

# TRANSCRIPT OF PROCEEDINGS

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

ELOUISE PEPION COBELL, ET AL.

**Plaintiffs-Appellees,**

**No. 03-5314**

**v.**

GALE A. NORTON, SECRETARY OF THE  
INTERIOR, ET AL.

**Defendants-Appellants.**

**Pages 1 through 76**

**Washington, D.C.**

**Date: September 15, 2004**

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3  
4 ELOUISE PEPION COBELL, ET AL.

5 Plaintiffs-Appellees,

6 v.

No. 03-5314

7 GALE A. NORTON, SECRETARY OF THE  
8 INTERIOR, ET AL.,

9 Defendants-Appellants.

10 Wednesday, September 15, 2004

11 Washington, D.C.

12 The above-entitled matter came on for oral  
13 argument pursuant to notice.

14 BEFORE:

15 CIRCUIT JUDGES SENTELLE AND TATEL AND SENIOR  
16 CIRCUIT JUDGE WILLIAMS

17 APPEARANCES:

18 ON BEHALF OF THE APPELLANTS:

19 MARK B. STERN, ESQ.

20 ON BEHALF OF THE APPELLEES:

21 ELLIOTT H. LEVITAS, ESQ.  
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P R O C E E D I N G S

THE CLERK: Case number 03-5314, Elouise Pepion Cobell, et al., versus Gale A. Norton, Secretary of the Interior, et al., appellants; Alan Lee Balaran. Mr. Stern for the appellants, Mr. Levitas for appellees.

ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. STERN: May it please the Court. The case before this Court now is in every respect transformed from the case that this Court reviewed in the year 2001. On the one hand, there's no longer any question of unreasonable delay in the performance of accounting duties. From the start of Secretary Norton's tenure, the agency has devoted its resources to meeting the broadest possible construction of this Court's mandate. And on the other hand, the 2001 remand to the agency to conduct accounting activities has been inexplicably transformed into an unprecedented structural injunction encompassing every aspect of Indian Trust management at an estimated cost of between \$6 and \$12 billion.

JUDGE SENTELLE: I wonder about that adjective, unprecedented. I think that might have been fairly accurate a few decades ago, but you're familiar with the

1 Adams plaintiffs in this circuit, for example?

2 MR. STERN: Not offhand, Your Honor.

3 JUDGE SENTELLE: That was the welfare children  
4 that apparently weren't being tended to the way the Court  
5 thought the law intended, and the District Court took over  
6 and entered a mandatory injunction. I think of Swan v.  
7 Mecklenburg, the Charlotte school busing plan.

8 MR. STERN: Well, Your Honor, I'm certainly  
9 familiar, I don't know, I don't recall the Adams case, but  
10 I'm certainly familiar with the idea --

11 JUDGE SENTELLE: You would if you'd ever had to  
12 work in this circuit.

13 MR. STERN: Yes, well --

14 JUDGE SENTELLE: We all had a piece of that just  
15 as well have a piece of this one.

16 MR. STERN: Well, Your Honor, the, I mean, I  
17 mean, I guess there are a couple, you know, points about  
18 that. First, you know, I mean, you know, as we note in our  
19 brief, you know, there have been structural injunctions,  
20 and they probably were more popular about 20 years ago than  
21 they have become since, since a lot of doubt's been cast on  
22 them in any context. But they have not come up in the  
23 context --

24 JUDGE TATEL: What doubt has been cast on them?

25 MR. STERN: Well, just in the scholarly

1 literature. There's really been, I mean, there's --

2 JUDGE TATEL: Well, what about the case law?

3 MR. STERN: Well, I mean, I think that there are  
4 fewer of them, but the real point, Judge Tatel, is that the  
5 structural injunctions of all involved orders to state  
6 governments that did not involve separation of powers  
7 concerns --

8 JUDGE SENTELLE: Adams was not a state  
9 government.

10 JUDGE TATEL: What about Adams v. Richardson,  
11 right. Adams v. Richardson was the defendant was the  
12 Secretary of Health, Education, and Welfare.

13 MR. STERN: As I say, I'm sorry, Your Honor, but  
14 I should be familiar with it. I'm not. But there are  
15 clear separation of powers concerns that arise here, and  
16 what the Supreme Court has told us in no uncertain terms,  
17 and --

18 JUDGE SENTELLE: Why does that not make it a  
19 weaker case for your side than the state cases were?  
20 Because there you had not only separation of powers but  
21 also federalism concerns.

22 MR. STERN: Well --

23 JUDGE SENTELLE: Here you have only separation of  
24 powers concerns.

25 MR. STERN: Well, there are no separation of

1 powers concerns in the state cases, which also --

2 JUDGE SENTELLE: There aren't?

3 MR. STERN: No, there are federalism concerns.

4 JUDGE SENTELLE: Certainly there are, but there's  
5 also the role of the executive involved there, counsel.

6 You have a judicial body taking over the role of the  
7 executive just as you do here.

8 MR. STERN: No, I understand. I mean, there are  
9 questions of judicial competence that arise there. They're  
10 just not the same as sort of various coequal branches of  
11 government that we have here. But I think that --

12 JUDGE SENTELLE: You have whole levels of  
13 government there.

14 MR. STERN: No, we do. Your Honor, I'm not here  
15 to defend structural injunctions against state entities.

16 JUDGE SENTELLE: Take the word "unprecedented"  
17 out of your sentence and start over, then, counsel.

18 MR. STERN: I'm happy to take that word out and  
19 instead on that point go, I would just prefer, I think that  
20 the relevant point on structural --

21 JUDGE TATEL: Let me ask this -- well, you finish  
22 your sentence. Go ahead.

23 MR. STERN: No, Your Honor --

24 JUDGE TATEL: No, go ahead, finish your sentence.

25 MR. STERN: I was just going to say that I think

1 that the relevant questions really are what the claim in  
2 this case is about and what the Supreme Court in Southern  
3 Utah cases said about how we review claims and what the  
4 limits on judicial review are, and for that matter what  
5 this Court said in its 2001 decision, which quotes  
6 precisely the same language from Lujan in the context of  
7 this case that the Supreme Court recently reiterated, and  
8 those are really the principles that we embrace.

