

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4
5 ELOUISE PEPION COBELL, et al.,

6 Appellants/Appellees,

7 v.

Nos. 08-5500 & 08-5506

8 KENNETH LEE SALAZAR, SECRETARY
9 OF THE INTERIOR, et al.,

10 Appellees/Appellants.
11

12 Monday, May 11, 2009
13 Washington, D.C.

14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CHIEF JUDGE SENTELLE, CIRCUIT JUDGE GINSBURG,
18 AND SENIOR CIRCUIT JUDGE RANDOLPH

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS/APPELLEES:

21 DENNIS M. GINGOLD, ESQ.

22 ON BEHALF OF THE APPELLEES/APPELLANTS:

23 ALISA B. KLEIN, ESQ.

24 ON BEHALF OF THE INTERVENOR:

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P R O C E E D I N G S

THE CLERK: Case number 08-5500, et al., Elouise Pepion Cobell, et al., Appellants versus Kenneth Lee Salazar, Secretary of the Interior, et al. Mr. Gingold for the Appellants/Appellees; Ms. Klein for Appellees/Appellants; and Mr. Godfrey for the Intervenor.

ORAL ARGUMENT OF DENNIS M. GINGOLD, ESQ.

ON BEHALF OF THE APPELLANTS/APPELLEES

MR. GINGOLD: May it please the Court.

JUDGE SENTELLE: Good morning, Counsel.

MR. GINGOLD: Good morning, Your Honor. This matter is before this Court on a 1292B appeal. We raise legal issues that we challenged for which we --

THE COURT: The only order that's subject to the 1292B is the order for the monetary judgment --

MR. GINGOLD: Yes, Your Honor.

THE COURT: -- not the previous one dealing with the adequacy of the historic account.

MR. GINGOLD: I believe that's *Cobell XX*, I think that's --

THE COURT: Is that right?

MR. GINGOLD: I believe that's correct, Your Honor. But we did petition this Court for review under 1292B with respect to *Cobell XXI*. I believe Judge Robertson included *Cobell XX* when he identified issues of appeal, or areas for

1 appeal.

2 THE COURT: He only identified three issues.

3 MR. GINGOLD: Yes.

4 THE COURT: Two are yours --

5 MR. GINGOLD: That's correct, Your Honor.

6 THE COURT: -- because the monetary judgment was not
7 high enough, I mean, it was under that, right? And then the
8 other was the Government's claim that there was no
9 jurisdiction to issue the monetary judgment. That's the only
10 three issues that Judge Robertson identified, right?

11 MR. GINGOLD: My recollection is a little different,
12 Your Honor. My --

13 THE COURT: Well --

14 MR. GINGOLD: -- recollection is that the Judge
15 certified the issues that we raised for appeal, and that the
16 Government didn't ask for any of its issues to be certified,
17 and the issues that we raised for appeal were interest,
18 whether or not interest is recoverable under *Bowen* as specific
19 relief for restitution, whether or not the court applied the
20 presumptions that we believe are required to be applied under
21 the rules of this court, and whether or not the funds that the
22 court held are found to be Individual Indian Trust Funds are
23 not recoverable in this litigation if they've been held in an
24 account that is not identified as an Individual Indian Trust
25 Account.

1 THE COURT: Yes, you're right. Actually, there are
2 four, the -- he says the question whether he had jurisdiction
3 to order discouragement, right?

4 MR. GINGOLD: That's correct.

5 THE COURT: Application of super strong presumption
6 that you invoke; third was the third driver the dollar amount
7 -- well, actually three -- was (indiscernible 11:19:27) funds,
8 right?

9 MR. GINGOLD: (No audible response.)

10 THE COURT: And then the Government is jurisdiction.

11 MR. GINGOLD: That's correct. But I believe the
12 question you asked, Your Honor, was which issues were
13 certified by the district court. And I believe the --

14 THE COURT: Well, the statute talks about issues,
15 but the Supreme Court has held that the certification is of
16 the order, and I asked you which order, there are two orders
17 here.

18 MR. GINGOLD: It was my understanding that the judge
19 included *Cobell XX*, as well as *Cobell XXI* within this. But
20 it --

21 THE COURT: You said the opinion, you mentioned the
22 earlier opinion, but I don't know that he certified the order.

23 MR. GINGOLD: I understand, Your Honor.

24 THE COURT: Okay.

25 MR. GINGOLD: In that regard, if I may, the first

1 issue that we raised in this appeal is whether or not as a
2 matter of law our clients are entitled to interest, if
3 interest is specifically identified by statute in the first
4 instance, and whether or not that interest should be
5 retroactive based on the express provision in section 4012 of
6 the Trust Reform Act of 1994, as applying solely to Individual
7 Indian Trust beneficiaries.

8 The second issue we raised was with regard to
9 presumptions, and these are presumptions, inferences,
10 ambiguities, and how the rules apply to a trustee when a
11 trustee has failed to render an accounting, or has failed to
12 maintain accurate books and records.

13 And the last issue is whether or not Individual Indian
14 Trust Funds, as we understand it, lose their character as
15 trust funds simply because they're not held in an account that
16 is not identified as Individual Indian Trust Funds. Osage
17 Individual Indian Trust Funds are the biggest example. There
18 are many other examples in this action, including the funds
19 held in special deposit accounts, that this Court dealt with
20 in *Cobell VI*, including the funds dealt that are held in per
21 capita in judgment accounts, including the funds that are held
22 in the Treasury General Account that are not identified as
23 Individual Indian Trust Funds, and including funds that have
24 been held in commercial banks in the name of the secretary,
25 superintendent --

1 THE COURT: Pardon.

2 MR. GINGOLD: In the name of the secretary,
3 superintendents, Indian agents. And of course, the last
4 portion of it, which is the most difficult, are funds that
5 were used by the Government to purchase certificates of
6 deposits, or government securities, whether they're Liberty
7 bonds, savings bonds, war stamps, or other types of
8 instruments, and those investments were made either in their
9 instruments, or in the name of the secretary, or the
10 superintendent, or the Indian agents. So, that is what the
11 third component encompasses with Osage as being an important
12 element of it.

13 With respect to interests, we are very well aware of the
14 rulings of this Court, and this Court has addressed many of
15 the interest obligations, statutes, the no-interest rule, and
16 the presumption against the waiver of sovereign immunity with
17 regard to interest. We are very well aware of that. We
18 believe under *Bowen* where there is a specific statutory
19 obligation to pay interest independent of a trust that that
20 statutory obligation is considered under *Bowen* as an
21 obligation that is enforceable, and in accordance with section
22 702, sovereign immunity has been waived. To the extent
23 sovereign immunity needs to be waived.

24 THE COURT: You took that issue out of this case
25 right from the beginning. How many times have we issued

1 opinions in this case, nine, 10? I don't know.

