

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL,	:	Civil Action 96-1285
et al.	:	
Plaintiffs	:	
	:	
V.	:	Washington, D.C.
	:	
DIRK KEMPTHORNE, Secretary	:	
of the Interior, et al.	:	
	:	
Defendants	:	Thursday, August 28, 2008

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

APPEARANCES:

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P R O C E E D I N G S

COURTROOM DEPUTY: This is civil action 96-1285, Elouise Cobell, et al. versus Dirk Kempthorne, et al. For the plaintiff we have Dennis Gingold and Elliott Levitas; for the defendants John Stemplewicz, John Warshawsky, Robert Kirschman, and Michael Quinn.

THE COURT: Good afternoon, everybody. I called this status conference for a three-week period after I issued the opinion that you've all read and probably studied and some of you reacted to on August 7th. I feel some need to begin this conference by re-emphasizing what I hoped was made very clear in the opinion that I issued three weeks ago, but which somehow has been either misconstrued or glossed over or misrepresented in the press.

I didn't issue a damages award against the government. The amount of money that I find the government owes to the plaintiff class does not include, does not include most of the claims that I think comprise many of the grievances that Indian country has or thinks it has against the BIA. Income that was not collected is not included in my judgment; assets that may have been sold or leased below market is not included in my decision; funds that may have been stolen or misappropriated are not included in my opinion; any failure on the part of the government or Indian agents to enforce lease terms, not included; any money that may not have been paid on direct pay

1 contracts, not included.

2 This line between what is damages or what might be
3 included in a claim by IIM accountholders for mismanagement,
4 this line was carefully drawn on the very first day of the trial
5 we had in October -- not in October, but whenever it was, by the
6 plaintiffs' own witness, Professor Laycock, who was at some
7 pains, as we have all been at some pains, to distinguish what
8 this court can award from what this court cannot award.

9 So whether or not the plaintiffs can recover for any of
10 these things that I've just enumerated under the rubric of
11 damages, I don't know. I do know they can't recover it in this
12 court. And if there's going to be a recovery, it has to be, I
13 think, in the Court of Federal Claims. Whether it can be done
14 as a class action, I don't know. Again, that's for another
15 court and another case. The plaintiffs made the decision to
16 cabin their case very, very carefully so that they would not be
17 seeking damages, which they knew they could not receive in this
18 court.

19 Now, I have to lay frankly at the feet of the
20 plaintiffs the responsibility for hyping expectations about what
21 might result from this case. But \$455.6 million is all I think
22 I could possibly have awarded, and the government may take the
23 position that that -- even that was a stretch.

24 The question now is where we go from here. We have
25 never resolved the class action questions that have been lurking

1 around the edges of this matter, and what I hope we can have
2 today is some discussion - and I think discussion is the right
3 word for it, unless anybody has a position they want to advocate
4 and argue - a discussion of the questions, of a number of
5 questions that occur to me. And you may have others.

6 One such question is, is it now time to prepare and
7 issue the historical statements of account that the government
8 has wanted me to authorize them to send for years, and wanted
9 Judge Lamberth to authorize to send for years before that.

10 How should the amount that I've concluded the
11 government owes the IIM accountholders, how should it be
12 allocated; per capita, equally per capita, as I think
13 Mr. Gingold has recommended earlier? Is that the equitable way
14 to distribute funds? Should the distribution be weighted for
15 the age of IIM accounts or the size of IIM accounts or both, or
16 is there some other way to allocate these funds?

17 Should the class be notified of a proposed method of
18 allocation by a notice to the class that would be sent to the
19 23(b)(2) class? Rule 23 does contemplate the issuance of
20 notices to the class in a (b)(2) class action.

21 Obviously there will be a share of this recovery to
22 which plaintiffs' counsel are entitled. Do I need a motion for
23 that in a (b)(2) class action?

24 Now, I want to hear where you-all are on these
25 questions. And I don't want to try to put my thumb on the scale

1 at all, but I do want to make this observation: It seems to me,
2 just because it seems like the most orderly way to do it, that
3 there should be a period in which -- it seems to me that there
4 should be notice to the class. It seems to me that the parties
5 should have time to either try to agree on what that notice
6 would be, or if they can't agree, submit proposed forms of
7 notice to the class. I don't know how much time that would be,
8 a couple of weeks, 30 days.