9 JUDGE TATEL: Let me ask you this, if I could. I  
10 mean, setting aside these really fascinating constitutional  
11 questions you've raised, if we were to agree with you about  
12 the appropriations rider and that it had the effect of  
13 barring the District Court from proceeding with at least  
14 the historical accounting part of his order, that is,  
15 Section 3 of the District Court's order, then we don't  
16 really have to address any of these broader constitutional  
17 arguments you're raising, do we?

18 MR. STERN: Well, Your Honor, I don't think that  
19 you need to address constitutional arguments to rule in our  
20 favor at all. I mean, I don't, I mean, we're not --

21 JUDGE TATEL: Well, what about my question about  
22 the rider? If we agree with you about the rider, that the  
23 rider bars enforcement of Section 3 of the District Court's  
24 order, then the only question before us is what to do with  
25 Section 4, which is, complies with fiduciary obligations.

1 MR. STERN: Well, I mean, you know, at the time  
2 when this Court was contemplating how to schedule this  
3 case, we did not oppose the request for a, for expedited  
4 briefing, but we pointed out to the Court that there were  
5 going to be some peculiarities because of the existence of  
6 this rider, and the Court determined, and we don't  
7 disagree, that it was appropriate to go forth expeditiously  
8 anyway. Now, what the legislative history indicates is  
9 that Congress expected this Court to, expected the appeal  
10 in this case to go forward, and although it is somewhat  
11 anomalous, I think what that history indicates is that  
12 Congress is looking for this Court to resolve the  
13 underlying case in its entirety --

14 JUDGE TATEL: Really?

15 MR. STERN: -- on its, to reach all the merits.

16 JUDGE TATEL: We're --

17 JUDGE WILLIAMS: But the question is what, I  
18 mean, we do what, we resolve issues that are properly  
19 presented before us. I guess my question is there's no  
20 reading of 108-108 that removes the forward-looking  
21 managerial aspects of the District Court's remedy, isn't  
22 that correct?

23 MR. STERN: That's correct.

24 JUDGE WILLIAMS: Okay. So then what is your  
25 legal objection to that?

1 MR. STERN: Well, our legal objection, I mean,  
2 our legal objections to our -- to the extent that there is  
3 language in the Court's opinion that purports to link  
4 directly to an accounting, that is at least within the sort  
5 of generic heading of what this lawsuit was about.

6 JUDGE WILLIAMS: Well, wouldn't there be a  
7 difference between backward-looking accounting and  
8 establishing procedures so that data as the trust  
9 management goes forward will yield material from which  
10 future accounting can be made?

11 MR. STERN: But Your Honor, there's never --

12 JUDGE WILLIAMS: Accountings with respect to  
13 future management of the trust.

14 MR. STERN: Well, Your Honor, there's no evidence  
15 of any kind of unreasonable delay in performing that part  
16 of Interior's responsibilities.

17 JUDGE WILLIAMS: No, but can we step back a  
18 moment? In the 2001 opinion, we allude to a stipulation by  
19 the Government in the District Court that there had been  
20 very substantial managerial failures, right?

21 MR. STERN: Yes.

22 JUDGE WILLIAMS: And at least one reason of what  
23 the district judge has done here with respect to them on a  
24 forward-looking basis is to say the Department come up with  
25 a comprehensive plan that will remedy all such problems,

1 and then there's a sort of a slightly, certainly an  
2 innovative and perhaps peculiar procedure for doing battle  
3 over that plan. So the question is why, given the  
4 stipulation, why isn't something like that, it maybe goes  
5 too far in some respects, but why isn't something like that  
6 entirely suitable?

7 MR. STERN: Your Honor, the fact that Interior  
8 would stipulate that there were problems in the context of  
9 a claim, in the context of this case doesn't expand what  
10 this case is about and it doesn't expand the limits of the  
11 Court's jurisdiction. This Court was very clear in 2001 to  
12 say the only actionable duty at issue here is the  
13 performance of an accounting.

14 JUDGE TATEL: Oh, I don't think that's what  
15 Cobell VI says.

16 JUDGE WILLIAMS: I think you took a sentence  
17 quite out of context there.

18 JUDGE TATEL: Right.

19 JUDGE SENTELLE: Uh-huh.

20 JUDGE WILLIAMS: That was relating to, as I read  
21 it, what with respect to accounting, with respect to  
22 historical accounting, what is the sort of behavior by the  
23 Department of Interior that requires judicial interference.  
24 But I don't read that passage, which you cite heavily in  
25 your brief, I don't read that passage as focusing at all on

1 the problem of managerial issues going forward.

2 MR. STERN: Your Honor, there, it could not have  
3 been an unreasonable delay case about managerial issues  
4 going forward. I mean, this was a case, the way that this  
5 Court, you know, (indiscernible) --

6 JUDGE WILLIAMS: Well, for a historical  
7 accounting, putting it in the slot of unreasonable delay  
8 makes complete sense.

9 MR. STERN: But that was the only basis for the  
10 Court's jurisdiction.

11 JUDGE WILLIAMS: But if one's talking about  
12 ongoing management --

13 MR. STERN: But --

14 JUDGE WILLIAMS: -- and with the record  
15 stipulated of past failures --

16 MR. STERN: Your Honor --

17 JUDGE WILLIAMS: -- it would seem to me at least  
18 ordinary arbitrary and capricious review of the agency  
19 would be suitable to make sure that this is not, that this  
20 is corrected.

21 MR. STERN: Your Honor, there has to be final  
22 agency action, and with all respect, this Court really did  
23 talk about those principles in 2001. It said we don't have  
24 final agency action. Nevertheless, we can review under the  
25 agency action that has been unreasonably or unlawfully

1 delayed. The Court recognized that you can't have  
2 programmatic reform, and it cautioned the District Court to  
3 be mindful of the limits of its jurisdiction. It pointed  
4 out that you can't have orders of injunctive relief  
5 resembling mandamus in the absence of clear ministerial  
6 duties to enforce. The Court said all of those things. If  
7 it hadn't said them then, the Southern Utah decision has  
8 said them since. And there --

9 JUDGE SENTELLE: Right, in the intervening  
10 contempt proceeding, the District Court made significant  
11 findings of failures occurring after the 2001 stipulation,  
12 right?

13 MR. STERN: Well, I'd like to address that if I  
14 could, Your Honor.

15 JUDGE SENTELLE: Well, I just asked you to say  
16 right or wrong about it. You can address it right now.  
17 That's a good time.

