UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.	:	**Civil Action 96-1285**
Plaintiffs	:	
	:	**Washington, D.C.**
V.	:	**Wednesday, March 5, 2008**
	:	
DIRK KEMPTHORNE, Secretary of the Interior, et al.	:	
	:	
Defendants	:	**2:30 p.m.**

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

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P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action Number --

THE COURT: Have I told this story before? When I was in private practice I was representing a television company, and somebody had sued them for anti-trust in Mississippi. And we walked in to take a deposition in the courthouse, and the courthouse was full of suits. And the local lawyer who had filed the suit against our client and others looked around and looked at that group of people and said: "Lord, I think the Chamber of Commerce ought to give me an award for bringing all you people to town."

That's kind of the way I feel with this courtroom.

I'm sorry. Call the case, Al.

COURTROOM DEPUTY: This is Civil Action Number 96-1285, Cobell, et al. versus Assistant Secretary of Interior, et al. If counsel that will be speaking would please identify themselves for the record.

MR. KIRSCHMAN: For the government, Your Honor, Robert Kirschman.

MR. GINGOLD: For plaintiffs, Dennis Gingold.

MR. DORRIS: For plaintiffs, Bill Dorris.

MR. HARPER: Plaintiffs, Keith Harper.

THE COURT: Okay. We set this status conference down after I issued the order I issued at the end of -- after issuing the findings of fact and conclusions of law that I issued at the

end of January, for the purpose of discussing a process for determining an adequate remedy.

I don't want to get all hung up on process. I think I tried to send a pretty clear message in those findings and conclusions that it is time to bring this matter to a close with a decision of some kind or another.

The most obvious kind of remedies that occur to me are, A, declaratory judgment, and/or, B, something to do with money. The money issue has been much vexed in the history of this case because of the very clear jurisdictional lines between something that looks like, smells like, feels like, or otherwise simulates economic damages on the one hand, and something which the plaintiffs have maintained from the beginning is not damages, but in fact the IIM account holders own money, which should be equitably disgorged to them.

It is no secret to anybody in this courtroom that the idea of equitable disgorgement, if it was ever clearly known to federal courts, is sort of lost in the murk of history. But frankly, when I try to think about remedy in this case, I can't quite think past the analytical blocks called jurisdiction, equitable disgorgement, and how much. Those are the questions that occur to me. I'm sure the lawyers can think of much more subtle, complex, and difficult questions, but when I said that I wanted to discuss a process for determining an adequate remedy, those are the three analytical boxes I had in my head.

I'm assuming that between January 30th and today, you-all have had some time to think about and ponder the question of where we go from here, and I will be happy to hear from counsel now, in whatever order you think you want to go first or whoever wants to grab the podium first.

There are some other related procedural questions and loose ends in this case that we should talk about at some point this afternoon, but I want to begin with this core subject of a process for determining adequate remedy.

So who wants to be heard first, Mr. Kirschman?

MR. KIRSCHMAN: Thank you, Your Honor. Your Honor, when you talk about determining an appropriate remedy in this case, the Court should be guided by two principal points. One is the fact that there is in this case not only a long history, but a well established law of the case, and that applies especially to the issue of a remedy in this case.

The second main point is the nature of this class action and how that affects any remedy in this case. I would like to address those two points regarding -- and I think that would cover your first analytical box related perhaps towards jurisdiction, to a certain extent.

The law of this case comes from Judge Lamberth over the years, several of his decisions, and it comes from the Court of Appeals. This law of the case cannot be simply ignored, and it certainly should not be forgotten.

Under the law of this case, both Judge Lamberth and the Court of Appeals made clear this point, and that is there is only one live claim and there's only one remedy available for that live claim, and that is the historical accounting.

Judge Lamberth, as late as 2005, was unequivocal in stating that the plaintiffs' single live cause of action seeks remedy for this legal breach - and that is the failure to provide an accounting - and I'm quoting now. Judge Lamberth stated in his 2005 opinion: "The remedy that this Court has fashioned is limited to ensuring that the defendants produce the requisite accounting of the Indian Trust."

Judge Lamberth then went on to address the underpinnings of the legal action brought, and he concluded -- while he was quoting his earlier Cobell V opinion, he stated in 2005 that: "Thus, to the extent plaintiffs seek relief beyond that provided by statute, their claims must be denied."

The Court of Appeals confirmed this point as late as in 2006, Your Honor. The Court of Appeals stated plainly that the accounting of the IIM Trust is, quote, "The ultimate relief sought in this case," and quote, "the ultimate relief sought by the class members."

Again, Judge Lamberth's consideration of this issue goes back to Cobell I in 1998, and to Cobell V in 1999, so this case law is very relevant to the issue of what remedy is available here.

And the second point tied to that, Your Honor, is the nature of this class action. This class action was brought for an accounting, and the accounting that was sought was for the individual plaintiffs, the plaintiff class and the individual beneficiaries. So the question has to be asked whether, in looking at a remedy, these individual beneficiaries can receive an accounting.

Plaintiffs have always taken an all-or-nothing approach to this issue, Your Honor. Their position is that if not every single IIM account for every single beneficiary can be accounted for to the extent that they argue should be found applicable, then no accountings should be done, no historical statements of account should be released. There's simply no justification for that.

What we have here is a class of individual beneficiaries, and to the extent that the individual can benefit from a historical statement of account because the work has been done, then those statements of account should be released. Any other finding is contrary to the interests of the individual and the purposes of the 1994 Act. Interior should be providing information to those people for whom it has such information, it should provide the accounting that is possible.