9 Then you get notice together, you send it out to the
10 plaintiff class, you wait for responses, and somebody reads and
11 analyzes and considers the responses. We're talking about a
12 couple of months, at least. Then you're talking about some time
13 period in which all of this is reduced to a final award or
14 judgment. I think as a practical matter it's not prudent to
15 think that a final judgment on that kind a timetable could be
16 issued much before the end of the year, if then.

17 And the question that I frankly -- I just want to lay
18 on the table, and you people may want to respond to it or not,
19 the question is, if there are going to be appeals, and the
20 plaintiff has indicated to the press that they're certainly
21 going to appeal this, if there are going to be appeals, what's
22 the point of waiting four months? Maybe we should either
23 certify the matter in some interlocutory way or issue a partial
24 summary judgment under Rule 54(b). Because otherwise, to take
25 four months to sort out the details of how the money is to be

1 distributed just adds four months to the bottom line.

2 So that, I think, is a brief outline of the
3 discussion - I underscore the discussion - that I would like to
4 have with the parties. And I will hear from anybody who wants
5 to stand up and speak about anything that he or she wants to
6 speak about, I guess.

7 Who's first? Well, thank you very much. It's been
8 nice seeing you-all.

9 MR. GINGOLD: Your Honor, good afternoon.

10 THE COURT: Good afternoon, Mr. Gingold.

11 MR. GINGOLD: I would like to start with your last
12 point first, since it is probably the most important point.
13 Plaintiffs do intend to appeal, and we believe it would be more
14 efficient for this court and better for the parties if the
15 issues that remain unclear at least in plaintiffs' view be
16 resolved by the appellate courts. We believe it would be very
17 difficult to fashion a clear and accurate notice to the class
18 without first resolving many of the issues that exist with
19 regard to, for example, interest, among other things, as to
20 whether or not that's damages or specific relief.

21 We think that the class should be informed as clearly
22 and as comprehensively as possible as to what their rights are,
23 as declared, and what their share is and how that share should
24 be determined. I think it is important to determine those
25 issues, at least resolve those issues on appeal before we can

1 make those statements affirmatively --

2 THE COURT: How are you going to resolve those issues
3 on appeal when they have never been resolved here?

4 MR. GINGOLD: No. For example, I think it makes an
5 enormous difference if this is, in plaintiffs' view, a trust,
6 and if, in plaintiffs' view, there are certain duties and
7 responsibilities and there are certain proofs that are required,
8 and burdens; it would make a significant difference with regard
9 to potentially whether or not there's a pro rata or weighted
10 share, whether or not, for example, the Osage, whose funds were
11 deposited -- the Osage individuals whose funds were deposited in
12 the Osage Tribal Account prior to distribution are included; it
13 would have an effect on the Osage individuals whose funds were
14 deposited at some point in the 14X6039 account.

15 The amount this court has stated clearly is an amount
16 it has determined based on a model that we believe needs to be
17 addressed on appeal. We don't believe that established, based
18 on our understanding of the testimony, accurate account balances
19 or funds that were not distributed. And it all ties back to
20 whatever the controlling law is as we understand it, this Court
21 understands it, or an appellate Court understands it in this
22 circuit and otherwise.

23 And we think it would be -- this process is an
24 expensive process. We've done some -- we've had discussions in
25 the interim period of time with professionals who do that for a

1 living. The nature and scope of the class itself is an issue,
2 as this court has defined it in significant part in the
3 January 30th, 2008 opinion; how the class is defined in
4 accordance with the language of the class certification order
5 very well determines the share of individuals.

6 We would envision issues that were not addressed on
7 appeal in the January 30th opinion to be also addressed in this
8 regard, and without a complete resolution, we may have to do
9 this process again. And we think it would be more efficient and
10 very -- much less costly to only have to do this process once
11 and finally.

12 Quite frankly, given, as this court quite accurately
13 noted, plaintiffs do intend to appeal, and if we prevail on
14 perhaps any one of the major issues as we see it, it could
15 dramatically change what was stated in the notice.

16 THE COURT: Sure. Sure.

17 MR. GINGOLD: Therefore, this case has gone on for over
18 12 years, the trust is over 121 years old; whatever views are
19 correct we believe need to be finally determined and
20 expeditiously determined in order to finally resolve it, so
21 we're not caught up in proceedings simultaneously in the claims
22 court, in this court, in the Federal Circuit, in the DC Circuit.

23 The efficiencies are important, the cost is very
24 important, the reliance on whichever systems need to be relied
25 on to even determine the beneficiaries -- and by the way, Your

1 Honor, I believe at least as of the most recent quarterly
2 report, there are over 80,000 Whereabouts Unknown trust
3 beneficiaries identified. How the class is defined will affect
4 the ability to even deliver notice to the right people.

