UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
Plaintiffs	:	
v.	:	Washington, D.C.
DEPARTMENT OF THE INTERIOR, et al.	:	Monday, May 14, 2007
Defendants	:	3:00 p.m.

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TRANSCRIPT OF PREHEARING 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 96-1285, Cobell et al. versus Gover.

If counsel who will be arguing would please identify themselves for the record.

MR. KIRSCHMAN: Your Honor, Robert Kirschman, Department of Justice, for defendants. Also arguing today on the motion to vacate the 2001 consent order will be John Warshawsky, and arguing the attorneys' fees issues will be Michael Quinn. Both gentlemen are with the Department of Justice.

MR. GINGOLD: Your Honor, my name is Dennis Gingold. I'm counsel for plaintiffs. With me is Keith Harper of Kilpatrick Stockton; Bill Dorris, Kilpatrick Stockton; Elliott Levitas, Kilpatrick; Jeffrey Rempel, our expert; and David Smith of Kilpatrick Stockton.

THE COURT: Okay. In my organization of this proceeding today, we have three basic topic headings to cover, the fee issues, the consent order issue, and the October hearing.

I want to start with the fee issue. I've lost my innocence in this case. I don't think we're going to put it behind us. The purpose of my short omnibus order recently was to try to put all this behind us. I have to say, I clearly, obviously, did not find in the morass that is the docket of this

case all of the memoranda and objections to fees that were lurking there.

But I have to say at the same time that I'm frankly disappointed in both parties on this particular issue. I had, as you all know, two ex parte meetings, one with plaintiffs, one with the defendants, to try to orient myself in this case. And I was reminded by plaintiffs of these outstanding fee matters, and resolved to take them up, discuss them -- I thought I discussed them with defendants, and the discussion we had was kind of a shrug on the part of the defendants, which led me into the erroneous belief that the defendants really weren't making a substantive opposition to the fee petitions.

Now, obviously, there is a very substantive set of oppositions to it. And again, as you all know, these fee matters can eat up an enormous amount of time and energy on everybody's part, and the Court of Appeals requires detailed rulings on these subjects. And I suppose what I've done is to sentence myself to sit down on a couple of weekends and crawl through these billing statements. I don't really want to do that, but it appears that I have to do it.

I asked the parties to respond on the defense's motion for reconsideration. I asked the plaintiffs to respond to a few points. And let me tell you where I am so far on this subject. Unless I am very much mistaken, the plaintiffs have put in billing statements of something like 83 hours, or $28,000, just

for scheduling the December 20th, 2002 deposition, at which the claim of privilege was made that was later held by Judge Lamberth to be improper.

They can't claim that money here. That was before these events happened, and I can't understand why the plaintiffs made that claim. There may be other dollar figures in this bill for actually taking that December 20th, 2002 deposition. Again, I can't understand why that was billed.

There is a substantial amount of money claimed for the Singer deposition. The relationship of the Singer deposition to the Erwin deposition escapes me.

And there's a very substantial claim made for preparing something called a "Report on the Status of the Evidence," that wasn't asked for, and I don't know how it can be billed under Judge Lamberth's order, which allowed "reasonable fees and expenses incurred in making plaintiffs' motion to compel the deposition of Donna Erwin, to respond to the question as to which privilege was improperly asserted, and as a result of having to re-depose Ms. Erwin."

So those are at least four elements of the claims in the Erwin deposition that I'm going to disallow, and there's a substantial amount of money involved in them.

There are a number of other objections that have been made by the government that I'm going to overrule. They've objected to Mr. Rempel's fee of $225. It's too late in the day

for me to mess around with that. Judge Lamberth approved that on previous occasions. I don't care what particular work Mr. Rempel was doing in this area or in the Sapienza area. His fees, the rate of his fees, have been previously approved. I'm not going to change that.

Nor am I going to sustain the government's objection generally to the scope of the second Erwin deposition, or to the fact that parts of the deposition were taken much later in 2004. I understand that Judge Lamberth sua sponte ordered that.

Nor am I going to get into deciding whether it was proper for both Mr. Brown and Mr. Gingold to review a motion to compel, or to what I consider frankly kind of flyspeck objections like Mr. Brown's spending two and a quarter hours reviewing a ruling of the Court, or to time spent preparing the fee petition, with one exception:

The latest filing made by the plaintiffs today, I think, indicates that they've cranked up the clock and there's another $129,000. No, sir. That time is not going to be compensated, not out of this Court.

The only reason we're compensating the earlier time is because it was all done under the rubric of Judge Lamberth's order. But I think responding to this motion for reconsideration, frankly, counsel, is a kind of a self-inflicted wound. You've made some very dramatic over-claims for fees, and having to respond to that motion for reconsideration, I do not

consider compensable.

Now, on the Sapienza affidavit, that's a much broader order of Judge Lamberth. The order allows "reasonable expenses incurred by plaintiffs as a result of opposing the claims set forth in the Sapienza affidavit." That is a much broader fee award, concept of a fee award, than was the Erwin deposition.

But I think the government is correct that no fees should be granted for work performed in June and July 2000, before the third motion for summary judgment was even filed, that contained the affidavit of Sapienza that was the subject of all of this Sturm and Drang.

And I think the government is correct that the plaintiffs cannot properly collect fees that were rejected on prior occasions concerning efforts to hold the Secretary and the Assistant Secretary in contempt, or for the Mona Infield matter. I am not worried about inconsistencies between the bills of Mr. Gingold, Mr. Harper, Mr. Brown.

I am, frankly, quite concerned about the assertion made in the government's motion, and I want a specific response from the plaintiffs. I don't think -- now, you're going to tell me I got this a long time ago, and if I did, then I've missed it again. But I don't think I've had a response yet to the suggestion in the government's "Corrected Objections to Statement of Fees and Expenses," filed on April 26th, that Mr. Gingold rewrote time entries to fit the Sapienza fee award.

I'm referring to the material at pages 11 and 12, and footnote 13 of the defendant's corrected objections.

Mr. Gingold will stand up and tell me that I'm wrong, that he did respond to that, and if so, I want to know what the response was. Because that I frankly find a rather disturbing charge.

Your nickel, Mr. Gingold.

MR. GINGOLD: Thank you, Your Honor. We did respond. There is a footnote response, and let me see if I can -- in the brief that we filed on Thursday.

THE COURT: Well, a lot of things were filed on Thursday, Friday, and today.

MR. GINGOLD: No, no. I'm just trying to explain this, and I will find it.

Your Honor, what I'm looking for in here, and which I expect to find shortly, is a statement dealing with the fact that an issue like this was raised before in other fee objections by the government. And the judge responded -- Judge Lamberth responded with the statement that, to provide clarity to enable the Court to understand what the issues are was satisfactory.

And in fact, if -- I'm still looking while I'm speaking, Your Honor. But in fact I went back through my actual time records, just to -- the original diaries, just to determine what is in there. There is nothing, Your Honor, that is at all

inconsistent with what is in the billing records. And in fact, there is probably, in all the meetings there referenced, Justice Department lawyers and others were present, including Treasury people. So they know the issues were specifically relating to those particular matters.

Where the allegation of, I guess, a manufactured time record is, is I think specifically with respect to matters within the five specifications for the show cause order that was dismissed by the Court of Appeals. The specifications had broad -- were very broad with regard to conduct and representations which we thought this Court did not want us to get into, and we did not. But among representations were representations with regard to the GAO settlements issue. That's the reason they were within the five specifications that we identified.

What was not -- they're actually within the first four; the fifth specification was the IT security. The other four dealt with conduct during certain periods of time, and they were broad scope conduct with regard to the misconduct of defendants.

The information was included within the fee petition for the show cause motion. The judge had not made any decisions with regard to any of those. The language that was changed was only with regard to certain -- oh, as a matter of fact, Your Honor, it's on footnote six of the brief that we filed on Thursday.

THE COURT: Well...

MR. GINGOLD: Sorry, it's -- the reference, Your Honor, is under 407 F.Supp 2d, 140, 155, where the statement in the decision of this Court is, "The Court finds defendants' objections to plaintiffs' practice of transferring records from one medium to another and clarifying records to facilitate judicial review meritless." That's 407 F.Supp 2d 140, 155. The same objections were made in that particular fee objection that were made in other fee objections.

We had explained to the Court -- because in the past, Your Honor, at our first fee application, one of the principal objections of the government was that we were insufficiently clear. And the Court indicated there was a lack of clarity with regard to the time that was submitted. As a matter of fact, in that same application, I think Mr. Holt had a significant amount of time that was denied because of the lack of clarity.

Subsequent to that, in fee applications, we attempted to make it clear in response to the objections of the government and Judge Lamberth's points. Mr. Holt, I think in the subsequent applications, chose to continue to report the same type of information that was directly in his diaries, and I think for the most part, much of that was denied for lack of clarity. The judge -- the Court then pointed out that the clarity was helpful to enable the Court to understand the issue.

Whatever was identified was identified with regard to

the points made by Judge Lamberth with regard to the need for clarity. The matters that were recorded were matters that were related exclusively to the GAO issue and those fees.

And as we pointed out, in part in objecting to the inconsistency argument, what we have a tendency to do because we are dealing with a number of pressing issues, is go from one conference, one meeting, to one issue, to another brief, and frequently write coded entries, entries that relate to that matter, if we are able to write them down at all because of the time constraints that we have. Because what we try to do is contemporaneously record our time, which is what we represented that we did.

So we had a situation where this issue was raised before, and in the raising of that situation, felt it was appropriate - and Judge Lamberth had on other occasions accepted that as appropriate - to make the clarifications that were identifiable specifically to the issue, but made clarifications in order to support it.

Those clarifications were simply clarifications. That was vigorously argued by the government that was improper, and as a matter of fact, suggested that there was a certain amount of dishonesty associated with it. Judge Lamberth found that that was without merit.

THE COURT: Okay. Government want to be heard on that particular point, Mr. Quinn?

MR. QUINN: Good afternoon, Your Honor. I would not have, I think, much to add beyond the four corners of the brief. I think that the thrust of the government's argument and the concern here is that the government not be billed twice for the same work.

Plaintiffs in their response brief seem to make the assertion that it doesn't matter if they billed twice if it was billed toward a contempt action; and now, because they didn't recover on that fee petition, can re-bill it here.