Now, in your January 30th findings of fact, Your Honor, you did find that the accounting was impossible. But this also appears to be on a global view, that not all the work that would

be necessary for every beneficiary could be done to the extent that you found was required under the terms of the 1994 Act.

However, we respectfully state that that is inconsistent with the 1994 Act that was looking to an accounting for individuals, and such a global view will not benefit the individual beneficiaries.

We appreciated and certainly agree with the Court's finding in the January 30th findings of fact that Department of Interior deserves credit for acting professionally and doing all they could to provide the accounting with the resources they have. That is absolutely true. Those efforts, to the extent they could benefit individual beneficiaries, should not be wasted.

The purpose of the Act was to give the best accounting practicable, and what we're saying is, as part of the remedy here, that information should be provided. Those individuals who can receive information should receive it. It shouldn't be kept from them.

The Court has before it pending historical statements of account related to per capita and judgment accounts. Now, those, along with other specific land-based accounts, could fall and do fall under the Court's opinion, or January 30th findings of fact. That is, you don't need to go behind a probate decision, for example, you don't have to look at an inheritance.

These historical statements of account and those

related to land-based accounts that began in the electronic ledger era that started with a zero balance not related to a probate, this type of information could be provided. And that's the remedy contemplated by the Act, and it's the only one contemplated by Judge Lamberth and the Court of Appeals, and it's the only one supported by the complaint in this case.

So all that hard work and the $127 million that has been expended to date should be utilized to benefit those people, those beneficiaries who could use the information.

Here it's notable, Your Honor, that since 2001, the Department of Interior has been providing quarterly statements related to the transactional history of accounts, moving forward, looking forward. And while plaintiffs have always argued that you shouldn't release any of this information related to the historical accountings because it's confusing or because it's incomplete, we strongly disagree with that.

There has not been a rush to this Court under the Little Tucker Act or the Court of Federal Claims related to those quarterly statements of account that have been provided through the hard work of Interior to the individual beneficiaries. And even if there were questions to arise from the historical statements of account that could be provided, at least they would see the light of day and the individual Indians, those who would benefit from the information and should have it, could raise their concerns. They could either file

claims, or, as another part of the remedy, they could move through an administrative process that we then ask the Court to take note of that the Department of Interior has contemplated.

This is the remedy, the only remedy contemplated by the 1994 Act and by the law of this case, and it will benefit individual beneficiaries. We are talking about tens of thousands of accounts. So we think this is a remedy, and it's the appropriate one.

To go beyond that, to look at any other relief, would be contrary to the law of the case and would raise issues related to the jurisdiction of this Court. It depends what monies you look at, but if you look at monies that were not or are not in individual Indian money accounts, any award would very likely be substitutionary and would likely then fall outside of 702 of the APA.

This is an APA case, and that's been recognized, especially when it comes to remedies, by Judge Lamberth and by the Court of Appeals. These issues related to the jurisdiction, related to the APA and the scope of 702, are matters that we believe - and I'm talking about process here - should be briefed anew in light of your findings of fact on January 30th.

The implications of your finding of impossibility should also be briefed by the parties. It is something that was not addressed, I believe by either party, leading up to the October hearing, and the parties should be able to provide the

Court with their insights and their argument on the implications of the finding of impossibility.

The Court did not, in finding impossibility, indicate the consequences of that finding, and I think it would benefit all concerned, and hopefully the Court, to brief that issue as to what it means.

THE COURT: Well, that's kind of what I thought we were here about today. And when you tell me that the law of the case says the only relief is a historical accounting, that doesn't mean very much if historical accounting is impossible. Then what? Then there's no relief? Relief is impossible?

MR. KIRSCHMAN: Well, Your Honor --

THE COURT: Is that the government's position?

MR. KIRSCHMAN: Well, respectfully, Your Honor, there are aspects of your January 30th findings of fact and conclusions of law we don't agree with, and one is the finding of impossibility, for the reasons I've just stated. We should address what it means regarding the individual accounts.

As far as other relief, that is not this case.

THE COURT: What case is it? What case is it?

MR. KIRSCHMAN: It's a case that has not been brought by this class of individual IIM beneficiaries. It is a case that would have to do more than ask for an accounting under the 1994 Act. It is a case that likely would have no place in this court. But those are matters we should brief.

What we have here is a complaint and a law of the case that demonstrates that there is an appropriate remedy, the ultimate relief is a historical accounting, and any other remedy may be denied. The ultimate outcome with that, then, may mean that the remedy available is what I've described and no more, because of the limitations in this Court and because of the posture of this case.

It's important to point out too, Your Honor, regarding the nature of this class action, that this class was certified under 23(B)1 and (B)2. And we raised this issue back in our June 13th, 2007 brief, Your Honor, and we cover it in more detail than I probably will here. But the point is, this is not an opt-out class action, this is a class action brought for injunctive relief only and not for an award of money.

Again, we cite cases in our June 13th brief, but the point is, there are additional safeguards that should be afforded class members when the issue of monetary relief is raised as part of a remedy in a class action. And that has never been addressed by plaintiffs, and at this stage there is no reason to raise it.

This class was presented to the Court, was presented to Judge Lamberth, not as an opt-out class, and as a class that was seeking only the injunctive relief of enforcement of the accounting obligation that in Cobell VI the Court of Appeals found to exist through the 1994 Act.

So we get into a lot of questions about in what case can they seek money. And I think the bottom line is, it's not this case. And to go beyond that in this case raises, as you said, jurisdictional issues.

The analytical box of equitable disgorgement raises those same issues, because under the APA, even under *Bowen v. Massachusetts*, you have to look to the statute that is being addressed by the Court and being raised by the plaintiff, and you look to determine whether the payment of money flows from that statute. And we believe that that is not the case, and we would like an opportunity to brief that again.

