 consent order that
8 exists in this case, Your Honor, regarding IT systems at the
9 Department of the Interior. The Court of Appeals most recently
10 vacated the injunction from Judge Lamberth related to Interior's
11 IT systems. That injunction had ordered the disconnection from

12 the Internet, had ordered the disconnection of computer systems
13 between different agencies, and even computer to computer. And
14 the Court of Appeals vacated that injunction.

15 But what remains is a 2001 consent order that was twice
16 stayed by this Court, by Judge Lamberth, and is still an order
17 that is pending. As a result of that 2001 consent order, there
18 are agencies at the Department of the Interior that still do not
19 have access to the Internet, and perhaps just as importantly, if
20 not more importantly, do not have computer access,
21 communications between other agencies or bureaus in the
22 department that are tied to the Internet. BIA is one, the
23 Office of the Solicitor is another. And this is an issue we
24 would like to raise with the Court in a motion to vacate.

25 We believe changes in the law since 2001 and changes in

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1 factual circumstances dictate that the Court should revisit the
2 2001 consent order so that Interior can continue to move forward
3 in its work, including work in relation to the accounting that
4 has to take place.

5 One thing more. I don't want to argue the merits, but
6 I think it's clear just from what I've said now that we don't
7 agree, and whether a trial is even appropriate is something that
8 would have to be briefed by the parties. Phase II, the extent
9 to which there is even a Phase II or what Phase II would entail,
10 is a matter that has to be addressed by the parties.

11 But right now, the ultimate relief that is before this
12 Court is the conduct of the accounting.

13 THE COURT: Okay. Let me hear briefly again from
14 Mr. Gingold or whoever is going to -- is it Gingold? Is that
15 correctly pronounced?

16 MR. GINGOLD: It's Gingold.

17 THE COURT: Soft G and then hard G?

18 MR. GINGOLD: That's correct.

19 THE COURT: All right. Go ahead.

20 MR. GINGOLD: Your Honor, first with regard to the
 21 December 17th, 2001 consent order, that's critical that it
 22 remain in place. The electronic trust records are already at
 23 catastrophic risk because of the vacature (ph) of the third
 24 preliminary injunction; further risk will continue to harm
 25 plaintiffs. We're dealing with the preliminary injunction issue

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1 in a petition for writ of certiori, and we hope that the Supreme
 2 Court will address that properly.

3 We had a 59-day trial where every government witness
 4 testified about the insecurity of the data, the inability to
 5 understand what has been changed, destroyed, and deleted, and
 6 the inability to control fraud, which is a principal problem in
 7 this Trust for many, many years, including the findings by the
 8 special -- or the special committee on investigations in the
 9 Senate finding pervasive fraud and corruption at the Department
 10 of Interior.

11 So Your Honor, we believe there should be no -- the
 12 2001 consent order which was requested by the government should
 13 not be vacated, and indeed the government said that the changes
 14 need to be made immediately, and they haven't been made in five
 15 years.

16 I would like to point out the money damages issue is a
 17 red herring. Your Honor, the Supreme Court dealt with this in a
 18 seminal case, Bowen vs. Massachusetts, specifically stating that
 19 the recovery of a party's own money is not damages. Damages is
 20 specifically defined, and it was very clear at saying that when

21 a party is entitled to money and it's not compensating someone
 22 for a loss, that is clearly a money remedy which is relief,
 23 which is other than damages. The Alaska Airlines case in 1993
 24 in the federal circuit follows Bowen, says exactly the same
 25 thing with regard to the recovery of money.

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1 So Your Honor, even in the Great West Life case --

2 THE COURT: Would your answer be the same if we were
 3 considering the question of whether enough money was collected
 4 over the years?

5 MR. GINGOLD: That component -- you raise an important
 6 distinction, Your Honor. The accounting should show what should
 7 have been collected and wasn't, and it should show what has been
 8 collected and not paid to the Trust beneficiaries.

9 THE COURT: Well, should have been -- I mean, as I
 10 understand it, there is one question about how much money was
 11 actually received, and there's another question about whether
 12 some of the land was leased too cheap.

13 MR. GINGOLD: Your Honor, there are many questions.
 14 Those are two principal. Our case concerns an accounting so
 15 that Trust beneficiaries can determine what other actions, if
 16 any, to take. For example, if, in fact, the price for oil is
 17 \$50 per barrel and the government charged five, then that action
 18 with regard to the \$45 should be in a claims court because that
 19 is a recovery of damages. They weren't paid.

