

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*, :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 96-1285 (JR)
 :
 DIRK KEMPTHORNE, Secretary of :
 the Interior, *et al.*, :
 :
 Defendants. :

PRETRIAL ORDER

Plaintiffs seek equitable relief in the nature of restitution for funds that were received in the IIM trust, do not appear to have been disbursed to beneficiaries, and are not explained by the government's accounting efforts, plus an amount that represents the benefit reaped by the government from the use of those funds. See [3515]. The proceedings set to begin on June 9, 2008, will be for the purpose of determining the dollar amount of that proposed remedy. My findings of January 30, 2008, [3505], will serve as a starting point for final determination, but my expectation is that the parties will adduce further evidence, following the guidelines set forth below:

1. The plaintiffs will go first. They will presumably rely heavily on documents that were identified and discussed in the January 30 findings, but the \$3 billion and \$3.6 billion figures suggested by those findings are subject to amendment by evidence and appropriate calculations that deal with or incorporate elements not addressed in the January 30 findings.

This may include discussion of such issues as Osage head right funds, judgment and per capita accounts, and tribal IIM monies.

It will be plaintiffs' burden to establish both the fact and the amount of the government's "benefit" from its alleged use of the funds that are not explained by the government's data. See, e.g., Joel Eichengrun, *Remedying the Remedy of Accounting*, 60 Ind. L.J. 463, 469-71 (1985), citing Pallma v. Fox, 182 F.2d 895 (2nd Cir. 1950) (L. Hand, C.J.). The legal issue whether such a "benefit," if proven, is the functional equivalent of pre-judgment interest, which would be foreclosed by Library of Congress v. Shaw, 478 U.S. 310 (1986), remains for decision.

2. Assuming that the plaintiffs succeed in establishing their prima facie case, the government will have the burden of refuting it, or parts of it. Testimony that amends, qualifies, or further explains AR-171 or DX-365, or both, will be considered. Evidence bearing on the percentage of monies collected by the IIM trust system that have been disbursed to beneficiaries - and the percentage that ought to have been disbursed - will be considered. Evidence supporting or opposing plaintiffs' proposal to include Osage head right funds, judgment and per capita accounts, and tribal IIM monies in a restitutionary award will be considered.

3. Evidence will not be material to the issues addressed on June 9 if it addresses, or principally concerns, land or land transactions or the January 30 finding of impossibility. Further legal argument as to class certification and jurisdictional issues will not be germane.

4. Plaintiffs are directed to file a list of their witnesses and the expected subjects of their testimony by May 16, 2008. The government is directed to file a list of their witnesses and the expected subjects of their testimony by May 30, 2008. If either party requests it, a final pretrial conference will be held on June 2, 2008, at 2:00 p.m.

JAMES ROBERTSON
United States District Judge