But the point also is that it would be substitutionary, depending on what was pled. We've been dealing here with allegations. And the Court, for example, noted in your January 30th opinion, for example, a delta in the one document presented by Dr. Haspel between collections and -- collections by the Department of Interior and that money that then was posted to individual Indian money accounts. That is the IIM Trust.

To look at that gap -- and you were right, Your Honor. You stated that you presumed that Mr. Haspel's exhibit wasn't meant to show any type of shortfall of about $3 billion, and indeed you were correct. That was not the implication that should be made from that document.

But the point is here, that money, that $3 billion gap,

assuming it exists, to address that, for example, would lead to an issue of funds that arguably should have been posted in the IIM accounts, and then we're looking outside of the accounting that was to be of funds that weren't in the IIM accounts.

Judge Lamberth also addressed that issue. In finding that he could hear the case and could decide the claim, Judge Lamberth clearly found, based on plaintiffs' representations, that this case was not about an infusion of funds into the existing IIM accounts. So to go in that direction, to consider what should have been in the IIM accounts, leads to that issue which Judge Lamberth found was not part of this case based on his early discussions with the parties and his reading of the complaint.

THE COURT: Well, there's no question, Mr. Kirschman, that there is a whole universe of issues that aren't even touched by this case. And they're the issues that we've come to call, I think, the management issues, and have to do with whether the sufficient monies were collected, you know, whether high enough prices were charged, how funds were managed once they were within the Treasury Department, and so forth.

And I think everybody agrees that those issues are not part of the case that is before us now.

MR. KIRSCHMAN: Yes, Your Honor.

THE COURT: What I am talking about, or thought I was talking about in the opinion, was monies that were in fact

collected and made it into Treasury -- into trust funds in some way, but have not been adequately accounted for. The payout has not been adequately accounted for. That's the issue which I said both sides at the October trial presented proof that I call desultory, because I don't think either side paid much attention to that or could pay much attention to it.

But to my way of thinking, that is a critical subject here, and the best fix I could get on it was somewhere between three and three and a half billion dollars. But that's pretty -- that's not even close enough for government work.

So we need better numbers than that. Go ahead.

MR. KIRSCHMAN: Your Honor, to look at the collections versus credits to the IIM account now would constitute a significant shift in the paradigm of this case. The accounting is for monies that are held in individual Indian money accounts, and now we're looking outside of that.

So the attention was not there because this would be a different view of a different set of funds. And the Department of Interior can conduct that investigation regarding that difference between collections and the posting to IIM accounts, and there are answers. That money, speaking generally, was money that was not intended or should have been in IIM accounts. It was money that was Tribal money, it was money returned to third parties - unsuccessful bidders was an example Mr. Cason provided - it was money that went to fees that were paid by

various parties to the Department of Interior.

And that investigation can be undertaken. It will be as detailed as the work you heard Michelle Herman testify about, where --

THE COURT: How many years will it take?

MR. KIRSCHMAN: I cannot answer that, Your Honor. Because again, that is not where the focus of the historical accounting has been.

And again, the bigger issue before we ever get to such an investigation is what that represents. That represents a should have been in the IIM accounts, not what is. And for that reason, that would constitute damages. It would be substitutionary.

For hypothetically the Court to find that three billion or 2.5 billion should have been in the IIM accounts, any award would not come from the IIM accounts, it would be funds that would have to be appropriated and would be outside the historical accounting, and certainly outside what both Judge Lamberth and the Court of Appeals have envisioned.

Judge Lamberth said in Cobell V that the plaintiffs have expressly disavowed seeking an order for the payment of money in this case. Plaintiffs simply do not seek every element of a true accounting, as that phrase was meant at common law.

And what was sought here, Your Honor, was information, information that they could use then to address their accounts.

Again, to the extent that information is available, that information should be provided to the individual beneficiaries. There's no reason to keep them separated from that information that Interior has gone to great lengths to provide.

I think it's also important to note in this vein, Your Honor, that as I said, as I just referenced, plaintiffs' common law claims were dismissed by Judge Lamberth, and the Court of Appeals in Cobell VI recognized that there were no cognizable common law claims here.

So we are not talking about some common law accounting that might include at the end of it the payment of funds. That has already clearly been decided. Instead what we look to is the 1994 Act and the limited accounting that was addressed in the 1994 Act.

In a similar vein, just as there's no common law accounting, this Court's ability to address the issue of remedies is limited by the fact that the Court here respectfully is not sitting as a chancellor in equity. Plaintiffs in an earlier brief this summer stated that an accounting trial should be one as -- and I'm quoting from a May 2007 brief, "An accounting trial is traditionally heard by the chancellor in equity."

Well, first of all, there is no common law claims here. Those have been dismissed, and that is the law of the case. And two, the Court of Appeals addressed the fact that this Court, in

considering the 1994 Act, is in a different position than it may be in a case involving private parties who are seeking the full breadth of equitable relief.

The Court noted that it would be wrong to assume that the 1994 Act gave the District Court the freedom of a private law chancellor to exercise its discretion fully. And that was in Cobell XVII. And the point of that, and the reason for that was also clearly set out by the Court of Appeals.

The Court stated, and again I'm quoting, Your Honor, "Nor does the act, the 1994 Act, have language in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee. Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense."

So we look to the 1994 Act and what it envisioned the Department of Interior providing to the individual beneficiaries. And again, Cobell VI addressed that. Cobell VI, in that opinion the Court of Appeals found that there was an obligation to perform a historical accounting, but that's where it stopped.