20 With regard to the \$5, however, Your Honor, whether or
 21 not it was a breach of trust to set a lease price that way, the
 22 fact is, have they paid that to the Trust beneficiaries --

23 THE COURT: Fine. We understand each other.

24 MR. GINGOLD: Okay. So there is a difference, and we

25 recognize that difference. But it's important, Your Honor, that

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1 the Trust beneficiaries should be able to learn from the
2 accounting what actions they may take to seek further
3 enforcement of the Trust, including compelling the trustee to
4 seek the recovery of that money from the oil companies. That's
5 what an accounting is supposed to do; it's supposed to reflect
6 the conduct of the government.

7 Part of the result would be a recovery of the money
8 that hasn't been paid that should have been paid, and that the
9 proof hasn't been made that the Trust beneficiaries have been
10 paid that money. That's Bowen, that's Alaska Airlines, that's
11 Great West Life, Your Honor, pure equitable restitution, as pure
12 as it has been for 800 years of trust law. And Justice Scalia
13 specifically identified that in very clear terms in the
14 Great West Life case in 2002.

15 Your Honor, with respect to the judgment fund
16 accountings or the per capita accounts, the declaration of trust
17 duty for the accounting is an accounting of all funds for each
18 Trust beneficiary. You're looking at a per capita account which
19 may relate to one of the many sources of funds for a particular
20 Trust beneficiary. This is a commingled trust, so the money is
21 held in common. If there's an error in one person, there's an
22 error in everyone.

23 For purposes of accounting and equitable remedy, it's
24 the court sitting in equity that determines whether or not the
25 accountings are adequate. It is not deferred to the Secretary

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1 of the Interior. We can disagree on what the Court of Appeals
2 has said, but the way we understand the decisions is the

3 methodology that the Secretary chooses is the methodology that
 4 the Secretary may present. Whether or not Judge Lamberth was
 5 trying to aid the executive branch in minimizing the ultimate
 6 amount of money that needs to be recovered by plaintiffs, that's
 7 irrelevant. It's choosing the methodology, it's not choosing
 8 the scope.

9 THE COURT: All right.

10 MR. GINGOLD: So Your Honor, we believe we need to move
 11 forward. We believe that the data continues to -- needs to
 12 continue to be protected. There are various sanctions and show
 13 cause motions pending, including a sanctions decision by
 14 Judge Lamberth where he ordered sanctions for materially
 15 misleading the Court with regard to the settlement of accounts
 16 of the GAO and Treasury for the years 1921 through 1951, where
 17 the GAO specifically told the government not to represent to the
 18 District Court that it settled the accounts of Individual Indian
 19 Trust beneficiaries when it only settled the accounts of
 20 disbursement agents.

21 Notwithstanding that knowledge, a summary judgment
 22 motion was filed, actions were taken, the Court imposed
 23 sanctions; the decision was in June of 2004. All the filings
 24 were made; those sanctions are still pending, Your Honor. That
 25 has nothing to do with contempt, that's just sanctions for

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1 materially misleading the Court. The evidence was clear, that
 2 was not appealed.

3 It is important, because in the November 1st, 2006
 4 quarterly report on page three, the government makes a similar
 5 statement with regard to the GAO settlements of account. And
 6 Your Honor, sanctions need to be imposed to be able to stop the

7 conduct, because it just hasn't stopped.

8 And Your Honor, thank you very much for the time you've
9 spent --

10 THE COURT: Wait a minute. I'm not quite finished yet.
11 Or you're not quite finished yet. I want you to tell me about
12 this trial you're proposing. I mean, what are the outlines of
13 this trial? Who calls the first witness and what does the
14 witness say, and who has got the burden of proof and what kind
15 of a trial is it?

16 MR. GINGOLD: Your Honor, the Court of Appeals on
17 February 23rd, 2001 in Cobell 6 stated as follows: "Under
18 traditional equitable trust principles, the trustee's report,"
19 this is to the Court, "must contain sufficient information for
20 the beneficiary readily to ascertain whether the Trust has been
21 faithfully carried out." And it cites White Mountain Apache,
22 26 Claims Court at 449, for that principle.

23 THE COURT: I've got that much.

24 MR. GINGOLD: Okay. So Your Honor, based on what the
25 Court of Appeals has affirmed Judge Lamberth is, as in every

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1 accounting performed by a trustee before a court in equity, it
2 is the responsibility of the trustee who creates and maintains
3 the records to make the proofs. The Trust beneficiaries are in
4 no position. They don't create the records, they don't maintain
5 the records; therefore, it is their obligation to make the
6 proofs because it is in complete control of the records.

7 THE COURT: Can you sneak up on the answer to my
8 question, which is, what does this trial look like? Who calls
9 the first witness and what does the witness say? Describe this
10 accounting trial to me. I mean, I understand a drug trial and I
11 understand a bank fraud trial and I understand an anti-trust

12 trial. I want you to tell me what the accounting trial looks
13 like.

