[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 08-5500 & 08-5506

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

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellants/
Cross-Appellees,
v.

KEN SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellees/
Cross-Appellants.

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

BRIEF FOR THE APPELLEES/CROSS-APPELLANTS

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici:

The named plaintiffs-appellants/cross-appellees are Elouise Pepion Cobell; Penny Cleghorn; Thomas Maulson; and James Louis Larose. Earl Old Person is no longer a class representative but remains a member of the class. In 1997, the district court certified a class consisting of "present and former beneficiaries of Individual Indian Money accounts," excluding those who had filed their own actions prior to the filing of the complaint in this case. Government Appendix (GA) 29-30.

The defendants-appellants are Ken Salazar, as Secretary of the Interior; the Acting Assistant Secretary of Interior–Indian Affairs; and Timothy Geithner, as Secretary of Treasury.

B. Rulings Under Review:

The order certified for interlocutory review was issued on September 4, 2008 by the Honorable James Robertson, United States District Court for the District of Columbia, in Civ. No. 96-1285. In that order, the district court declared that the class is entitled to $455.6 million on the basis of opinions issued on January 30, 2008, and August 7, 2008, and published at 532 F. Supp. 2d 37, 39 (D.D.C. 2008), and 569 F. Supp. 2d 223 (D.D.C. 2008), respectively.

C. Related Cases:

1. This case has been before this Court on nine previous occasions:

Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006)

Cobell v. Kempthorne, 455 F.3d 301 (D.C. Cir. 2006)

In re Kempthorne, 449 F.3d 1265 (D.C. Cir. 2006)

Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005)

Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004)

Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004)

In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004)

Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003)

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001)

2. Tribal trust accounts are at issue in the following cases pending before Judge Robertson:

Ak-Chin Indian Community v. Salazar, No. 06-cv-02245

Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Salazar, No. 02-cv-00035

Cheyenne River Sioux Tribe v. Salazar, No. 06-cv-01897

Chippewa Cree Tribe of the Rocky Boy's Reservation v. Salazar, No. 02-cv-00276

Coeur d'Alene Tribe v. Salazar, No. 06-cv-02242

Colorado River Indian Tribes v. Salazar, No. 06-cv-02212

Confederated Tribes of the Colville Reservation v. Salazar, No. 05-cv-02471

Confederated Tribes of the Goshute Reservation v. Salazar, No. 06-cv-01902

Crow Creek Sioux Tribe v. Salazar, No. 04-cv-00900

Eastern Shawnee Tribe of Oklahoma v. Salazar,
No. 06-cv-02162

Gila River Indian Community v. Salazar,
No. 06-cv-02249

Haudenosaunee and Onondaga Nation v. Salazar,
No. 06-cv-02254

Iowa Tribe of Kansas and Nebraska v. Salazar,
No. 06-cv-01899-JR

Lower Brule Sioux Tribe v. Salazar, No. 05-cv-02495

Muscogee (Creek) Nation of Oklahoma v. Salazar,
No. 06-cv-02161-JR

Nez Perce Tribe et al. v. Salazar, No. 06-cv-02239

Northern Cheyenne Tribe of Indians v. Salazar,
No. 06-cv-02250

Northwestern Band of Shoshone Indians v. Salazar,
No. 06-cv-02163-JR

Oglala Sioux Tribe v. Salazar, No. 04-cv-01126

Omaha Tribe of Nebraska v. Salazar, No. 04-cv-00901

Osage Tribe of Indians of Oklahoma v. United States,
No. 04-cv-00283

Passamaquoddy Tribe of Maine v. Salazar, No. 06-cv-02240

Pechanga Band of Luiseno Mission Indians v. Salazar,
No. 06-cv-02206

Prairie Band of Potawatomi Nation v. Salazar,
No. 05-cv-02496

Red Cliff Band of Lake Superior Indians v. Salazar,
No. 06-cv-02164

Rosebud Sioux Tribe v. Salazar, No. 05-cv-02492

Salt River Pima-Maricopa Indian Community v. Salazar,
No. 06-cv-02241

Shoshone-Bannock Tribes of the Fort Hall Reservation v.
Salazar, No. 02-cv-00254

Sokaogon Chippewa Community v. Salazar, No. 06-cv-02247

Standing Rock Sioux Tribe v. Salazar, No. 02-cv-00040

Stillaguamish Tribe of Indians v. Salazar, No. 06-cv-01898

Te-Moak Tribe of Western Shoshone Indians v. Salazar, No. 05-cv-02500

Tohono O'Odham Nation v. Salazar, No. 06-cv-02236

United Keetoowah Band of Cherokee Indians in Oklahoma v. United States, No. 08-cv-01087

Winnebago Tribe of Nebraska v. Salazar, No. 05-cv-02493

Wyandot Nation of Kansas v. Salazar, No. 05-cv-02491

Yankton Sioux Tribe v. Salazar, No. 03-cv-01603

3. Tribal trust accounts are also at issue in 51 cases pending before the Court of Federal Claims; 5 cases pending before the Court of Appeals for the Federal Circuit; 5 cases pending before the District Court for the Western District of Oklahoma; and 2 cases pending in the District Court for the Eastern District of Oklahoma.

_____
ALISA B. KLEIN
Attorney

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases: **Page**

* Authorities on which we chiefly rely are marked with asterisks.

Statutes:

Regulations:

Rules:

Legislative Materials:

Other Authorities:

GLOSSARY

1994 Act	American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239
AIRR	American Indian Records Repository
APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs
CFC	Court of Federal Claims
DCV	Data Completeness Validation
GA	Government Appendix
HSA	Historical Statement of Account
IIM Accounts	Individual Indian Money Accounts
OHTA	Office of Historical Trust Accounting
TAAMS	Trust Asset and Accounting Management System
TFAS	Trust Fund Accounting System

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1361. This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in this brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that an accounting on a scale that would cost billions of dollars is required, and declaring the accounting "impossible" due to inadequate appropriations.

2. Whether the Department of the Interior should be allowed to implement its accounting plan free of continuing district court jurisdiction.

3. Whether the award of $455.6 million in "restitution" should be vacated for lack of jurisdiction, authority, and record basis.

4. Whether the district court correctly rejected plaintiffs' demand for $47 billion in "restitution" and "interest."

STATEMENT OF THE CASE

The Department of the Interior administers accounts of funds held in trust for individual Indians. In 1994, Congress enacted legislation requiring Interior to account for the balances of funds in these accounts which, at the time, totaled approximately $390 million. H.R. Rep. No. 103-778, at 9 (1994).

Plaintiffs in this class action are present and former beneficiaries of individual money accounts held for the benefit of individual Indians. GA29-30. They filed this lawsuit in 1996, seeking to compel an historical accounting of the accounts. In 2001, this Court held that an historical accounting had been unreasonably delayed within the meaning of the Administrative Procedure Act (APA). 240 F.3d 1081, 1105 (D.C. Cir. 2001). In 2004 and 2005, this Court vacated injunctions that would have required accounting work on a massive scale, explaining that the "general language" of the American Indian Trust Fund Management Reform Act (1994 Act) "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." 428 F.3d 1070, 1075 (D.C. Cir. 2005); 392 F.3d 461 (D.C. Cir. 2004).

The interlocutory appeals now before this Court arise out of two opinions issued in 2008. In January 2008, the district court rejected Interior's historical accounting plan, which was estimated to cost $144 million to complete, and concluded that the 1994 Act requires an accounting that would cost billions of dollars. 532 F. Supp. 2d 37, 81, 82 (D.D.C. 2008). In reaching that conclusion, the court accepted as correct many parameters of the injunctions vacated by this Court. Id. at 93-102. Although the court believed that Congress would be "nuts" to appropriate such amounts, id. at 86, it held that Congress, "[i]n its refusal to appropriate enough money to pay for" a multi-billion dollar accounting, had rendered "a real accounting impossible." Id. at

102. Because the accounting was "impossible," the court concluded that it should devise "an appropriate remedy." Id. at 103.

In August 2008, the district court awarded $455.6 million in "restitution" to the class, based on a statistically possible but unproven difference between aggregate receipts and disbursements since the first accounts were created in 1887. 569 F. Supp. 2d 223, 236-239 (D.D.C. 2008). The court recognized that there was "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts," id. at 238, and that "an accounting claim raised 121 years into the trust would ordinarily be prejudicially late," id. at 250, but believed its approach warranted by the 1994 Act, ibid.

The court did not decide how the award would be distributed among class members and stated that final judgment would await another proceeding to address allocation issues. Id. at 253. On September 4, 2008, at plaintiffs' request, the court certified for interlocutory appeal an order declaring that the class is entitled to $455.6 million on the basis of the January and August 2008 opinions. 2008 WL 4151330. Plaintiffs and the government filed timely petitions for leave to take interlocutory appeals, which this Court granted.

STATEMENT OF FACTS

I. BACKGROUND

A. The IIM Accounts

The Department of the Interior administers accounts of funds held in trust for Indian tribes and individual Indians. Only the individual accounts – known as Individual Indian Money or "IIM" accounts – are at issue in this litigation. Tribal trust accounts are at issue in 100 cases pending in various federal courts. See pp. ii-iv, supra.

1. Sources of funds

As of 1994, when the legislation that prompted this lawsuit was enacted, there were approximately 337,000 open IIM accounts with balances totaling about $390 million. H.R. Rep. No. 103-778, at 9 (1994). The funds in the accounts derive from diverse sources.

Judgment and per capita accounts contain funds derived from tribal distributions of litigation judgments or settlements (the judgment accounts) and other tribal revenues (the per capita accounts). GA2282. Ordinarily, judgment and per capita payments are made directly to tribal members; however, for minors or other individuals ineligible to receive a direct payment (such as legally incompetent adults), the money is deposited in an IIM account. Ibid. At age 18, minors may withdraw their funds and close their accounts. 25 C.F.R. § 115.429.

Land-based IIM accounts contain funds derived from revenue-producing activity on lands held in trust for individual Indians.

GA2284. Sources of revenue include leases for activities such as farming, mining, grazing, and oil and gas exploration; timber sales; and rights-of-way for roads and utilities. Ibid.

The status of these lands dates from the late nineteenth century, when, often without tribal consent, Congress authorized the division of communal tribal land. Babbitt v. Youpee, 519 U.S. 234, 237 (1997). Under the Indian General Allotment Act of 1887 (Dawes Act), some tribal land was parceled out to individual tribal members and held in trust by the United States; lands not allotted to individual Indians were opened to non-Indians for settlement. Ibid.

The Dawes Act produced a dramatic decline in the amount of land in Indian hands. Ibid.[1] And as individual Indian allottees passed their interests on to multiple heirs, ownership of allotments also became increasingly "fractionated." Ibid. Fractionation proliferated with each generation as heirs took undivided interests in allotments. Id. at 238. Congress ended further allotment in 1934 but the legacy remained, as interests in lands already allotted continued to splinter. Ibid.

As of 1990, some eleven million acres were held in trust for the heirs of allottees. 532 F. Supp. 2d at 41. Many allotments are owned in common by hundreds or even thousands of beneficiaries, each with undivided interests in the whole parcel. Ibid.