2 MR. GINGOLD: Nine opinions, that's correct, Your
3 Honor.

4 THE COURT: Nine opinions, and if the question, or
5 if it appeared that your complaint was seeking money then I
6 don't know what would have happened, but the one thing that is
7 absolutely clear is that at least early on, back in, you know,
8 *Cobell I*, or *Cobell II*, this Court would have either by
9 adversary proceeding, but among the parties that were sua
10 sponte decided whether we have jurisdiction over that claim.
11 And here now, now we're in *Cobell X*, or whatever, and we've
12 had nine opinions issued without, on the basis that there was
13 no monetary judgment, no monetary claim involved, we've had
14 them all issued, and now suddenly we're confronted with a
15 jurisdictional question.

16 JUDGE SENTELLE: It'd be *Cobell XXII* if you count
17 both courts.

18 MR. GINGOLD: That's correct, Your Honor.

19 THE COURT: So, what's your answer to that?

20 MR. GINGOLD: Our answer is my understanding of the
21 facts is a bit different, Your Honor. And if I may?

22 THE COURT: Yes.

23 MR. GINGOLD: This issue was raised repeatedly at
24 the beginning of the litigation. It was not a secret issue.
25 The Government contested vigorously whether or not depending

1 on the results of the accounting Plaintiffs would be entitled
2 to recover in the district court. The issue was briefed, was
3 debated, and it was included in *Cobell V*. That is a decision
4 which led to the appeal for which this Court made a
5 determination on February 23rd, 2001. In the December 21,
6 1999 opinion in *Cobell V*, Judge Lamberth (phonetic sp.)
7 expressly addressed the issue then that was raised by the
8 Government precisely as Judge Randolph has discussed it now.

9 And as Judge Lamberth explained in his decision, and the
10 Government did not appeal that in *Cobell VI*, by the way, what
11 he explained was this, he explained the difference between
12 damages remedy, and an equitable remedy that includes
13 restitution and specific relief. He explicitly described what
14 his understanding of the scope of *Bowen* is, and he explained
15 that incidental to any accounting would likely be a monetary
16 award in accordance with *Bowen*, or in accordance with
17 restitution, which he specifically stated, citing *Bowen* and
18 cases in this circuit, that the type of award we are talking
19 about is restitution, it's equity, it's not damages, and it's
20 within the jurisdiction of the district court.

21 THE COURT: Whatever label you put on it the
22 district court, Judge Lamberth, said that you on behalf of
23 your client, he said disavowed any claim for cash infusions
24 into the IIM accounts.

25 MR. GINGOLD: That's correct, Your Honor. We are

1 not asking for --

2 THE COURT: Would this judgment be a cash infusion
3 into the IIM accounts? The answer is yes.

4 MR. GINGOLD: With all due respect, again, that very
5 issue was raised by Judge Lamberth during oral argument, and a
6 proceeding in that court back in I believe it was 1998. And
7 in that regard it was pointed out we're not asking for money
8 that hasn't been collected. We're not asking for money.

9 THE COURT: This is the proceeding in which you said
10 that all the money that's there is already in the accounts?

11 MR. GINGOLD: Well, no. We said all the money there
12 was collected and held by the Government, it wasn't identified
13 to the accounts as it should have been, which is the purpose
14 of an accounting and reconciliation, to determine whether or
15 not money is put in the wrong drawer is the question. The
16 money has been collected. Whether or not the money was never
17 collected is the point we're making, Your Honor. We
18 specifically disavowed damages in this litigation. We
19 recognized the district court does not have jurisdiction.

20 THE COURT: Well, you didn't put it in terms of
21 damages, you put in the term of cash infusion into the IIM
22 accounts, which is why I think, why I want to get away from
23 the label, is it damages, is it restitution? It's cash,
24 right?

25 MR. GINGOLD: No. Your Honor, it's my understanding

1 is again a bit different. When we're dealing with the funds
2 in the treasury we're not dealing with cash, we're dealing
3 with credits and debits. There is no cash. And that was
4 explained again during testimony from treasury witnesses I
5 think during the --

6 THE COURT: What would your clients collect -- by
7 the way, this is a little bit off, but how does the -- let's
8 assume the judgment stands, the \$400-some million, how does
9 the district judge go about deciding who gets what?

10 MR. GINGOLD: Your Honor, again, our understanding
11 is we're dealing with restitution and specific relief. It is
12 irrelevant to the harm sustained by an individual.

13 THE COURT: No, but you have how many individuals
14 are potentially --

15 MR. GINGOLD: Your Honor -- I'm sorry.

16 THE COURT: How many individuals potentially receive
17 this part of this judgment?

18 MR. GINGOLD: That's one of the problems in this
19 litigation, Your Honor. And by the way, Judge Robertson
20 specifically reserved these issues for discussion and to
21 address subsequent to this appeal. But if I may I will
22 address it anyway.

23 THE COURT: Let me tell you why I'm asking.

24 MR. GINGOLD: Okay.

25 THE COURT: One of the things that occurred, and the

1 parties -- this is an interlocutory appeal, which we have
2 discretion to take or not take, but one of the things that
3 occurred to me is that in deciding among all the individual
4 claimants how much of the \$488 million they're going to get
5 you have to do some sort of accounting. There's no way that
6 claimant one gets 10 bucks, and claimant two gets 50 cents.
7 You've got to make a decision about each individual, and so
8 you wind up doing the very accounting, at least partially,
9 that Judge Robertson said is --

10 JUDGE SENTELLE: You can't get.

11 THE COURT: -- impossible.

12 MR. GINGOLD: Your Honor, one of the reasons that
13 restitution is employed as opposed to a damages remedy where
14 we could disagree, but if you may indulge me just --

15 THE COURT: Yes, go ahead.

16 MR. GINGOLD: -- a little bit. One of the reasons
17 that restitution is employed in circumstances such as these
18 where you're dealing with a trustee who has records, supposed
19 to have records, supposed to maintain records, doesn't
20 maintain records, is that the beneficiaries don't have the
21 ability to be able to identify the amount of money, or the
22 issues related to the undisbursed funds that is their's.
23 We're dealing with a class in this case as a -- where the
24 funds are commingled when they're collected, the funds are
25 commingled when they're deposited, and the funds are

1 commingled when they're invested in various instruments.
2 Unless you are able to identify whose funds, from which lands,
3 from which leases were put in which pool, which were invested
4 in which securities, it is utterly impossible to make any
5 distinction between any individuals' claims.

6 Your Honor, one of the problems in this litigation is
7 that Treasury actually testified in response to Plaintiffs'
8 request for production of information on the securities that
9 were purchased, and redeemed, if they could identify the
10 securities that were purchased at any point in the trust with
11 individual (indiscernible 11:31:36) trust funds, the answer is
12 we can't do it. And the reason they said they can't do it is
13 because they were dependent entirely on predicate information
14 from the Department of Interior that did not provide that
15 information to Treasury. For several years in this litigation
16 that was one of the debates that was going on.