THE COURT: Are you saying that, Mr. Gingold?

MR. GINGOLD: It doesn't matter if it can fit in both categories, Your Honor. It matters -- if we were paying, we would have no right to bill and collect for it. If the matter is within the scope of two other matters -- for example, Your Honor, let me give you an illustration. I don't want to talk about this too much, because we're dealing with --

THE COURT: I want to talk about it a lot.

MR. GINGOLD: Okay. We're dealing, for example, with the Enfield situation. When we sat down and we talked, and both the government and we accepted the Special Master as the arbitrator in that dispute, the Special Master sat down with us specifically ex parte, and with the government ex parte, to resolve it in what he felt was a mutually acceptable manner.

We raised with the Special Master matters that we had filed with regard to contempt, the show cause motion that was

vacated by the Court of Appeals, matters that were raised in other issues. And the Master said, "I don't know where this is going to come out. Put them in and I will decide how to resolve it."

We explicitly had that discussion with the Master, and he said he wasn't going to make any decisions on it. He said it was appropriate to put it in, and we did, Your Honor. How he was going to come out with it, we have no idea. If we were paid for it, we wouldn't have submitted it. But we had that specific discussion before even filing that, Your Honor.

THE COURT: All right, look. I said I want to talk a lot about it, but actually it won't bear a lot of discussion. Here's the ruling on that point:

I'm not going to go back and undo what Judge Lamberth has said about your rewriting time records, not in the past. But from this point forward, a time record is a time record. It's not something that is embroidered, added to, subtracted from, categorized, et cetera, later on. A time record is a time record. If it's sufficiently clear, you may collect on it. If it's not, you won't. But there's not going to be any -- from this point forward, don't come to me with any edited time records.

Second: With respect to any time that you have previously asked to be reimbursed and have been rejected, take it out of this bill. I don't care whether you can re-categorize

it or not; take it out of this bill.

MR. GINGOLD: Your Honor?

THE COURT: Yes.

MR. GINGOLD: One of the bills that we submitted and were paid, for example, was the interim fee award for equal access to justice. The Court denied time, not because it was denied on the merits, but because it didn't fit within the scope of that fee award. And he explicitly stated that time could be resubmitted in other matters.

THE COURT: If you're going to resubmit that time, flag it carefully so that we can all understand which hours you're talking about.

MR. GINGOLD: But we had situations like that. For example, in each fee award, the Court indicated that time did not fit within that category, it wasn't within the scope of that award. Because sometimes the orders weren't as clear as we would have liked. And we submitted the fees, and decisions were made not on the merits, but with respect to what the Court felt were the scope of the particular award.

Therefore, what the Court said is, within his scope it wasn't appropriate. He did not say it wasn't appropriate to otherwise submit. And Your Honor, that is a situation in every one of the contentions made by the government.

THE COURT: All I'm saying is, if you're going to resubmit time that has previously been submitted and rejected,

flag it so we that know which is which.

MR. GINGOLD: Yes, Your Honor.

THE COURT: Now, just let me review the bidding here. On the Erwin deposition, no fees for the December 20th, 2002 deposition, either scheduling it or taking it; no fees for the Singer deposition, anything having to do with the Singer deposition; no fees for the report on status of the evidence.

As far as this Laffey rate thing is concerned, I understand the government's objection to your claiming the later Laffey rate for preparing a fee petition at a later time than it was expected. But by the same token, if they had prepared it earlier, they arguably would have had to pay it earlier. So I'm not worried about that.

I'm not worried about Rempel's fee. I'm not worried about the scope of the Erwin deposition, or the length of it, or even that it took place in October 2004.

I'm not worried about two or three people reviewing the same material, or inconsistencies in the time between who -- you know, it doesn't bother me if one person claimed time meeting with -- if A claims time meeting with B and C, and there's no claim by B and C for the same time. Life isn't perfect and neither is billing, and I'm not going to worry about that.

Nor, except for the latest claim for fees relating to the preparation of a fee petition, am I going to worry about that, because that's classically and typically compensable.

As far as Sapienza concerned, no fees for work performed in June and July of 2000. And, modified by the discussion I just had with Mr. Gingold, no fees rejected on prior occasions for the efforts to hold the Secretary and the Assistant Secretary in contempt unless that can be tied to the Sapienza thing, or for the Mona Infield matter.

Now, I really -- I think it's in the plaintiffs' interests to resubmit your bill with those rulings in mind, because otherwise I'm going to crawl through it and do it, and you may lose more that way than you would if you do it yourself.

Okay, next. Mr. Quinn, you want to be heard?

MR. QUINN: If I may, Your Honor. As I'm keeping tabs on my list with respect to the fee issue, Your Honor, the one additional thing with respect to the Sapienza matter. Plaintiffs had submitted time claims with respect to a number of motions that in fact they had lost in the course of -- subsequent to the Sapienza declaration attached to the partial summary judgment motion.

In their time requests, a request for fees in connection with a brief in opposition to the government's motion to withdraw the partial summary judgment motion that in fact the Court granted the government's motion to withdraw that motion.

So they had not succeeded on that motion. The practice of the Court heretofore on fee requests have been, if a particular filing had not been at least successful, as a

premise, the party would not be entitled to recover fees for that.

Plaintiffs had also made a motion to amend a motion for contempt, or to supplement the motion for sanctions with respect to Sapienza. That was denied by the Court as well, yet there are fee requests as part of their application. So that's one subset of the objections, Your Honor, that I would still say is open and unresolved.

THE COURT: Well, let me make sure that I understand what you're talking about. I've already said that the fee award or the awarding language of Judge Lamberth on this fee question is "reasonable expenses incurred by plaintiffs as a result of opposing the claims set forth in the Sapienza affidavit." That's pretty broad language. That covers a lot of territory.

Now, are you telling me that the matters that you've just identified don't have anything to do with opposing the claims set forth in the Sapienza affidavit, or just that they were motions that were denied?

MR. QUINN: Well, in the broad sense, they applied to that summary judgment motion. The government subsequently -- the government had made three Phase II partial summary judgment motions, then there was a changeover in counsel for the United States, and a motion was made to withdraw all three pending summary judgment motions, including the one that had the attached Sapienza declaration/affidavit.

Plaintiffs opposed withdrawal of the motion for partial summary judgment. The Court denied that, and granted the government leave to withdraw the motion. And now there are fees being claimed on behalf of that effort to block -- to withdraw the motion that was subsequently granted by the Court.

In the broadest sense, it's related to the subject matter, but I don't believe it is responding to any injury or harm or prejudice related to the Sapienza declaration itself.

THE COURT: All right. I hear that objection. I'm going to overrule it, and I'm going to allow their fees on that.

MR. QUINN: Thank you, Your Honor.

THE COURT: All right.

MR. GINGOLD: Your Honor, may I?

THE COURT: Sir?

MR. GINGOLD: Your Honor, there's another matter that I would just like to ask the Court to consider before we adjourn today, and that deals with the notice we filed --

THE COURT: I saw that. File a Title VII case. It doesn't belong in this case.

MR. GINGOLD: Your Honor, we have --

THE COURT: It doesn't belong in this case.

Now, the consent order -- there is such a thing as obstruction of justice, Mr. Gingold. If you think you've got something that amounts to obstruction of justice, go see the United States Attorney or give me an ex parte affidavit.

Otherwise, I'm through with this business of sanctions and counter-sanctions and retaliation and people yelling at each other. I am through with it, period.

Yes, sir, you want to be heard again? That's a nice smile, Mr. Gingold. Keep it on your face.

Consent order?

MR. KIRSCHMAN: Mr. Warshawsky will argue that for the government, Your Honor.

THE COURT: All right. Mr. Warshawsky, I have to tell you a couple of things here. I'm not writing on a blank slate. Consent order means consent order. The government consented to this at some point. And the government had the burden, in filing this motion to vacate it, of demonstrating that -- doing something to demonstrate that the IT failures that caused this subject in the first place have been remedied. And I don't know that you've made any showing on that point, nor do I quite understand where the prejudice to the government lies with keeping it in effect.

If you would like to address yourself to those two positions, I would like to hear it.

MR. WARSHAWSKY: Yes, I would be glad to. Thank you, Your Honor, and may it please the Court.

The government did in fact consent; Interior specifically consented to this order back in December 2001. And when a party consents to an order, it does so given a certain

given set of facts and the state of the law as it is.

The consent order was entered in response, or following shortly, the issuance of a temporary restraining order which this Court entered not long after the Special Master had issued his report concluding that Individual Indian Trust data was at risk because of deficiencies in the IT security of various systems.

When the government entered into the consent order, the law had not evolved as it has in the past few years. And in the Court's April 27th order scheduling this matter for hearing, you asked us to specifically address the continuing role of the Court in light of the resignation of the Special Master, and, I would suggest more significantly, in the wake of Cobell XII, Cobell XIII, and Cobell XVIII. Because these three decisions, particularly Cobell XII and Cobell XVIII, since they are specific to IT security, do present the Court with a, I would suggest, a new legal framework for reviewing this Court's jurisdiction and in general judicial review of IT security at an agency.

Within about a year's time after the entry of the consent order, Congress passed the FISMA statute as part of the E-Government Act. And FISMA, with all due respect to the plaintiffs, who characterize FISMA as a reaffirmation of previously existing duties, Congress clearly viewed FISMA as a broadening and strengthening of IT security law. And that's

established or that's confirmed by a review, for example, of the legislative history cited at pages four and five of our opening brief, and reiterated in our reply brief.

The FISMA statute did, for one thing, establish that it is the agency head who has the responsibility to determine what types of risks are acceptable in operating IT security systems. We did not argue, as the plaintiffs indicate in their opposition, that FISMA initially established the responsibility of an agency head to have -- made an agency head responsible for IT security. IT security was an agency head's responsibility before that.

But FISMA confirmed that going forward. The agency head permanently would be responsible for making risk-based assessments of what would be acceptable to operate a system. Specifically, the statute talks about the agency head making determinations about information security protections "commensurate with the risk and magnitude of the harm resulting from unauthorized access, use, disclosure, disruption, modification, or destruction of information." That's 44 USC, Section 3544(a)(1)(A).