---

[1] Land did not "vanish," as plaintiffs assert, Pl. Br. 2; it was "sold, transferred out of Indian ownership." GA2270.

Since 1887, landowners could apply to Interior to remove land from trust. 25 U.S.C. § 349 (Dawes Act); 25 U.S.C. § 483 (Act of May 14, 1948); 25 C.F.R. §§ 152.4, 152.7. The trust relationship has advantages for the landowner, however, because trust lands are not subject to state or local property taxes or zoning ordinances, 25 U.S.C. § 465, and income from trust lands is generally not subject to federal income tax, Squire v. Capoeman, 351 U.S. 1 (1956). As a recent GAO report explained, many Indians believe that having their land in trust is fundamental to safeguarding it against future loss and ensuring their sovereignty. GAO 06-781 (2006), 2006 WL 2150482. By the end of fiscal year 2005, about 1,000 applications were pending to place individual or tribal land into trust. Ibid.

2. Account activity

Activity in IIM accounts (receipts and disbursements) varies widely, depending on many factors including the source of the funds and the preferences of the accountholders. Many accounts have "extremely tiny balances," GA2852 (Langbein), receiving, for example, "a dollar and a quarter ... every few months." GA2113. Some are "very substantial accounts" whose funds derive from lands that are "much less fractionated and much more intact." Ibid. Moreover, landowners may choose "direct pay" arrangements with lessors and other third parties so that revenues from trust lands are paid directly to the landowner, rather than paid to Interior for deposit in an IIM account. 25 C.F.R. §§ 162.226, 162.604.

Disbursements likewise vary. Adults are generally free to withdraw funds from their IIM accounts. 25 C.F.R. § 115.101. Interior normally disburses funds automatically whenever the balance reaches $15 (or $5 for oil and gas revenue). GA268 (Winter); GA189 (Herman). However, some beneficiaries request that money be held above the regular $15 threshold and disbursed only upon the beneficiary's request. GA268 (Winter). A balance also might be held for other reasons, such as in the case of a minor or if the whereabouts of the accountholder are unknown. GA268 (Winter); 25 C.F.R. §§ 115.401 et seq.

B. The 1994 Act

This litigation arises out the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001 et seq.), which was enacted in 1994. In the "Misplaced Trust" report that preceded the Act, Congress was highly critical of Interior's management of the trust fund system. H.R. Rep. No. 102-499 (1992). However, Congress recognized the formidable obstacles to trust fund management, noting that Interior was "spending a great deal of taxpayer money and other resources administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances less than $50." Id. at 28 (footnote omitted).

The 1994 Act focused on prospective reform of the trust fund management system, and many of these reforms have since been

implemented. For example, the Act requires Interior to provide current accountholders with quarterly statements of the activity in their accounts. 25 U.S.C. § 4011(b). To that end, Interior overhauled its trust fund accounting system and adopted a system (TFAS) used by seven of the ten largest private commercial trust departments in the United States. 532 F. Supp. 2d at 44; GA2352. This upgrade has allowed Interior to issue quarterly statements for IIM accounts since 2000. 532 F. Supp. 2d at 44; GA266-267 (Winter), GA2346. Each year, Interior sends over 750,000 quarterly statements to IIM beneficiaries. GA2534.

The provision of the 1994 Act at issue here states:

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

25 U.S.C. § 4011(a). As construed by this Court, the duty to account for the current balance in an account (the balance of funds which "are" deposited or invested pursuant to the 1938 Act) entails a retrospective inquiry into the historical activity in the account. 240 F.3d at 1102. As this Court also held, the text of this statutory provision "offers little help in defining the accounting's scope." 428 F.3d at 1074.

Although Congress did not address any historical accounting project in the 1994 Act, it furnished guidance as to the appropriate cost of any such project in the "Misplaced Trust" report that preceded the Act. That report noted estimates that

it might cost "as much as $281 million to $390 million to audit the IIM accounts," and declared that, "[o]bviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." H.R. Rep. No. 102-499, at 26 (footnote omitted).

II. PRIOR PROCEEDINGS

A. The Unreasonable Delay Ruling And The Accounting Injunctions

Plaintiffs are a class of present and former beneficiaries of IIM accounts. GA29-30. They filed this lawsuit in 1996, seeking to compel an accounting of the money in the IIM accounts.

In 1998, the government moved to dismiss for lack of jurisdiction, urging that plaintiffs were seeking monetary relief not available under the APA. 30 F. Supp. 2d 24, 38-39 (D.D.C. 1998). The district court denied the motion on the basis of class counsel's representation that plaintiffs "only seek an accounting, not a cash infusion," id. at 39-40, and struck allegations that could be read to seek a cash infusion to restore money that might be missing, id. at 40 n.18. In 1999, the court declared that the historical accounting had been unreasonably delayed. 91 F. Supp. 2d 1 (D.D.C. 1999).

This case has been before this Court on nine previous occasions. 455 F.3d 317, 318-20, 330-31 (D.C. Cir. 2006). In 2001, this Court largely affirmed the 1999 declaratory judgment, holding that an historical accounting of the IIM accounts had

been "unreasonably delayed" within the meaning of the APA. 240 F.3d 1081, 1108 (D.C. Cir. 2001).

In 2003, the district court issued an injunction requiring Interior to undertake historical accounting activities on a massive scale, at an estimated cost of $6-12 billion. 392 F.3d 461, 466 (D.C. Cir. 2004). Congress responded with Pub. L. No. 108-108, which gave Interior temporary relief from any duty to engage in historical accounting for IIM accounts. Ibid. The conference committee "'reject[ed] the notion that in passing the" 1994 Act "Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court,'" and explained that "'[s]uch an expansive and expensive undertaking would certainly have been judged to be a poor use of Federal and trust resources.'" Ibid. "Individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" Ibid.

This Court vacated the accounting injunction on the basis of Pub. L. No. 108-108. Id. at 468. When that legislation expired, the district court reissued the injunction. This Court again vacated the injunction, explaining that the language of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." 428 F.3d 1070, 1075 (D.C. Cir. 2005). "Congress was, after all, mandating an activity to be funded

entirely at the taxpayers' expense." Ibid. This Court determined that "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." Id. at 1076. "This being so, the district court owed substantial deference to Interior's plan." Ibid. "The choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Ibid.

In 2006, this Court ordered that the case be assigned to a different district court judge. 455 F.3d 317, 319 (D.C. Cir. 2006). The case was assigned to Judge Robertson. GA32.

B. The Impossibility Ruling

In October 2007, the district court held a ten-day trial to evaluate Interior's progress towards completing its historical accounting for IIM accounts, including Interior's 2007 historical accounting plan. 532 F. Supp. 2d at 38-39. In January 2008, the court rejected Interior's plan, interpreting the 1994 Act to require a multi-billion dollar accounting. In defining the scope of the accounting, the court treated the reasoning of the vacated injunction opinions as "presumptively correct," id. at 94 n.16, and reinstated many parameters of the vacated injunctions, id. at 93-102.

The court recognized, however, that its "expanded historical accounting" would cost billions, id. at 81, and that Congress would not appropriate such funds, id. at 102. Nonetheless, the

court held that its expanded accounting was required by the 1994 Act. Ibid. Because Congress would not fund what the court called a "real accounting," the court held that performance of the required accounting was "impossible." Ibid. It further held that because the required accounting was "impossible," the court should devise "an appropriate remedy." Id. at 103.

C. The Restitution Ruling

In June 2008, the district court conducted a ten-day trial on plaintiffs' claim that monies had been unlawfully withheld from the IIM accounts. In August 2008, the court awarded $455.6 million in "restitution" to the class as a whole. 569 F. Supp. 2d 223 (D.D.C. 2008).

That award did not rest on proof that any funds were unlawfully withheld from plaintiffs, and the court expressly found that there was "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts." Id. at 238. Instead, the award reflects a statistically possible but unproven difference between aggregate receipts and disbursements over a 120-year period. Id. at 225-227, 236-239. The court believed that its "impossibility" ruling allowed it to "shift[] to the government" the burden of proving that "aggregate" IIM receipts were properly disbursed, id. at 236, and to "credit[] all the uncertainty to the plaintiffs," id. at 238. In the court's view, its "impossibility finding" raised "an evidentiary presumption in favor of the beneficiaries and against the trustee." Id. at 243.

The dollar amount of the award was based on a statistical model presented by the government's expert. That model did not establish any understatements in the IIM accounts; rather, it addressed uncertainty associated with missing data, and allowed the government to state with varying degrees of confidence a range of theoretically possible (but unproven) aggregate understatements or overstatements. Id. at 236-238. Using the 99% confidence interval demanded by the district court, the range encompassed the possibility of a cumulative understatement of up to $455.6 million and a cumulative overstatement of up to $200 million. Id. at 238; GA2919. As the court acknowledged, this range was "wide enough that it encompasse[d] a zero difference between the calculated and stated balance of the trust, meaning that the current, stated balance could very well be exactly correct." 569 F. Supp. 2d at 238. "Crediting all the uncertainty to the plaintiffs," the court adopted the "very large value that represents the high end of the 99 percent confidence interval" – $455.6 million – as its award. Id. at 238-239.

SUMMARY OF ARGUMENT

I. In 1994, Congress enacted legislation requiring the Secretary of the Interior to account for the daily and annual balance of funds held in trust for individual Indians. In 2001, this Court affirmed a finding that the agency had unreasonably delayed required accounting activities. This Court also affirmed the exercise of continuing district court jurisdiction, with admonitions regarding the limits of the court's authority.

Since the finding of unreasonable delay, Interior has spent several hundred million dollars on historical accounting activities and related trust reforms. As a result, the agency is in a position to produce statements describing historical activity in nearly 250,000 accounts.

District court orders, however, prevent the agency from distributing these statements: The court has enjoined communication with class members, and has repeatedly defined the accounting in terms that would require billions of dollars and that would delay indefinitely completion of the accounting project. In 2003 and 2004, this Court vacated orders imposing such costly parameters. This Court made clear that the accounting could not be defined without regard to the costs contemplated by Congress; that the district court should defer to the agency's expertise in the allocation of scarce resources; and that invocation of common law trust principles would not allow the court to displace the agency and exponentially escalate the scope and cost of the accounting.

Nonetheless, the district court has again defined the accounting as a multi-billion dollar enterprise, resurrecting many parameters of the vacated injunctions. The court failed to defer to the agency's efforts to conduct an accounting within the framework established by Congress – a framework that requires Interior to maximize the effectiveness of the limited resources furnished by Congress. Instead, the court invoked general and inapt common law principles to expand the accounting requirements far beyond the contemplation of Congress. The court compounded its errors by declaring the accounting "impossible" due to inadequate appropriations, usurping the prerogatives of Congress.

II. Interior should be allowed to implement its accounting plan free of continuing district court jurisdiction. The court's rejection of that plan rested on an error of law – its mistaken view that the plan must include the parameters that defined a multi-billion dollar accounting.