So the issue of how much, we in all honesty believe we should not reach that. That would be contrary to the law that's been established and the 1994 Act. The issue of how much is an issue that is not before the Court in this case, which is one for injunctive relief only, and not an award of money damages to

a class that was certified only, only to receive information, to receive a historical accounting.

Again, to the extent you're talking about money that was unlawfully withheld, that is also a mismanagement issue, Your Honor. Whether that $3 billion, assuming hypothetically they lost it or they erroneously sent it to another Treasury account, that would be a mismanagement issue, and any relief for that relating to equitable disgorgement begs the question, what is it that the government is to disgorge?

Speaking roughly, in the IIM account, in 14X-6039, there is approximately $400 million of funds at any time. That money is generally earmarked for individual Native Americans, as it is distributed as addresses are found, as minors reach a mature age. That money, even the $400 million that is in the 14X account, is generally earmarked for individual Native Americans.

So the question is, what could the government possibly disgorge even if the Court were to recognize in this case some type of general theory of equitable disgorgement?

Again, we would like the opportunity to brief these issues more fully, and --

THE COURT: You're certainly going to get the opportunity. What you're not going to get is 10 years to do it.

MR. KIRSCHMAN: Oh, to brief the issue, Your Honor?

THE COURT: Of course. I mean, the whole purpose of

this is to -- we have to figure out what issues we're going to brief. Of course you're going to have the opportunity to brief these questions.

MR. KIRSCHMAN: Well, I mention that because I'm --

THE COURT: Sometime over the next 30 or 45 days, okay, that's what we're talking about here. That's my time frame.

MR. KIRSCHMAN: Okay, Your Honor.

THE COURT: We're going to move this matter along and do something. I don't know what we're going to do, but we're going to move it.

So with respect, Mr. Kirschman, I think you're starting to repeat yourself a little bit. So why don't I hear from the plaintiffs?

MR. KIRSCHMAN: Thank you, Your Honor.

MR. GINGOLD: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

MR. GINGOLD: And thank you very much for scheduling the status conference for today.

Your Honor, Mr. Kirschman's understanding of the facts and law in this case is materially different from our own. I've been practicing law for 34 years, and this is the first time I've heard a description of what the United States District Court can do and not do. That's more consistent with a civil law state and a common law state.

We do not, as far as I know, operate under the civil

code doctrine damnum absque injuria; unless there is a specific provision identified in the statute, there is no remedy. And literally speaking, it provides for injury without remedy. We don't have that in this country in this court system.

And I understand Mr. Kirschman has expressed a lot of concern for benefits to beneficiaries that they receive --

THE COURT: Do we have damnum absque jurisdiction?

MR. GINGOLD: Yes, Your Honor. The jurisdiction is grounded in statute and informed by common law. That's precisely what Cobell VI said, and none of the subsequent Court of Appeals decisions said anything otherwise. Rule 54 of the Federal Rules of Civil Procedure deals with the scope of authority with regard to judgments for an action brought, and specifically provides that Justice be done, that remedies be provided to ensure that the party that's successful gets the relief he's entitled to receive.

Your Honor, we've dealt with these issues before and we've discussed them with you, and since I understand that we will be briefing these, I'll be as brief as I can, subject to Your Honor's questions.

Monetary recovery is not necessarily damages. The United States Supreme Court established that very clearly in *Bowen v. Massachusetts*. This Court is aware of that case and itself has noted the discussion of issues in that case.

The issue of an accounting is not merely a de minimis

obligation. As this Court and the Court of Appeals has held, it is actually fundamental to any trust. Without an accounting or an obligation to do an accounting, there is no trust, Your Honor.

An accounting, as plaintiffs have said repeatedly, will allow plaintiffs to determine other courses of action once the accounting of all funds, as stated by the Court of Appeals, is completed. And in order to account for all funds, Your Honor, it is necessary to start with the opening balances. This is a commingled trust, it is a common trust fund; we have undivided interests in millions and millions of acres of land. The government itself has represented to this Court --

THE COURT: Somebody answer the phone.

Okay. Go ahead.

MR. GINGOLD: If it's for me, I can't take it.

Your Honor, the interests are for the most part now held undivided. The government has complained about the fractionated interest problems. Even for those interests that are not held in an undivided context, the funds are collected jointly from the revenues developed by the trust lands, deposited in either a government entity or authorized representatives of the government.

And in fact, on June 30th, 1998 in a statement of undisputed material facts sent to the -- or filed with this Court, the statement of what constitutes an account is not just

accounts held by the Secretary of the Interior, they also explicitly stated it's accounts held by authorized representatives. That is part of their own regulatory structure, Your Honor. It was never intended to necessarily be identifiable to a trust beneficiary.

Because, Your Honor, if a trust trustee manages a trust so poorly that the trust funds are not identifiable and the beneficiaries are not properly stated, that does not excuse the trustee from his own accountability for the mismanagement of the trust. That would be a change of generations of trust law.

What we are dealing with here, Your Honor, is a confluence of trust law, the law of restitution and the law of equity. We're dealing with law that has been decided in cases in this country and before that in England. And whether or not there are limitations on this Court because of the unique aspect of the government as trustee, in fact the District Court was granted the same authority of a chancellor in equity. And the Supreme Court has explicitly dealt with that issue, as has this circuit.

But what we have here is a very different situation. In order to manage a trust properly, there have to be adequate records, there have to be adequate systems, there has to be adequate staffing. That was explicitly stated by the Court of Appeals in Cobell VI. Those are subsidiary duties of the duty to account.

The government is in breach of its duty to account, it has been in breach of that duty to account, and the impossibility means it will continue to be in breach of its duty to account.