FISMA also placed the agency's determinations under a specific oversight structure. They're reviewable by, first of all, the agency reports to the Office of Management and Budget. OMB reports to Congress. The agency inspector general has an oversight role. And as the Cobell XVIII Court confirmed, 455

F.3d at 313 to 314, the one thing Congress did not do when it established FISMA is put in place a judicial role for assessing IT security.

Now, the Cobell XVIII Court, in discussing that, said this is not a FISMA case, if indeed such animal exists, or some language like that. And what's important about that is, what this Court's role is, this is a case brought pursuant to the APA, to seek enforcement of the government's responsibilities under the 1994 act. It's not an action under the APA attacking Interior's general IT security.

It's difficult. I mean, I think there is some confusion -- there can be some confusion about where the limits are for judicial oversight in this case, and Cobell XVIII Court recognized that, and I think reconciled them.

What this Court's proper role, I would submit, is, if plaintiffs were to come in with a set of facts demonstrating an imminent threat to the data necessary to prepare the historical accounting, then this Court has the authority to issue a temporary restraining order followed by a preliminary injunction, perhaps a final and permanent injunction.

But that's where the Cobell XVIII Court deviated from the general IT oversight role, which the consent order really contemplated. And, you know, if we all had the wisdom to project five and a half years down the road -- first all, I can't second-guess what happened back then. I don't think

anybody contemplated a five-and-a-half-year process.

But what I do know is that in 2003 and 2004, this Court entered injunctions intended to supersede the consent order. The consent order was stayed by the Court because the Court considered the consent order's process to be a failed process. The plaintiffs have never endorsed the consent order. Even in their opposition to our motion, they point to the fact that the consent order wasn't their consent order.

And the 2005 hearing --

THE COURT: How did it get to be called a consent order if it wasn't consented to?

MR. WARSHAWSKY: Oh, it was consented to at the time by the Interior. But my point, Your Honor --

THE COURT: That's usually the basis of a consent order.

MR. WARSHAWSKY: Well, whatever. I will not go in -- I will plead ignorance on the process for naming the order that was entered. But the consent order certainly was one that the plaintiffs have never endorsed, and -- in 2003 and 2004. And then finally again in 2005, with the 59-day evidentiary hearing, the Court determined that the consent order process was flawed, broken, couldn't be utilized anymore.

And it's at 394 F.Supp 2d at 170. The 2005 hearing, the Court stated that that hearing was to assess current, current IT security. And having gone through that process, for

those of us who went through it, a tortuous 59-day process, during which time the government produced roughly five million pages of documents, many of which were highly sensitive regarding IT security, having gone through that entire process, and the Court entered what it considered the appropriate injunction to replace the consent order, the Court of Appeals of course last year vacated that consent order -- or I'm sorry, vacated the order entered by Judge Lamberth following the 2005 hearing.

So in a nutshell, Your Honor, here we are five and a half years later with a completely different set of facts; and completely new, more importantly, new legal framework for determining what levels of security are adequate.

The consent order, for example, Your Honor, contains no standard that the then-Special Master was to apply in assessing whether IT security was adequate. It simply said, the government, in essence, either submitted information to show that systems did not house or access Individual Indian Trust data, and therefore truly were outside the scope of the case. Or, if they did house or access Individual Indian Trust data, the Special Master reviewed them and made his determination whether the security was adequate.

Following FISMA, the National Institute of Standards and Technologies, NIST, was given much more -- a much greater role in terms of being able to mandate standards for the

government. And so, as we referenced in our brief, a number of standards came out: FIPS 199, and I'm flipping forward here, which sets out standards for security categorization; FIPS 200, minimum security requirements. Those both came out in 2004 and 2006, respectively.

Special Publication 800-53, which sets out recommended security controls. It's now mandatory for the government because of Roman numeral page five of FIPS 200. That came out in February 2005.

Special Publication 80-37 came out in May 2004. That's the current guidance on what's been referred to as the certification and accreditation process. That's the process the agency is required to go through to assess what types of information are on its systems, what types of risks exist for that information, and ultimately to make a determination as to whether adequate security exists and whether the agency -- whether the risks remaining are acceptable.

As the Court I'm sure is aware, the D.C. Circuit wrote about it, this Court has written about it in the past. I think it's common knowledge: No connected operating computer system is 100 percent safe from any form of, you know, manipulation, whatever. If you operate a computer system, there's always the possibility somebody is going to break into it, and it very well could be from the inside as well. The threats, frankly, from employees are often greater than the threats from the outside

world.

But the question is, in the final analysis, who is the arbiter about what those risks -- whether the risks of being disconnected -- or the risks of being connected are great enough to justify disconnection? The D.C. Circuit in 2006 reviewed this Court's analysis of that, and concluded that it was highly skeptical that the public would benefit from disconnected IT systems.

One thing I do want to clarify or confirm to the Court. In asking that this Court vacate the consent order, Interior is not today seeking permission from this Court to reconnect systems, and they do not currently intend to reconnect the currently disconnected bureaus or offices.

They do want to continue going through the process of evaluating the systems to assess risks. And, you know, the Court obviously is aware, for example, the declarations that the plaintiffs filed in their opposition. I mean, that's the kind of information an agency considers in assessing whether to go ahead and allow a system to be connected to the Internet.

The consent order remains a cloud or an impediment to Interior being able to complete the process, which they are required to do under FISMA, and I would submit they should be allowed to do in light of the last few appellate decisions on this issue.

THE COURT: There was an IG report on the state of IT

security that was issued in March. I don't think you've filed that with the Court, have you?

MR. WARSHAWSKY: We have not, Your Honor.

THE COURT: What does it say?

MR. WARSHAWSKY: Your Honor, I'm not -- first of all, not conversant with its details. I don't think I would feel comfortable reducing it to a few sentences. And frankly, you know, it is a matter that we consider to be sensitive.

THE COURT: Well, look. I think everyone understands that the consent order in its current form doesn't make a lot of sense. I mean, it makes references to a Special Master that doesn't exist anymore. It all has to do with the functioning of the Special Master that doesn't exist.

And I think you've just clarified for me that its only real effect is that it keeps four bureaus offline. That's about it. And you call it a cloud or a --

MR. WARSHAWSKY: An impediment.

THE COURT: An impediment.

MR. WARSHAWSKY: Because ultimately, Your Honor, if Interior does what it's statutorily required to do and goes through the process of determining when, for example, the Bureau of Indian Affairs is ready to be reconnected to the Internet, it still can't do that as long as the consent order is in place.

And the only way we can get past the consent order is to ask the Court to determine that that security -- that the

security levels in, for example, the BIA are now adequate to allow Internet connectivity.

I would submit, though, Your Honor, in light of the many authorities that I've cited, including Cobell XVIII, there isn't a basis for this Court to do that. It would be -- this Court doesn't have a standard to make that judgment. What the Court can do is, if indeed the data necessary to prepare the historical accounting were at risk, then the plaintiffs can run in and ask for a TRO. And that is, after Cobell XVIII, I believe, what the proper judicial role is: To protect the data for the historical accounting, not to look at the current state of IT security at BIA and decide whether it's good enough for connection to the Internet.

THE COURT: Okay. Who is going to respond to this from the plaintiffs?

MR. SMITH: I am, Your Honor.

THE COURT: Mr. Smith?

MR. SMITH: Your Honor, if I could point at one thing. You were looking for a response to Mr. Gingold's argument, and apparently it's in footnote 54 of plaintiffs' response to the Court's order dated April 27th. Mr. Gingold could not find that.

Your Honor, I think you hit the nail on the head. This is a consent order. They agreed to this back five and a half years ago. And that has extraordinary implications for this

case. Number one, it shows that they waived all defenses. If they had an argument back in 2001 that, "Look, this is the Secretary's role, it's not the Court's role," they had the opportunity to make that argument back then. They did not.

The second implication from the fact that it's a consent order is the fact that it's enforceable by this Court. We cited the Frew case, Frew vs. Hawkins, which actually Cobell XII relied on to some extent. In Frew, they said just because it's a consent order doesn't mean we can't enforce it. Cobell XII relied on Frew when they went and said this is a court of equity which has the right to enforce Trust obligations a century old, and also has the right to, or the equitable authority to enforce a consent decree.

Third and perhaps most importantly, it changes the standard. We've heard Mr. Warshawsky talk about the need for us to come in and make a preliminary injunction or make a showing of a preliminary injunction that we have to show irreparable harm. But that's not the circumstance anymore when they consent to it. It's their obligation to come into this court and show changed circumstances of some sort. And they haven't done that in this case, Your Honor.

When they originally --

THE COURT: FISMA doesn't change the circumstances?

MR. SMITH: It does not, Your Honor. Because everything that they rely on in FISMA was an existing obligation

at the time of the consent order.

Your Honor, interestingly, on I believe it's page 15 of their original brief, they referred to FISMA as being a consolidation of existing provisions. And that's basically what it is. Number one, they argue that, look, the Secretary, when FISMA was enacted, suddenly had these obligations to manage and assure adequate security. You look back through the prior statutes, the Paperwork Reduction Act, 44 USC, Section 3506, it was the obligation of the Secretary to implement and enforce standards on security.

The IT Reform Act, which was I believe 1996, several years prior to the consent order, the Secretary had that obligation. OMB Circular A-130, which is largely unchanged in its current status, from the time of the 2001 order, imposed on the Secretary this same obligation. So that's an obligation that they had at the time of the consent order, and one that has not changed.

The other thing they refer to is the argument that, look, suddenly OMB is required to create these standards, and must look to NIST for guidance and then promulgate standards that the agency had.

Your Honor, those are obligations that existed back in 2001. There's nothing new in FISMA. The IT Reform Act, again, in 1996 said the OMB must develop standards based on NIST. The Computer Act of 1987, one of the original standard -- or

statutes that Congress enacted regarding IT security, once again referred to the predecessor to NIST, which said you must look at the National Bureau of Standards, I believe I was called at that time. The Department of Commerce must look to that and enact guidance for the secretaries. And all these statutes refer to these obligations as compulsory and binding.

So there's nothing new, merely because FISMA was created, that caused a change of circumstance. In fact, the standard that was described by Mr. Warshawsky of one that you look at the danger to the Trust data and weigh it with all the circumstances to make sure it's commiserate, that the security is commensurate with the risk, that's a standard that was derived from the Computer Act of 1987. It's not something that was suddenly created by FISMA.