5 We need these issues resolved. They are material
6 issues. We understand and respect what this court has done. As
7 this court knows from our pretrial submissions and also our
8 posttrial submissions, we interpret things a great deal
9 differently, and we would hope that we can accomplish what this
10 court seeks, which is a fair and expeditious resolution, more
11 appropriately if we can get the issues resolved on appeal first.

12 There are so many issues we believe are necessary to
13 provide a clear and accurate notice that they cannot be
14 provided --

15 THE COURT: So not to put too fine a point on it, what
16 you want me to do is either by means of partial summary judgment
17 or by means of a judgment that just -- a judgment that says the
18 plaintiff class is entitled to \$455.6 million, you want that put
19 into appealable form and you want to leave all the rest of this
20 stuff aside until you hear from the Court of Appeals. Is that
21 right?

22 MR. GINGOLD: You're absolutely right, Your Honor.

23 THE COURT: What says the government?

24 MR. QUINN: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

1 MR. QUINN: I understand Mr. Gingold's comments just
2 now, and empathize with the concern about going through the
3 process of issuing notice and so forth.

4 However, there have already been a fair number - in
5 fact, I've lost number of the exact number - of appeals that
6 have already gone up to the DC Circuit on this one case.

7 THE COURT: Nine I think is the last count.

8 MR. QUINN: I knew I needed at least two hands to count
9 them, but I wasn't sure of the exact number. And with the last
10 appeal, the court urged this court, revisiting, remanding the
11 case, to move forward with all due speed to resolve the case.

12 I think there's a way that Your Honor could come to a
13 final judgment without having to send a further piecemeal appeal
14 up to the DC Circuit. I think, in fact, you could enter a final
15 judgment that considers all these issues, distribution, who's in
16 the class, what the attorney's fee -- if there's anything to be
17 charged against the award, how that would be done. I think it
18 would be less efficient, in essence, to send the case on a
19 partial summary judgment, leaving all these issues unresolved.

20 I heard Mr. Gingold say we want these issues resolved.
21 I think it's better that the court address and resolve all these
22 issues and enter a final judgment that reserves jurisdiction to
23 administer and oversee distribution as whatever the court
24 finally enters as the plan for distribution, and then take all
25 those issues up.

1 Taking plaintiffs' position, you could have the
2 consequence of having an appeal go up, where in effect you are
3 affirmed and it comes back and we go through the process of
4 defining the distribution, and there's a further dispute and we
5 wind up yet having another appeal because some of these
6 remaining issues haven't been resolved now.

7 I think it's in everyone's interest to try to come to
8 the best final conclusion of the case, short of actually
9 disbursing the money or going through the notice process, and
10 making those determinations now, so that if there is a
11 difference of opinion, the parties have an issue that's been
12 decided by this court that could be incorporated with any appeal
13 to the Circuit Court.

14 THE COURT: Well, we all have our own -- we all bring
15 our own ideas of what might happen here to the table. My own
16 view is that what really -- aside from the question of whether
17 the Osage are in or out, which is not a small question, what the
18 plaintiffs are most exercised about is that this dollar has two
19 fewer zeros than they wanted, and one fewer than they really
20 thought they were entitled to, even without the interest and
21 the -- or whatever -- I'm happy to hear Mr. Gingold call this
22 number interest. He was steering away from that number -- that
23 word like crazy until today, but calling it what it sort of is,
24 that's where the most dollars are.

25 The next most dollars have to do with this whole burden

1 of proof question, and the third most dollars have to do with
2 the Osage question. I think when those three questions are
3 resolved, there's not going to be a lot of nifnawing about
4 notice to the class or who gets it or how it's sent out.

5 I haven't heard the government say what their view is
6 of this opinion. Are you going to defend it or cross appeal, or
7 do you know?

8 MR. QUINN: I think in essence we were waiting to hear
9 and see what exactly the plan -- how the plaintiffs would
10 propose to bring this to resolution. There were seven things we
11 were going to suggest that plaintiffs -- that the court should
12 ask the plaintiffs to brief as part of their proposal for
13 distribution, and I could tick those off if you like.

14 THE COURT: Yeah, tick them off.

15 MR. QUINN: And then the government would respond to
16 that proposal.

17 The first would be addressing fees and expenses that
18 may be charged against the award. I think Your Honor, under
19 Rule 23(h), to the extent there are any attorneys' fees that
20 will be petitioned to the court that would come out of an award,
21 Your Honor is required to give notice to the class with respect
22 to any legal fee petition.