Therefore, what we are dealing with, Your Honor, is, what are the remedies available for this Court with a breaching trustee? The remedies available to a Court with a breaching trustee are broad, Your Honor. So long as we don't run into the jurisdictional issue this Court has identified, which is whether or not we are in fact seeking damages as opposed to restitutionary relief, the issue of legal versus equitable restitution has been examined thoroughly over the decades, more recently with regard to the U.S. Supreme Court in 2002 in the *Great West Life* case.

Your Honor, this trust at the turn of the 20th century had 54 million acres of land; today we are guessing there are approximately 11 million acres of land. The government says in its filings with this Court that it is one of the largest land trusts in the world. This Court in its January 30th opinion specifically restated what has been said before by this Court, and that is, yes, assets are part of the accounting.

Your Honor, equitable restitution is identified for a breaching trustee. To the extent this Court doesn't have jurisdiction, in both this circuit and in decisions of the Supreme Court, there must be a specific statute that limits the

equitable authority of the Court. Examples for Your Honor are ERISA, CERCLA, and civil RICO. They are characterized by the United States Supreme Court in this circuit and other circuits as comprehensive reticulating statutes that explicitly provide the relief that a United States District Court judge is to consider, unless the limitations are established by statute. And, Your Honor, they are not established by the Trust Reform Act or any other statute going back to the 1890s that plaintiffs have provided as a supplement in their proposed findings and conclusions that deal with any limitation with regard to the remedies where the United States as trustee is in breach.

Your Honor, an easy way to look at it from our perspective is damages is to provide a remedy for the injury sustained by the plaintiffs. Equitable restitution is to provide a remedy for two purposes; to require the disgorgement of trust funds and assets that the trustee in breach has no right to retain for his or her purposes, and two, equally important, Your Honor, to ensure that the misconduct in the management of the trust does not continue. They are equally important issues.

And that was an issue, as a matter of fact, recently discussed in the United States Supreme Court case decided on February 20th with regard to the reach of ERISA. And it's one of the few Supreme Court decisions I've seen in years, Your Honor, where there was no dissent. And in that particular case

the statement was, where you have -- in an ERISA pension fund situation, where you have misconduct by the administrator or the trustee, there's greater latitude, even where there is a comprehensive reticulating statute, to provide remedy for the beneficiary, the participant in the plan, not just for the plan itself. That was a significant change from previous decisions, and Your Honor, there was no dissent by the Supreme Court.

Now, equitable restitution has always been considered the antithesis to damages. If plaintiffs wanted damages, we would have sought damages in the appropriate forum. We were hoping that an accounting, and we were hoping, obviously naively at this point in time, Your Honor, we were hoping that an accounting would reveal exactly how the trust was managed, what assets continue to be held, what funds continue to be held, how they were held, and where they were held, and whether or not it's the United States government that should be disgorging or provide restitution, whether or not damages would be in order based on the details of that conduct over the history of the trust, and/or, Your Honor, whether or not we would need to seek relief from third parties.

Your Honor, it became evident after the first couple of years of this litigation that the accounting was not possible, as the government was unable to produce documents even under the November 27th, 1996 court order. And Your Honor, we learned that, we kept on reporting to the Court we didn't believe the

accounting was possible and therefore the remedies that we could have determined as appropriate once an accounting is rendered obviously don't exist in that regard, but we are left with a remedy that has been in existence, and the Supreme Court does not consider it damages and no other circuit that I'm aware of, Your Honor, has ever considered it damages, and that is restitution.

We want the property of our clients back. We want the benefit conferred on the government for its unlawful conduct -- and there is no correlation, Your Honor, between the injury our clients have sustained and the benefit conferred on the government for its breach of trust. That is the difference between damages and non-damages, or equitable relief, which every single authority has stated does not constitute damages.

THE COURT: Okay. Mr. Gingold, I get the drift. But talk to me about Mr. Kirschman's Rule 23 point. What do we do about the class action aspects of this case?

MR. GINGOLD: I would like to refer this Court to *Coleman Vs. Pension Benefit Guaranty Corporation*. It's a District Court decision in this district, August 10th, 2000. It specifically holds as follows: "The class certified under Rule 23(B)(2) may recover monetary relief in addition to declaratory and injunctive relief at least where the monetary relief does not predominate." And it cites to you *Banks vs. Billington*, a DC Circuit case in 1997.

THE COURT: You don't think a monetary award styled as something other than damages in the neighborhood of billions of dollars wouldn't predominate over --

MR. GINGOLD: Your Honor, we sought an accounting to determine whether or not there was anything that was owed to the plaintiffs. Based on the discovery and the testimony in this case and the documents that have been produced over nearly 12 years, it became evident that there are issues that go far beyond this, especially, Your Honor, with respect to the property.

I would suggest, Your Honor -- prior to Trial 1.5 in 2003, Your Honor, plaintiffs deposed Bert Edwards, the executive director of the Office of Historical Accounting. During the course of that deposition, plaintiffs' counsel asked Mr. Edwards, "What happened to approximately 40 million acres of land that were held in trust?" The response from Mr. Edwards was -- after plaintiffs' counsel said, "Did the land just vanish," he said, "It must have just vanished."

Your Honor, that is trust corpus. The subsurface rights include oil and gas, the surface rights include timber and grazing and other issues. These are vested property rights. The government itself may have acquired much of that acreage, whether those properties were transferred to the Department of Defense for military bases and bombing ranges, whether they were transferred to the Department of Agriculture, or whether BLM

itself directly has held them or has acquired those lands through swaps.