The record makes clear that there is no ongoing agency delay and no basis for continuing jurisdiction. Plaintiffs do not seek to compel completion of the accounting, and there is thus no controversy for a court to adjudicate. Moreover, the work that remains on the accounting will require the allocation of limited resources among competing projects – judgments not amenable to judicial supervision.

III. The district court believed that its finding of "impossibility" cleared the way for it to fashion alternative relief, and ordered payment of $455.6 million in "restitution."

That order rests on multiple legal errors even apart from the flawed predicate finding of impossibility.

The 1994 Act does not mandate the payment of money and certainly does not mandate the payment ordered by the district court. Nor could the district court award monetary relief for alleged breaches of trust. Jurisdiction over claims, if they exist, would lie in the Court of Federal Claims under the Tucker Act, not in district court under the APA.

Moreover, the monetary award is not "restitution" and has no basis in law or fact. By the court's own account, there is no direct evidence that the government has any funds to which any class member is entitled. Instead, the award represents one estimate of the aggregate funds allegedly received into the "IIM trust" between 1887 and 2007 that, given current knowledge of the available records, the government cannot now show, to the level of confidence demanded by the court, to have been properly disbursed over that 120-year period.

The court had no authority to engage in this ad hoc disbursement of funds from the Treasury. It could not, as it believed, shift to the government the burden of disproving liability or order release of monies not in defendants' possession. The court's focus on aggregate-level throughput was misplaced. There is no unitary "IIM trust" and no duty to maintain or produce aggregated data. Since 1887, there have been hundreds of thousands of individual accounts held for discrete persons over discrete periods of time, many of which were closed

decades ago or longer. Neither the accounts nor the assets from which funds derive were held in common by the class as a whole. The court had no authority to demand an aggregate-level accounting or order a monetary award. Nor could it properly convert this class action for injunctive relief into a class action for money.

IV. Since no basis exists for a monetary award, plaintiffs' arguments for an exponentially larger award are moot. Moreover, as the district court found, plaintiffs' demand for $47 billion in "restitution" and "interest" rests on a model that is riddled with error and whose results are "manifestly inaccurate." 569 F. Supp. 2d at 250.

STANDARD OF REVIEW

The order on review rests on errors of law subject to de novo review. Findings of fact are reviewed for clear error.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT A MULTI-BILLION DOLLAR ACCOUNTING IS REQUIRED AND DECLARING THE ACCOUNTING IMPOSSIBLE DUE TO INADEQUATE APPROPRIATIONS.

A. As This Court Has Already Held, Congress Did Not Require A Multi-Billion Dollar Accounting Project.

1. The 1994 Act directs the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." 25 U.S.C. § 4011(a). As interpreted by this Court, this requirement to account for current balances entails an obligation to examine historical account activity, 240 F.3d at 1102, but the text of the Act "offers little help in defining the accounting's scope." 428 F.3d at 1074.

This Court has provided significant guidance as to the nature of Interior's accounting responsibilities and the judicial role in reviewing the agency's discharge of those responsibilities. In two prior appeals, this Court vacated an injunction premised on a definition of the agency's accounting duties that was substantially similar to the view adopted by the district court in the orders now on review.

In Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004), this Court reviewed an injunction that defined the accounting obligations to include, among other things, review of transactions in IIM accounts dating back to 1887, including

accounts of persons who had died decades before passage of the 1994 Act, as well as review of transactions in lands and other "assets" distinct from the "funds" addressed by the 1994 Act. 283 F. Supp. 2d 66, 175-177 (D.D.C. 2003). The cost of that accounting was estimated at $6-12 billion. 392 F.3d at 466.

In response, Congress, as part of the FY 2004 Interior appropriation, Pub. L. No. 108-108, amended the law to provide that neither the 1994 Act nor any provision of common law required the performance of an historical accounting while the appropriations provision remained in effect. 428 F.3d at 1073; H.R. Conf. Rep. 108-330, at 117-118 (2003). As this Court explained, Pub. L. No. 108-108 was enacted "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466 (emphasis added). This Court vacated the accounting injunction in light of the appropriations legislation and vacated other injunctive requirements for lack of legal or factual basis.

This Court vacated the accounting requirements for a second time after the district court reinstated them upon the expiration of Pub. L. No. 108-108. 428 F.3d 1070 (D.C. Cir. 2005). Concluding that "reissuance of the injunction was not properly grounded in either fact or law," this Court explained that "the choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Id. at 1076. The district court, however, had improperly "invoked the common law

of trusts and quite bluntly treated the character of the accounting as its domain." Ibid. It had "thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" Ibid. (quoting Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66-67 (2004)).

2. These decisions make absolutely clear that Congress did not require Interior to conduct accounting activities that would cost billions of dollars. As this Court explained, in enacting Pub. L. No. 108-108, Congress "'reject[ed] the notion that in passing the" 1994 Act it "had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" 392 F.3d at 466 (quoting H.R. Conf. Rep. 108-330, at 117, 118 (2003)). As this Court stressed, the "general language" of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." 428 F.3d at 1075.

Congress's response to the 2003 injunction echoed statements in the 1992 "Misplaced Trust" report, which observed that Interior was "spending a great deal of taxpayer money and other resources administering and maintaining tens of thousands of minuscule ownership interests and maintaining thousands of IIM trust fund accounts with little or no activity, and with balances less than $50." H.R. Rep. No. 102-499, at 28 (1992) (footnote omitted). The report noted estimates that it might cost "as much as $281 million to $390 million to audit the IIM accounts," and

declared that, "[o]bviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." Id. at 26. The report recognized that "cost and time ha[d] become formidable obstacles to completing a full and accurate accounting of the Indian trust fund." Ibid. Accordingly, it observed that "it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund," and directed that "as complete an audit and reconciliation as practicable be undertaken." Ibid. (emphasis added).

B. The District Court's Rejection Of Interior's Accounting Plan Was Based On An Erroneous Definition Of The Scope Of The Accounting That Replicated Errors Already Disapproved By This Court.

The district court's rejection of Interior's 2007 accounting plan was premised on an incorrect view of the scope of the accounting and an analytical approach previously rejected by this Court. In defining the scope of the accounting, the district court declared that it would treat the reasoning of the vacated injunction opinions as "presumptively correct," 532 F. Supp. 2d at 94 n.16, and proceeded to reinstate parameters of the vacated injunctions.

That ruling was manifest error. Nothing in this Court's decisions suggested that the vacated rulings were entitled to a presumption of correctness, or that the district court was free to reinstate vacated requirements without regard to cost. The district court frankly acknowledged that its "expanded historical

accounting" would cost billions of dollars, 532 F. Supp. 2d at 81, and that Congress would not appropriate such funds, id. at 102. Indeed, the court believed that the requirements it imposed were "irrationally expensive." 569 F. Supp. 2d at 250. In essence, therefore, the district court recreated the judicially defined accounting parameters that had been vacated twice before, even as it recognized that those parameters framed an accounting far removed from any project that Congress plausibly could have intended to require.

This decision is particularly remarkable because the district court arrived at the parameters through the same flawed legal reasoning that this Court had already rejected. The district court held that it owed deference only to the "methodology of Interior's plan," believing that it was free to define the "scope" of the accounting project without regard to Interior's judgments or cost. 532 F. Supp. 2d at 89-90. Instead, in "interpreting the statute's scope," the court would "look toward the common law of trusts and be guided by the canon of construction directing that ambiguous statutes be resolved in favor of Indians." Id. at 90.

This Court, however, had already held that the district court erred when it "invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain." 428 F.3d at 1076. This Court explained that the district court had "abused its discretion" when, "[i]nstead of deferring to Interior's judgment about how best to execute the historical

accounting, the district court set out, in great detail, how Interior must go about the job." Ibid.

This Court's rejection of the district court's mode of analysis reflects separation-of-powers principles, which vest control over appropriations in Congress, OPM v. Richmond, 496 U.S. 414, 424 (1990), and which require the agency to implement its statutory obligations using the resources provided by Congress. As this Court observed, whereas "trust expenses for private trusts are normally met out of the trust funds themselves," "the expenditures that plaintiffs seek are to be made out of appropriated funds." 392 F.3d at 473.

This Court's admonition that the district court could not "abstract[]" general common law duties "from any statutory basis," id. at 471, also reflects the significant differences between the IIM accounts and typical private trusts. This Court emphasized that "because the IIM trust differs from ordinary private trusts along a number of dimensions, the common law of trusts doesn't offer a clear path for resolving statutory ambiguities." 428 F.3d at 1074. Deference to agency expertise in the allocation of scarce resources was particularly appropriate precisely because "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." Id. at 1076.

Indeed, many critical features of the IIM accounts have no ready counterpart in the world of private trusts. The IIM trusts include a "staggering" number of individual accounts, many with

"extremely tiny balances." GA2852 (Langbein). The result is "a management problem which would test any sophisticated manager of financial assets and of account systems." Ibid.[2]

We briefed the specific parameters imposed by the court on two prior appeals and we brief them again here. As an overarching matter, the reinstated parameters repeat earlier mistakes. The district court once more "invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain," 428 F.3d at 1076, importing common law principles without regard to agency judgments, congressional appropriations or the particular attributes of the IIM accounts.

1. Closed accounts and probated estates

The 1994 Act requires that Interior account for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24,

---

[2] A tract identified in Hodel v. Irving, 481 U.S. 704, 713 (1987), illustrates the complexities and costs of administering splintered revenues derived from fractionated lands:

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $0.05 in annual rent, and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming all 439 owners could agree) for its estimated $8,000 value, he would be entitled to $0.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

1938 (25 U.S.C. § 162a)." 25 U.S.C. § 4011(a) (emphases added). Consistent with this requirement, Interior has focused its accounting efforts on accounts that were open when the 1994 legislation was enacted and accounts opened thereafter. The district court, in contrast, concluded that the accounting must extend to accounts closed before passage of the 1994 Act, including the probated accounts of deceased individuals. 532 F. Supp. 2d at 98.

That requirement conflicts with the language of the 1994 Act and misunderstands the nature of the trust relationship. Closed accounts have no "daily and annual balance" and no funds which "are" deposited or invested on an ongoing basis. See United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 493 (D.C. Cir. 2004) (noting "the Supreme Court's admonition that 'Congress' use of a verb tense is significant in construing statutes'") (quoting United States v. Wilson, 503 U.S. 329, 333 (1992)).

The clear premise of the "Misplaced Trust" report was that an accounting would be performed for the roughly 300,000 accounts open at that time. H.R. Rep. No. 102-499, at 26 (noting that "it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund"); id. at 7, 23, 59. That premise reflects the nature of the trust relationship. Once an account is closed through the death of the accountholder or otherwise, the trust relationship ends and trust duties as to that account cease. GA62 (Cason). Nothing in trust principles,

much less the 1994 Act, remotely suggests that a trustee has a duty to conduct an accounting of such an account years or decades after it was closed.

Had Congress intended to take the extraordinary step of mandating an accounting for accounts closed before its legislation took effect, it surely would have said so. Expanding the accounting in that manner would add enormously to the accounting task, and review of accounts closed as of 1994 would be particularly expensive because older accounts are more likely to have transactions in the paper records era. See p.37, infra.