23 Earlier in this case, on the first phase EAJA petition,
24 where the fees weren't even coming out of plaintiffs' pocket but
25 the fees were coming through the EAJA Act from the government,

1 Judge Lamberth ordered notice be issued with respect to that fee
2 petition in accordance with Rule 23(h).

3 So I think at a minimum, Your Honor will have to
4 issue -- if there's going to be requests with respect to the
5 award, Your Honor will be required to issue a notice to class.
6 And then the question becomes what other kinds of notice would
7 you include in that if you're going to issue anything to the
8 class.

9 As part of the written description, we would like to
10 know from plaintiffs, for instance, in terms of what specific
11 recovery will be given to the named plaintiff parties here. In
12 some class actions there's certain additional awards that are
13 given to named parties. I don't know whether the plaintiffs
14 considered that. They haven't indicated that at all. I don't
15 want to suggest that, but to the extent there's going to be any
16 difference in payments between the named plaintiffs, the
17 representative plaintiffs, and the class members, that ought to
18 be made known.

19 What if any - we've already addressed this - notice to
20 class members would be distributed, what the wording of that
21 notice would be, what the manner of distribution would be.

22 Fourth, whether and the process by which class members
23 could at all object.

24 Five would be a final -- you know, what plaintiffs'
25 final determination -- what their argument would be in terms of

1 finally determining who's in the class, class membership issues.

2 Six would be a description about how the disbursement
3 of the award would be distributed, the actual mechanics. Would
4 you hire an administrator, who would hold the money, how that
5 would be accomplished, the time frames and so forth.

6 And then seven, actually the physical aspects, if you
7 will, about how the judgment would be distributed and how that
8 would be accomplished. And we sort of envision that plaintiffs,
9 obtaining the benefit of the award and representing the class
10 members as a whole, would submit a written proposal, if you
11 will, to the court on these and any other issues that they
12 believe are germane for purposes of the award, and that the
13 government would respond to those points that were of concern.

14 THE COURT: Well, two questions occur to me after what
15 you've said. The first is whether any of those are questions
16 that have to be decided now if the plaintiffs want to take an
17 appeal. And the second, quite frankly, is which of those
18 questions is a question in which the government actually has any
19 interest? I mean, the payment of the money would be by the
20 government, but after that point I'm not sure the government has
21 much skin in the question of the final determination of who's in
22 the -- except, of course, that the government continues to be
23 the fiduciary for all of the members of the plaintiff class, and
24 so I suppose in its capacity as fiduciary, it continues to be
25 interested in that.

1 MR. QUINN: Well, I agree with you. I think that's
2 accurate, from a general perspective. It's just that class
3 action cases are all animals of a different color. They all
4 have their own particularities about them, and the manner -- the
5 specifics, the things that would prompt concern by the
6 government would be based upon what the specifics are of how
7 this thing would be administered; how many years it would be
8 open, how the costs are going to be borne, what kind of
9 information demands would be made of the government.

10 It's one thing if you are going to do a pro rata
11 distribution, whether it's by number of accounts or by number of
12 accountholders, and quite another if you're going to say, well,
13 we're going to consider how long somebody has held an account or
14 how much has gone through the account. Because you could wind
15 up putting information demands on the government that are close
16 to if not equal or exceeding the cost of conducting the
17 accounting itself. I mean, you wind up going back to the same
18 information sources to make those determinations.

19 So we were requesting that the court direct the parties
20 to brief these issues, asking plaintiffs to make their proposal,
21 and that we would respond to those particular items that are of
22 concern to the government, making suggestions on those points.
23 Some points, as you mentioned, we wouldn't have any comment on
24 one way or the other.

25 But I think it's beneficial to all parties to have

1 finality, to get to a judgment that can be appealed completely,
2 short of actual execution of the notice and award of --
3 distribution of funds.

4 THE COURT: Well, I indicated in the last line of the
5 opinion I issued a few weeks ago that perhaps it would not be
6 too much to suggest that the parties could have some offline
7 discussion and settle this case. I guess that was too much to
8 expect and that's not happening.

9 MR. QUINN: There have been offline -- at your
10 suggestion, Your Honor, there has been offline conversations
11 between the parties. I haven't been privy to that conversation.
12 If you would like to address those, I would ask Mr. Kirschman to
13 come up.