17 Consequently, we're -- one other factor, and this is an
18 important one, they sent a class certification based on our
19 understanding of Cobell VI, which we believe is controlling
20 law, the accounting should go back to the date of the earliest
21 deposit, so opening balances can be determined in order to
22 come to a conclusion with regard to current balances.

23 Your Honor, based on the record of these proceedings, and
24 exhibits provided by the Government, from 1985 to I believe
25 2001, 265,000 accounts were closed, they were closed for a

1 variety of reasons. We don't know which accounts were closed,
2 we don't know whose accounts were closed. We do know, for
3 example, that this Court has said that each individual who has
4 a stake in the land should have an account. That's precisely
5 what the first special trustee said. One of our main
6 plaintiffs, Mr. Molson (phonetic sp.), doesn't have an
7 account, he has trust land, his parents have trust land, his
8 grandparents have trust land. They're dealing with
9 timberlands.

10 It is difficult to answer the question, Judge Randolph,
11 as to how much money any individual should receive as a result
12 of a class conclusion unless we know how many individuals
13 there are. We know there were 550,000 accounts through 1985.
14 We don't know how many accounts existed prior to 1985. As a
15 matter of fact, what Judge Robertson said was absolutely
16 correct, the Government has not even in earnest attempted to
17 assess what is necessary for an accounting in the pre-1985
18 period, the first 100 years of this trust.

19 So, Your Honor, we agree with what you are thinking.
20 Therefore, the only way to provide for a class resolution
21 (indiscernible 11:34:10) is on a per capita basis. It's rough
22 justice, some people are not going to be receiving the money
23 that should reflect the benefit that was conferred on the
24 Government, but if you don't have the records, and the
25 Government hasn't even begun to look for the records, and has

1 disavowed any intention to do an asset assessment, the lands,
2 the subsurface rights, the securities that were purchased,
3 Your Honor, the subsurface rights are more complicated than
4 the land itself, and those rights sometimes are separated from
5 the land, sometimes they're reserved in the land when the land
6 is sold. None of this has been done. So, Your Honor, we have
7 the same concerns that you do with regard to a specific
8 allocation.

9 JUDGE SENTELLE: This is possibly --

10 MR. GINGOLD: As a matter of fact --

11 JUDGE SENTELLE: -- not our issue, but I think it
12 goes back to what Judge Randolph started from, can that be
13 done, is it possible, or is that within the realm of
14 impossibility that the district court was talking about?

15 MR. GINGOLD: Your Honor, as I understand the law,
16 rough justice is something that is done in circumstances like
17 this. Unless something like this is done we will not only be
18 in court another 13 years, this case will never be resolved.

19 JUDGE SENTELLE: Has it only been 13 years, this
20 case has been going on?

21 MR. GINGOLD: It's only been 13 years, Your Honor.
22 Some of us didn't have gray hair when this started. We all do
23 now if we still have --

24 THE COURT: Some of us had hair.

25 MR. GINGOLD: Well, Your Honor, you're absolutely

1 right. And the court, this Court is properly concerned about
2 it. We've been concerned about it, as well. And therefore we
3 believe there's ample precedent in this circuit, and at the
4 Supreme Court for rough justice in circumstances such as this.
5 And indeed when you --

6 THE COURT: What's rough justice?

7 MR. GINGOLD: Rough justice is something that's
8 fair, and we believe would be a per capita distribution. If
9 you are able --

10 THE COURT: Is it possible for one individual to
11 have more than one account?

12 MR. GINGOLD: You're absolutely -- it's possible for
13 more than one individual to have more than one account.

14 THE COURT: Yes. Would you distribute on the basis
15 of the number of accounts an individual has, or on the basis
16 of just the individual?

17 MR. GINGOLD: In my view --

18 THE COURT: Each person would get what by your
19 estimate? About less than \$1,000.

20 MR. GINGOLD: In my view each person should receive
21 money, whether he had one account, no accounts, or 10
22 accounts. Because as this Court stated each individual should
23 have had an account, and that's what the special trustee
24 stated. So, the real question is for -- is to identify the
25 Individual Indian Trust Beneficiaries, those who owned the

1 land.

2 And Your Honor, you asked probably the most critical
3 question that we've been debating in the 13 years of this
4 case, not only is that what we've discussed a problem, but the
5 UBSG, or the (indiscernible 11:37:06) issue complicates it
6 even further. Through year end 1999 as a result of
7 legislation that twice has been deemed unconstitutional by the
8 United States Supreme Court, 775,000 undivided interests held
9 by Individual Indian Trust Beneficiaries were permitted by the
10 Department of Interior to (indiscernible 11:37:32) to the
11 tribes for nothing. Twice it was held unconstitutional.

12 We don't know how many more of (indiscernible 11:37:40)
13 in the last 10 years. We do know based on testimony in this
14 litigation that the Government hasn't done anything about the
15 775,000 (indiscernible 11:37:51). Those are land interests,
16 undivided interests that can produce income, where's the land,
17 where's the income? Nobody knows. Nobody has even identified
18 the trust beneficiaries whose lands (indiscernible 11:38:05),
19 Your Honor. That's another further question, and Your Honor,
20 the Government has not even attempted to do anything about
21 that.

22 So, what we're left with is this, where you have a
23 trustee who doesn't keep adequate records, who doesn't
24 maintain adequate systems, who doesn't comply with orders,
25 whether it's orders of this Court or anyone else, and Your

1 Honor *Cobell VI* in our view is controlling law in this case.
2 The question is can a trustee escape accountability under
3 those circumstances? If that's the case, Your Honor, and this
4 Court has enormous discretion in equity to do what it believes
5 is best, but if that's the case, Your Honor, it would change
6 115 years of precedent in this circuit. And we're dealing
7 with precedent from the 1995 through 1946 to 1961 to 1981
8 concluding in *Rainbolt* with Judge Skelly-Wright (phonetic sp.)
9 in that opinion with regard to what the obligations are, and
10 what happens when the information is provided, and what
11 happens when the presumptions are applied. And it's stated
12 from 1895 to the present in this circuit.

13 JUDGE GINSBURG: Mr. Gingold, notwithstanding
14 everything you've said this morning, the district judge in the
15 final footnote said he didn't reach his conclusion in this
16 case based on an adequate accounting being impossible because
17 of missing records, but rather -- as to which he thought the
18 record was inconclusive, but rather on the ground that the
19 expense of doing an adequate accounting just was inconsistent
20 with congressional appropriations for this purpose. Now, that
21 seems to put everything we've been discussing today, and I
22 know you were responding to our questions, to one side if that
23 isn't the ground of the decision. And my first question,
24 therefore, or my question is what do we do first with the
25 actual ground of decision?