Your Honor, to take that one step further, Judge Brown in her opinion in Cobell XVIII said this is not a FISMA case, and in many respects she's right. It's a Trust case. And the standards that were imposed on the defendants under Trust law existed in 2001, existed prior to that time, and existed today.

Cobell XVIII reiterated that Congress intended to impose on the defendants Trust obligations, traditional fiduciary duties, unless they unequivocally expressed an intent to the contrary. There's nothing in FISMA, in FISMA's enactment that said, Look, no longer are these obligations imposed on the Secretary of Interior.

There's no such intent expressed in FISMA. They have -- had in 2001 a fundamental duty to protect Trust data. They have it today. Nothing has changed.

Your Honor, the other thing they argue in their original motion, and I'll just address this briefly, not only did they say the law had changed, but they said the facts have changed. And the specific argument they made was the deficiencies which led to the entry of the consent order are no longer present in Interior's IT systems. We thought it was odd that there's no affidavit that was presented to this Court, or any evidence to support that statement in that brief.

And in fact, after we filed our three affidavits last week, the response and the reply was, Well, that issue is no longer relevant. So basically, the second prong of their attack on this consent order seems to have gone away.

Your Honor, we do believe it is relevant, and particularly for this reason: Your Honor, what those affidavits show -- and it's the affidavit of Ms. Tyler, Ms. Infield, and Mr. Rice, and they're two or three key security people there at BIA. And what those affidavits show is that in the five and a half years since that consent order was entered, nothing has changed. They say that if it was connected to the Internet, it would pose unmitigated risks on Trust data. They say there is no intrusion detection on these systems.

That's important when you consider where IT security

was back when this consent order was entered. We cited the statement from Secretary Norton. I believe it's in footnote, I believe six or seven of our brief. She said, "At the time the consent order was entered," she told Congress, "we cannot protect Indian Trust data with our computer systems. There is no security."

Judge Lamberth, in the year prior to issuance of that 2001 order, said basically, Look, BIA has no security plan for the protection of Trust data. The Special Master made similar findings shortly before entry of the consent order.

So Your Honor, basically when this order was entered, there was no security. And I suggest to you that the affidavits we've presented show nothing has changed since that time.

That's particularly important when you consider what the consent order said. Because the consent order said, "Court, number one, we're going to hire a contractor, and we're going to go and have that person go and insert or apply intrusion detection systems into all our systems." That was the first thing they said.

Then secondly, "We're going to have a contractor come in, and they're going to review each system and each major application, and we're going to make sure that those are in compliance with OMB Circular A-130."

The interesting thing about Ms. Tyler's affidavit and Mr. Rice's is, they haven't even started doing that. According

to Ms. Tyler, they're just now beginning to order an intrusion detection system.

Your Honor, I know this is not an evidentiary hearing, at least not yet, on this issue. But if this were an evidentiary hearing, there would be testimony that Mr. Cason, who is the primary person behind this effort to reconnect the systems, said just a few weeks ago, "What have you been doing in five and a half years?" And I suggest we have the same question: What have BIA and the offline bureaus been doing for five and a half years?

This is important for two reasons, Your Honor. Number one, you've got to wonder what responsible trustee would go and reconnect these systems to the Internet, knowing there's unmitigated danger to the Trust data on those systems, and to ask Court for basically permission to do so.

And it raises a second issue, whether this Court in fact has authority to do something when a trustee takes such action, which is such a gross breach of their fiduciary duty.

Your Honor, I suggest to the Court that it does. If I could use an analogy, in a few months we're hopefully going to have --

THE COURT: I don't read the Court of Appeals as saying that a failure of Internet security can be a gross breach of fiduciary duty, counsel. That's not the way I read it.

MR. SMITH: Your Honor, I suggest that --

THE COURT: What I read them as saying is, "Okay, it was all right the first time around, but you've got a little too hands-on about this IT stuff."

MR. SMITH: I think you're exactly right. The Court of Appeals did say that the Secretary has an obligation to protect Trust data, and in Cobell XII, and they reiterated in Cobell XVIII, that the Court has authority to --

THE COURT: Tell me this, Mr. Smith. Is there anything in this record that -- I mean, IT risk is a fact of life. We all know that.

MR. SMITH: Sure is.

THE COURT: Is there anything in this record that shows any large-scale loss, or any attacks on this data, or any hacking in, or any -- is this anything more than risk?

MR. SMITH: Your Honor, I think it is more than risk. In the IT security trial, we provided several examples of where there actually had been attacks on the system, and there had been some manipulation of data. In fact, even the Special Master was able to go in and manipulate data.

THE COURT: Able to, yes. But I mean, is there any showing that there are bad guys out there messing around with the data?

MR. SMITH: Yes, Your Honor.

THE COURT: Who are they and what did they do?

MR. SMITH: There was testimony in the trial that there

are millions of attacks on the Department of Interior's systems. What do they do? There's hackers all over the country, all over the world. And it's easy to hack in, unfortunately, the Interior's systems and, for example, change an account holder to themselves so they receive the royalty payments that should be going to an Indian beneficiary.

THE COURT: Has that happened?

MR. SMITH: Your Honor, we believe it has happened.

THE COURT: What do you mean, you believe it's happened? Do you have any proof that it happened?

MR. SMITH: Your Honor, the answer to that is, we have Indian beneficiaries who don't receive their payments. We have evidence of --

THE COURT: So maybe somebody hacked in and changed the payee, maybe?

MR. SMITH: Your Honor, we know that there are millions of attacks on that system, and that Interior does not have the capability to stop it.

Your Honor, I suggest to the Court that perhaps in the --

THE COURT: What I'm trying to figure out, Mr. Smith, to be honest with you, I'm trying to figure out what's in this for the plaintiffs. Is this anything more than just sort of a victory, a notch on your gun, we beat them on this subject? What is there really in it for the plaintiffs here?

MR. SMITH: No. Let me take an example here. Here we're dealing with BIA, and I think the record evidence at this point shows there's no security at BIA. They go ahead and put it on-line and connect it to the Internet; the reliability of that Trust data is gone, Your Honor. It's important, as the Court of Appeals noted, for there to be an accounting, that you have integrity of those systems. But you need to have reliable Trust data, and if you have open systems subject to manipulation, you don't have that.

THE COURT: Well, at the end of the day, the government is going to have to demonstrate -- and we're sneaking up on the subject of this October trial. The government is going to have to demonstrate that its accounting is a real accounting.

MR. SMITH: There's no question about that.

THE COURT: You will take the position, "Well, there's no computer security here. How do we know?" Right?

MR. SMITH: We're going to contend that the data is unreliable and the systems are unreliable. That's exactly right.

THE COURT: The fewer controls there are on the system, the better you like it, from that point of view, because the more able you are to show that the data is unreliable. Why don't you just give them enough rope to hang themselves, if that's what your theory is?

MR. SMITH: That's a good point, Your Honor. It's a

two-edged sword. Certainly for purposes of this accounting trial, we can show that the systems are unreliable, there is no security.

But Your Honor, this case doesn't end here. There's another aspect to this case. As the Court in Cobell XIII noted, there's an issue of Trust reform. The Trust does not end here, and we have an obligation to our Trust beneficiaries, our clients, to make sure their data is protected. It doesn't end here. And, going forward, their data can't be on systems that are open to manipulation as the BIA systems are.

THE COURT: Okay. Do you want to be heard further, Mr. Warshawsky?

MR. WARSHAWSKY: Briefly, Your Honor.

Your Honor, you asked, Is there any record of any loss, any proof that anyone has ever hacked into a system and manipulated data? The Cobell XVIII Court squarely addressed that. Mr. Smith talked about no facts since 2001. The 2005 hearing, as I cited, 394 F.Supp 2d 170, was to address the current state of IT security in 2005. And the Cobell XVIII Court, reviewing that --

THE COURT: Mr. Warshawsky, excuse me. Mr. Gingold, when he finishes consulting, I'll be able to listen to you.

MR. GINGOLD: I'm sorry, Your Honor.

THE COURT: Go ahead.

MR. WARSHAWSKY: 455 F.3d at 315, the Court of Appeals

noted that "The class members had pointed to no evidence showing that anyone had already altered IITD by taking advantage of Interior security flaws, nor that such actions are imminent. There was no reason to believe that the effects would be so extensive as to prevent the class members from receiving the accounting to which they're entitled." So in fact, there's been a lot of evidence in the record since 2001 about the state of IT security.

Mr. Smith commented, he made the statement, There's no security at BIA. I'll be brief. We addressed this in our reply brief. Gross misstatement of the state -- of what was reported in the quarterly report, the 28th quarterly report. It was not a statement that there's no security at BIA. The 28th quarterly report referred to the certification and accreditation process for one system, which, by the 29th quarterly report, which we filed a week before their opposition, the 29th quarterly report advised the Court that the C&A process had been completed for that system and it did have an authorization to operate.

So it's simply not true that there's no security at BIA. There's certainly adequate security to operate the systems in their current environment. Is there adequate security to connect it to the Internet right now? Interior has not made that determination.

But until the consent order -- as long as the consent order process is in place, that's not a decision that Interior

can make. And as a result, people, the public, including beneficiaries, are not able to get the benefit of an agency connected to the Internet.

THE COURT: I think we have kind of a chicken/egg situation here. I don't quite understand the argument that you can't even prepare to connect something while the consent order is in place. I think there's a good deal of merit to the government's position that the consent order is no longer justified, and certainly doesn't work the way it was intended to work.

But I don't see why Interior can't go ahead with its plans to connect these bureaus, and when you're ready, come to me and say, "I want to connect the bureau." And I'm probably going to say yes, because I'm going to look at Cobell XVIII and say, "I don't really have the -- the Court of Appeals doesn't want me to tinker around with this."

But you haven't shown me -- you haven't made the requisite showing that you have any security. You haven't filed the IT reports, you haven't -- you say, "Oh, yeah, we have security," but you tell me that you're not even ready to connect the bureaus to the Internet. All this consent decree really does is to stop you at the last step of connecting to the IT. There's nothing in this consent decree, is there, that says that you can't prepare to connect.