18 MR. STERN: It's --

19 JUDGE SENTELLE: It made such findings, right?

20 MR. STERN: It made, it certainly made, the Court  
21 among other things said that the Secretary failed to  
22 undertake a historical accounting.

23 JUDGE SENTELLE: Yes.

24 MR. STERN: Yes, it did.

25 JUDGE SENTELLE: Right. So isn't there further

1 default since the 2001 opinion?

2 MR. STERN: Well, you know, the, even, look, this  
3 Court really did also review that decision, and --

4 JUDGE SENTELLE: Yes. And set aside the contempt  
5 order --

6 MR. STERN: But --

7 JUDGE SENTELLE: -- but I don't find in that  
8 opinion a setting aside of the findings of fact, do you?

9 MR. STERN: No, what I see, Your Honor, is that  
10 first of all the Court had no basis to reach lots of things  
11 in the opinion, because what the Court said was that the  
12 only thing you could properly in this proceeding have been  
13 doing is to be having something along of the lines of  
14 criminal contempt, and so it had to look at only certain  
15 parts of the Court's opinion. It didn't mean that it  
16 blessed the rest of it. However, those would be the  
17 relevant parts of the Court's opinion, because those are  
18 the only parts that deal with the agency as it was  
19 constituted even in 2001 and 2002, and what this Court  
20 explicitly said was, no, of course the agency did not fail  
21 to, didn't fail to undertake accounting duties, and it said  
22 the record made precisely the opposite clear.

23 JUDGE SENTELLE: And I know we're jerking you in  
24 lots of different directions, but to get back to the  
25 statute --

1 JUDGE TATEL: Yes, let's talk about the statute,  
2 could we?

3 JUDGE SENTELLE: -- appropriations rider that  
4 Judge Tatel was asking you about, whatever that fixes, it  
5 fixes it only for a year?

6 MR. STERN: Until December 31st of this year.

7 JUDGE TATEL: What is the status of that? Is  
8 that a rider in the current Interior appropriations bill?

9 MR. STERN: Not to my knowledge.

10 JUDGE SENTELLE: Now, also, does that rider  
11 itself not raise significant constitutional questions?  
12 Separation of powers questions. Spendthrift Farms,  
13 Hayburn's Case, Klein v. United States all speak in fairly  
14 strong terms to the lack of power of Congress to redecide  
15 cases that the judiciary has decided and also to dictate  
16 the rules of decision where Congress has not changed the  
17 substantive law. So under those cases, would not that  
18 rider be constitutionally suspect?

19 MR. STERN: Well, I think, Your Honor, that  
20 plaintiffs have not demonstrated any respect in which this  
21 case is different from Robertson v. Seattle Audubon  
22 Society, which was also a provision in a rider, and in fact  
23 that one actually talked about what would --

24 JUDGE SENTELLE: Forget it's in a rider. I'm not  
25 talking about the rider problem.

1 MR. STERN: No, but it changed, it spoke --

2 JUDGE SENTELLE: I'm talking about the ability of  
3 the attempt of Congress to change the decision of a decided  
4 case or to dictate a rule of decision without changing the  
5 substantive law.

6 MR. STERN: Well, we think Congress did change  
7 the substantive law.

8 JUDGE SENTELLE: All right, what substantive law  
9 changed in that rider?

10 MR. STERN: The substantive law is that there  
11 is --

12 JUDGE SENTELLE: Substantive law. What changed  
13 substantively as opposed to Congress simply saying we're  
14 telling the Court how to decide this case?

15 MR. STERN: Well, I mean, the, I mean, what this,  
16 I mean, I understand that the Court's question is because  
17 the Congress said no provision of law shall be construed,  
18 but, I mean, that's not a, I mean, that kind of language in  
19 statutes is not unprecedented, and --

20 JUDGE SENTELLE: In that context, it's  
21 extraordinary. Perhaps not unprecedented, but I don't know  
22 of any place -- that kind of thing was considered in Klein  
23 v. U.S. well over 100 years ago, and I don't know of any  
24 place since then where the law has changed to say that  
25 Congress can dictate a rule of decision where they are not

1 changing the substantive law.

2 MR. STERN: Well --

3 JUDGE SENTELLE: I'm asking you for a change in  
4 substantive law, and the best you do is come back at me and  
5 say, well, Congress said no provision of law shall be  
6 construed thus and so, which seems to be only dictating a  
7 rule of, a decision for this case as opposed to saying the  
8 duties of trustee when it's the federal Government do not  
9 include X, Y, and Z, or the Indians are no longer  
10 beneficiaries or something substantive.

11 MR. STERN: Well, look, in Seattle v., in the  
12 Audubon case, the Congress had talked about what the  
13 Government had been done being adequate for the purposes,  
14 you know, of the particular situation everyone knew --

15 JUDGE TATEL: Are you talking about Robertson?

16 MR. STERN: Yes.

17 JUDGE TATEL: Well, what exactly, did the rider  
18 have language like this: Nothing in the '94 act or any  
19 other statute nor principle of law shall be construed?

20 MR. STERN: No, it didn't have that language, but  
21 it had language that would be --

22 JUDGE SENTELLE: That's what I'm asking you  
23 about.

24 MR. STERN: Well, I mean, I guess that the  
25 question --

1 JUDGE SENTELLE: So Robertson has nothing to do  
2 with this.

3 MR. STERN: Your Honor, the, if the question is  
4 can Congress with particular litigation in mind speak to  
5 something that is connected with that litigation without  
6 broadly changing the law, which is what it sort of in some  
7 general way, you know, which is what it did in Robertson,  
8 and that's why that case is relevant. And this is not a  
9 case involving a final judgment, and Congress can always  
10 amend what can be done --

11 JUDGE SENTELLE: Congress can certainly amend the  
12 law that governs situations. But I think as recently as  
13 Spendthrift Farms and as long ago as Hayburn's Case, and  
14 that spans us from John Marshall to Scalia, the Supreme  
15 Court has recognized that the separation of powers includes  
16 a niche for the courts. And that court niche includes  
17 making decisions that Congress is not going to upset for a  
18 case under adjudication. Now, Congress can change the law  
19 that governs situations, but to come in and change the  
20 decision-making in a judicial case is something that over  
21 that period of 200 years the courts have claimed this is  
22 our own, and how is this different?