1 MR. GINGOLD: Thank you, Your Honor, I was trying to
2 address --

3 JUDGE GINSBURG: Sure.

4 MR. GINGOLD: -- Judge Randolph's question.

5 JUDGE GINSBURG: Yes.

6 MR. GINGOLD: And that's an important point you're
7 raising. *Cobell VI* identified an important factor, because
8 this issue was raised 10 years ago, this isn't the first time
9 the issue was raised, 10 years ago the Government explained,
10 as a matter of fact on September 5th, 2000 before this Court
11 the oral argument occurred with Justice Department and
12 Plaintiff's counsel, and this Court asked some of the very
13 same --

14 JUDGE SENTELLE: Move to what was said, Counsel, we
15 don't need to hear any more history.

16 MR. GINGOLD: Okay.

17 JUDGE SENTELLE: Move along.

18 MR. GINGOLD: Your Honor, cost is not a factor.
19 This Court held in *Cobell VI* that neither the sufficiency of
20 resources, nor the administrative complexities are
21 satisfactory to either delay or excuse the accounting
22 obligation. And the reason given by this Court was that the
23 Government as trustee has been well aware of its obligations
24 since before the Trust Reform Act, and to use that as an
25 excuse now isn't appropriate. Further, and this maybe the

1 most --

2 JUDGE SENTELLE: That did not, however, deal with
3 precisely the question today where the judge is finding from
4 the legislative enactments that Congress must not have
5 intended that full of an accounting given the fact that they
6 did not appropriate consistent with that interpretation of the
7 statute, would you speak specifically to that?

8 MR. GINGOLD: Yes. What I --

9 JUDGE SENTELLE: That issue didn't exist at the time
10 of *Cobell VI*, what I think Judge Ginsburg is asking about.

11 MR. GINGOLD: I think what the judge, what Judge
12 Robertson is referring to was based on what had been done to
13 date, or to date of that decision, based on what needed to be
14 done that hadn't even been started, and based on the costs
15 that were estimated, it would take -- and the absence of
16 appropriations if in fact the appropriations remained
17 constant, it would basically be more than 100 years before the
18 accounting would be completed. I think that's what he's
19 referring to.

20 JUDGE GINSBURG: The 100 years isn't in the opinion,
21 is it?

22 MR. GINGOLD: No, I think he discussed that in
23 court, Your Honor.

24 JUDGE GINSBURG: Okay. How do you reconcile this
25 with the *Mashpay* (phonetic sp.) decision?

1 MR. GINGOLD: There are a couple of different --
2 first of all, Your Honor, we are dealing with a trust, we're
3 dealing with a trust obligation; we're dealing with an
4 obligation by statute that's been codified since 1898; we're
5 dealing with the consequences of not providing an accounting,
6 and the consequences in the context of *Mashpay* or in *Henkels*
7 *v. Sutherland*, or in the 1932 controller decision, if you have
8 a trust, and the trust -- you have the trust funds it is an
9 obligation to restore to the trust beneficiaries all funds and
10 income generated therefrom, all or you will have a
11 confiscation that would have constitutional concerns.

12 Your Honor, it is simply not a good excuse to say we
13 don't have the money to account for your funds. If that's the
14 case, Your Honor, there is no trust. The fundamental -- what
15 this Court said in *Cobell VI* and has been restated, has been
16 stated by the Supreme Court, and most recently before *Cobell*
17 *VI* there was (indiscernible 11:43:42) *Apache*, and before that
18 it was *Mitchell II*.

19 Inherent in the trust itself is a duty to account. If
20 the duty to account is excused based on insufficient funds or
21 administrative complexities caused solely by the trustee we
22 don't have a trust here, Your Honor. And if we don't have a
23 trust here we either have a confiscation that would be
24 endorsed, and we have something even more critical than that,
25 what is the legal authority for the United States to hold our

1 clients' assets and trust money. Fifty-four million acres or
2 so at the beginning of the trust --

3 JUDGE SENTELLE: Yes. I think you've probably
4 finished responding to Judge Ginsburg and started talking on
5 your own again, and your time is actually up. So, unless my
6 colleagues do have further questions we'll hear from the
7 Government.

8 MR. GINGOLD: Your Honor, may I have rebuttal time?

9 JUDGE SENTELLE: Beg your pardon?

10 MR. GINGOLD: Rebuttal time, would that be
11 available?

12 JUDGE SENTELLE: We will see if we give you back a
13 couple of minutes for rebuttal.

14 MR. GINGOLD: Thank you, Your Honor.

15 JUDGE SENTELLE: Thank you, Counsel. We are likely
16 to, I would put it that way. We'll hear from Ms. Klein.

17 ORAL ARGUMENT OF ALISA B. KLEIN, ESQ.

18 ON BEHALF OF THE APPELLEES/APPELLANTS

19 MS. KLEIN: May it please the Court, Alisa Klein for
20 the Government. I appreciate I am here to answer the Court's
21 questions about the orders on review, but if I may ask the
22 Court's indulgence just for two minutes, I just would like to
23 explain what we know today as a result of the hundreds of
24 millions of dollars that have been spent on historical
25 accounting activities --

1 JUDGE SENTELLE: All right. Very soon get to Judge
2 Randolph's original question.

3 MS. KLEIN: Yes. I appreciate that I need to
4 address the procedural history. But I just want to clear
5 something up, because there's a difference between what was
6 known in 1994 when Congress passed the legislation, and also
7 what was known in 2001 when this Court heard the first appeal,
8 and what's known today now that a lot of work has been done.

9 Back in 1994, I promise I'll be brief, but back in 1994
10 there was a lot of uncertainty because of the way trust
11 records had been kept over time, which was in a totally
12 decentralized fashion, paper ledger era, back, you know,
13 individual field offices would keep the money, keep track of
14 the money by individual account, money in, money out, money
15 in, money out, but these were scattered throughout the
16 country. Even in the electronic era, which was 1985 to 2000,
17 you had decentralized databases, and so what we couldn't do
18 was guarantee or give assurance that the current balances were
19 correct back in 1994 because we had not yet amassed the
20 documents, and had not yet analyzed them.

21 The purpose of this project, the historical accounting
22 project, was to gain some competence in what had been done
23 over time. And that's why we have gathered 43 miles of
24 documents, and centralized them at that facility in Lenexa,
25 Kansas, and that's why we've had five accounting firms and two

1 historian firms going through them for all of these years.
2 And what we now know is that in -- I'm not saying we know this
3 100 percent, but from everything we've seen we know that the
4 BIA offices did exactly what would have been required of any
5 private fiduciary, they kept individual books for each
6 account, money in, money out, these were mostly pass through
7 accounts, so the money would come in, and then it would be
8 paid by check to the account holder generally over night. So,
9 there were a lot of small transactions. We know these books
10 were kept, and we know that they were made available upon
11 request. We cite the old policy, and Plaintiffs witness
12 acknowledging that they were made available upon request, that
13 is the fiduciary duty to account. It's accounting, it's
14 keeping the books, and producing them at reasonable times upon
15 request, and that was done.