MR. WARSHAWSKY: And I apologize if I haven't been

clear about it, Your Honor. Clearly, the Interior Department would like its remaining bureaus and offices to be connected. Clearly, they are taking steps internally to bring that about. They've done an incredible amount. And I can tell you that because, Your Honor, I've been working on this case since January 2002.

THE COURT: Well, if we were working on a clean slate, you could just go ahead and do it. But we're not. We have a consent decree. So I'm going to deny the motion to vacate, but without prejudice. And when you're ready to connect to the Internet, either all at once or bureau by bureau, come back and renew the motion, and I would say the chances are it's going to be granted. But I don't have the right showing before me to grant that motion at this time.

MR. WARSHAWSKY: Your Honor, may I have just one moment?

THE COURT: Yes, sir.

MR. WARSHAWSKY: Your Honor, thank you very much.

THE COURT: Thank you. Now let's talk about what's going to happen in October and what we're going to do between now and then.

My reaction to what both sides have told me is that you're all wrong. Interior seems to be saying that -- if I read your bench memo correctly, you seem to be saying that what I'm going to do is make kind of an APA review of your historical

accounting plan, and that that would be enough to determine whether the language you keep quoting from, one of the Cobell's, ultimate provision of historical accounting under Interior's plan, will be arbitrary and capricious.

Interior points out, I think correctly, that I'm bounded on both sides. I'm bounded by a whole line of cases and the rulings of the Court of Appeals by my, I'm quoting from your brief now, "inability to order broad programmatic reforms." I'm bounded on the other side by rulings that make me unable to require the agency to file a detailed plan of action.

Interior concedes that whatever it does has to satisfy fiduciary standards, but says I cannot abandon the APA process, underscoring the word "process."

And so the question, they say, is whether the department is taking steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting. Well, if we were just talking about delay and acceleration, that might be right.

But we're talking about more than delay and acceleration; we're talking about what an accounting is. And I think the parties have rather dramatically different ideas about what an accounting is.

What I have in mind is something that would take into account -- that would display some subset of the total accounting job. It's a subset because you're not finished, and

you won't be finished by October. That's understood. But enough of a subset that can be picked at, probed at, looked at, studied, cross-examined, challenged to determine whether indeed the Department of the Interior is on the way to the ultimate provision of an adequate accounting.

I have the feeling that the plaintiffs look at what you're doing and say, "This isn't an accounting, this is bookkeeping of the last five or 10 years of a few accounts. But it's not the accounting that is required."

And frankly, you-all have been struggling with each other for so long on IT systems and sanctions and contempt and fee petitions, and all that other flak that's been circulating here, that there has never, to my knowledge, been a real engagement on the subject of what is an accounting, what is an adequate accounting? And I'm not -- I'm interested in more than just your plan, I'm interested in what you've actually done.

Now, what I want to know from counsel is, can you get your minds around something like that, and help shape a hearing that is that? It's not going to be -- believe me, it's much too late in the game for an APA paper review of everything. Much too much water has flowed under the dam or over the bridge -- under the bridge or over the dam for us to make this a straight up, old-fashioned APA document review of a record. It can't be done that way. There's going to have to be testimony, probably by experts.

The plaintiffs want a lot more discovery than they're going to get. You've had a lot of discovery. I'm not sure that I even see discovery between now and October. But what I would like to have is some discussion from both sides, if you can fit your discussion within the framework that I've just tried to lay out here.

MR. KIRSCHMAN: Thank you, Your Honor.

Your Honor, when you ask what is the accounting, I think one of the things you address are a lot of the issues that Interior has already contemplated, first in establishing the 2003 accounting plan, and now considering the adaptations to that plan and preparing what will be the 2007 accounting plan.

In our bench memorandum, we address certain determinations that we propose should be reviewed under the standards you cited. And of course, that is a step so defective that they would necessarily delay the accounting. We took that from Cobell VI. And those parameters of the accounting go to, I think your general question, what is the accounting? So those issues could be addressed.

We alluded to some of those in the footnote, and if you look at plaintiffs' response, you'll see that they object to them. Some of those related to, for example, whether direct pay accounts are being considered.

THE COURT: Let's talk about that. The defendants say, you've excluded the vast majority of payees. Is -- who are

these people? Let's see. "It will not perform a historical accounting for so-called direct pay transactions."

What is a direct pay transaction? Excuse the ignorance.

MR. KIRSCHMAN: A transaction where -- you have a lease for grazing; the money, the payment for that lease can go directly from the company leasing the land to the Native American. It does not pass through the Trust system.

THE COURT: Oh, okay.

MR. KIRSCHMAN: It is our position --

THE COURT: How could you account for something that doesn't pass through the Trust system?

MR. KIRSCHMAN: Well, as a matter of law, we don't believe it's covered, and Interior is not in a position to account for something that hasn't entered the Trust. So that is one broad issue.

But we feel there are several of these determinations that are not final agency action. We believe the final agency action here will be the final accounting, final historical accounting that is provided. But that will ultimately lead to that accounting, and that can be reviewed by this Court as a step that should be addressed, so that the Court determines, is it so defective that at the end of the day, when the accounting is done, it will not be arbitrary, capricious, or contrary to law.

So there are several scope issues like that, that have already been briefed to the Court of Appeals but that were not ruled on. And as we point out in our bench memorandum, the Court of Appeals said in remanding the case back that to the extent those issues are addressed by this Court, a substantial deference should be given to the Secretary in interpreting the 1994 Reform Act.

Now, if it's a legal issue, there are legal arguments that can be made, and you do not need witness testimony on, again, for example, the direct pay accounts. These are something we believe -- defendants believe can be addressed prior to any hearing, and that will, as we address these, truncate the October 10th hearing to the nub.

THE COURT: I don't have any problem with that.

MR. KIRSCHMAN: Well, that would go a long way, I think, to addressing the broad issue: What is a historical accounting?

You also asked the question, "I want to know what you're doing." And we believe that the administrative record -- first of all, the 2007 accounting plan that will demonstrate the adaptations to the earlier plan will demonstrate the changes.

THE COURT: When is this 2007 accounting plan coming out? I think it was promised in March or April, wasn't it?

MR. KIRSCHMAN: When last we spoke, Your Honor, I did mention that Interior did intend it for publication at the

beginning of April. That obviously has not come to pass. Interior is working on finalizing the plan, and the explanations for it.

So I would say -- I'm not going to give a date, but I would say in the coming weeks. They are working on a draft that is far along, but there are still points to consider with our experts, and they're doing that. So it will certainly be in time to resolve the issues and meet the deadline of an October 10th hearing. I think we can say that.

But that document and the administrative record that will support it, the supporting documentation upon which the 2007 accounting plan is based upon, will answer the question: What has Interior been doing? Because it will serve as a justification for their upcoming plan, and that plan will include a schedule for the accounting, for the historical accounting.

I made a statement back in December 2006, at our first status conference, that I could not give you a date when the accounting would be completed, and that has oft been used to state that the accounting is nowhere in sight. And I guess it depends on your vision.

But there will be a schedule proposed by the Department of Interior so that the Court will understand what is planned when it comes to the amount of work to be done, when that work is proposed to be done, and what the final accounting will

consist of.

And as part of that record, again, we have the historical statements of account. And Your Honor, you have many of those pending before you. What you do not have are any historical statements of account for land-based accounts. But those are in work, and as we've told the Court, significant work has been done to prepare those, especially regarding the electronic era, 1985 to 2000.

That will be presented to the Court, and that will be in a paper record. There will be a lot of information there from the Department of the Interior and its experts, its accounting experts and its statistical experts, that demonstrate what they have been doing.

The notion that nothing has been done is entirely inappropriate and incorrect. A lot of work has been done. This has taken time, and it has cost money, more money than has appropriated over the years by Congress.

So all this goes into your review. We are not shying away from a review, but I respectfully say that there is a role for the APA to play here, and that's to frame the issues. Because you have to look why we're here in the first place.

One of the things that formulates that review is the complaint. And the core claim here is an APA claim regarding agency action unreasonably delayed. And that has not changed.

And the Court of Appeals has continued to reiterate

throughout the years, from Cobell VI, which we quote, related to this Court's ability to review steps taken as so defective, to its last decisions in July 2006, where it again stated in essence, we have an APA claim that here is affected by Trust law. But Trust law, the Court of Appeals has said, does not supplant the APA. It only adds context to the fiduciary responsibilities.

And the reason we underline "process" is because the APA, the Court of Appeals has said, controls jurisdictional issues. And the scope of review that would take place is a jurisdiction issue. What standards, what length of review, what type of review will occur, we believe are jurisdictional issues. So the APA does have a role here, despite Trust law, and the Court of Appeals has made that clear.

So are we saying the Court should take no testimony? If the record is not clear and there are gaps, or testimony is needed to clarify what you have before you because you say, "I look at this and I don't get where you're going. I see all these documents and I see your 2007 accounting plan, and I still see a gap in the record that I need to hear testimony on."

Or, more correctly, if plaintiffs point out a gap in the record, then there may be a need for testimony as a last resort.

But as far as any general discovery, there's no purpose for that to get to the matter at hand. What discovery this

summer would do is effectively take all the resources the Department of the Interior has to work on the accounting, and devote it to this litigation, again, as people prepare for depositions and go scurrying for documents. The documents that matter will be presented to the plaintiffs and the Court.

So there is no basis for discovery, and in their response to our bench memorandum, the plaintiffs have not offered any. They offered a schedule, but no justification for it. And under the APA, which again should govern this process, that discovery should only come after the record has been reviewed and the documentation has been considered, and specific concerns have been expressed by the plaintiffs.

Again, this should not be a new record. We should not come into this Court on October 10th with the intent to establish a new record based on testimony. What we should be doing other than October 10th, respectfully, Your Honor, is supplementing the paper record that has been offered.

And that would include historical statements of account. That would include, for example, the Department of Interior's accounting standards manual. The Department of Interior uses the accounting standards manual, compiled based on its accounting experts, to decide what documents are being reviewed to do the accounting. So again it goes to, what's the accounting?

And I should point out, there was a Phase 1.5 trial

that Judge Lamberth held that explores a lot of these issues: What are you doing, what's the accounting? And when he was presented with the historic -- I'm sorry, with the accounting standards manual, he approved its use. He approved Interior's use of the 2003 version of that historical -- I did it again. The 2003 version of that accounting standards manual.