23 MR. STERN: Your Honor, I mean, I fear I'm going  
24 to just repeat myself, because what, it's easy to explain  
25 why this case is different from lots of other cases that

1 plaintiffs rely on, you know, generally, you know, which  
2 generally involve like Plaut v. Spendthrift Farms, the  
3 problem there was its application to a closed case. All  
4 the cases that were still pending, whether they were in the  
5 Court of Appeals or anywhere else, you know, the  
6 application of that statute was fine. That was strictly a  
7 closed-case problem.

8 JUDGE SENTELLE: But here you're taking decided  
9 questions decided by a court, as you were in Hayburn's, and  
10 you were in Spendthrift, and instead of subjecting them to  
11 appellate process and judiciary, Congress is changing the  
12 decision of the Court. Now, Robertson, Congress came in  
13 and said we're changing the substantive law as to the  
14 circumstances under which a harvest is considered to take,  
15 right? They were not saying in the case under adjudication  
16 you shall not construe any provision of law in such a  
17 fashion as to say there's a take there.

18 MR. STERN: Well, Your Honor --

19 JUDGE SENTELLE: Then you're have a parallel  
20 case.

21 MR. STERN: Well, Your Honor, I'd --

22 JUDGE SENTELLE: But that's not what happened in  
23 Robertson, was it?

24 MR. STERN: I'd suggest that if this statute had  
25 been written in precisely the way it is before this case

1 was ever filed that nobody would think that there was a  
2 problem with it. Everybody would say, yes, Congress has  
3 made absolutely clear that what it's just saying is that  
4 there's --

5 JUDGE SENTELLE: Well, you might then have a very  
6 serious takings problem, but that would be a different  
7 case.

8 MR. STERN: Well --

9 JUDGE SENTELLE: If you -- or, and even  
10 discrimination, probably. If you came in and said the  
11 courts shall not construe any law so as to say that a  
12 trustee has to, it doesn't have to perform the same duties  
13 toward the Indian Trust as they would in other trust  
14 circumstances.

15 MR. STERN: Your Honor, Congress could --

16 JUDGE SENTELLE: You'd have some other problems,  
17 but it wouldn't be this problem.

18 MR. STERN: Well, maybe, but Congress clearly can  
19 say what duties are or are not enforceable. It can create  
20 causes of actions for damages with regard to fiduciary  
21 trust obligations, and if it doesn't, you don't have one.  
22 You know, if you don't --

23 JUDGE SENTELLE: But if you had a pre-existing  
24 right under a trust relationship and Congress sought to  
25 extinguish that right, are you saying there would be no

1 takings problem there?

2 MR. STERN: Well, Your Honor, you would have, if  
3 the, where did the --

4 JUDGE SENTELLE: Are you saying there would be no  
5 takings problem there?

6 MR. STERN: Your Honor, I'm saying that there  
7 would be no takings problem if there was -- first of all, I  
8 mean, there's lots of case law about whether even taking  
9 away a real cause of action for something could constitute  
10 a taking, but the point in this context is that it is one  
11 thing to talk about fiduciary duties, and there are a lot  
12 of fiduciary duties and, you know, the Government has  
13 sometimes failed in it, sometimes horribly failed in it.

14 JUDGE SENTELLE: Uh-huh.

15 MR. STERN: This case, however, is not and cannot  
16 be a review of all historical failures or even all failures  
17 going forward. The Court does not sit to do that, and that  
18 is equally true in fiduciary cases.

19 JUDGE TATEL: But that's not what Cobell VI says.  
20 Cobell VI says it should.

21 MR. STERN: No, it does not, Your Honor, with all  
22 respect, and it can't. It cites cases from this circuit  
23 that say you can't order in the context of an Indian Trust  
24 case. Unless there's a specific statute or treaty or  
25 regulation, you can't require the Government to do

1 anything.

2 JUDGE TATEL: You and I must be reading different  
3 cases. Cobell VI requires it.

4 JUDGE SENTELLE: I think I wrote it.

5 JUDGE TATEL: Yes.

6 JUDGE SENTELLE: And I don't remember precisely  
7 what you're saying.

8 MR. STERN: Your Honor, it would be foolish for  
9 me to quarrel with the author of an opinion about what it  
10 meant. However, the other decisions, including the cases  
11 that the Court quotes --

12 JUDGE TATEL: Can we go back, can we just  
13 continue with this rider for a minute? Because I'm  
14 confused about your argument here. In view of your  
15 responses to Judge Sentelle that this rider is  
16 constitutional and limits a court from interpreting the  
17 statute or the common law in any way to require an  
18 historical accounting, right?

19 MR. STERN: Yes.

20 JUDGE TATEL: Doesn't that apply? If you're  
21 right that that's constitutional, doesn't that apply to  
22 this Court as well?

23 MR. STERN: Yes, it does.

24 JUDGE TATEL: Okay, so if we can't interpret the  
25 statute or the common law to require an historical

1 accounting, whatever that means, then I don't understand  
2 your argument that Congress passed this to give us time to  
3 decide the constitutional case. Is that what you were  
4 saying?

5 MR. STERN: No, what I think, and I agree that it  
6 is somewhat anomalous, I think that Congress expected --

7 JUDGE TATEL: What's anomalous? Where is there  
8 any language in this rider -- so you think what happened  
9 was Congress passed this to restrain the District Court's  
10 order but to give this Court time to review it?

11 MR. STERN: I think in one sense, yes, that is --

12 JUDGE TATEL: Where do you find that in this --

13 MR. STERN: It's in, I mean, it's in the  
14 legislative history, Your Honor, yes.

15 JUDGE TATEL: It is? Why don't you read me  
16 something that says that. I mean, it's like a legislative  
17 stay. Did the Government seek a stay pending appeal from  
18 us?