The requirement that Interior reexamine the estates of deceased accountholders was particularly misconceived. The district court declared that the heirs "have a right to an accounting of any IIM funds and assets they inherited, and since the probate process does not produce an accounting ... Interior's duty to those heirs includes accounting for the allotment assets and IIM funds that were their inheritance." 532 F. Supp. 2d at 98 (citation omitted).

But the very point of probate is to produce a final determination of the assets of the estate, so that the assets may be distributed among heirs and creditors. Interior's probate proceedings afford heirs the opportunity to contest Interior's determination of the estate's holdings. 43 C.F.R. part 30; Kicking Woman v. Hodel, 878 F.2d 1203 (9th Cir. 1989) (rejecting due process challenge to Interior's probate regulations). Challenges to probate determinations are governed by time limits

set out in regulations. 43 C.F.R. §§ 30.205, 30.207, 4.21. Once administrative appeals are exhausted or forgone, probate decisions constitute final agency actions that, unless challenged in court in a timely manner, are conclusive.

It is no part of an accounting of funds held in a trust account for a current beneficiary to look behind such a final determination of the interests of the beneficiary's decedent who no longer has an account. That result would be self-evident in any other context: if a bank holds funds in trust for X, any responsibility of the bank to account for funds in that account would not extend to funds that were once held in separate trust accounts for X's father, grandfather, or great-grandfather that were closed many years earlier. Moreover, under Interior's probate regulations, funds in an estate may be "paid directly to" heirs or creditors, 25 C.F.R. § 115.502; thus, the absence of a payment into an IIM account after probate would not demonstrate any error in the distribution of the estate.

The requirement that Interior verify probate receipts is especially anomalous because the district court did not – and could not – require verification of other receipts, such as oil & gas royalties or grazing income. In vacating the accounting injunction, this Court held that transaction-by-transaction verification is not required, and vacated a ban on statistical sampling as an abuse of discretion. 428 F.3d at 1077-1079.

2. Asset statements

The district court further held that "statutory and common law trust accounting principles" require Interior to provide accountholders with historical information "about the assets from which IIM funds have been derived." 532 F. Supp. 2d at 98. The court noted that "[i]n most cases, the source of a beneficiary's funds is a plot of land that was carved out of a tribal reservation, allotted to her ancestors, and placed in trust," and that the "beneficial interest in that land, and perhaps the size of the allotment, likely diminished over time (due to fractionation and land sales) as it worked its way down to the current beneficiary." Id. at 100.

The court thus would have Interior reconstruct the century old process of "fractionation" of land that, as the "Misplaced Trust" report observed, has yielded land ownership interests recorded to the 42nd decimal point. H.R. Rep. No. 102-499, at 28 & n.94. That understanding of the accounting obligation would transform the project envisioned by Congress beyond recognition and dwarf the task of accounting for funds in the IIM accounts.

Although the district court invoked "statutory" principles, 532 F. Supp. 2d at 98, its asset statement requirement conflicts with the plain language of the 1994 Act, which requires Interior to account for the balances of "funds" held in trust. 25 U.S.C. § 4011(a).[3] If the United States holds land in trust for an IIM

[3] Plaintiffs omit the word "Fund" from the title of the 1994 Act. Pl. Br. 4.

accountholder, there are two separate trusts – one for the land and the other for the funds in the account. These separate trusts are governed by separate statutory frameworks. Accordingly, this Court observed that "funds have quite a different legal status from the allotment land itself." 392 F.3d at 464. The 1994 Act applies only to the funds in the accounts, and the relevant trust "corpus" therefore is not land but "revenues derived from land[.]" 391 F.3d 251, 254 (D.C. Cir. 2004).

The district court observed that Interior's quarterly statements of current account activity must identify the "source" of the funds. 532 F. Supp. 2d at 99. It is one thing to describe current land holdings on a quarterly basis (which Interior does); it is another thing entirely to reconstruct the entire history of the particular allotment in which an IIM accountholder may hold an interest, much less to do so for every IIM accountholder over a 120-year period.

The district court's search for support in "common law trust accounting principles," id. at 98, was mistaken for reasons already discussed. Indeed, the court itself recognized that at common law, "an accounting claim raised 121 years into the trust would ordinarily be prejudicially late." 569 F. Supp. at 250 (citing Bogert § 962).

3. Transactions before 1938, after 2000, administrative fees and Youpee interests

The 1994 Act requires Interior to account for "all funds" "deposited or invested pursuant to the Act of June 24, 1938." In

2003, the district court recognized that the 1994 Act thus does not require an accounting for funds deposited or invested prior to 1938, but held that the government has a generalized fiduciary duty – unconnected to any statute – to account for all funds deposited or invested in IIM accounts since 1887. 283 F. Supp. 2d at 172-173.

In vacating the injunction, this Court held that the district court could not "abstract[]" general common law duties "from any statutory basis." 392 F.3d at 471. This Court also repeated the language of its 2001 decision, stating that "'all funds'" "means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." Id. at 465 (quoting 240 F.3d at 1102) (second emphasis added).

Nonetheless, in the 2008 opinion, the district court reinstated the requirement of the 2003 injunction and dismissed as a "red herring" this Court's reference to funds "deposited after the Act of June 24, 1938." 532 F. Supp. 2d at 94. But this Court's references to the specific language of the statute cannot be deemed a "red herring," and the district court erroneously rendered that language meaningless.

The district court also erred in rejecting Interior's decision to treat December 31, 2000, as the closing date for the historical accounting. The court recognized that some dividing line must be drawn between "historical" and "current" account activity. Id. at 95. Interior chose the date on which it began

issuing quarterly statements of current account activity, ibid., GA2346, an eminently reasonable date.

The district court's willingness to displace the agency without reference to any statutory guidepost is underscored by its requirement that Interior account for "administrative fees" and "unrestored Youpee interests." Id. at 96. As the court recognized, these items are "not reflected as specific IIM account transactions" and "likely amount to a tiny fraction of the monies that pass through the IIM trust." Ibid.

Plaintiffs take issue with this finding, asserting that the government "conceded" that "significant administrative fees have been imposed routinely on individual Indian beneficiaries since the inception of the trust." Pl. Br. 26-27. What the government actually said was that "there are a handful of administrative fees that are charged for particular programs," such as reforestation fees for timber production, but that "[i]n large part, for most of our program[s], we don't charge fees." GA102 (Cason); see also GA391 (Red Thunder). Plaintiffs cannot dispute that the cost of the accounting is paid with appropriated funds, and the court's micromanaging of Interior's accounting activities disregards this Court's prior instructions.

C. In Declaring The Accounting "Impossible," The District Court Usurped The Authority Of Congress.

As we have shown, the district court erred in interpreting the 1994 Act to require a multi-billion dollar accounting. The court compounded that error by declaring that the accounting required by Congress is "impossible" based on its prediction of

inadequate congressional appropriations. 532 F. Supp. 2d at 102.

The Constitution vests the appropriations power in Congress alone. The impossibility ruling usurped Congress's prerogative to decide whether and to what extent to fund its statutory requirements. It also circumvented Congress's ability to respond as it had responded to the 2003 injunction – with legislation clarifying that it has not required an accounting of the dimensions prescribed by the court. The district court's characterization of that 2003 enactment as having "derailed this litigation," ibid., underscores its confusion of the relative roles of Congress and the judiciary.

The impossibility ruling also embodies a basic misunderstanding of the law of unreasonable agency delay. As this Court has stressed, agency delay is not unreasonable if it stems from a "shortage of resources." Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100 (D.C. Cir. 2003). In Mashpee, this Court described Interior's pace in processing petitions for tribal recognition as "glacial." Id. at 1097. Nonetheless, this Court recognized that the "problem stemmed from a lack of resources" and was thus "'a problem for the political branches to work out.'" Id. at 1101 (quoting In re Barr Laboratories, 930 F.2d 72, 75 (D.C. Cir. 1991)).

II. INTERIOR SHOULD BE ALLOWED TO IMPLEMENT ITS ACCOUNTING PLAN FREE OF CONTINUING DISTRICT COURT JURISDICTION.

The district court's impossibility ruling followed a ten-day trial in October 2007 that was intended to evaluate Interior's progress towards completing the historical accounting project and to determine whether Interior's conduct, including its 2007 accounting plan, could support a finding of ongoing unreasonable agency delay. That trial, like the record as a whole, makes clear that unreasonable agency delay has long ceased to exist. Interior has addressed the problems cited when it was found to have unreasonably delayed action in 1999. It has made substantial progress toward completion of historical statements of account that will provide accountholders with as much historical information about their accounts as practicable within a reasonable period of time and that are fully consistent with the 1994 Act.

The district court's rejection of Interior's accounting plan rested on an error of law. The court reviewed the plan as final agency action, 532 F. Supp. 2d at 88, and held that it was contrary to law because it failed to include the parameters of the multi-billion dollar accounting discussed above, id. at 93-102. Those parameters should be rejected for reasons already discussed, and Interior should be allowed to implement its accounting plan free of continuing district court jurisdiction.

A. Interior Has Effectively Addressed The Systemic Problems Cited In The 1999 Unreasonable Delay Ruling.

The findings of unreasonable delay that have propelled this case for a decade were made in 1999, based largely on government stipulations. The district court found, in particular, that defendants had failed to staff the historical accounting project; to collect and retain necessary trust records; and to develop necessary computer and business architecture. 91 F. Supp. 2d at 58; 240 F.3d at 1104-1105.

The intervening decade has witnessed a sea change in agency practice, as is clear from the opinions now on review.

Management and Staffing: Interior established the Office of Historical Trust Accounting (OHTA) to supervise the historical accounting project, 532 F. Supp. 2d at 82, and engaged five outside accounting firms, two historian firms, and a statistical consultant to assist with the project, id. at 64 (citing GA2278).

Interior has provided training in trust fund management, trust administration, and records management to thousands of employees. GA2534. Ninety-eight Interior employees have been certified as Indian Fiduciary Trust Specialists. Ibid.

Records Collection and Retention: Interior has "located and centralized 43 miles of Indian records potentially relevant to the accounting at the National Archives and the American Indian Records Repository (AIRR) in Lenexa, Kansas." 532 F. Supp. 2d at 45 (emphasis added) (citing GA353 (Angel)). "Problems related to the disorganized or poor condition of records were noted early in

this litigation and have been addressed by defendants' contractors at the AIRR," id. at 46, which is a "state of the art, climate-controlled, organized, and sizable facility suitable to the storage and research obligations of the Interior Department." Id. at 55. Boxes of records are "indexed, inventoried, and labeled according to strict procedures." Ibid. (citing GA138 (Ramirez)). Relevant documents are imaged, coded and loaded into a computer system where they are accessible to OHTA contractors performing historical accounting work. Ibid. "Quality control measures are observed throughout the process." Ibid.

Computer and Business Systems: Interior has overhauled its trust fund accounting system, id. at 44, adopting a new system (TFAS) that is used by seven of the ten largest private commercial trust departments in the United States, GA2352. It has adopted a new land ownership system (TAAMS), 532 F. Supp. 2d at 44, that, in conjunction with TFAS, has "facilitated vastly improved accounting of IIM and all tribal trust funds." GA2534. The interface of these systems "link title, encumbrance, income and distribution records and transactions." Ibid.