Your Honor, this is an action in equity. The Court of Appeals said the Trust Reform Act doesn't create or limit the rights of the plaintiffs in Cobell, it affirms rights and it isn't exclusive. That's exactly what it said, Your Honor.

How far we go with that remains to be seen. However, I'm dealing with specific holdings and what the truth of the matter is. And Your Honor --

THE COURT: What do I do with Eddie Jacobs? What are you going to do with Eddie Jacobs? He wants to opt out.

MR. GINGOLD: Your Honor, Mr. Jacobs, as I read his complaint, Mr. Jacobs is talking for the most part about damages. Mr. Jacobs believes he has an action for damages. This case is not for damages, it is not covered for damages, does not preclude anyone who is otherwise not precluded, based on whatever judgment occurs, from seeking damages on his own in the claims court.

Your Honor, the claims court does not have general class action jurisdiction, nor does the claims court have general equitable jurisdiction. One of the reasons the Individual Indian Trust is in as bad shape as it is, based on testimony from government officials, former government officials, is because there was no expectation that individuals would be able to bring an action to hold the government

accountable because of the limited jurisdictional requirements in the claims court. Again, they don't have general equitable authority to fashion equitable relief, as this Court, as an Article III Court, has. That doesn't exist in a claims court.

What we have is a situation that has gone on for 120 years with no accountability, poor records --

THE COURT: I got that part. I got that part.

MR. GINGOLD: Your Honor, one other thing with regard to Judge Lamberth. It's stated by Mr. Kirschman that Judge Lamberth said that this is only an APA case. I would like to cite to you language from the November 5, 1998 decision of Judge Lamberth. It's 30 Supp 2nd 33, and it is a summary judgment decision of Judge Lamberth at the time.

Direct quote at page 33: "The defendants seek from the beginning to constrain the plaintiffs' claims to the APA, but such a characterization simply does not comport with facts alleged and the allegations set forth in the complaint. Therefore, to the extent that plaintiffs state a claim for equitable relief for breach of trust duties, Defendant's motion for judgment on the pleadings must be denied." Your Honor, that wasn't appealed.

So therefore, with all due respect to Mr. Kirschman, our understanding of the law of this case is very different from his own. We believe it's critical for this Court to set a trial date clear. Clearly the issues that this Court has outlined for

us with regard to jurisdiction and the other two issues can be dealt with in motions in limine or in pretrial briefs.

We believe it is important. It's been 12 years. 10 percent of the time of this trust has been involved in litigation against this trustee. We agree completely that this case must end, it must end in accordance with Cobell XIX's instructions, which are to resolve the case expeditiously and fairly.

Therefore, Your Honor, we ask this Court to consider setting a May 26th, 2008 trial date. We can be prepared to go to trial at that point in time. This Court has noted before, much has been produced given the concerns about accuracy and completeness of information. There's very little that anyone can reasonably expect will be changed between now and, Your Honor, another 10 years with regard to the quality of the data. What it is, it is. So we are prepared to go to court, try this case on May 26th --

THE COURT: What does the trial look like?

MR. GINGOLD: Your Honor, I believe it should be considered an equitable restitution proceeding, and the equitable restitution, if this Court chooses, can include both the monetary relief, the recovery of the benefits conferred on the government through its breaches of trust - and this Court has held the government in breach of trust - and also, Your Honor, the incidental and consequential benefits derived

therefrom, which is conventional equitable restitution.

In addition, Your Honor, if this Court chooses at that time, or how it deems appropriate, the recovery of up to 44 million acres of land that is held in trust by -- that have been held in trust no longer exists, we would like either the recovery of that land or the identification of to whom that land has been transferred, we would like the income that was derived from that land in the interim that it was held by the United States. That is a benefit conferred in classic equitable restitution, Your Honor.

So Your Honor, we believe this should be construed as an equitable restitution proceeding. The remedies are plaintiffs' remedies. They are not defendants' remedies to choose, particularly whereas here the government remains in breach of its most fundamental trust duty.

Your Honor, until the government understands that it has the same interests to manage the trust in the best interests of the beneficiaries, and it chooses to make its resource decisions in that regard, no injunction, no declaratory judgment, and no other action by this Court will be effective.

Indeed, Your Honor, what is clear is this Court has more limited injunctive relief powers than other courts with regard to a private trustee. Which is precisely why equitable restitution is critical in this case, because that is one of two essential components of equitable restitution, to deter

continuing breaches of trust. And Your Honor, it's time. 12 years of litigation is enough, and 120 years of misconduct is enough.

So, Your Honor, we request this Court to set a May 26th, 2008 trial date. We will be prepared, and if necessary we will go first.

THE COURT: Don't leave that podium. I asked you what the trial looked like, and you got very expansive about 44 million acres of land, but you didn't tell me anything about what the trial looks like. Tell me what the trial looks like. Who are the witnesses? What are the issues?

MR. GINGOLD: The way we understand them, Your Honor, we would be working with the data principally -- well, whatever data we would use, Your Honor, would be data that has already been produced in this case or has been admitted into evidence in this case. So that's the information.

We would be looking at the income information. And Your Honor, some of the documents that have been produced - and we have been reviewing them over the last several weeks - indicate additional income figures. And there is a significant amount of disbursement figures that were not actually introduced in the October 10th trial. That information sometimes is not even consistent with what was identified as throughput.

For example, in one particular year it was represented in the government's throughput analysis there was approximately

$60 million received in income, when in fact, in that particular year, in a report that went to Congress, I believe, and other information backing it, it showed $120 million received that particular year.