19 MR. STERN: Yes, and we got one, Your Honor.

20 JUDGE TATEL: So --

21 MR. STERN: Otherwise, I mean --

22 JUDGE TATEL: Well, then, what did the --

23 MR. STERN: Well, the legislation came out  
24 first --

25 JUDGE TATEL: What did the rider do, then?

1 MR. STERN: The legislation came --

2 JUDGE TATEL: Why would Congress have passed a  
3 law staying an order that we already stayed?

4 MR. STERN: You hadn't already stayed it, Your  
5 Honor. We sought, the Congress acted very quickly and  
6 passed the legislation and --

7 JUDGE TATEL: Okay, so where does it say in here  
8 that this is really stayed?

9 JUDGE SENTELLE: This is what happens when  
10 Congress acts very quickly.

11 JUDGE TATEL: I mean, I may just have missed it.

12 MR. STERN: I mean --

13 JUDGE TATEL: I just didn't see it, so.

14 MR. STERN: It says, I mean, I'm looking it, it  
15 sort of says there will be further court proceedings in the  
16 Cobell case based on the likely appeal. Managers believe  
17 it would be unwise to expend hundreds of millions of  
18 dollars on further accounting while this case is under  
19 appeal. Now, one can --

20 JUDGE TATEL: Yes, but the only time limits, the  
21 time limits the rider imposes include either action by the  
22 Congress or December 31st, 2004. They don't say anything  
23 about this Court. And it doesn't say no court shall  
24 interpret the fiduciary obligations of the Department to  
25 require an accounting until the D.C. Circuit so rules.

1 MR. STERN: Your Honor, that's why I found it to  
2 be anomalous, because I do think that there is a bit of  
3 mismatch between what Congress expected and what it wrote,  
4 and --

5 JUDGE TATEL: Uh-huh.

6 JUDGE WILLIAMS: Isn't a sort of straight reading  
7 of it that it imposed this delay so that it could --

8 JUDGE TATEL: Right.

9 JUDGE WILLIAMS: -- address the matter?

10 JUDGE TATEL: Exactly.

11 JUDGE WILLIAMS: And I'm not sure why that's a  
12 problem for you.

13 MR. STERN: Your Honor, I'm reading this, I'm not  
14 really trying to sort of defend the logic of, I'm just  
15 saying that I think --

16 JUDGE WILLIAMS: I'm just saying, you seem to be  
17 tying yourself in quite unnecessary knots.

18 MR. STERN: I just think --

19 JUDGE WILLIAMS: You have a statute that seems to  
20 say nobody ought to make, and the Secretary of Interior  
21 ought not to, and no one should make the Secretary of  
22 Interior spend huge dollops of money on this accounting  
23 while we are thinking of what the right remedy, and your  
24 introduction of having this being some sort of stay for the  
25 Court to think about it totally baffles me.

1           MR. STERN: Well, I'm sorry, Your Honor. I'm  
2 only sort of trying to point up what I think Congress  
3 thought was going to happen. As I said, I don't believe  
4 the language of that rider is in the current appropriations  
5 bills, and we did sort of point all this out --

6           JUDGE WILLIAMS: And it creates a standstill  
7 until the end of December 2004 or until Congress acts,  
8 so --

9           MR. STERN: Well --

10          JUDGE WILLIAMS: -- there doesn't seem to be any  
11 urgency about it until December approaches.

12          MR. STERN: That may well be, and the Court may,  
13 you know --

14          JUDGE SENTELLE: But in December we're back to  
15 where we were without the rider, right?

16          MR. STERN: Well, that would be correct, yes, and  
17 that's really why I'm sort of, I mean, trying to, however  
18 the Court, whatever, however the Court chooses to come at  
19 this, there is at least the possibility that these issues  
20 will be at some point presented. And the point also in our  
21 lawsuit, I mean, in our appeal is this, is that, you know,  
22 we do think, you know, and again, I don't want to quarrel  
23 with anybody, not even the one that wrote the opinion, but  
24 I think that the Supreme Court really has made clear in  
25 principles that this Court embraced in its 2001 opinion

1 that to bring in action for agency action unlawfully  
2 withheld, and that's what this Court said that the case was  
3 about, and it really did say, and we're sending it back to  
4 the agency for a remand, and there is an absolute lack of  
5 any evidence of unreasonable delay since then. That  
6 contempt trial, even if you look at all of the findings  
7 that are in that trial, if you leave out the parts that  
8 were reversed by this Court, that is, you couldn't get, on  
9 its own terms you couldn't get unreasonable delay out of  
10 that. There's a lot of statements --

11 JUDGE WILLIAMS: Is delay the issue between the  
12 parties here? I thought the issue really, and apart from  
13 the question of judicial supervision, which is not a  
14 trivial issue, but apart from that, the issue is the scale  
15 and character of, insofar as we're talking about historical  
16 accounting, the scale and character of that accounting, and  
17 the Government argues forcefully that spending hundreds of  
18 millions to catch errors worth 38 cents is not particularly  
19 sensible, and particularly when Congress seems to have  
20 doubts about the propriety of that. So that seems to me  
21 not on the question of delay but the question of what kind  
22 of an accounting is actually required.

23 MR. STERN: Well, I mean, I think one possible  
24 way of looking at this is that to the extent that there was  
25 specific action contemplated by this Court's decision and

1 that whether this is reviewed now under the rubric of is  
2 it, is there further delay or should I look at the  
3 accounting plan and the accounts that have actually been  
4 reconciled, which amount to, you know, about 60 billion, 60  
5 million of the total of the 400 million, has actually been  
6 completed. But of course we're not even allowed to send  
7 those out. The District Court has restrained us from doing  
8 that. However, if you look at the progress --

9 JUDGE SENTELLE: Well, you rather understand why  
10 the Court is not allowing you to send that out when they  
11 don't know how much you owe other people.

12 MR. STERN: Well, no, no, these are the ones --  
13 well, that's the problem, Your Honor, is that when a court  
14 remands to an agency to complete accountings, an agency, to  
15 restrain an agency for a lot of these judgment denying on  
16 the accounts, you know, which, where we didn't get bogged  
17 down with orders telling us we couldn't use sampling and  
18 having the Court tell the Secretary it was contemptuous to  
19 even think about it, on those who were actually able to not  
20 only proceed with all, you know, getting the documents,  
21 indexing them, and putting everything, you know, in order,  
22 those were actually able to go ahead and finish them and  
23 reconcile them. You know, and we still can't send it out.  
24 We've got a motion that's been pending with the Court for  
25 over a year to allow us to do that. But he says, no, you

1 can't send out to, you can't send that because that would  
2 be a contact with class beneficiaries. But the point would  
3 be that if you take that and the accounting plan together,  
4 and if you review those under an arbitrary and capricious  
5 standard, we'd welcome the Court to review that under an  
6 arbitrary and capricious standard, because we think it is  
7 100 percent clear that it meets, that it would meet that  
8 standard. And so we're not trying to avoid this Court's  
9 review of anything that might actually be emerging here as  
10 a relevant question in terms of an accounting, and --

11 JUDGE SENTELLE: At the risk at unnecessarily  
12 prolonging this, which we probably have already, if we were  
13 to hold that the Court has the authority to enter some sort  
14 of structural injunction, what parts of this one are the  
15 ones that you think are worst, I guess? I would say which  
16 parts which would make it invalid anyway, but I'm not sure  
17 that's a good statement, so.