According to the GAO, the Office of the Special Trustee (OST), which is the Interior agency charged with implementing trust reform under the 1994 Act, spent several hundred million dollars on its mission since 1999. GA2702 (2006).

B. Interior Has Already Completed The Accounting Work Necessary To Issue Historical Statements of Account For Nearly 250,000 IIM Accounts.

1. Historical Statements of Account

This investment of resources has placed Interior in a position to produce historical statements of account for nearly 250,000 IIM accounts, and work continues apace.

As explained in its 2007 plan, Interior intends to provide an historical statement of account to every accountholder who had an open account between October 25, 1994 (the date of passage of the 1994 Act) and December 31, 2000 (when Interior began issuing statements of current account activity on a regular quarterly basis). GA2274 n.4, GA2277. These statements will contain a ledger describing the historical activity in that account (receipts, disbursements, and interest), accompanied by an assessment of the accuracy and completeness of the statement. GA2274.

As of 2007, Interior had reconciled 83,711 out of a total of 96,823 judgment and per capita accounts, using a transaction-by-transaction reconciliation method. GA2282-2283.

As of 2008, Interior had completed the accounting work necessary to create statements covering all transactions in the post-1985 "electronic ledger era" for 163,795 of the roughly 268,000 land-based accounts that were open between 1994 and 2000. GA2652 (35th quarterly report); see also GA2596, GA2536, GA2474, GA2410 (31st-34th quarterly reports). For roughly three-quarters of the land-based accounts open between 1994 and 2000, all

transactions were in the electronic ledger era, i.e., there were no transactions in the pre-1985 "paper ledger era." GA2286.

Accounting for pre-1985 transactions entails far greater expenditures of time and money. GA2322-2323. Before it can begin the process of reconciliation, Interior must locate and digitize the paper ledgers to create a virtual electronic ledger. GA2322. Because there is no reason to delay issuance of statements for the vast majority of the land-based accounts until after the agency has completed the work for the subset of accounts with some pre-1985 transactions, Interior plans to prepare and mail subsequent statements covering paper ledger era transactions. GA2281.

2. Accounting Methodology

The 1994 Act does not address an historical accounting project or prescribe any particular accounting methodology. The Misplaced Trust report contemplated that Interior would consider a "range of sampling techniques and other alternatives" to conduct "as complete an audit and reconciliation as practicable[.]" H.R. Rep. No. 102-499, at 28. In vacating the accounting injunction, this Court confirmed that transaction-by-transaction verification is not required and vacated a ban on statistical sampling. 428 F.3d at 1077-1079.

Under Interior's accounting plan, no statistical methods are used to create the ledgers that describe historical activity in the IIM accounts; only the existing electronic and hard copy transaction records are used to create those statements. GA2311.

Statistical sampling is used to verify the accuracy of the statements for the land-based accounts. Ibid.

Working with its consultants, Interior has developed reconciliation methodologies that have been refined on the basis of experience. Interior has sought to maximize the accuracy of the historical statements of account consistent with the time and expense involved in reconciling individual transactions. The costs of reconciling individual transactions have proved to be far higher than estimated in earlier plans. In 2003, the agency estimated that it would cost about $100 on average to reconcile a single transaction. GA2312. Four years of experience revealed that the actual cost to reconcile a single transaction averages between $3,000 and $3,500, depending on how many documents must be located to support a transaction. Ibid.

At the same time, the results of the reconciliation work showed that there were "faster, equally accurate, more cost effective ways to complete and deliver the historical accounting to IIM account holders." GA2309.

As part of its effort to develop a viable, accurate methodology, Interior reconciled all 2,099 post-1985 transactions of $100,000 or more – representing about $498 million. GA2316-2317. For debit transactions (disbursements), Interior found eight overpayments totaling $21,174 and five underpayments totaling $9,298, for a net overpayment of $11,876. GA2317. The observed underpayment rate for dollars reconciled was 0.004 percent. Ibid. For credit transactions, Interior found 58

overpayments totaling $142,947 and 64 underpayments totaling $154,155, for a net underpayment of $11,208. Ibid. The observed underpayment rate for dollars reconciled was 0.062 percent. Ibid.

Interior also reconciled a statistically valid sample of nearly 4,500 smaller value transactions. Ibid. For debit transactions, no overpayments or underpayments were observed. Ibid. For credit transactions, 11 underpayments totaling $341 and 25 overpayments totaling $853, for a net overpayment of $512, were found. Ibid.

Reconciliation work as of the time of the 2007 plan indicated that "less than one percent of the reconciled transactions have differences," GA2310, i.e., discrepancies between the actual transaction posted to an account and the amount expected to be posted based on contemporaneous records, GA2307. "Further, less than one-tenth of one percent of the dollars reconciled is in error." GA2310. Interior found "no bias in the observed differences," meaning that "underpayments and overpayments occur about equally and the dollar values are about equal." GA2311.

Interior's statistical consultants also conducted a "meta-analysis" of more than 900 historical audits and Indian trust account reconciliations performed by government and non-governmental organizations. GA2311-2312. They found that "while audits have identified potential risks associated with management

of the Indian trust funds, actual account reconciliations do not show that the risks have been realized." GA2312.

An earlier study likewise found a very low rate of error involving extremely small dollar amounts. In 2003, Ernst & Young partner Joseph Rosenbaum conducted a transaction-by-transaction analysis of the 37 accounts of the named plaintiffs and their predecessors in interest – at a total cost of about $20 million. 532 F. Supp. 2d at 50; GA2774 (Rosenbaum report). Using 160,000 pages of historical documents dating back to 1914, Rosenbaum found supporting documentation for 86 percent of the 12,617 transactions reviewed, representing 93 percent of the total dollar value of the transactions. 532 F. Supp. 2d at 50 (citing GA2795-2797 (Rosenbaum)); GA2315. Only a single posting error (funds deposited to an incorrect account with a similar account number) of $60.94 was noted; the net underpayment difference rate was 0.02 percent of the dollars reconciled. GA2315, GA2776. Rosenbaum concluded that the documents necessary for assembling transaction histories for the named plaintiffs and their predecessors were available, and that the account balances as of December 31, 2000 were sufficiently supported by supplemental documentation. 532 F. Supp. 2d at 50 (citing GA2793 (Rosenbaum)).

On the strength of the accounting results, Interior's statistical consultant concluded that further sampling would neither produce a better result nor be cost effective, and recommended against further sampling of transactions in the

electronic ledger era. GA2286, GA2311. Interior's consultants continue, however, to perform extensive systems tests to assess the integrity and completeness of the data in the IIM historical accounting and land records systems. GA2290-2292; GA157-162 (Herman). Interior's Data Completeness Validation (DCV) project, for example, comprises a battery of tests on IIM data designed to ensure that historical statements of account are complete and contain all transactions recorded during the electronic ledger era. GA2290-2291. As the district court explained, this project has been a "massive undertaking"; between four and eight employees at Interior's forensic accounting consultant "have worked between three and four years conducting DCV testing on some 113 million transactions, or 50,000 annual man-hours," "not including the work of other contractors who support DCV testing through projects like scanning and coding, etc." 532 F. Supp. 2d at 67.

These systems tests are done on a region-by-region basis, and Interior will not prepare historical statements of account for a given region until the systems tests for that region are complete. GA2322. As of December 31, 2008, those systems tests were nearly complete. GA2652-2654. Interior is thus in a position to issue statements describing the electronic ledger era transactions in 163,795 land-based accounts. GA2652.

Interior estimates that completion of historical accounting for the IIM accounts will cost approximately $144 million, in addition to the funds already spent. GA2296. These costs would

permit completion of the project in a reasonable period, assuming that Congress continues to fund historical accounting work at approximately the same level as in recent years ($44 million, $57 million, and $56 million for fiscal years 2004, 2005, and 2006, respectively). See 532 F. Supp. 2d at 82 (noting annual appropriations); 428 F.3d at 1075 (same). These appropriations also cover accounting-related work for the tribal trust accounts. GA63 (Cason). Thus, among other choices faced by Interior is the need to allocate limited resources among IIM and tribal accounting-related activities.

The record precludes a finding of ongoing unreasonable delay. The agency has addressed overarching deficiencies in records management and invested substantial resources specifically directed to historical accounting activities. In keeping with the timetable of its 2007 plan, it has completed the accounting work necessary to provide hundreds of thousands of accountholders with statements of historical account that reasonably implement congressional goals consistent with congressional funding.

C. No Basis Exists For Continuing District Court Jurisdiction.

In 2001, this Court approved the district court's retention of jurisdiction but admonished the court "to be mindful of the limits of its jurisdiction," noting that the basis for retaining jurisdiction was to determine whether Interior's actions "would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." 240 F.3d at 1110.

The grounds for continuing jurisdiction no longer exist. Indeed, for several years, plaintiffs have invoked the court's continuing jurisdiction not to "accelerate the ultimate provision of an adequate accounting," ibid., but to halt accounting activities on the ground that they are inherently inadequate. Plaintiffs first reoriented their suit in 2003, when they attempted to show in a 44-day trial that an adequate accounting was "impossible." 283 F. Supp. 2d at 207. Although the district court rejected that argument at that time, id. at 207-209, "impossibility" has been the leitmotif of plaintiffs' filings ever since. See, e.g., GA2881-2882 (2004) (urging the district court "to declare that the accounting legally required is impossible" and to "fashion appropriate equitable relief"); GA2887 (2005) (urging that defendants "are incapable of rendering an adequate accounting" and asking the court to order "disgorgement").

In March 2008, class counsel again urged that "the accounting was not possible," GA2248, and demanded a prompt trial on "equitable restitution," GA2253, which led to another trial and the order of monetary relief now on review.

The years of continuing jurisdiction, during which plaintiffs have disclaimed any desire to obtain the performance of an accounting, have witnessed a series of trials and injunctions that have consumed resources and impeded progress. The district court has repeatedly adopted a prohibitively

expansive definition of the required accounting and enjoined activities inconsistent with that view.

Class communications orders that remain in effect today prevent class members from receiving the historical statements of account that have been completed. These orders bar Interior from mailing such statements without court approval. GA36 (2004). As of 2007, four requests to mail a total of 66,000 HSAs for judgment and per capita accounts were pending. GA2327-2328. Some requests have been pending for years. Ibid. Addresses for these accounts quickly become stale; the delay thus will require Interior to reconfirm mailing addresses, causing additional delay and expense. GA2280. Moreover, in light of the "impossibility" ruling, Interior cannot obtain court approval to mail HSAs for the 163,795 land-based accounts for which electronic ledger era work is complete.

Nor can Interior develop an administrative appeals process by which accountholders can challenge their historical statements of account. GA2293-2294. As the district court acknowledged, Interior is "unable to issue a notice of proposed rule-making in the Federal Register because of the class communication orders in this case." 532 F. Supp. 2d at 73-74.