14 MR. GINGOLD: The United States government would appear
15 before this Court, call its witnesses to identify what has been
16 done to perform an accounting of all funds, introduce the
17 evidence to support the claims, it would bring whatever
18 witnesses it needs to be able to demonstrate that all funds have
19 been accounted for for each Trust beneficiary since the
20 inception of the Trust.

21 Once the government puts its case on, plaintiffs would
22 raise exceptions. And to the extent the Court accepts the
23 exceptions, and to the extent that the evidence is proffered in
24 accordance with evidentiary rules, this Court would make a
25 decision as to whether or not the accounting is adequate or not,

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1 and if it's not adequate, what alternative forms of relief are
2 necessary; particularly, Your Honor, if in fact the accounting
3 was defeated or frustrated based on the malfeasance or
4 misconduct of the trustee. The trustee is absolutely liable
5 under the law. Other than admiralty law, that is the only law
6 that establishes absolute liability in the trustee.

7 And Your Honor, the '94 act that my opposing counsel
8 was referring to, the Trust Reform Act of '94, is specifically
9 termed by the Court of Appeals several times as an inclusive
10 legislation, a remedial legislation. It doesn't purport to set
11 or limit remedies. It was intended to encourage the government
12 to discharge the long overdue trust duties. The language is
13 explicit with regard to what it is included but not limited to
14 is as follows with regard to the accounting. The language is
15 literal, Your Honor. You don't have to trust me in that regard.

16 THE COURT: So the government has taken the position
17 here, and not for the first time, that there's no way that it's
18 going to be ready to present the proofs of accounting on
19 June 10th, 2007, and your suggestion of a trial on that date can
20 be, I think accurately, translated into a drop-dead date in
21 which the government either does the accounting or you get the
22 relief you want?

23 MR. GINGOLD: That's a harsh way of putting it, Your
24 Honor, but that is one way of --

25 THE COURT: It's pretty plain, though, isn't it?

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1 MR. GINGOLD: Yes. And that's consistent with
2 Cobell 6. Yes, that's what the Court of Appeals has said, and
3 is in fact what the Court of Appeals said on February 23rd,
4 2001, was if the egregious breaches of trust continue, if
5 malfeasance continues, the District Court should take further
6 action to ensure that there's no further delay, because of the
7 harm to the very lives of our clients, Your Honor. This is not
8 my language, this is the Court of Appeals.

9 There is no justification for not rendering the
10 accounting that has been long overdue. It's been 12 years since
11 the '94 Trust Reform Act was passed which restated and codified
12 certain trust duties, and it's been 10 and a half years since
13 litigation was filed.

14 Your Honor, this litigation is twofold. With all due
15 respect to my colleague, even in Cobell 17, the Court explicitly
16 stated that it's appropriate for the government to stop saying
17 there's only one aspect of this case. Trust reform is part of
18 this case, just as the accounting is.

19 THE COURT: Yeah, but in your own submission, trust
20 reform is step two after Phase II. You want Phase II resolved,

21 then you want to get on to trust reform.

22 MR. GINGOLD: Your Honor, we tried -- we felt -- as a
23 matter of fact, when the Court bifurcated the case back in I
24 think it was '98, the goal was to move forward with the trust
25 reform first. And that was the first trial during the summer of

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1 '99. And the Court on April 4th, 2000, just four months after
2 the decision came in in December of '99, specifically said from
3 the bench everything he was told during the trial was a lie
4 because of misrepresentations with regard to trust reform. We
5 felt it was important to move first with trust reform, and that
6 failed based on the experience in the first trial, because the
7 sooner we're able to ensure adequate systems, the less harm will
8 befall our clients.

9 Therefore we felt it was imperative at the outset, and
10 that failed because of misrepresentations to the Court. The
11 Court's opinion from the bench is a published opinion. I don't
12 need to restate it. But he said specifically everything he was
13 told in trial was a lie.

14 THE COURT: Last word, Mr. Kirschman.

15 MR. KIRSCHMAN: Your Honor, if I may, counsel for the
16 named alleged contemnors has asked for a time to speak.

17 THE COURT: I would be happy to hear from her.

18 MR. KIRSCHMAN: I believe it will be Ms. Jackson.

19 THE COURT: Ms. Jackson?

20 MS. JACKSON: Thank you, Your Honor. May it please the
21 Court, my name is Amy Jackson and I represent Edith Blackwell,
22 who is the Deputy Associate Solicitor General at the Department
23 of Interior. She's one of the many individual government
24 servants who has been named in the motions for orders to show

25 cause. My firm, Trout Cacheris, represents several others, but

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1 I don't address you today in my capacity as their counsel, but
2 as the designated speaker for the lawyers for close to 40 other
3 people from the Department of Interior and from the Department
4 of Justice. Some of these are political appointees, not only
5 from this administration but the previous administration; some
6 are career government employees; some are still with the
7 government, some have long since moved on.