18 MR. STERN: Well, I mean, they work in different  
19 ways. First, there's half the injunction that simply says  
20 that everything the Department of Interior is ever going to  
21 do, whether it's reorganizing itself or whatever, is  
22 really --

23 JUDGE SENTELLE: That obviously is not what it  
24 says, and you're not addressing the question I asked you.

25 MR. STERN: Excuse, Your Honor --

1 JUDGE SENTELLE: The parts of the order that it  
2 was -- more a paraphrase than I'm going to let you get by  
3 with. Tell me what parts of it it is that are genuinely  
4 and obviously too intrusive on the Executive Branch?

5 MR. STERN: Well, Your Honor --

6 JUDGE SENTELLE: We're back to concerns about  
7 separation of powers now.

8 MR. STERN: Your Honor, you know, I'll stand by  
9 what this order actually says, because I think it really  
10 does, what it's done is to take --

11 JUDGE SENTELLE: No, you can't possibly contend  
12 that it said what you just quoted.

13 MR. STERN: No, what --

14 JUDGE SENTELLE: If you do, tell me where it says  
15 that.

16 MR. STERN: Well, Your Honor, what it does is it  
17 takes the plan --

18 JUDGE SENTELLE: No, I don't know what it does.  
19 I want to know what it says that you say is the most  
20 invasive of the executive power.

21 MR. STERN: Well, look --

22 JUDGE TATEL: Are you talking about Section 3 of  
23 the order?

24 MR. STERN: The fiduciary duty part. And with  
25 respect to --

1 JUDGE TATEL: And you're talking about  
2 subparagraph (a), which directs the implementation of the  
3 comprehensive plan?

4 MR. STERN: Yes.

5 JUDGE TATEL: Is that what you're talking about?

6 MR. STERN: Yes.

7 JUDGE TATEL: Okay, and it's your objection to  
8 that that the Court has ordered the Department to comply  
9 with its own plan? I mean, it hasn't taken over the  
10 Department. It's the Department's own plan.

11 MR. STERN: Your Honor, this is not, this is a  
12 plan set out in the most general terms to guide the  
13 Department in the future. No court has the authority to  
14 say you are now subject to contempt if you don't do what  
15 your plan is.

16 JUDGE TATEL: So that's Complaint No. 1. All  
17 right, so --

18 MR. STERN: That's Complaint No. 1.

19 JUDGE TATEL: Okay, that's No. 1. Now, what  
20 about (b)? Within 90 days, file a plan --

21 MR. STERN: Well, this is --

22 JUDGE TATEL: What's the matter with (b)?

23 MR. STERN: Well, Your Honor, it's essentially  
24 telling the Department of the Interior, you know, I really,  
25 you know, it's really too bad that you guys ever thought

1 that you were running an agency, because now I am.

2 JUDGE TATEL: Wait, wait, wait, wait.

3 JUDGE SENTELLE: It doesn't say that.

4 JUDGE TATEL: Now, come on. That's not what that  
5 says.

6 JUDGE SENTELLE: We're talking about the real  
7 order, not the one that you'd like to --

8 MR. STERN: All right, the real order says --

9 JUDGE TATEL: Read, why don't you read --

10 JUDGE SENTELLE: -- the straw man that you'd kick  
11 around.

12 JUDGE TATEL: Why don't read (b) out loud?

13 MR. STERN: It said within 90 days the Interior  
14 defendants shall file with the clerk of this Court, serve  
15 upon plaintiffs a detailed plan identifying specific  
16 measures that Interior defendants will take as a part of  
17 their 2(b) plan.

18 JUDGE TATEL: Okay, so, I mean, technically you  
19 could file a plan which says, Your Honor, there are no  
20 specific steps we need, and then you will have complied  
21 with that. I mean, I don't see the Department as, the  
22 Court as running the agency and that. What about identify  
23 any portions of the plan that are inconsistent with the  
24 fiduciary duties, so?

25 MR. STERN: Well, and of course we think that

1 the, all the fiduciary duties and the Court's understanding  
2 of those fiduciary duties, and it sounds like this is all  
3 premised on not only want of jurisdiction but on  
4 fundamental legal error, too.

5 JUDGE TATEL: Well, but you lost that in Cobell  
6 VI.

7 MR. STERN: Your Honor, we, I just have --

8 JUDGE TATEL: You did.

9 JUDGE WILLIAMS: Isn't your argument  
10 fundamentally --

11 JUDGE TATEL: Cobell VI --

12 JUDGE WILLIAMS: -- that the order taken as a  
13 whole makes everything the Department does with respect to  
14 these trusts subject to remedy, if that's the word, by  
15 contempt.

16 MR. STERN: Yes, it does.

17 JUDGE WILLIAMS: Which is certainly unusual.

18 MR. STERN: It's very unusual.

19 JUDGE SENTELLE: And what I think I'm probing and  
20 perhaps Judge Tatal is is does this have, the Government  
21 have only an all or nothing case here? If you don't win on  
22 the point that the Court cannot have entered any  
23 injunction, you lose because you're not satisfied with us  
24 saying there's something wrong with this particular  
25 injunction?

1 MR. STERN: No, Your Honor. I was going to say,  
2 even assuming that a court had authority to enter a  
3 structural judgment --

4 JUDGE SENTELLE: That's what I asked you to do a  
5 moment ago.

6 MR. STERN: -- leave the authority question out  
7 of it, each of the parts is premised on errors of law and  
8 is not supported by fact, and so, and we can go through  
9 them one --

10 JUDGE TATEL: Okay, yes, let's keep going.  
11 Start, go to (c).

12 JUDGE SENTELLE: That's the kind of thing we've  
13 been begging you to do.

14 JUDGE TATEL: Right, let's go to number (c).  
15 Submit a list of tribal laws.

16 MR. STERN: It's again, Your Honor, where, there,  
17 these are just requirements coming out of nowhere. I  
18 mean --

19 JUDGE TATEL: It says, but he's not, you said  
20 this order is the Court running the Department. Courts  
21 require agencies to submit reports all the time. Submit  
22 lists of tribal laws. In fact, it even says submit lists  
23 of tribal laws Interior believes are applicable.