14 THE COURT: Well, if there's anything anybody wants to
15 tell me about it. I mean, settlement discussions are by their
16 nature very private. I don't want -- there's a lot of people in
17 this courtroom. I don't want any of that to be spread on the
18 public record. If there have been discussions, more power to
19 you.

20 But I have to tell you that when I took this case on, I
21 tried to make it very clear to everybody that one of my
22 principal concerns was getting it done and getting it over with.
23 And I'm still working on that project. And from what you've
24 said and from what Mr. Gingold has said, it seems to me that the
25 most efficient use of my time and your time and the Court of

1 Appeals' time is to put this thing in a posture where it can be
2 appealed right now.

3 The question is exactly how to do that. I mean,
4 Rule 54(b) -- there's Rule 54(b) and there's 1492(b). One is an
5 interlocutory appeal the other is an appeal from a partial
6 judgment. I don't know of any other way to get it to the Court
7 of Appeals.

8 MR. QUINN: Not without a final judgment, Your Honor.

9 THE COURT: 54(b) is a little problematical because it
10 permits me to direct entry of final judgment as to one or more
11 but fewer than all claims or parties. This is a class action.
12 If I just say the government owes the plaintiff class
13 \$455.6 million, so adjudged and decreed, that doesn't really --
14 it actually doesn't even tee up the question that Mr. Gingold
15 wants teed up, which is what about the Osage. It does, I think,
16 tee up the question about interest. Can we all call it that
17 shorthand? Interest and the whole burden of proof question, the
18 allocation of burdens.

19 MR. QUINN: Your Honor, if I may, there's one
20 additional concern. And we're going to address this at another
21 juncture, but I think it's a factor here in terms of getting to
22 a final judgment or whether you do something short of a final
23 judgment at this point.

24 And that is, there are certain orders in effect,
25 interim orders that have been going on in place throughout this

1 case, that impose certain reporting duties on the department,
2 some with trust reform aspects, fixing the system, that are for
3 all intents and purposes over. That part of the case is over,
4 yet those reporting obligations have continued.

5 I think we would expect with a final judgment in place
6 that the government would be relieved of those burdens. To the
7 extent that those could be addressed short of final judgment,
8 that might make a difference as well.

9 But there are continuing burdens to leaving the case
10 open and having any kind of further appeal short of a final
11 judgment. And I still think you can get to a quick judgment
12 without going through the notice process, which seemed to be the
13 primary concern, the costs of distributing a notice and so
14 forth.

15 THE COURT: Yeah, I agree with you. I think we can
16 clean up a lot of these housekeeping matters that have been
17 running along for some time, status reports, quarterly reports,
18 maybe even historical statements of account. Because as I
19 understand Mr. Gingold, and I'm not surprised by what he says,
20 again the main questions that drive the plaintiffs'
21 dissatisfaction with this opinion are interest, whether they
22 proved their \$4 billion, and what do we do about the Osage. I
23 think the rest of it is nickel-dime issues, relatively speaking.

24 All right. Thank you. Maybe it's time for me to hear
25 from the plaintiffs again.

1 MR. DORRIS: Good afternoon, Your Honor.

2 THE COURT: Good afternoon, sir.

3 MR. DORRIS: We would request that the judgment be
4 entered under 54(b). I believe that it can be fashioned along
5 the lines that you're talking about in terms that the defendants
6 are ordered to pay the amount to the plaintiff class, and then
7 stay further proceedings regarding the distribution of those
8 amounts until the appeals.

9 Kind of a belt and suspenders approach would be to then
10 also state that you would be granting interlocutory appeal with
11 respect to any and all issues arising out of your two orders
12 here, or your two opinions that you've issued, the one in
13 January and now the one in August. And I think that that would
14 clear up -- if there became an issue as to the extent to which
15 that judgment was appealable, we would still be able to get up,
16 get the issues heard, and back.

17 The reason that the -- one of the reasons the plaintiff
18 thinks it's important that the judgment be entered under 54(b)
19 is that that would at least start the clock ticking on
20 postjudgment interest. As the court is well aware, all of the
21 calculations for that \$455 million amount were through the end
22 of fiscal year 2007, so it's been even a year since that has
23 stopped. So we would ask that the court do it in fashion that
24 would at least get the postjudgment interest clock ticking on it
25 as we move forward.