So there will be explanation for the Court as to what Interior has been doing over the last years. And it will be, if not the complete record, an awful big starting point for the Court to understand what Interior is doing and what it plans to do based on what it's learned, and the appropriations schedule that it's anticipating.

THE COURT: When does Interior expect to complete the first land-based account accounting?

MR. KIRSCHMAN: I'm going to be so general as just to say this calendar year. I think their schedule may be more precise, but they are -- these again relates to the electronic records era. But in the coming months.

THE COURT: You're telling me that there won't be any land-based accounts ready for scrutiny and review in October?

MR. KIRSCHMAN: I am certainly not telling you that. I think there will be. I think there will be thousands of historical -- statements of account related to --

THE COURT: They're only going to go back to '85 because they're going to be electronic?

MR. KIRSCHMAN: The ones that will be done this calendar year will relate to land-based accounts within the electronic era. That's my understanding.

Now, to be clear, some of those accounts have paper tails, paper trails that go back into the paper era, that precede 1985. But what Interior is doing is looking at those land-based accounts that are most readily available for review, and a good percentage of the funds and a good number of land-based accounts that are being considered fall within that electronic records era, Your Honor.

So in October, I do not anticipate that you will have before you historical statements of account for land-based accounts that are solely in the paper era. I think that's a fair representation, and before we leave, I'll make sure I'm not saying anything off. But you will have, I believe, historical statements of account for land-based accounts to review, and that will demonstrate the work Interior has done and plans to do.

We mentioned in our bench memo, and we think it will be important here, too, just so that we devote resources as appropriate and the parties focus on the real issues that are facing the Court related to the historical accounting, that the October 10th hearing not address issues that were raised, for example, in Cobell V. You mentioned Cobell V in your order. One of those relates to the Department of Treasury's fiduciary

responsibilities.

The Court has received summaries and information on a quarterly basis from Treasury regarding its document retention efforts. There's really no issue now that has surfaced related to Treasury. So clarifying that Treasury's fiduciary duties, as it were, are not part of the October 10th hearing will clarify and help us narrow our resources and our work.

On the same token, we've discussed briefly fixing the system, and plaintiffs' counsel mentioned it today. The Court of Appeals mentioned that, after first reviewing Judge Lamberth's structural injunction plan, and found that other than to file a "to be" plan, Interior was not obligated to produce more, related towards the fixing the system part of the case. The "to be" plan was filed, and was filed quite a while ago along with the fiduciary trust model. It was filed with this Court. That's Docket Number 2882.

And there's no point now -- and plaintiffs certainly have not raised any issues or objections or argument about Trust reform that would merit consideration on October 10th. But we think further defining the scope would assist the parties.

There is certainly enough to address, regarding the historical statements of account, that can be done through legal filings, it can be done through presentation of the administrative record consistent with the Court of Appeals discussion of this case over the years. And it gives context

and a framework.

Plaintiffs have raised the issue of impossibility with this Court. There is no real framework for that. It's not contemplated in their complaint. But if you take their allegations and review it in the context of an APA review, what are their specific challenges to the work of Interior, and whether those challenges demonstrate work that's so defective that it's unreasonably delaying or would lead to arbitrary or capricious conduct at the end of the day, then you have your standard and you have a framework that makes sense of all of this, and will allow the Court to review things in an organized and lawful manner come October 10th.

THE COURT: All right. Mr. Gingold?

MR. GINGOLD: Mr. Harper will do this.

THE COURT: Mr. Harper?

MR. HARPER: Good afternoon, Your Honor. If I may, with the Court's indulgence, speak to the issues of jurisdiction and scope of the accounting and things of that nature, and then turn to my colleague, Mr. Dorris, to speak on the discovery issues? Thank you.

First, let me address the scope of the accounting, because it's clear that the government and the plaintiffs have a very different view.

We touched upon one issue, and that's direct pay. What the government fails to mention in their brief or to you today

is that the Court, the District Court, concluded after a long evidentiary hearing, and after reviewing an Interior Department Solicitor's memorandum opinion, the Westlaw cite for that is 1965 Westlaw 12755, in which the Solicitor himself concludes, "It is settled beyond debate, of course, that the direct income from a Trust allotment partakes of the character of the corpus of the allotment itself, and is subject to all the authorities and responsibilities of the Trust undertaking relating to the allotment itself."

And so the Court concludes with that, and a number of other items of evidence, quote, "Therefore concluded that Interior's fiduciary duty to account, which predates the 1994 act, mandates that the adequate historical accounting of the IIM Trust must include the accounting of all funds paid to IM beneficiaries in conjunction with direct pay leases and contracts."

Your Honor, you asked a good question: How does one do that as a trustee if somebody is getting a direct pay? Well, the way a normal trustee would do it, one who carries out their fiduciary duties, is that they would seek a voucher from the person making the payment that is sent in to them, so that they can provide the necessary accounting later on to their beneficiary.

That was not done here, as far as we can tell. Maybe the government can say it was. But that's the purpose of the

accounting process, is to determine whether or not they fulfilled their fiduciary duty in this and other respects.

They've excluded many account holders. In the plan itself, they intend not to give any accounting whatsoever. Even though this is a class of present and all former beneficiaries, they are not intending to give an accounting to anybody whose accounts closed prior to October 25th, 1994.

Now, let me just touch upon, if I could, Your Honor, the absurdity of that. Because I think it illustrates the fundamental problem with the government's entire approach. In Cobell VI -- in Cobell VI, this is what the Court of Appeals held. And I'm just going to quote the language because I can't say it better than they have. "The enactment of the Indian Trust Reform Management Act did not alter the nature and scope of the fiduciary duties owed by the government to IM beneficiaries.

"With respect to the accounting itself," this is critical, "reaffirmed the government's preexisting fiduciary duty to perform a complete historical accounting," and then goes on to say this: "Nothing in the 1994 act, nor any other federal statute, acts to limit or alter the right to a complete accounting."

So if I'm an IM beneficiary and my account was closed in 1990, this says the duty preexisted the '94 act. Then I had a right to get an accounting for my trustee at that time. And

if the '94 act, by the Court of Appeals' own words, does not alter or limit that right, then it must be that I still have a right to that accounting after the '94 act.

Yet they're excluding each and every beneficiary that falls into that category, hundreds of thousands of people. So even if you just take their words for what they're saying they're doing, they're excluding the vast majority of beneficiaries, and they're not going to give them an accounting, not in one year, not in 10 years, not in 100 years. They're just never going to do it, according to the government.

In part, we believe that the reason they're not going to do it is because they can't. They can't do it because they've destroyed the documents and because the data that they do have is unreliable. And we believe that we can show that, and would ask that we have some discovery to further elucidate those issues.

But there's many of these exclusions. If you look at their plan, there's exclusion after exclusion. Deceased account holders are excluded --

THE COURT: Explain that one to me, deceased account holders are excluded.

MR. HARPER: Anybody who is passed away prior to the lawsuit, as I understand it, is being excluded from the accounting. They don't give accountings to any of those individuals.

So if, say, somebody -- in fact, I don't think it's even limited to that. It's anybody who died prior to the year 2000, because their accounting only goes up to 2000. If they died, they don't get an accounting, even though, of course, their heirs would benefit from that accounting. And they have the right to assert that accounting right.

Again, on that particular issue, this Court has already decided the question, and held that they do have to account for those beneficiaries.

So again, time and again, they're continuing to exclude individuals, deceased account holders, pre-October 25th, 1994 beneficiaries, and a whole slew of others, direct pay, those who pursuant to compact or contract or other means, their assets are managed by a tribe, they excluded them.

What's critical with that is, under 25 USC, it is very clear that a Trust beneficiary whose assets are managed by a tribe pursuant to compact or contract do not lose any of their rights. Its very clear on the face of the statute. It says, "It does not diminish or modify the Trust responsibilities owed to individual Indians." Yet the government excludes them from the accounting, as well.

So time and again we have this preexisting duty to account. The nature and scope of it is not defined by the 1994 act. That is the principal and most critical holding of Cobell VI. Yet that's all they want to look at, is the 1994

act. And they say, "If somehow we do some actions just with post-1994 act dollars, post-1994 act accounts, that's good enough." Well, it's clearly not. There have been decisions rendered by this Court that make it so.

We would look to have these issues further briefed and rights declared as to what is our right to an accounting? Which beneficiary has a right to an accounting? We believe it's already been decided, that it's an all-funds accounting for each and every beneficiary, whether a former beneficiary or a present beneficiary. We think that that is the clear law of this case, and we can offer up a briefing at any point in time that demonstrates this in conclusive terms.

With respect to the APA issues -- and again, I'll let my colleague Mr. Dorris talk on the specifics of the discovery. The fact is, Your Honor, that this is a Trust case. The government points to our complaint. Our complaint was not limited to the APA. And as this Court is well aware, a complaint need only identify the facts by which you can later conclude the causes of action.

So even if it didn't, even presuming it didn't, notice pleading requirements only require that we put forward the facts necessary to get the relief we seek. And the relief we seek here is an accounting and other equitable remedies appropriate for a Trust beneficiary to enforce the Trust.

And this Court sits as a Court in equity, having the

same equitable powers as the chancery courts of England in the adoption of the 1789 Judicial Act. Those powers are broad, particularly in the Trust context.

And what we're seeking here is precisely those remedies available to every other non-Indian Trust beneficiary in this country. And the fact that we're dealing with 500,000 individual Indians should not matter as far as what are the rights of the beneficiaries involved. And they have a right to an accounting, and they have a right to other equitable remedies.

In particular, if the government cannot perform the requisite accounting, and we think they either cannot or will not -- they say they will not. I mean, we are now eight years after the Court of Appeals declared, in a record eight years ago --

THE COURT: I got that part.

MR. HARPER: -- unconscionable delay, Your Honor. Unconscionable then. If it's unconscionable then, Your Honor, what is it now? At what point in the government's estimation can this Court act?

We say the time to act is now, and the scope of the proceeding be with -- we believe is appropriate, is to have that Phase II trial, to have the government come up with all the proofs they can with respect to these beneficiaries, and establish whatever balances they think they can establish. And

then we can make the necessary objection to that accounting.