24 MR. STERN: But Your Honor, these steps are all  
25 have meaning only because they're linked up to things that

1 have to occur later.

2 JUDGE TATEL: Only because they're what?

3 MR. STERN: They're not sort of reporting

4 requirements like, you know, please send me a list, you

5 know, of, you know, tribal laws. I'm really interested.

6 It's because the Department, the Court says, you know, from

7 now on, among a million other things, everything you do has

8 to be governed by tribal laws, and that's where this comes

9 in.

10 JUDGE TATEL: No, no --

11 JUDGE WILLIAMS: It hasn't exactly said that.

12 JUDGE TATEL: (c) says --

13 JUDGE WILLIAMS: It said, it's asked you to

14 identify a list of tribal laws that the Department deems

15 controlling.

16 JUDGE SENTELLE: Deems applicable.

17 JUDGE TATEL: Right.

18 JUDGE WILLIAMS: So if the Department's view is

19 as I understand it to be, the correct, that could be

20 complied with by filing a paragraph that says we do not

21 believe any tribal laws govern whatsoever. Period. Full

22 stop.

23 MR. STERN: Sorry, I'm trying to find the

24 citation, but the District Court really does say in its

25 opinion that tribal laws will govern. We can't go to Judge

1 Lamberth and --

2 JUDGE SENTELLE: Right, we're not reviewing  
3 opinions, though. We're reviewing the injunction. You  
4 understand that?

5 MR. STERN: Yes, Your Honor, and, but I'm just  
6 saying that it is, in a case where everybody has already  
7 been sanctioned, to go back to Judge Lamberth and say, by  
8 the way, I read your opinion, and here's what, I'm  
9 complying with this section by telling you that nothing's  
10 controlling, and I really don't think that that would be a  
11 (indiscernible) thing to do in any case, and it would  
12 certainly not be a very wise one to do in this case. I  
13 mean --

14 JUDGE TATEL: Why? I don't understand that.

15 MR. STERN: Because the Court really has  
16 addressed these, and it's already declared its view that  
17 tribal laws generally --

18 JUDGE TATEL: Well, look all we can do, all we  
19 can do is read the order, and it says that the Department  
20 deems applicable.

21 JUDGE WILLIAMS: I guess you're pointing 2(d).  
22 2(d) does say the defendants shall administer the trust in  
23 compliance -- well, there's a fudge word -- with applicable  
24 tribal law and ordinances, so one reading of it is that  
25 none is applicable.

1 JUDGE TATEL: Right.

2 JUDGE WILLIAMS: So the paragraph is meaningless.  
3 The trouble is that runs into canons of construction,  
4 saying that --

5 JUDGE SENTELLE: Yes.

6 JUDGE WILLIAMS: -- people don't say things that  
7 are meaningless.

8 JUDGE SENTELLE: Nothing's supposed to be  
9 meaningless.

10 JUDGE WILLIAMS: Which is a fiction, of course,  
11 but.

12 MR. STERN: I mean, if I really could take a step  
13 back, the question was what trial was there ever held on  
14 Interior's compliance with general fiduciary  
15 responsibilities? What claim is it in this case that would  
16 allow a court to be doing any of this?

17 JUDGE TATEL: Well, how about Cobell VI?

18 MR. STERN: Your Honor, if Cobell, I mean, we  
19 really --

20 JUDGE TATEL: I mean, your theory of Cobell VI as  
21 I, your theory is that the Government's fiduciary  
22 responsibilities to the Indians extends only to the  
23 historical accounting. Only to an accounting, excuse me,  
24 right? That's your theory.

25 MR. STERN: My theory is that the District Court

1 dismissed the common law claims in this case --

2 JUDGE TATEL: Yes, but --

3 MR. STERN: -- and that this Court reviewed that  
4 order.

5 JUDGE TATEL: Yes, and listen to what Cobell, let  
6 me just read you one sentence from Cobell VI. The '94 act  
7 recognized and reaffirmed what should be beyond dispute,  
8 that the Government has a longstanding and substantial  
9 trust obligation to Indians, particularly to IM Trust  
10 beneficiaries, not the least of which is the duty to  
11 account. And the statute itself refers to the accounting  
12 obligations as only being part of the obligation. So it  
13 really doesn't make any difference what the district judge  
14 did with the original complaint. The common law trust  
15 allegations are almost the law of the case here. Now, I  
16 don't know what the specific ones are, but I just don't  
17 see, I can understand how you can argue about the elements  
18 of the fiduciary obligation that extend beyond an  
19 accounting. I don't understand how in view of Cobell VI  
20 you can argue there are none.

21 MR. STERN: Your Honor, the question is not  
22 whether there are common law obligations. The question is,  
23 what is enforceable in what claim? How would you decide  
24 it? And has there been a proceeding to decide it?

25 JUDGE TATEL: Okay, now that's a different

1 question as to whether the District Court has jurisdiction  
2 to even consider whether the violations of non-accounting  
3 fiduciary duties have occurred. Your argument is they  
4 don't even have, the District Court doesn't even have  
5 jurisdiction to do that.

6 MR. STERN: Your Honor, this claim --

7 JUDGE TATEL: You want us to order this case  
8 dismissed.

9 MR. STERN: That's right, Your Honor, because  
10 this case out of all the things that it might have been, I  
11 mean, we're not saying, look, you can file other cases  
12 about other problems, but this case was --

13 JUDGE TATEL: The complaint was obviously broad  
14 enough to cover this, because the District Court originally  
15 dismissed the common law claims.