1 I don't know that I need to address all of the seven
2 issues that were listed, but I do want to say, because the court
3 asked about a motion for fees and expenses, and under 23(h)(1),
4 that is going to be done at a time when the court sets and asks
5 the plaintiffs for that type of motion. Typically, and what we
6 would think would be the most economical and efficient fashion,
7 is that that's done in conjunction with -- when the case comes
8 back down from the appeal, Your Honor, would be done as part of
9 the same notice that goes out to the plaintiff class so that
10 it's all done one time.

11 That's a very expensive process, to provide notice
12 certainly to this many plaintiffs, and we would ask that that be
13 set by the court when it comes back down from appeal to be
14 addressed all at the same time, so there's one single notice
15 that goes out to the plaintiff class.

16 I'm not sure if there's anything else, Your Honor, you
17 would like me to address that's been brought up, but we'll be
18 glad to try to do so.

19 THE COURT: No, I don't think so.

20 MR. DORRIS: Thank you.

21 THE COURT: Yes, sir, good morning. Good afternoon.

22 MR. KIRSCHMAN: Good afternoon, Your Honor. To the
23 extent that we would be moving to a final judgment, there are
24 issues, as Mr. Quinn indicated, that would assist us in being
25 resolved, would close out the record.

1 One of those was the question you yourself raised
2 regarding the HSA's. A question Interior has that we have is
3 not only regarding the HSA's that are presently before you that
4 have been pending, but those that they have been preparing since
5 we first addressed this issue. Work has continued, as we've
6 told you, and those are on both the per capita and judgment
7 accounts, and also more recently more modern land-based
8 accounts.

9 So a question we would like resolved, if we could, we
10 would like to have answered, is what you view as Interior's
11 responsibility to continue to prepare those for your
12 consideration, those that are not yet before you. And also,
13 once final judgment is issued, what Interior's responsibilities
14 regarding historical accounting are, at least for the time that
15 your finding of impossibility is the law of the case.

16 This is a question that's very significant because of
17 funding and the allocation of resources, especially in light of,
18 as you're well aware, the Tribal cases. But it's a question
19 that burdens our client, because they have certainly continued
20 with the accounting of the IIM accounts. They feel, we feel
21 that there is a ruling under Cobell VI, an interpretation under
22 Cobell VI that found a responsibility to do that under the
23 '94 Act, but also too as trustee we face a question of
24 impossibility.

25 So that's an important issue for the Department of

1 Interior, and it goes I think hand in hand with not only should
2 we issue now the HSA's that have been before the court, but
3 should we continue to follow the process that we have, provide
4 you with notice of subsequent documents that have been prepared.

5 Regarding any appeal or apparently a cross appeal, that
6 is a subject that there's been no decision on. It would
7 ultimately be up to the Solicitor General's office to make such
8 a decision. So that is something that's being considered, but
9 certainly we can't represent today what that decision is or what
10 issues could possibly be appealed. It's a complex matter,
11 obviously.

12 So those are the issues I wanted to further raise with
13 the court. Thank you.

14 MR. GINGOLD: Your Honor, with respect to the HSA's,
15 there was no evidence regarding the HSA's that was introduced
16 during the trial that was completed this June. Issues were
17 raised with regard to both the understanding of the description
18 of what the HSA's were and the basis for the decisions that were
19 made with regard to amounts estimated. And Your Honor, I say
20 estimated because the administrative record demonstrated there
21 was debate among the contractors with regard to how issues were
22 to be resolved on the HSA's, particularly, Your Honor, with
23 regard to the allocation and computation of the compound
24 interest that was reflected in the administrative record, and
25 questions were raised substantially in that regard. However,

1 Your Honor, there was no evidence introduced during the trial
2 that was completed in that regard.

3 And Your Honor may recall, one of the issues that was
4 involved - and we briefed this - was the HSA's were to be used
5 as the basis to trigger an anticipated administrative process
6 that would effectively require each beneficiary to present his
7 information, to be able to challenge HSA's, when Your Honor, our
8 clients have never been provided the information. That was one
9 of the critical problems associated with the HSA's, in addition
10 to the fact that the computation of interest remained a question
11 mark that was not provided, and answers to which were not
12 provided in the administrative record.

13 So without the evidence introduced, Your Honor, we
14 think it would be unfair and almost impossible for the
15 individual members of the class whose funds are included in the
16 judgment accounts to be put through a process where nothing has
17 ever been provided to them that can be determined as verified or
18 otherwise. This court has noted in its January 30th, 2008
19 opinion the difficulties that exist with regard to the records.
20 Our clients are the beneficiaries, they're not the trustees, and
21 they have not been provided this information, nor would they be
22 in a position -- because it would be done on an individual
23 basis, nor would they be in a position to address the particular
24 statements that would be given to them.