8 But what they have in common is that they are not
9 parties to this litigation. They are not individually the
10 subject of any court order or any injunction in this case, but
11 they have all been named in their individual capacity in this
12 series of what we consider to be highly vitriolic contempt
13 motions that at bottom deal with the merits. They address the
14 acts and the omissions of the defendants, and they do not deal
15 with the individual conduct of these individual people.

16 As this litigation has proceeded, as lawyer after
17 lawyer in the Department of Justice has stepped up to be
18 assigned to this matter, one after another they've been accused
19 of something, a contempt motion has been filed, and they've been
20 forced to recuse themselves. People involving trust reform in
21 the Department of Interior one after another has had to be
22 recused as contempt motions have accumulated.

23 I need to make clear for the record, I do not represent
24 all of these people. They're not all named in the same motions,
25 and they each have facts and circumstances that are individual

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1 to them, that are set out in detail in their individual motions.

2 But their attorneys have had a chance to confer, and in
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3 what is probably an unprecedented development in Washington,
4 D.C. for over 50 lawyers from probably 25 different firms, we
5 wish to speak with one voice. And what we wish to say to the
6 Court is this: The Court should reject the invitation to keep
7 us in suspense any longer.

8 These motions for order to show cause, some of them
9 have been pending for more than five years. They are entirely
10 collateral to the class action pending before the Court, they
11 are not traditional civil contempt motions, they do not ask the
12 Court to coerce or order anyone to do anything, and indeed, the
13 former employees and the recused employees couldn't do anything.

14 The motions were opposed on a timely basis long ago on
15 the grounds that they were legally and factually deficient, and
16 there have been multiple opportunities to brief the issues
17 subsequently.

18 With respect to one of the motions, the one that was
19 filed in October of 2001, the plaintiffs were told by the Court
20 in March of 2002, you really need to particularize your
21 allegations against these people, and then the Special Master
22 ordered them in November of 2002 to do so by May of 2003. But
23 for 22 of the individuals, no Bill of Particulars has ever been
24 filed. The Bills of Particulars, or the so-called Bills of
25 Particulars, that were filed do not make out the elements of

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1 contempt. Across the board they fail to identify an order
2 that's been violated, or act in violation of any order.

3 Most recently there was -- the last thing that's really
4 happened with respect to the contempt is there was a status
5 hearing before the Court in March of 2005. Judge Lamberth asked
6 us to brief the impact of the eighth Cobell vs. Norton opinion

7 on the pending contempt matters, and those briefs are in the
8 record. But basically the D.C. circuit made it clear that the
9 kinds of allegations in these motions involving past conduct
10 cannot support a civil contempt action.

11 In short, our position is that the motions are ripe for
12 decision. These individuals, these non-parties, do not want to
13 minimize the importance of the issues in the case or the
14 troubled history of trust reform, but they want to underscore
15 that denying the motions for order to show cause will not affect
16 the merits of this case, it will not extinguish the plaintiffs'
17 rights.

18 These individuals have been repeatedly and really
19 unnecessarily vilified in these pleadings, and we ask the Court
20 to rule on the motions and remove this cloud that has been
21 hanging above the heads of a large number and ever expanding
22 group of hardworking and well intentioned government servants.
23 Thank you.

24 THE COURT: Thank you, Ms. Jackson. Anything further
25 from the defense side?

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1 MR. KIRSCHMAN: No, Your Honor. Thank you.

2 THE COURT: All right. I said at the beginning that
3 I'm not going to do anything dramatic today. I just wanted
4 everybody in here and I wanted to get an idea from both sides of
5 where we are and where both sides think we ought to go.

6 What I'm going to do in the next -- well, frankly, I've
7 got a jury out now and then it's the holidays, so it will
8 probably be after the first of the year, but I'm going to get
9 out some kind of a -- I may rule on some of what I've heard
10 today, and probably will get out some kind of an order for
11 another status conference pretty soon in January. We can get

12 down to a little more brass tacks on some of the subjects we've
13 been talking about today.

14 It is not my intent to dawdle with this case. On the
15 other hand, I'm the newest kid on the block here, and I don't
16 want to come in and start breaking china before I know what the
17 china is. So I need a little time to orient myself and to chew
18 on what I've heard today.

19 All I want to say at this point is thank you all for
20 coming, and happy holidays to you all. And you'll hear from me
21 shortly.

22 (Proceedings adjourned at 5:08 p.m.)
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1 CERTIFICATE OF OFFICIAL COURT REPORTER

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3 I, Rebecca Stonestreet, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.

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SIGNATURE OF COURT REPORTER

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