16 This project -- we didn't know that back in 1994, we now
17 know that. This project has gone further, and it's
18 essentially done an audit, again, not 100 percent because no
19 one would pay for that, and it would take 200 years, but
20 there's been all of this additional work to see how well were
21 those records kept. If you trace it back to the original
22 lease does the money make sense, was it distributed correctly?
23 And the results are described in the 2007 plan, and we've
24 reproduced the underlying reports, the (indiscernible
25 11:47:59) reports that summarize all of these findings, and

1 what we found again they were kept remarkably well, not
2 perfectly, of course there were errors.

3 JUDGE SENTELLE: Yes. You're using time on adverbs
4 and adjectives when you've already gone about three minutes
5 without getting to the questions that Judge Randolph raised
6 which are essential.

7 MS. KLEIN: Yes. I understand it, but this case --

8 JUDGE SENTELLE: Okay. Well, make it plain that you
9 understand it --

10 MS. KLEIN: I understand, but --

11 JUDGE SENTELLE: -- by finishing that up without any
12 adjectives or adverbs, and then getting to the Court's
13 question.

14 MS. KLEIN: Okay. But I'm just very concerned that
15 this case not be propelled by a myth.

16 JUDGE SENTELLE: Move along, Counsel.

17 MS. KLEIN: Yes. Yes, Your Honor. Because both the
18 money claims, and the assumption that accounting is
19 impossible, everything rests on this myth that has been
20 dispelled by the work that's actually been done.

21 Judge Randolph, your procedural question, here's what
22 happened, the impossibility ruling was the reason for the
23 money trial, explicitly. It was the district court because it
24 believed that Congress had required a multi-billion dollar
25 accounting project that at the current appropriation level

1 would take hundreds of years, the district court concluded
2 that would be irrationally expensive and take too long.

3 So, the district court said I will therefore devise an
4 alternative remedy, and that was the money trial, and because
5 the district court thought we can't analyze individual
6 accounts, it decided to focus on what it called aggregate
7 level through put, throws through put. And we have all of our
8 objections to that, but just procedurally, and then at the end
9 of that the Court issued a money award.

10 And the Plaintiffs came in and asked the district court
11 to, actually, what they asked for was a 54(b) certification.
12 And the district court said parties, I want briefs in three
13 days on whether I can do a 54(b) certification. We came in
14 and said no, there's not jurisdiction to do 54(b), and we said
15 if you're considering 12(d) 92(b) certification, please give
16 us time to go to the Solicitor General to get authorization to
17 formulate our own questions, and the district court declined
18 to do that.

19 But the order that it certified, it said I am issuing --
20 it issued a new order, declaratory judgment, the class is
21 entitled to \$455.6 million for the reasons stated in the
22 impossibility and restitution rulings. So, both of those
23 rulings -- that's just the reasoning, everything is here that
24 is, it's not even antecedent, it is the reason.

25 THE COURT: You can argue that it's a preliminary

1 question to the award of the, you know --

2 MS. KLEIN: And --

3 THE COURT: -- I --

4 MS. KLEIN: But also that Judge Robertson meant it
5 to be. He explicitly said the order I am certifying is this
6 \$455.6 million for the reasons that necessarily start with
7 impossibility.

8 THE COURT: But in his memorandum accompanying that
9 he didn't mention the, didn't even mention this impossibility
10 rule.

11 MS. KLEIN: Well --

12 THE COURT: He mentioned four questions, and not one
13 of the dealt with the previous rule.

14 MS. KLEIN: Yes. But again, I mean, we had not
15 briefed this because we needed Solicitor General authorization
16 and there was no time, there was just a matter of days. And
17 so, from our perspective this was essentially a sua sponte
18 certification. But we nonetheless, we didn't just do a cross-
19 appeal, we filed a timely 1292(b) petition in which we raised
20 all of these issues, and we explained that we didn't think
21 their appeal by itself would have met the standards for
22 1292(b), but since our appeal has the potential both to
23 eliminate the need for any distribution proceedings, which
24 would necessarily be very complex, but also to end the case,
25 that's why we said to the panel that, you know, was going to

1 hear the 1292(b) issue, that's why this satisfies the
2 requirements of 1292(b).

3 Now, going back to everything that started us off on
4 this --

5 THE COURT: Well, that's an open issue for this
6 panel because the ruling was without prejudice to our
7 decision.

8 MS. KLEIN: No, I appreciate that the panel is not
9 bound by any decisions made at the motion stage. But I just
10 wanted the Court to understand the sequence, and that the
11 whole reason we said this is appropriate to hear now is --
12 well, two reasons, to avoid wasting time on distribution
13 proceedings which could be very confusing to the class --

14 THE COURT: But let me, you know, fast forward
15 here --

16 MS. KLEIN: Yes.

17 THE COURT: -- a little bit. Okay. Suppose we
18 agreed with you that the district judge did not have
19 jurisdiction to issue the monetary award for several reasons,
20 not the least of which is that the Plaintiffs may have taken
21 it out --

22 MS. KLEIN: Yes.

23 THE COURT: -- of the case early. All right.
24 What's left then of the 1292(b) appeal?

25 MS. KLEIN: Well, this Court has, certainly has --

1 THE COURT: The order --

2 MS. KLEIN: -- a number of grounds to vacate --

3 THE COURT: We would necessarily have to reverse the
4 order on which he granted the 1292(b). Now, once we do that
5 what's left of this interlocutory appeal?

6 MS. KLEIN: Well, the Court could do that. I'm not
7 disagreeing. The Court has discretion to do a number of
8 things because the Court could vacate the money award on a
9 number of different grounds. It's not a steel company
10 problem, the Court doesn't have to start with either Tucker
11 (phonetic sp.) Act jurisdiction, or the fact that these --

12 THE COURT: It's not Article 3, it's --

13 MS. KLEIN: Exactly.

14 THE COURT: Right.

15 MS. KLEIN: The district court had jurisdiction to
16 hear the controversy, and this Court certainly has appellate
17 jurisdiction, and it can start with the antecedent issue. And
18 the reason that we care about the Court starting with the
19 antecedent issue is that every time we have an order of
20 relief, you know, more proceedings in this case, as a
21 practical matter it's diverting resources from other Indian
22 program. This is what I want to make sure the Court
23 understands, what Congress has said over and over again, and
24 we quote one example from 2007, this is the appropriations
25 committee, and I'm reading from 22 to 23 of our reply brief,

1 "Since the inception of the *Cobell* case the committee has
2 appropriated hundreds of millions of dollars for litigation
3 and accounting activities. The committee believes that these
4 funds would have been better used to fund greatly needed
5 healthcare, law enforcement, and education programs in Indian
6 country." So, the problem is that if the Court does what it
7 could do, the minimum of just say no authority for money
8 vacated is that we are concerned that we will continue to have
9 more orders and oversight that divert resources from other
10 important Indian programs.