Interior moved to vacate the class communications orders after this Court confirmed that Rule 23 does not authorize substantive relief. 455 F.3d at 324. The district court, however, denied the motion without prejudice for "the administrative convenience of the Court," stating that it would

"consider issues related to future communication between defendants and class members after concluding the remedies phase of this case." GA39 (3/25/2008).

Judicial imposition of such impediments to Interior's completion of the accounting are directly contrary to the very basis for this suit under the APA, which was to compel the agency to proceed more quickly with agency action that had been unreasonably delayed. It inverts the roles of the agency and the court to bar Interior from carrying out its statutory duties with respect to individual accountholders because of the pendency of this suit.

Interior should be permitted to implement its 2007 plan free of any ongoing judicial supervision. Plaintiffs do not seek to compel the completion of the historical accounting and there is thus no live controversy over the accounting for the court to adjudicate. Ours is an "adversarial legal system," 455 F.3d at 330 (quoting 334 F.3d 1128, 1142 (D.C. Cir. 2003)), and, as this Court noted in vacating the accounting injunction, it is error for a court to issue, sua sponte, relief that "no party favor[s]," 428 F.3d at 1077.

Nor is the work that remains on the accounting project amenable to judicial supervision. As this Court stressed, the "'prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with [broad] congressional directives is not contemplated by the APA.'" 392 F.3d at 472 (quoting Southern Utah, 542 U.S. at 67). That admonition has

particular force where, as here, the agency confronts "a shortage of resources addressed to an extremely complex and labor-intensive task." Mashpee, 336 F.3d at 1100. As this Court explained:

> "[T]he agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack."

Id. at 1101 (quoting Barr Laboratories, 930 F.2d at 76).

As the district court recognized, the work that remains on Interior's accounting project requires analysis of transactions from the pre-1985 paper ledger era, work that is "by far the most expensive and labor intensive effort." 532 F. Supp. 2d at 57. Costs may prove higher than expected, id. at 81, and progress will depend upon appropriations, GA2275.

Moreover, Interior must finance tribal accounting-related work, including litigation support, out of the same appropriations. GA63 (Cason). Tribal trust accounts are at issue in 100 cases pending in federal courts. See pp. ii-iv, supra. The tribal balances dwarf those of the IIM accounts; as of September 30, 2006, there were $2.9 billion in the tribal accounts, compared to $419 million in the IIM accounts. GA2808, GA2820 (KPMG audit); H.R. Rep. No. 103-778, at 9 (balances as of 1994). Interior will have to determine how to maximize the effectiveness of limited funds in financing competing projects. The APA does not authorize judicial supervision of such judgments.

III. THERE WAS NO JURISDICTION, AUTHORITY, OR RECORD BASIS FOR THE MONETARY AWARD.

A. The Monetary Award Rests On The Flawed Premise Of Impossibility.

Having declared the accounting "impossible," the district court believed that it could devise what it regarded as "an appropriate remedy," 532 F. Supp. 2d at 103, and proceeded to award $455.6 million as "restitution." 569 F. Supp. 2d at 226. Had the court ordered the agency to spend funds not appropriated by Congress, the order plainly would have infringed upon Congress's appropriations power. The direct monetary payment ordered by the court was no more permissible.

To justify its award, the district court invoked an amalgam of statutory and common law principles. In the court's view, the 1994 Act allowed the class to demand an accounting of all transactions in the individual accounts since the creation of the first accounts in 1887. Id. at 250. The court coupled this conclusion with its re-conceptualization of the case as a claim for a breach of the fiduciary duty "to allocate and pay trust funds to beneficiaries," which, the court declared, was "remediable by restitution or disgorgement of the very money that has been withheld." Id. at 243.

The court believed that the "very money that has been withheld" could be identified through an analysis of the aggregate "throughput" of the "IIM system" since 1887. Id. at 225-226. And it "shift[ed] to the government" the burden of

proving that funds allegedly received into the "IIM system" over this 120-year period had been properly disbursed. Id. at 236.

The court cited three grounds for its burden-shifting approach: (1) the government's purported "admission in the October 2007 trial that perhaps $3 billion of IIM system receipts had not been posted to IIM accounts"; (2) the court's "finding that the government had not and could not provide an adequate accounting of its IIM trusteeship" (i.e., the impossibility ruling); and (3) "plaintiff's presentation of at least a theory that some $4 billion of IIM funds had never been disbursed to IIM account holders." Ibid.

The district court itself, however, promptly discredited two of its stated justifications. The alleged "admission" referred to two exhibits that the court said suggested a $3 billion discrepancy between IIM receipts and disbursements over a 120-year period. Id. at 226. But as the court acknowledged in the same opinion, that was not the "intended import of these exhibits," ibid., whose "receipts" column included significant funds "never intended for an IIM account," id. at 234; id. at 226-228, 234-236 (examples). And while the court noted plaintiffs' "theory" of a $4 billion underpayment, it rejected that theory as "uncorroborated by any other event or data," id. at 231, and resting on numerous methodological flaws, id. at 231-234. See Part IV(A), infra.

Accordingly, the court's burden-shifting approach rested entirely on its "impossibility finding" which, in the court's

words, raised "an evidentiary presumption in favor of the beneficiaries and against the trustee," 569 F. Supp. 2d at 243, and allowed it to "credit[] all the uncertainty to the plaintiffs," id. at 238. Since the "impossibility" premise is wrong for the many reasons already discussed, the monetary award also must be vacated. Moreover, as explained below, the monetary award would be independently reversible even if the premise of "impossibility" were not mistaken.

B. The Monetary Award Was Not Permissible Under The APA.

The APA waives immunity in an action for relief other than money damages, including "a suit seeking to enforce [a] statutory mandate" if the mandate "happens to be one for the payment of money." Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999) (citing Bowen v. Massachusetts, 487 U.S. 879 (1988)). The waiver is inapplicable, however, to actions that could proceed under the Tucker Act. Albrecht v. Committee on Employee Benefits of the Federal Reserve, 357 F.3d 62, 68 (D.C. Cir. 2004).[4]

Although the district court invoked Bowen, it did not identify any statutory mandate. The 1994 Act did not mandate the payment of money, and it certainly did not mandate the payment ordered by the district court. The court could not transform the

[4] Thus, the Court of Federal Claims routinely adjudicates claims that the government failed to comply with a statutory duty to pay. See, e.g., Carlsen v. United States, 521 F.3d 1371 (Fed. Cir. 2008) (Federal Employees Pay Act); Bull v. United States, 479 F.3d 1365 (Fed. Cir. 2007) (Fair Labor Standards Act).

1994 Act into a money-mandating statute by declaring that its actual mandate was impossible to perform. Indeed, if Congress had refused to fund its own mandate, there could be no order of judicial relief against the agency. Mashpee, 336 F.3d at 1099-1101.

The district court recognized that it could not, under Bowen, order relief that is "a substitute for the accounting itself," 569 F. Supp. 2d at 242, so it revived a "failure to pay" claim that (as discussed below) had been dismissed ten years earlier. The court believed that it had authority under the APA to enforce "trust duties ... imposed, not only by statute, but by established principles of equity and federal common law," and to award monetary relief for a "failure properly to allocate and pay trust funds." Id. at 243. The Supreme Court, however, has held that such claims must be grounded in a money-mandating statute, and explained that they are properly filed under the Tucker Act or Indian Tucker Act, not under the APA. United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II).

In Mitchell II – which plaintiffs invoke as authority for a "restitution" award, Pl. Br. 20 – more than a thousand individual Indian trust beneficiaries brought suit in the Court of Claims seeking monetary relief for "breach of the fiduciary duty owed them by the United States as trustee." 463 U.S. at 210. In holding that the action fell within the Tucker Act's waiver of sovereign immunity, the Supreme Court explained that Congress had enacted the Indian Tucker Act precisely to ensure that tribes –

whose claims were once excluded from the Tucker Act – would have the same access to the Court of Claims as individual Indians "'when trust funds have been improperly dissipated or other fiduciary duties have been violated.'" Id. at 214, 215 (citation omitted). The Court specifically contrasted the monetary remedies available under the Tucker Act with the "prospective equitable remedies" available under the APA. Id. at 227-228 & n.32. Accordingly, the Supreme Court's subsequent cases for monetary relief (and hundreds of lower court cases) have arisen under the Tucker Act or Indian Tucker Act. United States v. Navajo Nation, 537 U.S. 488 (2003); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

The APA does not allow a plaintiff to choose between the Tucker Act and the APA in bringing a claim for breach of trust. By its terms, the APA is unavailable "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Tucker Act is such a statute, Albrecht, 357 F.3d at 68, and this Court thus held that breach-of-contract claims cannot proceed under the APA, ibid. For the same reason, claims that could proceed under the Tucker Act in light of Mitchell II cannot proceed under the APA.

Members of the plaintiff class may, of course, file suit in the CFC, as many tribes have done, if they believe that they can establish a claim for violation of money-mandating statutory duties concerning their IIM accounts. Moreover, if they can substantiate such a claim, the CFC may order an accounting in aid

of its jurisdiction to render a money judgment on the claim. Yankton Sioux Tribe v. United States, 84 Fed. Cl. 225, 235 (2008). By contrast, a district court-ordered accounting provides information, not monetary relief. Ibid.

The order to pay $455.6 million in "restitution" is particularly remarkable because plaintiffs recognized these jurisdictional limitations at the outset of this case and – to avoid dismissal of their complaint – disavowed any claim for "cash infusions into the IIM accounts." 30 F. Supp. 2d at 40. Plaintiffs had originally alleged that the government had "lost, dissipated, or converted, to the United States' own use money of the trust beneficiaries" and that the "true totals" of the accounts "would be far greater ... but for the breaches of trust." Id. at 40 n.18. The complaint had asked that plaintiffs be "made whole" with an order directing the government "to restore trust funds wrongfully lost, dissipated, or converted." Id. at 40 & n.16.

In denying the government's motion to dismiss, the district court relied on the assurances of class counsel that "all of the money that should be held collectively in their IIM accounts is already there," and that "plaintiffs do not ask this Court to order the government to make cash infusions into the IIM accounts to recompense the plaintiffs for lost or mismanaged funds, but instead ask this Court solely for ... an accounting of money already existing in the account." Id. at 39, 40. The court stressed that "plaintiffs have repeatedly and expressly stated

that their Complaint does not seek an additional infusion of money or other damages for other losses, but rather requests only an accounting," explained that it would "construe the Complaint in that light," and struck the allegations quoted above from the complaint. Id. at 39-40. The court held that was "not presented with a request to ... add to the collective balance of the accounts, so the Court cannot possibly grant such relief." Id. at 40. Against that background, the revival of the "failure to pay" claim and the order to pay $455.6 million is difficult to comprehend.