So, Your Honor, we would be using principally the government documentation. We would be prepared to retain experts to identify -- for example, 1972 forward is much better information provided by the government with regard to the income figures than 1887 to 1972. As a matter of fact, as this Court noted in its opinion, there are concerns about the quality of the data because you're looking at year-end balances as opposed to income and disbursements.

Your Honor, we would plan to use the data available, whether the data -- if we do an early trial as opposed to a late trial, we would not need to get checks, nor all the check authorization documents, whether those documents are signature cards, whether those documents indicate authorization to the payee as a particular beneficiary. We would assume for purposes of the trial that disbursements that are recognized in the CP&R data would be valid for certain purposes or for purposes of the restitution.

Your Honor, we're looking at approximately from 1972 forward, I think it's to 2005, we're looking at approximately something between a 60 to 70 percent disbursement rate between the money the government itself acknowledges was deposited in

the Trust - and Your Honor, how much of that was actually reported as being deposited in commercial banks, it's impossible to tell - but that was a depository authorized representative of the government, commercial banks, for many, many, many years; as a matter of fact, for probably more time than the Treasury held the funds.

So we would be looking at the government's data in that regard. We would consider using a regression analysis, straight-line regression analysis prior to 1971 through the beginning of the trust in 1887, using data points provided in the government materials itself in order to come up with a reasonable income and distribution rate. So again, we would be relying on government data, what the government itself has admitted to.

We have discussed this type of approach with our experts, each of whom says it is reliable and doable, and obviously an alternative to having all the documentation.

Your Honor, when there's spoliation of documents in litigation independent of the trust, or when the trustee destroys documents, generally all inferences are against the government. We're not asking for that even in this case, Your Honor. We'll use the government's data, we'll go forward. And if you look at the data, whether you look at Dr. Haspel's sheets and information or others, you're looking at data from actually 1887 through 2005, which is greater than

13 billion in collections. You're looking at disbursement rates that range from actually, Your Honor, less than 50 percent to slightly more than 70 percent. The difference between the amount of money held in trust and the amount of money disbursed is the amount of money that remains in the government's hands.

Your Honor, we're not asking for the interest that should have been paid on it. That would be damages. Rather, we would be looking at the benefit conferred on the government.

Let me give you an example. In the 1999 trial on June 7th, Commissioner Gregg, the commissioner of the Financial Management Service of the Department of Treasury, testified that funds held in the Treasury general account reduced the amount of money the government needs to borrow, and explicitly testified that the government has benefitted from the use of those funds.

Your Honor, whatever that benefit is, is benefit conferred. That is part of traditional restitution if those funds have been held and not distributed.

We're also looking at a situation, Your Honor, where because the trustee has not maintained adequate records, and for much of the trust our clients have been labeled as non compos mentis, they didn't have the ability to make any decisions with regard to their assets and they didn't have any ability to make decisions with regard to the income.

Therefore, to the extent we have thumb prints on checks and other things, practically speaking, that would be impossible

for us or this Court to resolve for decades. So we're not going to go there. We're going to make certain assumptions. We're going to make certain assumptions because we agree with this Court's approach to resolving this case. This case can be resolved fairly and expeditiously. We will use the government's information, we will use what they have admitted to this Court, what they've represented to the Court of Appeals, what they've produced in discovery, and what they've produced and has been introduced into evidence in this case.

Your Honor, it's the government's information; the government will have to repudiate its own data. If that's the case, that's another interesting position for a trustee to be in.

But Your Honor, we think this can be relatively simple, we think it can be short. We're not going to be dealing with months of litigation. This case can be resolved fairly and expeditiously.

And Your Honor, it is not as traditional as an equitable restitution proceeding as we would hope, because that would actually require all the information. But it is something that recognizes reality.

As this Court has noted - and Your Honor, we as counsel for the class are extremely grateful for this Court's understanding and sensitivity of the issue - class members have died out of this class. Your Honor, one of our named plaintiffs

has died since this action was filed. We see people suffering too long, and we believe they're entitled to a resolution, and Your Honor, we could do it quickly, it could be done fairly, and it's time that the trust -- that the trustee be encouraged within the bounds of the law to manage this trust as it should.

One last point in that regard. Generally speaking, when you're looking at trust cases over 200 years in this country, first through Massachusetts and then through New York and then elsewhere, the most frequent repudiation of a trust is where the trustee refuses to do an accounting. When there's a repudiation of the trust, the Court sitting in equity has significant authority to ensure that the beneficiaries are protected and their assets do not fall into further ruin. The United States Supreme Court in *White Mountain Apache* in 2003 specifically said the Secretary of the Interior has an obligation not to allow trust assets to fall into ruin on his watch.

Your Honor, as long as this trust is managed the way it is, ruination will continue. It's time to stop. It's time to encourage them. We think this proceeding can -- I would be surprised, Your Honor, if this proceeding would take more than two weeks, and it could take less time than that.

THE COURT: All right. Thank you, sir. Both sides have addressed me so far at a very high level of generality, and, if I may say so, rhetoric. Well spoken rhetoric, but

rhetoric. I have to get a lot more specific.

Mr. Kirschman says he wants to brief issues in this case. Of course he does, and he'll be permitted to do so. Mr. Gingold says he wants a trial in May. I can't do that. But I am committed, absolutely committed, to getting this matter resolved in something like a final judgment this summer, before the summer is out, early this summer, if possible.

And so here is a schedule that I've been sketching out as you've been talking. Now, you will all remember that sometime last year I said we were going to have a trial in October and we'll figure out later what the trial is all about. And we did that. We did that by kind of sneaking up on it and coming together to talk about it.

I have a trial date available on June 9th.

MR. GINGOLD: That's acceptable to plaintiff.