11 THE COURT: Well, I don't know what the district
12 judge does if we do that because Judge Robertson has said that
13 the kind of historic accounting that's needed is impossible.

14 MS. KLEIN: Well, the district court -- I know,
15 well, obviously the Court knows, we believe that the district
16 court was mistaken in that, that Congress made very clear from
17 before the time it enacted the 1994 legislation.

18 THE COURT: Congress could solve this problem in a
19 minute. I mean, if they've got a problem with appropriating
20 money for historic accounting and all the rest of it all they
21 have to do is pass legislation, and then divide up the
22 proceeds. And Congress did that, in fact, I hadn't thought
23 about this, but in fact in the 1970s Congress did just that in
24 the Alaskan Native Claims settlement. They had all this
25 litigation going on, and they split the state up into 12

1 different regions, gave them a corporation, and then funded it
2 to the tune of \$900 million. So, they can do it.

3 MS. KLEIN: Congress, of course, can do all sorts of
4 things, but what Congress has said right below that same
5 passage I just read is correct, which is that the underlying
6 problem, the problem that needs money is fractionation, it's
7 buying back the fractionated lands. This case is not a money
8 case, and nothing that we have found has shown that these
9 Plaintiffs are owed money. So, if we take what X amount of
10 money and Congress says I'll do it, you know, it's not even
11 rough justice because we have no showing of any injury, but it
12 says I'm going to give it to these Plaintiffs, it's taking
13 from somewhere. And, you know, most immediately it's taking
14 away money that could be --

15 THE COURT: Judge Robertson's --

16 MS. KLEIN: -- used to fix the problem.

17 THE COURT: To simply, Judge Robertson's take on
18 this was that Congress would not appropriate \$450 million for
19 an accounting, historic accounting, but it will appropriate
20 \$450 million to satisfy a money judgment.

21 MS. KLEIN: Well, this was one of the many ways in
22 which the district court was overstepping its bounds.
23 Because, of course, just as the district court couldn't direct
24 Congress to fund its mega-accounting plan, neither could it
25 say as a remedy for a failure to find I'm just going to order

1 a cash payment. And of course --

2 THE COURT: I wish they'd appropriate money to fix
3 the cooling system in this --

4 MS. KLEIN: I'm sorry, the noise, I can't hear any
5 more. I'll try to speak louder, but I also can't hear.

6 THE COURT: Shayna (phonetic sp.)?

7 MS. KLEIN: But I just want to, you know, again, I
8 want to make clear back from what I was saying at the
9 beginning, Congress could easily believe quite reasonably that
10 the purposes of this historical accounting project have been
11 accomplished, because what we now know, and there was no way
12 to know this without spending hundreds of millions of dollars,
13 but we now know that the records were kept just as a private
14 fiduciary would have been required to keep them, on an
15 individual level, and they check out.

16 So, from Congress' perspective it doesn't need to pass
17 legislation, it could just stop financing this work, which as
18 Congress has said is coming at the expense of other Indian
19 programs.

20 Unless the Court has further questions I'll rest on our
21 brief.

22 JUDGE SENTELLE: Forgetting the Osage question for a
23 moment --

24 MS. KLEIN: I'm sorry?

25 JUDGE SENTELLE: -- what exactly would you like us

1 to do today? We're not going to do it today, but what would
2 you like us to do as a result of the argument we've heard
3 today?

4 MS. KLEIN: We'd like the Court to reaffirm for the
5 third time that Interior was not ordered to do a multi-billion
6 dollar accounting. We think this follows from what the Court
7 has already said. And that should be it, because to the
8 extent -- as I said, Congress could think it's goals have been
9 accomplished, and decisions about whether we're going to spend
10 more money to learn more about the very old transactions
11 really have to be made by Congress and the Secretary --

12 JUDGE SENTELLE: And so we answer that --

13 MS. KLEIN: -- with an eye to the rest of the
14 programs.

15 JUDGE SENTELLE: -- we answered that specific
16 question in the fashion you want?

17 MS. KLEIN: I'm sorry, Your Honor. I can't --

18 JUDGE SENTELLE: I'm sorry. I'm sure if you can't
19 hear me you can't hear anybody. But you answer that
20 specific -- we answer the specific question you just stated
21 and the way you state, and does that obviate all the other
22 questions that are proffered here before us to just proceed?

23 MS. KLEIN: If I heard the question correctly, you
24 know, we're asking, we've asked explicitly that there be no
25 further retention of district court jurisdiction, that there's

1 no relief that could be ordered under *Southern Utah*, and that
2 the Plaintiffs in any event abandoned the effort to secure
3 individual accounting six years ago. So, that's what we're
4 asking.

5 THE COURT: They abandoned the effort to -- I didn't
6 hear all that.

7 MS. KLEIN: To secure the historical accounting
8 project. After they got the Rosenbaum (phonetic sp.) report,
9 which made clear that the named Plaintiffs had no claim for
10 money, they switched gears and they started saying it's all
11 impossible. They argued it on a different ground, they said
12 there are no records, that's not true, and that was not the
13 basis of the district court's ruling. But --

14 JUDGE SENTELLE: We want to thank the Deputy Clerk
15 for getting that noise shut off.

16 MS. KLEIN: Thank you.

17 JUDGE SENTELLE: Thank you very much.

18 MS. KLEIN: But since 2003 absolutely consistently
19 what they have argued is that it is impossible one way or
20 another to do what Congress wanted in terms of retrospective
21 analysis.

22 THE COURT: The named Plaintiffs have -- repeat
23 that. The named Plaintiffs have, their accounts have been
24 thoroughly audited, and they are due nothing.

25 MS. KLEIN: Exactly. This is, and we have put the

1 citations in our brief, this was the Rosenbaum study, this was
2 a pilot, and it was very early on, it was a special \$20
3 million appropriation, and that's cited in volume five of our
4 appendix in that letter, and it was to trace back not only
5 through the living named Plaintiffs' accounts, but they even
6 looked back through predecessor accounts, the earliest
7 transactions were in 1914, and they gathered 160,000 records,
8 historical records from around the country relating to the
9 named Plaintiffs and their predecessors, and did not only a
10 reconciliation, but a transaction by transaction
11 reconciliation, and the findings are in the -- this is a
12 summary Rosenbaum report, the original long version is under
13 seal. I could supply it, but the summary is adequate for
14 these purposes. And what was found was back in 1980 there was
15 one named Plaintiff who should have gotten \$60.94 that was
16 posted to an account with a similar number. So that was one
17 actually missing transaction. And then there were a larger
18 number of what are called variances where the amount posted to
19 the account was off a bit from what should have come in, but
20 it was not off systematically, and if you net it all out the
21 named Plaintiffs were overpaid \$3,000.