C. The Monetary Award Was Not "Restitution."

It is difficult to attach a label to the district court's award, but it is certainly not "restitution." As the district court found, there is "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts." 569 F. Supp. 2d at 238. In other words, no class member identified any funds held by the government to which he is entitled. Even apart from the Tucker Act bar, this finding undermines the invocation of APA jurisdiction because the APA does not allow a court to order transfers of funds out of the general Treasury.[5]

Instead of requiring plaintiffs to identify funds wrongfully held by the government, the district court shifted to the government the burden of proving that the gross sum of funds

[5] Cf. America's Community Bankers v. FDIC, 200 F.3d 822, 831 (D.C. Cir. 2000) (noting that "no transfer of funds would be necessary" if the plaintiffs there were to prevail).

allegedly received into the "IIM system" over a 120-year period were properly disbursed. The court thus replicated the error made in 2003, when it required the government to identify its own possible breaches of trust duties. As this Court explained, that "innovation" turned "the litigation process on its head." 392 F.3d at 474. "However broad the government's failures as trustee, which go back over many decades and many administrations, we can see no basis for reversing the usual roles in litigation and assigning to defendants a task that is normally the plaintiffs'[.]" Ibid.

The district court's focus on aggregate throughput as the basis for a "restitution" award was particularly misguided. There is no unitary "IIM trust"; there are hundreds of thousands of discrete accounts held for discrete individuals over discrete periods of time. The 1994 Act did not direct Interior to account for "aggregate" balances based on "aggregate" throughput; it directed Interior to account for the daily and annual balances in individual accounts.

As the district court recognized, its requirement that the government produce an aggregate-level accounting posed inherent practical difficulties. Because IIM accounts are maintained on behalf of individuals, the "government's records of IIM receipts and disbursements have been kept primarily at the individual level rather than the aggregate level." 532 F. Supp. 2d at 83. "In fact, Interior did not begin tracking annual [aggregate] trust receipts and disbursements until 1997." Ibid. The

"accounting systems relied on by Interior were designed to track money, not to aggregate throughput data." 569 F. Supp. 2d at 231.

Nevertheless, at the direction of the district court, the government sought to account for the aggregate throughput of all IIM accounts, including a statistical analysis to address uncertainties associated with missing data. That statistical model allowed the government to state, with varying degrees of confidence, a range of theoretically possible aggregate understatements and overstatements. Id. at 236-238. It allowed the government's expert to state with 99% level of confidence that the current total balances were understated by no more than $455.6 million. Id. at 238. As the district court recognized, the range of uncertainty was "wide enough that it encompasses a zero difference between the calculated and stated balance of the trust, meaning that the current, stated balance could very well be exactly correct." Ibid. (citing GA1553 (Scheuren)) (emphasis added). Indeed, it was also possible under the government's model that the current balances were overstated by $200 million. GA2919. Nonetheless, the court chose to "credit[] all the uncertainty to the plaintiffs," and declared that "the balance of the trust should be roughly double its current stated amount." 569 F. Supp. 2d at 238-239.[6]

[6] Plaintiffs assert that this award was too "conservative," Pl. Br. 21, but they miss the district court's point, which was that the award was the most conservative possible in their favor. 532 F. Supp. 2d at 252.

The district court could not penalize the government (and the taxpayers) for failing to demonstrate to a level of confidence demanded by the court the aggregate throughput of hundreds of thousands of accounts over more than a century. Just as clearly, the award cannot be deemed "restitution" of the "very money that has been withheld" from the account of any class member.

D. The District Court Lacked Authority To Convert This Class Action For Injunctive Relief Into A Class Action For Money.

The certified class consists of "present and former beneficiaries of Individual Indian Money accounts," excluding those who had filed their own actions before the filing of the complaint in this case. GA29-30. The class was certified under Rule 23(b)(1)(A) & (b)(2) of the Federal Rules of Civil Procedure because class members had a common interest in compelling the production of historical statements of account. By contrast, there is no common interest in the monetary award.

Class members are discrete individuals with distinct interests in separate accounts held over different periods of time. As the district court recognized, many accounts receive only "a dollar and a quarter ... every few months," while some are "very substantial accounts" whose funds derive from assets that are "much less fractionated[.]" GA2113 (4/28/2008). The funds themselves derive from different sources. "Some of them have to do with oil leasing and some of them have to do with timber, some of them have to do with cattle grazing and with

markedly different receipts in each of those accounts." Ibid. None of these interests is held in common for the class as a whole; neither the funds in the accounts nor the underlying assets belong to the class. Yet plaintiffs would take the aggregate money award and, in the district court's words, "whack it up pro rata, per capita, so everybody gets the same amount of money." Ibid. Given the differences of interest among class members, the court had no authority to issue a monetary award on a class-wide basis.

The original certification created a mandatory class with no right to notice or opt-out that was permissible because injunctive relief was sought. As this Court has explained, "the underlying premise of (b)(2) certification – that the class members suffer from a common injury that can be addressed by classwide relief – begins to break down when the class seeks to recover ... other forms of monetary damages to be allocated based on individual injuries." Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997). Certification of a mandatory class in a damages action implicates the due process rights of absent class members, Ortiz v. Fibreboard, 527 U.S. 815, 846 (1999), and of defendants, which cannot properly "be bound by a loss" if "class members would not be bound by its win." In re Veneman, 309 F.3d 789, 795 (D.C. Cir. 2002). Yet despite the government's objections, the district court failed to consider the suitability of the class for a monetary award, as required under this Court's precedents. Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998).

IV. PLAINTIFFS' APPEAL.

The district court correctly rejected plaintiffs' demand for $47 billion. 569 F. Supp. 2d at 228, 234. There is no basis for a monetary award and plaintiffs' objections to the size of the award are thus moot. Moreover, as the district court found, plaintiffs' model "suffer[ed] from numerous methodological flaws" that were "obvious to anyone having basic familiarity with the case." Id. at 231.

A. The District Court Properly Rejected Plaintiffs' "Restitution" Model.

1. Plaintiffs' model presumed a unitary "IIM trust" consisting of all funds held on behalf of all individual Indians (living or deceased) between 1887 and 2007. Id. at 225. Plaintiffs contended that all government data regarding "receipts" over this period must be deemed admitted, while only negotiated checks or other irrefutable evidence could be probative of disbursements. Id. at 228. Plaintiffs claimed that aggregate receipts exceeded aggregate disbursements by $4 billion over the 120-year period. Id. at 229. Subtracting the current aggregate balance of the IIM accounts, they arrived at an alleged $3.6 billion difference between aggregate receipts and disbursements over the lifetime of the "IIM trust." Ibid. Plaintiffs added interest at a 10-year bond rate, compounded annually, and thus transformed the $3.6 billion figure into $46.8 billion. Id. at 240.

As the district court explained, plaintiffs' model was at odds with this Court's prior rulings in this case. By demanding

that all disbursements be documented with contemporaneous evidence, plaintiffs would "breathe new life into a 'gold-plated' form of accounting" that this Court "rejected as unduly burdensome, and that plaintiffs themselves have disclaimed." 569 F. Supp. 2d at 250. This Court held that "statistical sampling is an acceptable method of accounting for IIM trust transactions." Ibid. (citing 428 F.3d at 1077-1079). It would be "bizarre" if "the government – really the taxpayers – were held liable for every transaction not proven by a method that is not legally required and would be irrational to pursue." Ibid.

As the district court found, the results of plaintiffs' model were "manifestly inaccurate." Ibid. The "size of plaintiffs' calculated shortfall – $4 billion, out of total receipts of about $14 billion," was "uncorroborated by any other event or data." Id. at 231. "[T]he Indian trust has been repeatedly audited, and while each of those audits has been qualified, ... no audit report states or hints at the disappearance of anything close to 30 percent of trust receipts." Ibid.

The district court found "numerous methodological flaws" in plaintiffs' model. Id. at 231. For instance, they drew "their receipts data from government figures produced during the October trial, ... ignoring or refusing to accept the replacement of those figures with updated numbers ... that have eliminated phantom receipts." Id. at 232. They treated as "receipts" substantial funds that were not held for individual Indians, such

as funds held for tribes or other third parties. Id. at 235. They disregarded "fund transfers," thus "driving up the amount allegedly 'withheld' and driving down the disbursement rate upon which plaintiffs relied for their calculations of 'withholding' for all the years before 1988." Id. at 231. Plaintiffs' "demonstrated willingness to accept data they liked and reject data they disliked did not enhance the credibility of their model." Id. at 233.

In short, the district court found that plaintiffs' model could not be used "as a representation or even an estimate of the amount of trust funds that the government has failed to disburse or post to IIM accounts." Id. at 234. "Instead of providing unbiased opinions, plaintiffs' expert witnesses essentially provided plaintiffs with a way to put a dollar value on their argument that all data that favors the plaintiffs may be treated as admitted, and all data that disfavors them must be proven by the government with discrete, transactional evidence." Ibid.

2. Plaintiffs do not discuss these findings, much less demonstrate clear error. They cannot resuscitate their model through vague references to "traditional equitable evidentiary presumptions." Pl. Br. 20.

As we have already explained, the "common law precedents don't map directly onto the context" of the IIM accounts. 428 F.3d at 1078. Indeed, at common law, "an accounting claim raised 121 years into the trust would ordinarily be prejudicially late." 569 F. Supp. at 250 (citing Bogert § 962) ("Beneficiaries who

know of the method employed by a trustee in keeping accounts and do not object over a period of years will not be heard to object later."). And as we have already shown, there is no basis for requiring an accounting at all of for accounts closed when the 1994 Act was passed. Plaintiffs assert that beneficiaries "could not know their trust funds had been withheld because, as a matter of policy, they had been provided no account statements." Pl. Br. 3. But since at least the early 1930s, BIA agency superintendents were required to "furnish a statement of account to any Indian at any time upon request of the party in interest." GA2892. Indeed, plaintiffs' witness acknowledged that individual Indians "got statements if they specifically asked for them." GA1026 (Palais). At common law, the duty of a trustee was to give the beneficiary information about his trust property "upon his request at reasonable times[.]" Restatement (Second) of Trusts § 173 (1959) (emphasis added).[7]

The private trust cases on which plaintiffs rely do not remotely support their position. In Corporation Audit Co. v. Cafritz, 156 F.2d 839 (D.C. Cir. 1946), the plaintiff testified that he gave his fiduciary five signed checks drawn on the plaintiff's bank account and payable to his corporations. Id. at 840. Although the checks were paid by the bank, ibid., the money "disappeared," and there was "no entry or notation ... to be

[7] This Court's 2001 decision did not decide whether the accounting duty imposed by Congress was limited by laches or limitations principles, an issue that had been left open by the district court. 240 F.3d at 1110.

found indicating the whereabouts of either the money or the checks." Ibid. The plaintiff "promptly" requested an accounting. 60 F. Supp. 627, 630 (D.D.C. 1945). This Court sustained the district court's determination that the "combined circumstances" required the fiduciary either to account or be liable. 156 F.2d at 840.

In Rainbolt v. Johnson, 669 F.2d 767 (D.C. Cir. 1981), the plaintiff alleged that her trustee had misappropriated trust funds. Id. at 768. During pretrial proceedings, the plaintiff served on the defendants requests for admissions that the defendants had received more than $900,000 from the trust account and from the profits of businesses and real estate acquired by misappropriating trust assets. Id. at 769. The defendants failed to answer the admissions within 30 days; this Court held that the admissions were thus "deemed admitted" under Rule 36 of the Federal Rules of Civil Procedure. Id. at 768. This Court held that the plaintiff was entitled to a full accounting of profits and gains, noting that if the trustee had not kept adequate records, the benefit of the doubt was to be given to the beneficiary. Id. at 769.