25 I think, Your Honor, our clients would be put in an

1 impossible position to be able to challenge the HSA's, because
2 there are time periods within which they would have to be
3 challenged effectively or they are out of luck. I don't think
4 those issues, Your Honor, should be addressed at this point in
5 time because the bigger issues have to be addressed first at the
6 circuit which this court --

7 THE COURT: What's your reaction to the -- what's your
8 response to the question of whether the government should
9 continue to prepare and complete HSA's for land-based accounts
10 and keep that whole process going? Or just bag it, since I've
11 said that it's impossible?

12 MR. GINGOLD: Your Honor, there are two elements of the
13 issue we're dealing with. And as this court and the Court of
14 Appeals has noted, the accounting -- an accounting involves
15 three components, the historical accounting, the current
16 accounting, and future accountings.

17 Your Honor, they have specific statutory duties with
18 regard to accounting. Those statutory duties exist whether or
19 not this litigation was ever brought. They are trustees and
20 they have the duty to do this, and Your Honor, they're paid
21 significant fees by the beneficiaries to do this. As this court
22 may recall, evidence was introduced in the October trial from
23 the administrative record that confirmed that eight to
24 10 percent of all revenue generated by timber is paid to the
25 government as fees, administrative fees, that out of the

1 Agua Caliente or the Palm Springs agency office, leases -- there
2 were lease schedules in place where in one case a \$60,000 fee
3 was paid as administrative fees.

4 Your Honor, the government is obligated as a trustee to
5 do this anyway. This trial is about a historical accounting.
6 At the beginning of this case, for many years we sought reform
7 of the systems to ensure that the current and future accountings
8 could also be done properly, and it could not be done without
9 adequate systems, staffing, and records. This court is well
10 aware of how those have been resolved, but the Court of Appeals
11 has never backed away from the fact that the obligation to do
12 current and future accountings exists.

13 So Your Honor, we believe the obligation exists. We
14 believe every trustee has that duty, and the government is not
15 excluded. In fact, Congress has reinforced that with the
16 Trust Reform Act.

17 But Your Honor, there are also damages issues that this
18 court has raised. The list that this court identified are
19 damages issues, and we have never shied away from that and we
20 were never dancing on the head of the pin. We brought this
21 action, as the Court of Appeals confirmed, to enforce the duties
22 owed -- the trust obligations owed by the United States
23 government. That included an accounting, it included
24 restitution, it included what we believe is also specific
25 relief. That's an issue this court believes, with regard to

1 interest, although it's provided by statute, is also damages.

2 That issue needs to be addressed as quickly as possible
3 at the Court of Appeals. The other damages issues, Your Honor,
4 would have to be resolved properly either in the Court of
5 Claims, or, if the Little Tucker Act is invoked, in this court
6 as well.

7 THE COURT: By individuals?

8 MR. GINGOLD: No. Your Honor, the Little Tucker Act
9 provides, and all the authorities are in accord, that where you
10 have a class action, it's \$10,000 apiece. Subject to the Little
11 Tucker Act, it's not \$10,000 aggregate, it's \$10,000 per member
12 of the class.

13 THE COURT: Would that be a related case assigned to
14 me?

15 MR. GINGOLD: That could also be part of this case,
16 Your Honor. If it was filed in this court separately --

17 THE COURT: No way, Mr. Gingold.

18 MR. GINGOLD: I think Your Honor would not like to see
19 us a lot more, so -- but Your Honor, I just wanted to point out,
20 there are damages issues that can be addressed in this court, up
21 to \$10,000 per beneficiary, and Your Honor, if it's 500,000
22 beneficiaries, that's \$5 billion. If it's other damages issues,
23 such as the ones you identified, they're properly in the claims
24 court.

25 But Your Honor, we don't believe HSA's should go out,

1 we don't believe any new processes should be triggered, we don't
2 believe the government's accounting duties have been in any way
3 suspended or should be suspended by a final judgment or by an
4 interim order or by a certification for interlocutory appeal.
5 Those obligations have existed prior to the '94 Act, and
6 continue to exist and are reaffirmed explicitly.

7 THE COURT: Okay.

8 MR. QUINN: Your Honor?

9 THE COURT: Yes.

10 MR. QUINN: Let me just quickly -- just a couple of
11 quick points in response to Mr. Gingold's comments just now.

12 What we're referring to is just the historical
13 accounting aspect, not the current accounting aspect. We
14 continue with those present current duties.