And we believe that that will demonstrate that this is not a complete accounting, this is not an adequate accounting, it does not discharge their duties.

THE COURT: All right. The plaintiffs are going to have to get used to much more modest goals for this October trial, and the defense is going to have to get used to much more ambitious goals for this October trial than either side has thought about.

I would be interested in the prehearing briefing that you're talking about, Mr. Harper, that would identify and sort out for me the classes of beneficiaries that you say the government is impermissibly not going to render an accounting for. I've got to sort that out before we go any further.

Now, it may be that this will all be generated by this elusive 2007 plan that we were going to have in April. I don't know when we are going to have it. I can't wait until September for it, because seems to me that that plan itself will be subject to some challenge, and I would hope that is all done before we start hearing testimony in October. What are the chances of that?

MR. KIRSCHMAN: Oh, yes, Your Honor. Again, I think it should be completed in the coming weeks.

THE COURT: "The coming weeks"?

MR. KIRSCHMAN: Well, we're in the middle of May. At

the end of May, June.

THE COURT: Well, I would hesitate to order you to finish it by a certain time, because that might be construed as meddling.

MR. HARPER: Your Honor --

THE COURT: Come on, guys. This has been a long time in the coming. What's the holdup?

MR. KIRSCHMAN: Again, there's just a lot of issues to consider and final determinations to be made on what action will be taken. I think we're just talking a matter of weeks.

THE COURT: Mr. Harper, do you want to start briefing before that plan comes out?

MR. HARPER: I think there are significant issues based on the government's admissions --

THE COURT: Everyone behind you is nodding their heads.

MR. HARPER: Yes. I think the answer is yes, Your Honor.

Could I speak on the meddling issue? Because this has already been decided by the Court of Appeals in Cobell VIII. In Cobell VIII, Judge Lamberth had ordered the government to provide an accounting plan by January 6th, 2003. The Court of Appeals vacated other aspects of the order, but said they clearly could require them to provide their plan by a date certain. And we think that that is law of the case, here. In fact, the mandate rule applies. And so Your Honor clearly has

the authority to order the government to produce that plan by a date certain.

THE COURT: Well, I don't doubt that. I just -- it doesn't make any sense to me to start issuing rules that don't have any -- you know, that don't have any substance.

MR. KIRSCHMAN: Your Honor, I obviously hesitate to give dates certain, but I would anticipate after conferring with counsel that by May 31st, plaintiffs and the Court would have the historical -- I'm sorry, the 2007 accounting plan.

THE COURT: Would it help you to get that done if I made it an order?

MR. KIRSCHMAN: No, sir. We understand how significant the accounting plan is, and how important it is to your review. And you've obviously reiterated that again today.

THE COURT: All right. It's very important to get that out. But frankly, I don't want any more contempt citations, I don't want any more sanctions motions. I just don't want any more of that in this case, counsel, period.

So if I issue an order for him to do it on May 31st and it doesn't come in on May 31st, the next thing I'd get from you would be a motion for contempt. I don't want that. I'm not going to order them to -- I'm not going to order them to issue the report by May 31st. I'm going to issue a strong, jaw-boning, interest of the Court in getting that thing done an issue. Okay?

MR. KIRSCHMAN: Yes, Your Honor.

THE COURT: All right. Mr. Harper?

MR. HARPER: Well, we believe that briefing on that question, as well as the nature and scope of the government's duties with respect to the Trust, would both be helpful for the Court, and we would propose to do briefing on both of those items.

The reason that's so critical is, as the Court of Appeals in Cobell VI held, one aspect of the accounting is not only to sort of define all the withdrawals, accruals, things of that nature, but to provide sufficient information so the beneficiary can readily ascertain whether or not the Trust duties have been faithfully carried out.

And the only way to do that is to have a declaration of the Trust duties that are applicable. Because I think again, we're far apart. The parties are far apart on that. And the Court defining those Trust duties that are applicable, which in Cobell XIII, this Court -- excuse me, the Court of Appeals held was perfectly appropriate and within the discretion of this Court, we think would offer key guidance as to how the accounting duty and other duties should go forward.

THE COURT: Just as a thought experiment, Mr. Harper, tell me -- let's assume that you're right about these direct payments, that some unknown number of lessees made direct payments, to landowners, of royalties or lease payments, that

Interior had no records of them, demanded no vouchers, didn't track it. So neither you nor Interior knows who received the direct payments, or from whom, or how much they were, or over what period of time. Right? That's the hypothetical that I'm trying to get my mind around.

Now, your position would be, "Well, with respect to those people and those payments, that's a violation of the fiduciary obligation of the trustee." Right?

MR. HARPER: Correct, Your Honor.

THE COURT: What's the remedy, and for whom?

MR. HARPER: First of all, we would seek that -- documents from third parties, and that is particularly appropriate in instances, for example, with oil and gas, where you have a lot of third party records, to make those proofs.

The second thing that I would say is that we would -- that doesn't mean that Interior does not have material and documentation. And I don't want to get into the discovery questions. But they have, for example, leases, and those leases require that certain payments are made. And if those payments were made, according to them, by direct pay, then we would want those leases, and we would -- in order to demonstrate that they failed to live up to their duties.

Now, we've always said that there are alternative equitable remedies that may be available when the Court and if the Court were to find that they breached their duty and cannot

discharge their accounting duty. And that would be an instance in which they can't possibly discharge their accounting duty.

And that's when this Court, sitting as a chancellor in equity, would exercise the authority vested in him to protect the interests of the beneficiary.

And there are a whole slew of equitable remedies available.

THE COURT: And require what? A requirement to make payments, and maybe double payments?

MR. HARPER: Your Honor, there is an issue with that. And the law of Trust is clear on this point, that where there is an absence of information, all doubts are against the trustee and for the beneficiary. Because it means that the trustee failed to -- in breach of their fiduciary duty, to maintain sufficient records to discharge their accounting duty.

So if they've done that, all inferences are against them, all evidentiary inferences are against them and for the beneficiary. If it's a choice between -- where you don't have evidence, then the Court is set with two choices. Either it says the payment -- we're going to presume the payment was made, or we're going to presume the payment was not made. And in that circumstance, Trust law is very clear and says you presume the payment was not made.

THE COURT: Yeah, but you've been talking all along about -- you say, "Oh, no, we're not after damages. Damages

wouldn't be proper in your court. We don't call it damages, we call it equitable disgorgement." Right?

MR. HARPER: We believe that there are equitable non-damages type relief that are available for certain kinds of things available from this Court.

THE COURT: But I'm talking about this particular situation, in which the money never came into the Treasury in the first place, and the Treasury cannot tell you whether or not the third party made the payment to the Indian. But what's to disgorge?

MR. HARPER: Your Honor, I will say, as we have for a long time, that there are instances when the final remedy will ultimately, or perhaps may need to be sought in a different Court. We understand that. But the vast majority of remedies are available in equity in this Court.

The restatement on Trust makes it very clear that most of the remedies available to a beneficiary are equitable in nature. And the only exclusion is when you have a sum certain due, and therefore it is then money damages and it's legal relief that is available.

And there may very well be that, in the failure to account or in the accounting itself, that there is revelations regarding damages, and that ultimately, if that is the case and that is the only available remedy for that specific wrong, then we would need to bring a subsequent action or get that aspect

transferred, or whatever the process may be.

But that is not to say that we still don't have the right to the accounting and the revelation of all the information from our Trustee in order to determine what is the most appropriate remedy for that particular and all other breaches of Trust. And that's what we're saying we're seeking in this litigation. To the extent that they can account, great.

Let me give you another example of an equitable remedy that we could seek. Maybe there is a place where they failed to collect $100 from a certain oil company. In that circumstance, a beneficiary has a right to enforce what's called the duty of the trustee to enforce claims. And if they have that duty, as all other trustees do, and we believe they do, then we could seek this Court to order that they go bring a third party action against that person.

Now, I'm just saying that there are many options --

THE COURT: Wait a minute. Wait a minute. There's a whole Trust management issue, whole area of this thing that I don't think we're talking about trying in October, this business of, did you collect the money you should have? Did you lease the land for as much as you should have leased it for? Did you -- you know, I thought it was understood that that was a different piece of this whole case than the Cobell case that we're talking about here.

MR. HARPER: I'm not sure I fully understand the

question.

THE COURT: You fully understand it better than I do, Mr. Harper, so you're in a teaching mode here.

MR. HARPER: Your Honor, we believe that the October trial -- and we would appreciate the opportunity to provide the Court with a memorandum setting forth how we get from here to there in a way that could dispose of the vast majority of issues in this litigation. We believe that that is entirely possible, this Court, exercising its inherent equitable authority in a Trust case, and we would propose to do that. And it would address issues such as that.

THE COURT: That's what I thought we were going to start to do today. But if you want to take another bite of that apple and let me have that, the sooner the better.

MR. HARPER: We would be prepared to file that, and at the same time address the issues of scope that we discussed earlier today, the scope of the accounting and the exclusions that the government is making contrary to law.

THE COURT: When can you do that?

MR. HARPER: Could I consult?

(OFF THE RECORD.)

MR. HARPER: We would like to do it in two separate briefs, within two weeks.

THE COURT: You mean, both brief in two weeks?

MR. HARPER: Both briefs in two weeks.

THE COURT: I can't quarrel with that. By the way, for both sides, next time we have one of these hearings, I'm going to impose kind of a no-fly zone about four days ahead of time. Because documents that come in late on Friday, over the weekend, Monday morning, I mean, we scramble and do the best we can to catch up with them, but there's no way we can absorb everything that you-all file at the last moment.

All right. So you're going to file two briefs in the next two weeks which are going to address generally -- just say it again.

MR. HARPER: I think the first brief would set forth the ways in which the government's proposed accounting, what they've done and what they intend to do, excludes the vast majority of beneficiaries that have a right to an accounting, and why that is contrary to law.

And then discuss other issues around that accounting duty; you know, what is the nature and scope of it, why is that the nature and scope, what is the law of the case with respect to it, things of that nature.

And the second would be a memorandum in which we talk about where we are now, and how we get to a place where we can utilize that October trial to resolve the vast majority of issues in this litigation through certain kinds of evidentiary proceedings and legal issues that will be raised and addressed in that proceeding.

THE COURT: All right. And how much time -- the government is going to get that in a couple of weeks. Do you want a couple of weeks to respond?