22 THE COURT: All right. This just comes to my mind,
23 it's not really relevant to what you just said, but you say in
24 your brief that because of the Court's order you have 250,000
25 accounts ready that have already, that are ready to go and be

1 mailed out to the individual beneficiaries, but you can't do
2 that because was it Judge Lamberth issued an order preventing
3 the Government from communicating directly with any of the
4 class members, is that what it was?

5 MS. KLEIN: Yes, Your Honor. And after the 2006
6 decision in which this Court confirmed that there's no
7 authority under Rule 23(d) to issue that type of substantive
8 relief, then we went to Judge Robertson and said vacate the
9 class communications bar, and he didn't rule on that one way
10 or another, he said I'm deferring for the administrative
11 convenience of the court that issue until the conclusion of
12 the monetary remedies phase. So, we are still under an
13 injunction that prevents us from communicating with class
14 members.

15 JUDGE SENTELLE: Unless my colleagues have further
16 questions.

17 THE COURT: Well, I have one question. What do you
18 propose? Suppose we affirm the \$400-some million, what's your
19 proposal for distributing it?

20 MS. KLEIN: Your Honor, there is no rational
21 distribution mechanism. I mean, obviously, we don't think
22 there's authority for the money, and we don't think it's
23 consistent with the class action requirements. But what we
24 know, from what we know about all the accounts and how they
25 were kept is that there is no rational distribution mechanism.

1 So --

2 THE COURT: Unless you do an historical accounting.

3 MS. KLEIN: Well, exactly. But still, there's been
4 no proof of injury, so this money we talk about how the
5 district court derived it, but it's not an estimate of any
6 historical injury.

7 THE COURT: Okay.

8 MS. KLEIN: Thank you.

9 JUDGE SENTELLE: Thank you, Counsel. I think we
10 have an Intervenor somewhere. There's the Intervenor. Okay.

11 ORAL ARGUMENT OF MERRILL C. GODFREY, ESQ.

12 ON BEHALF OF THE INTERVENOR

13 MR. GODFREY: Good morning, and may it please the
14 Court, Merrill Godfrey for the Osage Nation. The Osage Nation
15 is here only to protect its tribal trust account. The
16 Plaintiffs here have argued that it is a tribal account in
17 name only, and I want to explain briefly why that's incorrect.
18 Before I do --

19 JUDGE SENTELLE: What is it we're likely to do today
20 that's going to effect the rights of the Osage Nation?

21 MR. GODFREY: Well, if --

22 JUDGE SENTELLE: There's been a dispute that I think
23 is still open as to whether you're properly before us. And
24 you might first want to convince us that you are.

25 MR. GODFREY: Thank you. Let me address that. The

1 claim that the Plaintiffs bring here is for disgorgement of
2 funds from accounts that include the Osage Tribal Trust
3 Account. The Osage Tribe has a case pending before Judge
4 Robertson in the district court for equitable relief with
5 respect to the Osage Tribal Trust Account. So, that is our
6 claim, and they're trying to take our claim away from us, and
7 that's why we're here, and that's why we have --

8 JUDGE SENTELLE: Okay.

9 MR. GODFREY: -- standing. And I would note before
10 I go into the statutory argument that it was only last year
11 that the Plaintiffs first made this argument. We're a
12 newcomer to this litigation because when it was a question of
13 whether the accounting could be done, nobody was looking at
14 the Osage Tribal Trust Account, it was only when the question
15 of equitable monetary relief came into the picture that the
16 Plaintiffs first argued that this Osage Tribal Trust Account
17 through which billions of dollars of oil and gas royalties had
18 passed was actually only a tribal account in name, and that's
19 not so under any of the statutes here.

20 The 1906 Act, the Osage Allotment Act, allotted the
21 surface estate of Osage County, which is the Osage
22 Reservation, but it preserved the mineral estate to the tribe
23 as an unallotted asset. In Sections 2 and 3 of the Osage Act
24 provide that royalties on the mineral estate are to be, "paid
25 to the Osage Tribe." And Section 4 requires that all monies

1 owed to the Osage Tribe, or paid to the Osage Tribe be held in
2 trust for the Osage Tribe.

3 THE COURT: That's pretty typical in that period,
4 that sort of arrangement. It happened on the -- it went to an
5 Ouray (phonetic sp.) reservation in Utah, as well, and I think
6 the (indiscernible 12:05:21) and the Navajo reservations under
7 the same individual -- we have the checkerboard reservation
8 down there, but the individuals got their allotment, but the
9 mineral interests remained with the tribe for distribution as
10 the tribe saw fit, I think.

11 MR. GODFREY: Okay. That may be, I'm not familiar
12 with the other tribes. The purpose certainly is not an
13 unusual one, which is a principle purpose of having a division
14 of ownership in the mineral income between tribal funds and
15 individual funds, and here that division is the quarterly
16 distribution date, is that the funds that sit in the tribal
17 account before distribution are not subject to individual
18 debts, they can't be lost in bankruptcy as the *Tarean*
19 (phonetic sp.) that we cite held, and they may be used for
20 tribal purposes, such the 1906 Act itself provided, and as
21 subsequent acts amending it provided, such as for example, in
22 1921 the royalties, "received by the Osage Tribe were to be
23 used to pay gross production taxes on the tribe's minerals."
24 Now, that's a tribal liability, the gross production tax owed
25 to Oklahoma, and by federal law that's paid out of the tribal

1 trust account. So, that's one example of how use of the
2 account for tribal purposes shows that it's a tribal account.
3 Another one is in 1938 the amendment provides that funds to
4 the credit of the Osage Tribe are used to pay for official
5 travel for the Osage government officials.

6 So, when you get in the statute to the phrase that the
7 Plaintiffs like, which is that the funds are placed to the
8 credit of individual members of the tribe, that's after the
9 statute has already established that there needs to be a
10 tribal trust fund to receive the monies. The Section 4 clause
11 that occurs later in that section, when you're talking about
12 the placing the funds to the credit of individuals that's the
13 quarterly distribution, it says that it's to be done as other
14 monies are, as other tribal monies are distributed to
15 individuals.

16 THE COURT: What argument of the Plaintiffs would
17 enable the class to get its hands on the tribal account that
18 you claim exists? What is the argument that they're making?

19 MR. GODFREY: My understanding of their argument is
20 that this is de facto, and allotted, that this tribal trust
21 account is a de facto allotment, and that it ought to be
22 treated as an aggregate of individual IIM accounts.

23 JUDGE SENTELLE: And as I've asked others, what you
24 want us to do today, or what you want us to do is simply
25 uphold the district court's ruling on this question as already

1 made, right?

2 MR. GODFREY: We want this Court to do as the
3 district court did in respecting the division of ownership
4 between the tribal trust account and monies that have been
5 distributed out of that account and have become individual
6 funds.