Neither of these cases nor any common law principle supports a huge monetary award based on 120 years of transactions to an undifferentiated mass of hundreds of thousands of individuals, none of whom identified any funds that should have been posted to his account.

3. As discussed above, the extensive accounting work performed by Interior's consultants showed that errors in the IIM accounts "tend to be small, tend to be few, tend to be on both sides of the ledger, and tend to net out against each other." GA58 (Cason). The district court expressly found that there was "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts." 569 F. Supp. 2d at 238.

Plaintiffs declare that this finding was "clearly erroneous." Pl. Br. 28. But the "evidence" that they claim establishes "wrongful withholding and misappropriation of IIM trust funds," ibid., does not survive even cursory scrutiny. For instance, plaintiffs note the district court's statement that a discrepancy between Interior and Treasury records "'lent credence to the possibility that substantial funds had gone missing over the life of the trust.'" Pl. Br. 28 (quoting 569 F. Supp. 2d at 227). But as the court explained, the "balance discrepancy results in $5.2 million more in beneficiaries' accounts than the total of funds in the asset pool for investment," 532 F. Supp. 2d at 74 (emphasis added) – hardly evidence that the balances are understated.

Plaintiffs' other "evidence" consists largely of snippets from an exhibit (PX-65) that purported to be their "summary" of select historical documents. Even if the snippets were accurate descriptions of the underlying documents, outdated reports of anecdotal problems in trust administration would not establish

that the current balances of any individual accounts are understated. And the descriptions are not accurate. Although the inaccuracies are too numerous to catalogue, the following statements are illustrative:

Citing a 1986 report, plaintiffs assert that "funds totaling almost $1 million in 2,331 accounts had been withheld from individual Indian beneficiaries." Pl. Br. 3. What that report actually said was that "Four of the five agencies had a significant number of IIM accounts where the addresses of the holders were unknown (2,331 accounts with balances totaling almost $1 million)." GA2897. The report advised Interior to make greater efforts to locate the individuals. Ibid.

Citing a 1989 report, plaintiffs assert that "$17 million of trust fund investments could not be accounted for." Pl. Br. 3 n.11. They neglect to mention that a FY 1990 audit showed that "no actual funds [were] misplaced or lost, but rather that the imbalance [was] an accumulation of accounting/posting errors over the years, compounded by a difference in the ways the systems respond[ed] to particular data." GA2901.

Citing a 1954 report, plaintiffs assert that "IIM Trust funds collected from 1933 to 1954 had not been disbursed." Pl. Br. 3. The cited statement concerned one "suspense account" in BIA's Aberdeen Area Office that held funds from "Sioux Pony Claims payments, proceeds from sales of Government vehicles, patronage dividends from cooperatives, and proceeds from lands sales due to individual Indians." GA2905.

Citing a 1991 document, plaintiffs allege "widespread fraud at the Crown Point Agency." Pl. Br. 3 n.11. The statement concerned a check fraud scheme to which one person confessed. GA2910.

Citing 1988 and 1989 reports, plaintiffs assert that "defendants' auditors determined that from 32% to 44.4% of beneficiaries had reported that they did not receive their IIM funds." Pl. Br. 3-4. Those reports indicated that in 1988, when accountholders were asked to contact Interior if they did not agree with their balances (a "negative confirmation" procedure), 32% of the 1,249 people who responded reported that they did not receive payments; in 1989, 44.4% of the 811 people who responded reported not receiving payments. However, the auditors expressly disclaimed reliance on the results of this "negative confirmation" procedure, GA2917, and plaintiffs' witness admitted that "you can't use negative confirmations for audit evidence," GA1015 (Pallais).

Plaintiffs' assertions of missing trust records (Pl. Br. 4 & n.15) would not support a monetary award even if they were based on current information, which they are not. As the district court found, Interior has collected and indexed 43 miles of Indian records potentially relevant to the accounting, 532 F. Supp. 2d at 45, and restored hundreds of thousands of transactions to its electronic database, GA229-230 (Herman).[8]

[8] The absence of data from an electronic database did not mean that a transaction was not posted to the account; it reflected the fledgling state of the database. GA225 (Herman).

The extensive accounting work done by Interior's consultants confirmed that transactions could be supported by contemporaneous records. Accordingly, the district court found that plaintiffs "failed to establish that the problem of lost or destroyed documents" rendered the accounting project impossible – notwithstanding the court's expanded definition of the accounting. 532 F. Supp. 2d at 47 & 102 n.19.

B. The District Court Properly Rejected Plaintiffs' Demand For "Interest."

1. Plaintiffs' demand for "interest" disregards the plain terms of the statutory provision they invoke. That provision, enacted as part of the 1994 Act, states:

> The Secretary shall make payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual before October 25, 1994, retroactive to the date that the Secretary began investing individual Indian monies on a regular basis, to the extent that the claim is identified–
>
> > (1) by a reconciliation process of individual Indian money accounts, or
> >
> > (2) by the individual and presented to the Secretary with supporting documentation, and is verified by the Secretary pursuant to the Department's policy for addressing accountholder losses.

25 U.S.C. § 4012.

None of the statutory prerequisites to payment of interest has been met. Section 4012 requires payment of interest where an "individual" has presented an administrative claim to the Secretary for interest on "amounts deposited or invested on behalf of such individual." Payment is required only "to the

extent that the claim is identified ... by a reconciliation process of individual Indian money accounts, or ... by the individual and presented to the Secretary with supporting documentation, and is verified by the Secretary pursuant to the Department's policy for addressing accountholder losses."

No individual has presented a claim for interest to the Secretary, and the government's accounting work has not revealed any significant failures to pay interest on amounts deposited or invested on behalf of individual Indians.

Contrary to plaintiffs' contention (Pl. Br. 14, 16), this Court's decision vacating the first accounting injunction did not nullify sub silentio the requirements of Section 4012. This Court rejected the contention that Pub. L. No. 108-108 worked an unconstitutional taking, observing that plaintiffs' claim was "obscure, as plaintiffs do not explicitly identify the property right that they believe enforcement of Pub. L. No. 108-108 would take." 392 F.3d at 468. This Court noted that plaintiffs did "mention the right to 'interest earned on trust accounts,' if only in a parenthetical to a case citation." Ibid. And this Court saw "no reason to think Pub. L. No. 108-108 will affect plaintiffs' entitlement to interest," noting that "trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any period of delay in paying over income or principal[.]" Ibid. (citation omitted). Although the availability of interest had not been briefed to this Court, this

Court's conclusion was correct: Pub. L. No. 108-108 did not affect plaintiffs' right to interest – a right governed by Section 4012.

2. Plaintiffs' reliance on the Act of 1841 (Pl. Br. 10 & n.18) is equally misplaced. That statute, enacted well before the Dawes Act, modified the treatment of specified trust funds and provided that "all other funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall in like manner be invested in stocks of the United States, bearing a like rate of interest." 5 Stat. 465.

As the Court of Claims explained in a comprehensive opinion, the Act of 1841 "did not expressly require the Government to pay interest to Indian tribes or to anyone else." United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1324 (Ct. Cl. 1975). "It was merely a directive to the appropriate officers of the Government holding trust funds that were required by treaty, contract, or statute to be invested, to invest them only in stocks of the United States, bearing interest at not less than five percent per annum." Ibid. "The primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds." Ibid. "Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided where they must be invested if any statute or treaty required them to be productive." Ibid.; id. at 1324-1333.

C. Class Members Have No Right To A Per Capita Distribution Of Osage Headright Funds.

Finally, plaintiffs argue that the district court improperly excluded from its "restitution" award income from Osage mineral estates. Pl. Br. 34. But as the district court explained, plaintiffs treated such funds as IIM "receipts" even though they were distributed directly to individual Indians and thus were not shown as "disbursements" under plaintiffs' model. 569 F. Supp. 2d at 232. The effect was "to add over $800 million in erroneous receipts and to drive down plaintiffs' calculated disbursement rate, ... causing the inaccuracy to metastasize." Ibid.

Plaintiffs' approach to Osage headright funds highlights the problems caused by the transformation of this suit into an action for money. The proceeds of Osage headrights do not belong to the class as a whole. Yet plaintiffs would divide them up per capita, prompting the district court to ask: "If a billion dollars of the asserted shortfall is related to Osage headrights, how are you going to support per capita distribution of that to all Native Americans, no matter what their tribes are?" GA2171.

This problem was inherent in the court's "aggregation" approach, as the court itself recognized. GA2113. Although the court treated IIM accounts as if they formed a single "IIM trust," the reality is that they are separate accounts held by separate individuals. It was no more permissible for the court to issue a lump sum money award to the class than it was for the

court to extinguish, through its "impossibility" ruling, the rights of individuals to information about their accounts.[9]

In opposing the Osage Nation's motion to intervene, plaintiffs assert that the "class representatives" "represent the interests of individual Osage beneficiaries in these proceedings, not the tribe," and argue that the tribe has a conflict of interest that "disqualifies it from serving in a representative capacity in this litigation." Pl. Br. 38 n.46. But as the Rosenbaum study showed, the class representatives have no claim to Osage proceeds or any other funds. GA2774. Yet plaintiffs would take the district court's lump sum award and "whack it up pro rata, per capita, so that everybody gets the same amount of money." GA2113. The conflict of interest is apparent, and the transformation of this suit into an action for money undermined the basis for the original class certification.

[9] As one class member protested: "I understand why an accounting may be impossible for all IIM beneficiaries due to costs and/or lost and destroyed records, but an accounting is not impossible for me." Gov't 1292(b) Pet., Exhibit 3 (letter from Eddie Jacobs). The district court declined to docket Mr. Jacobs' filings.

CONCLUSION

For the foregoing reasons, the order on review should be vacated and there should be no further retention of district court jurisdiction.

Respectfully submitted.

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

FEBRUARY 2009

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

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing brief contains 16,471 words, according to the count of Corel WordPerfect 12.

_____
ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009, I caused the foregoing brief and accompanying appendix to be served on the following counsel in the manner indicated, by agreement with counsel:

Bill Dorris David Smith Justin Guilder Kilpatrick Stockton, LLP 607 14th Street, N.W., Suite 900 Washington, D.C. 20005 BDorris@KilpatrickStockton.com DCSmith@KilpatrickStockton.com JGuilder@KilpatrickStockton.com	By messenger (briefs and appendix) and by email (brief)
Dennis Marc Gingold 607 14th Street, N.W., 9th Floor Washington, D.C. 20005 DennisMGingold@aol.com	By email (brief)
Merrill C. Godfrey Akin Gump Strauss Hauer & Feld, LLP 1333 New Hampshire Avenue, N.W. Washington, D.C. 20036 mgodfrey@akingump.com	By messenger (brief and appendix) and by email (brief)
Earl Old Person (Pro se) Blackfeet Tribe P.O. Box 850 Browning, MT 59417	By first class mail (brief and appendix)

_____
Alisa B. Klein