THE COURT: I thought it would be, Mr. Gingold. And if it took two weeks, we could spend two weeks, although I don't expect it to take two weeks.

I will take Mr. Gingold at his -- I will accept Mr. Gingold's offer that it's the plaintiffs' case and the plaintiff goes first. I still don't know what they're going with.

And so here's what I want to happen: This sets up a pretty dramatic schedule for the plaintiffs' side, but the plaintiffs have been thinking about this case for what, 16,

18 years? I figure that they're ready for anything at this point.

The plaintiffs have two weeks from now to file what I will call a written claim for equitable disgorgement in reasonable detail setting forth what they think they're entitled to and on the basis of what evidence, broadly stated. That statement also had better deal pretty clearly with this Rule 23 problem, which I think is a significant snag.

The government will then have three weeks to respond and to brief its jurisdictional questions, its law of the case questions, and to file whatever objections they think are appropriate to the claims that the plaintiffs have made.

And the plaintiffs have 10 days to file a reply to that responsive pleading, or pleading, memorandum. I don't care what you call it, counsel, petition, response. Put whatever label you want on it. If you have any questions when I'm finished talking about what I mean by any of this, I'll be happy to try to answer them.

Then we'll have a hearing on April 28th to go over the materials that have been submitted by the parties, to hear further argument, to discuss the content and the shape of the trial proceeding, or evidentiary proceeding, or whatever is going to happen on June 9th. And after that, I don't know what's going to happen.

So your dates are two weeks from today, which I think

would be March 19th, plaintiff makes its submission; three weeks after that, which is -- I lost track of that. It would be, what, April 10th, something like that? April 9th would be the government's response. 10 days after that works out to April 21st for the plaintiffs' reply, and the hearing we're going to have, call it a status conference, hearing, argument, whatever, it will take at least half a day, and we will set it up for -- let's set it up for 10:00 o'clock in the morning on April 28th and go as long as we need to go.

And then mark down June 9th on your calendar as the day when we're going to begin whatever it is we decide to begin after that process that I just outlined.

The purpose of this is to bring this matter to a conclusion. I will listen carefully and very respectfully to the government's argument about jurisdiction, but I want them and the plaintiffs and everybody in this room to know that I would not consider it a good use of the judicial resources of the United States to stop this case here only to have it start all over again in a different court. 16 or however many years is long enough, and a result of some kind is called for here.

Now, that's the big picture we came here to talk about today. Any questions about that schedule or about what I expect of the two sides? I'm not going to issue an order. Everybody okay with that?

MR. GINGOLD: Yes, Your Honor.

THE COURT: Or if you're not okay with it, do you at least understand it? Yes, Mr. Kirschman?

MR. KIRSCHMAN: No, we understand.

THE COURT: All right. Now, there are all kinds of other matters kind of floating around here. Probably the most persistent ones are the various motions about reconnecting the computers at the Solicitor's Office and the Department of Interior.

Plaintiffs say they don't want to mess with that, they don't want to talk about it, they don't want to answer it. I'm sorry, you've got to answer it. You've got until March 12th. That's the extension of time you have. I've gotten to the point, quite frankly, where I consider this computer connection issue to be collateral to the whole question that is before me, and fail to see why it is any longer necessary to keep the department IT dysfunctional. And I'll want to have some pretty powerful reasons why by the 12th of March; otherwise, I'm frankly inclined to let them turn the switches on.

Then there is, of course, the question - Mr. Kirschman came back and back and back to this question in his opening remarks today - of the historical statements of accounts and class communications. I certainly agree with the government that at some point -- that the $127 million of work that has been done is not going to go down the drain. I think I tried to suggest in the findings and conclusions that I issued that they

have value, it's just that the individual Indians need a clear notice about what the limits of that value are.

And at some point -- as soon as we can sort out the bottom line we're trying to get to here, it seems to me that at some point, as long as we can get this other big nut taken care of, it will be quite appropriate to send these notices out to people with an appropriate notice that says whatever it says based on the Court's ruling.

I do not anticipate terminating this case with an order that says, all that work that's been done is for naught and will never be used. Because, as I tried to indicate in the findings of fact and conclusions of law that I issued, for what they are, there is sufficient accuracy and so forth; they just don't have any starting point that an accounting needs.

So we're going to work that out. We're going to work that out as part of the ultimate resolution of this case, and we're certainly not going to keep DOI ever from issuing these historical statements of account. They may be called something different, they may have different legends at the front of them, they may have a surgeon general's warning or something on them, but there's been a lot of work that's gone into the organization of these data and the work should be used.

That's all I have today, counsel. Is there anybody that wants to raise any other issue?

Mr. Dorris, I haven't heard from him yet.

MR. DORRIS: Your Honor, one small request. You've asked us to respond on the reconnection issue by March 12th, or that's what is presently scheduled. We have the March 19th date, two weeks to put the equitable claim together. I would ask the Court's indulgence to let us file the reconnection brief a week after that date, on March 26th.

THE COURT: All right. March 26th.

MR. DORRIS: Thank you.

MR. KIRSCHMAN: Your Honor, related to that, I wanted to point out that the briefing on reconnection of the Office of the Solicitor is complete and has been pending before the Court. So --

THE COURT: I know. I have the same limitations everybody else does. I don't want to climb up this learning curve and then have to do it again. I want to do it all at once. So just hang in there until the 26th or sometime after the 26th, and then I'll deal with the whole question.

MR. KIRSCHMAN: Very good, Your Honor.

THE COURT: All right. Thank you everybody. We're adjourned.

(Proceedings adjourned at 3:50 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

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

_____ _____

SIGNATURE OF COURT REPORTER **DATE**