7 JUDGE SENTELLE: I should ask the other -- I will,
8 they get up for rebuttal. Is that even really before us? On
9 this certified appeal is the Osage question reopened, or is it
10 now the current status of it the district court has ruled in
11 your favor, and nobody brought that one up to us.

12 MR. GODFREY: The Plaintiffs in their third
13 question, the third question, and the district court also
14 mentioned this, raised the question as to whether accounts
15 that are tribal in name only but that actually constitute
16 individual monies should have been included in calculating a
17 monetary award.

18 JUDGE SENTELLE: Okay.

19 MR. GODFREY: And --

20 JUDGE SENTELLE: I'll reopen that with Counsel when
21 he gets back up. I'll probably give him three minutes instead
22 of two since I'll be asking him about that.

23 MR. GODFREY: Okay. Thank you, Your Honor.

24 JUDGE SENTELLE: Thank you.

25 MR. GODFREY: So, we agree with the district court

1 to the extent that it respected the line in the Osage Act and
2 amendments that provides for distribution on a quarterly
3 basis, that's the line between tribal funds and individual
4 funds.

5 Now, if I could address briefly the cases that the
6 Plaintiffs cite, they've taken phrases that they like out of
7 these cases, but each of the cases that they've relied on has
8 the same flaw, which is that none of them involve the claim
9 that somebody should be able to dip into undistributed mineral
10 income in the Osage Tribal Trust Account. *United States v.*
11 *Mason; West v. Oklahoma Tax Commission*; the other cases that
12 they cite involve questions such as in *Mason* and *West* does the
13 restricted property of an individual head right holder that
14 has already been distributed, the property that has already
15 been distributed out of the account, out of the tribal account
16 and into an individual Indian money account, is that money
17 subject to taxes, or how should it be treated at the estate
18 tax stage, for example?

19 None of the cases include a claim to funds in the tribal
20 trust account, and in fact the only case that does is one that
21 we cite, which is *Tarean*. And in that case the bankruptcy
22 trustee, the question was whether the bankruptcy trustee
23 should include the value of the head right, and the head right
24 is the right to receive the future distributions of income.
25 And there the court examined the question and decided that

1 Congress didn't want that because it wanted to protect head
2 right holders against that kind of bankruptcy relief, and
3 that's an important reason why keeping the tribe as a
4 beneficiary of the tribal trust account protects head right
5 holders.

6 And a couple of other reasons are that the Osage Nation
7 can protect the trust as a collective entity, and as a
8 government for benefit of the people who are entitled to
9 receive the future distributions.

10 If the Plaintiffs had limited their claims here to only
11 the distributed head right funds that had come out of the
12 account we wouldn't be here today. So, if there are no other
13 questions, that all I have.

14 JUDGE SENTELLE: Seeing none, thank you, Counsel.
15 We'll hear from the Appellants. We will give you back three
16 minutes for rebuttal, Counsel.

17 ORAL ARGUMENT OF DENNIS M. GINGOLD, ESQ.

18 ON BEHALF OF THE APPELLANTS/APPELLEES

19 MR. GINGOLD: Thank you, Your Honor. I'm going to
20 be as brief as I can, and I appreciate the rebuttal time.

21 First of all, a reading of Judge Robertson's decision is
22 much different from Counsel for the Osage Tribe. At star
23 eight of the decision he says the proceeds of the mineral
24 estate were to be held in trust for, and distributed per
25 capita to individual Osage Indians. He did not say the tribe,

1 Your Honor. The reason he excluded funds that he held were
2 Individual Indian Trust Funds from the recovery was because he
3 said they were not within the IIM trust system. The trust
4 system that the district court itself said was a construct for
5 purposes of this litigation. Of course, there is no system,
6 Your Honor. Witnesses testified to that.

7 With that as the reason, he explicitly held what I just
8 read. And Your Honor, the two Supreme Court cases confirm
9 that, so we're relying on an explicit statute, the 1906
10 statute which explicitly states the funds are to be placed for
11 the benefit of individual Osage Indians, not the tribe. That
12 is not our language, that's Congress. They haven't changed
13 that. In addition, the Supreme Court twice in *Mason and West*
14 has affirmed that.

15 With regard to the issue of what was regarded as the
16 Rosenbaum Report, the Rosenbaum Report was not an audit, Your
17 Honors, it was nothing but as was testified by Rosenbaum a
18 member of the accounting firm, the Government collected
19 information, provided that information to the accounting firm,
20 and they tried to verify that the information they received
21 was consistent. They did nothing more than that. They didn't
22 gather a single document, they didn't verify a single
23 transaction. One of the most important aspects of *Cobell VI*
24 is that transactions have to be documented.

25 What was even referenced in *Cobell XVII*, and this is very

1 important because the issue of statistical sampling has become
2 something that is beyond its importance in many respects,
3 there's nothing in *Cobell XVII* that is inconsistent with what
4 this Court ruled in *Cobell VI*. What Judge Williams was
5 talking about at 1077 in *Cobell XVII* was the use of
6 statistical analysis to verify transactions. So, not every
7 transaction had to be individually verified. With regard to
8 Rosenbaum no transactions were verified.

9 THE COURT: How many of the 550 beneficiaries have
10 you identified as having been short-changed by the Government
11 in the last 100 years?

12 MR. GINGOLD: You mean 500,000?

13 THE COURT: Yes.

14 MR. GINGOLD: Okay. Your Honor, we have said, and
15 we've provided evidence in this proceeding from government
16 documents from 1905 to the present that throughout time
17 millions of dollars, these are government records, have not
18 been disbursed to our clients. That's part of the --

19 JUDGE SENTELLE: That's not the same question,
20 however.

21 MR. GINGOLD: We haven't identified a single
22 individual. We've identified the aggregate dollars because
23 that's how it's reported by the Government. We don't have the
24 individual records. We rely on the records, the Government
25 itself introduced these records as part of admitted analysis

1 report. We reviewed every one of the records from 1905,
2 record after record after record talks about the disbursement
3 problems, the withholding, the fact that funds were
4 intentionally withheld because our clients as a matter of law
5 were deemed incompetent until 1951, therefore the Government
6 was not disbursing the money, whether it was a non-Osage
7 individual, or the Osage. As a matter of fact, with the Osage
8 it was limited to \$1,000 a quarter because of their competency
9 status.

10 Your Honor, that is the problem our clients have faced,
11 have been facing. With everything that's been said we're
12 still dealing with statutory construction.

13 JUDGE SENTELLE: Unless my colleagues have further
14 or follow up question we're over your three-minute rebuttal
15 now. And seeing --

16 MR. GINGOLD: Thank you, Your Honor.

17 JUDGE SENTELLE: -- no further questions the case
18 will be submitted.

19 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

May 15, 2009

DEPOSITION SERVICES, INC.