15 But as it relates to this case, to the extent the case
16 remains open and doesn't go to a final judgment, the faster it
17 goes to a final judgment, the claim that was presented to this
18 court for the historical accounting, and the findings of this
19 court with respect to the historical accounting obligation, that
20 issue, that claim becomes merged into any judgment that's
21 entered by this court. And that would define the rights and
22 obligations of the parties as adjudicated by this court.

23 To the extent that the judgment -- no final judgment is
24 entered, it leaves open these questions about the continuing
25 historical obligation vis-a-vis this class of plaintiffs. I

1 think if the plaintiffs ask for a historical accounting, the
2 court has ruled as a matter of law it's impossible. If you
3 conclude that case and essentially made an order with respect to
4 \$456 million in terms of a finding, that resolves the matter
5 between the parties as to the historical accounting aspects for
6 purposes of rendering that accounting.

7 But as long as the judgment remains open, we continue
8 to have these issues about, as an ongoing basis, to go back and
9 continue to do the accounting.

10 THE COURT: Are you telling me the government wants to
11 stop preparing historical statements of account for land-based
12 accounts?

13 MR. QUINN: We would like to know whether we need to
14 continue to do so. I think it's the lack of certainty. When
15 members of the department go up to ask and make appropriations
16 requests on the Hill, there are always competing obligations and
17 they get asked to justify the request.

18 THE COURT: All right. Here's what I think we ought to
19 do. And I'm going to need some agreement from the parties, if
20 that's possible, to get there.

21 I think I should put this case in a posture as soon as
22 possible, as soon as next week, so that the plaintiffs have
23 something that they can appeal if they want to appeal it. I
24 think the plaintiffs are right that that's Rule 54(b). I don't
25 think it's too hard to form an order that qualifies as a final

1 judgment under Rule 54(b) that permits -- that leaves open
2 issues of administration of the plaintiff class, attorneys'
3 fees, and so forth.

4 I invite either or both parties to present me with
5 forms of order that they think will satisfy that responsibility
6 or those requirements. And, as I said, I think we can get this
7 entered by the end of next week, so when I say invite forms of
8 orders, I think you better get something in my hands no later
9 than Wednesday.

10 But there are ongoing questions that have to do with
11 historical statements of account, that have to do with quarterly
12 status reports, that have to do with I don't know what else, but
13 what I would like to have from the parties is the agreement that
14 my jurisdiction to deal with those matters is not terminated or
15 ousted by the pendency of an appeal.

16 In other words, we can run on two tracks. We can deal
17 with -- and I don't think it is -- I think an appeal of the
18 basic underlying obligation to pay does not stop everything in
19 this court. That's my belief anyway, but I would be much more
20 comfortable if the parties would both recite their agreement to
21 that so that we can deal with this HSA question and other
22 related questions on a more deliberate basis with maybe written
23 motions or written requests and I can sort them out. I'm not
24 going to sort them out here in this courtroom this afternoon.

25 And I don't want to stop the music while we have a

1 round of motions to deal with them, either. Because I do think
2 the most efficient way to get this case to the finish line is if
3 it's going to be appealed - and I'm not surprised that it will
4 be - is to get that started as soon as possible. Let the clock
5 start ticking, and Mr. Gingold makes a correct point about
6 postjudgment interest as well.

7 MR. DORRIS: Your Honor, on behalf of plaintiffs, we
8 would agree to what you've just proposed in terms of your
9 jurisdiction.

10 THE COURT: Government okay with that?

11 MR. KIRSCHMAN: I will have to address it with others.
12 I'm sorry, I can't answer that right now. We will have a quick
13 answer for you, but I can't address it standing here.

14 THE COURT: All right. I'll have a quick answer in a
15 few days, and by the middle of next week you'll tell me. I
16 think I have the jurisdiction to deal with these housekeeping
17 matters even if the underlying case is on appeal anyway, but if
18 you have a different view, let me know and let me know why.

19 So we have sort of a plan here: Proposed forms of
20 order or judgment by the middle of next week, something entered
21 by the end of next week, and unless I'm convinced that I don't
22 have any jurisdiction to do otherwise, then we'll deal with this
23 HSA question in a more deliberate fashion by renewed motions or
24 whatever you want to present to me.

25 Anything else today, counsel? Thank you very much.

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We're adjourned.

(Proceedings adjourned at 4:01 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

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

SIGNATURE OF COURT REPORTER

DATE