MR. KIRSCHMAN: Sure, Your Honor. Yes, we can meet that.

THE COURT: Today is May the 14th. Plaintiffs will file a couple of briefs on May 28th. Defense has until June 11th to file whatever they want to file. I don't want any replies. We will meet again on June 18th at 3:00 o'clock, and talk about it. Okay?

MR. HARPER: Thank you, Your Honor. I think Mr. Dorris to speak on the discovery issues.

THE COURT: I know. I know he wants to talk about discovery. He's got an uphill fight.

MR. HARPER: Thank you, Your Honor.

MR. DORRIS: Your Honor, our view of discovery is not broad.

THE COURT: Excuse me. Let the record reflect the judge laughed.

MR. DORRIS: And I was serious with what I said with respect to between here and October. It falls into two basic categories, first with respect to the beneficiaries that are not even going to be included in the accounting that the government plans to do. So in other words, we now know that the government is not even planning to do an accounting for them.

We would want discovery that's geared toward -- we think largely the briefing will indicate whether they should or should not have done that accounting, but then we need discovery on what the appropriate remedy to help this Court fashion a remedy by which you would have a basis to restate what those accounts should have been. So that's the first area.

The second area is to then concentrate on a subset of the claims such as the Court suggested earlier today, and have some discovery on what the accounting that has been done on those, so that we can better understand what has been done so that we can test that with respect to the October 10th hearing.

Now, at this point, obviously, what we would prefer would be some of the land-based accounts, because that's the bulk of what they're going to do. That's the bulk of what's at issue in terms of the nature and scope of the accounts. There's much more involved in those.

So to some extent, the discovery that we want to seek on that has to do with analyses that they have referred to in their quarterly reports with respect to land-based work that they've done so far. So there are a number of analyses there that we need to get a copy of, and perhaps take a deposition or with the of.

And then, if we can determine from the government when they can have some of those land-based accounts done, we would want some limited discovery with respect to what those show so

that we understand what has and has not been done with respect to it.

So that's the scope of the discovery that we would want leading up to the October hearing.

THE COURT: Well, I did enough discovery when I was practicing law to know that what you call limited discovery could, as Mr. Kirschman says, eat up most of the time that we all have to get ready for this trial in October. I don't want that to happen. That doesn't make any sense to me.

You know, this is a bench -- to the extent we're going to call it a trial, let's call it a trial. I made light of that in this order. I said you can call it whatever you want to; you can call it a hearing, you can call it a trial, you can call it a proceeding. I don't care what you call it, but there are going to be witnesses in that witness chair there, and you're going to be asking questions of them. And that, it seems to me, is discovery. That is the challenge that you want to do.

I don't see the point, in a bench proceeding like this, of getting people in conference rooms and going over their documents with them for three days, and objecting to each other's questions, and then putting them on the witness stand and do the same thing again and say, "Well, didn't you say on June 14th this, and now you're saying that?" That's what this all descends into. I don't see the point of it.

MR. DORRIS: I hear what you say, Your Honor. With

respect to documents, though, that may relate to those witnesses' testimony, I must say, it's -- it goes much more efficiently here in front of you if we have those prior to the trial.

THE COURT: That's true. That may be what the -- you know, the government keeps calling this an APA proceeding. In an APA proceeding, the normal routine of an APA proceeding is, the government files something it calls an administrative record. They haven't filed an administrative record in this case, have they?

MR. KIRSCHMAN: No, sir.

THE COURT: What would it look like, do you have any idea?

MR. KIRSCHMAN: Yes. It would be the documents prepared by Interior related to the historical accounting. It would be documents prepared by their experts that Interior has used to determine how to proceed, documents of those sorts.

And it goes back to 2003. The 2003 accounting plan addressed many of these same parameters. These are not new. These aren't exclusions as much as interpretations of the Act, and they were all presented in 2003.

So the paper record will consist of documents compiled within the Department of Interior that address the rationale in 2003 up to the present, including the adaptations that will be represented in the 2007 accounting plan.

THE COURT: Well, if you want to prepare -- in the absence of something called an administrative record, if you want to prepare a, you say not broad request for production of documents, go ahead.

MR. DORRIS: Okay.

THE COURT: Now, it will be subject to objections, and I may call a close game on the objections. I do not want this to devolve into a discovery fight. I don't think discovery is the core of what we're all about. I think you-all know enough about this, about what Interior is doing already, that you can make some pretty cogent challenges to what their witnesses are going to say about their accounting in October without spending the whole summer doing discovery.

MR. DORRIS: Your Honor, you've scheduled a June 18, I think, hearing?

THE COURT: Yes, sir.

MR. DORRIS: When should we have our discovery filed, so that the response is made before that hearing, so that's an issue -- I assume that would be an issue the Court would want to take up that day.

THE COURT: How about the day after tomorrow? You know what you want.

MR. DORRIS: Well, it would be helpful if we could have until the end of the week, at least.

THE COURT: You've got until the end of the week. But

the government's objections will be due before June 18th, and we'll talk about it -- that's one of the things we'll talk about on June 18th.

MR. DORRIS: Thank you, Your Honor.

MR. KIRSCHMAN: Your Honor, just so I'm clear to the Court, we anticipated filing this administrative record I've been talking about subsequent to the accounting plan, and it may address the documents that Mr. Dorris is making reference to that they believe they need.

THE COURT: Well, then, that will be your response.

MR. KIRSCHMAN: Just so we're on the same page, I wanted to be clear on that.

And Your Honor, on June 18th, will we then be arguing the merits of the motions as well as any other scope issues?

THE COURT: The merits of what motions?

MR. KIRSCHMAN: The two briefings that the plaintiffs will be filing and we'll be filing.

THE COURT: I would hope so.

MR. KIRSCHMAN: All right. Just to be clear.

THE COURT: I would hope so. I mean, what I'm trying to do is sneak up on packaging this October hearing so that we have some idea of what we are going to do in October, and what we're going to get done between -- what legal rulings can be made, if any, between now and then.

So far, there's still a lot of mist out here, but I

hope we'll progressively clear some of it away.

MR. KIRSCHMAN: Your Honor, will there be an order from the Court before the June 18th hearing?

THE COURT: Do you need one?

MR. KIRSCHMAN: Well, if I could, Your Honor, I mentioned before narrowing the scope of the subject matter related to both the Department of Treasury's involvement and fixing the system, the prospective work of the Department of the Interior.

THE COURT: I do not anticipate that the October hearing will include either the Department of the Treasury or fixing the system. I will hear -- whoop, they're on their feet.

MR. KIRSCHMAN: That doesn't mean anything, Your Honor.

THE COURT: I know.

MR. DORRIS: May I be heard, Your Honor?

THE COURT: Yes, of course.

MR. DORRIS: Your Honor, we think the Department of Treasury's fiduciary duties are at issue in the October hearing.

THE COURT: I understand that. They're an issue in the case, yes.

MR. DORRIS: But they are an issue with respect to what the issues that we would be addressing, or at least I think the Court has indicated it is addressing in October. That is where the account actually is, one of the main accounts.

So to take Treasury out of it seems to me that we're

bifurcating essentially the collective fiduciary duties that the trustee delegates have, and we would ask the Court to not take the Department of Treasury's fiduciary duties off the table.

THE COURT: All right. I won't take them off the table, and I'll expect to hear about that subject in one of the two briefs that you-all are going to file in the next two weeks.

MR. DORRIS: Thank you, Your Honor.

THE COURT: Mr. Quinn, you look like you want to be heard.

MR. QUINN: If we're finished with the planning for June 18, Your Honor, I just wanted to clarify where we left off on the order with respect to fees.

In your April 27th order, Your Honor, you invited the plaintiffs to address several specific issues, and expressly said that it wasn't necessary for them to address matters of excessive hours that were claimed with respect to work.

I didn't know whether Your Honor is contemplating in terms of plaintiffs resubmitting a statement, that we readdress any excessive hours claims, or how you would like to do that.

THE COURT: I've tried to make it clear that I'm simply not going to start carving up the numbers of hours. I'm just not. The bills seem enormous to me, frankly. But I'm very anxious to get this fee thing done, over, and behind us.

And by the way, the Justice Department should be interested in a decision that came down from the Second Circuit

a couple of weeks ago on attorneys' fees. The Second Circuit says, "The word Lodestar no longer has any meaning in the law," and they've knocked the Lodestar idea completely out of attorneys' fees in the Second Circuit. I'm assuming you're going to be attempting to apply that circuit by circuit.

MR. QUINN: I'll have to read up on it, Your Honor.

But with respect to plaintiffs' resubmission, to the extent they choose to resubmit, will we have an opportunity to go back, in terms of the extra billing or the double matter billing that they may attempt to clarify, will we have an opportunity to respond to that if we see a problem with that?

THE COURT: You can respond to anything you want to, but I think I've tried to make clear what my rulings are on the last round, and I'm not going to have a third round.

MR. QUINN: Thank you very much, Your Honor.

MR. GINGOLD: Your Honor, just one point?

THE COURT: On Lodestar?

MR. GINGOLD: Yes.

THE COURT: Yes, sir. That was just a shot across the bow, Mr. Gingold. The Lodestar will apply to past --

MR. GINGOLD: Your Honor, in this circuit, this circuit has never adopted Lodestar. It's been a common fund doctrine. It is the law of this circuit.

THE COURT: Well, there are common fund cases, and there are not common fund cases. Your assertion is that this is

a common fund case.

MR. GINGOLD: Yes, Your Honor. It's pursuant to Swedish Hospital. Correct.

THE COURT: But there's no common fund in these fee petitions that we've been talking about.

MR. GINGOLD: No, no, not in these, Your Honor. With regard to the case itself, with regard to the restatement and correction of the accounts.

THE COURT: Well, you're putting the cart way in front of the horse.

MR. GINGOLD: No, I just want you to -- this circuit has never adopted Lodestar. It has adopted common fund, and it was a two-to-one decision, Your Honor, but that is a decision of this circuit.

THE COURT: Okay. Thank you. Anything further? I should never ask that question when there are 15 lawyers sitting in front of me.

There is nothing further. We're adjourned.

(Proceedings adjourned at 5:12 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.

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SIGNATURE OF COURT REPORTER DATE