16 MR. STERN: Well, it didn't just originally  
17 dismiss it. That was the, there was no cross-appeal on  
18 that, and that was key to the jurisdiction of the Court,  
19 because it went to whether this could --

20 JUDGE TATEL: What about the sentence I just read  
21 you from Cobell VI?

22 MR. STERN: Your Honor, what this said, what that  
23 said --

24 JUDGE TATEL: Do you want me to read it again?

25 MR. STERN: No, Your Honor.

1 JUDGE TATEL: Okay.

2 MR. STERN: I fully recognize that what the Court  
3 said, and, I mean, I've got a lot of quotes from the  
4 opinion, too, you know, what --

5 JUDGE TATEL: Well, do you have any that go the  
6 other way?

7 MR. STERN: Okay, where -- I'll (indiscernible)  
8 my last (indiscernible).

9 JUDGE TATEL: Yes, I'm trying to, you know, we're  
10 all bound by Cobell VI.

11 MR. STERN: I know, and I'm at somewhat of a  
12 disadvantage because I'm talking to its author.

13 JUDGE TATEL: Cobell VI -- no, I didn't, Judge  
14 Sentelle wrote it, not me.

15 MR. STERN: No, I appreciate that, Your Honor.

16 JUDGE TATEL: But we can all read it, I think.

17 MR. STERN: I know, but look --

18 JUDGE TATEL: No, you're right, there are certain  
19 elements of Judge Lamberth's order that the Court said were  
20 not required by fiduciary obligations, such as the elements  
21 of the accounting.

22 JUDGE SENTELLE: And there may be some here.

23 JUDGE TATEL: Right. Yes, exactly, but Cobell VI  
24 nowhere says, and the author can correct me if I'm wrong,  
25 that the fiduciary duty is limited to accounting. In fact,

1 the statute doesn't even say that.

2 MR. STERN: Your Honor, we've never said the  
3 fiduciary duties are limited to the duties (indiscernible)  
4 accounting. The question is what is the fiduciary duty  
5 that is actionable and presented in this case, which is a  
6 very different and much more discrete question.

7 JUDGE WILLIAMS: You weren't saying that the  
8 complaint didn't raise the issue of management going  
9 forward, are you?

10 MR. STERN: The complaint -- well, first of all,  
11 a lot of stuff was stricken from the complaint by the  
12 District Court.

13 JUDGE WILLIAMS: Well, was that stricken? Were  
14 those passages stricken?

15 MR. STERN: To the extent that there was stuff  
16 about common law claims that was, the District Court went  
17 out of its --

18 JUDGE WILLIAMS: I really think the common law  
19 issue is a complete red herring.

20 JUDGE SENTELLE: The '94 statute.

21 JUDGE WILLIAMS: Section 101(a).

22 JUDGE SENTELLE: Section 101.

23 JUDGE WILLIAMS: I'm sorry, (d)(1) through (8), a  
24 lot of that has to do with non-accounting issues.

25 MR. STERN: That's right, but the question is

1 what is enforceable and what isn't? If Congress sets out a  
2 series of general duties in a statute, that doesn't mean  
3 that they can come in and all be enforced. And it really  
4 is the case that this Court said, no, of course you can't  
5 have wholesale reform, and it really is the case that the  
6 Supreme Court said that in the Southern Utah case. And  
7 we're not trying to limit the overall scope of the  
8 Government of fiduciary responsibilities. But just as in  
9 actions for damages, the fact that you have a trust and a  
10 fiduciary relationship doesn't mean that you then come into  
11 sue about it, and this Court has sort of over and over  
12 again in its opinion, it sort of says, look, the  
13 Government's fiduciary responsibilities necessarily depend  
14 on the substantive law creating this obligation, and it  
15 cites Shoshone Tribe --

16 JUDGE WILLIAMS: That's right.

17 JUDGE SENTELLE: Yes.

18 JUDGE WILLIAMS: That doesn't help you any.

19 JUDGE SENTELLE: That doesn't help you any.

20 MR. STERN: No, it cites Shoshone Tribe v.  
21 Bannock, which in turn sort of says, look, an Indian can't  
22 force the Government to take specific action unless a  
23 treaty, statute, or agreement imposes it. I mean, those  
24 are the cases of this circuit.

25 JUDGE WILLIAMS: We're got the statute.

1 JUDGE SENTELLE: We've got the statute here, so  
2 that still doesn't help you any.

3 JUDGE WILLIAMS: We've got 101(d)(1) through (8).

4 MR. STERN: Right, but all the parts, Your Honor,  
5 we really would argue that the general spelling out of  
6 duties in a statute, which first of all are all forward-  
7 looking, they aren't part of the historical accounting  
8 activity.

9 JUDGE WILLIAMS: Yes, but apart from the  
10 historical accounting, what we're talking about is forward-  
11 looking stuff.

12 MR. STERN: And then the question is under what  
13 jurisdictional basis is this before this Court, because  
14 it's got to be either unreasonable delay or else it's got  
15 to be final agency action. And if it's not one, it's got  
16 to be the other. And if there's final agency action here,  
17 we welcome the Court's review of it.

18 JUDGE SENTELLE: But I thought the Government had  
19 conceded back before Cobell VI that there had been  
20 unreasonable delay.

21 MR. STERN: Yes, but that goes and can only be  
22 for a clear, where you have a clear, unequivocal duty,  
23 which was, had to be perform the accounting.

24 JUDGE WILLIAMS: I though the Government also  
25 stipulated that --

1 JUDGE SENTELLE: Well, I'm correct that there had  
2 already been a stipulation that there's been an  
3 unreasonable delay.

4 JUDGE WILLIAMS: -- massive management failures.

5 MR. STERN: No, but it's, no, no, no, but that's  
6 not the duty, Your Honor. The duty, to order unreasonable  
7 delay, and again, that is crystal clear in the Southern  
8 Utah case, there has got to be a clear, it's got to be  
9 clear and discrete, and this Court said fine. You've got  
10 something just like that in this statute. You've got to go  
11 ahead, and you've got to do this accounting. And that's  
12 fine. And we've been sort of knocking ourselves out for  
13 years trying to do what this Court said, and in doing that  
14 we've come up with a plan that is a good plan, and we've  
15 done, invested hundreds, really, about, so much money and  
16 time and effort, none of which gets reviewed. You know,  
17 it's all dismissed out of hand. There's no basis. The 1.5  
18 trial isn't a trial about anything that the agency did  
19 wrong or failed to do. It's just a consideration of what  
20 duties the District Court thinks it ought to impose. The  
21 contempt trial was sort of about, like sort of like alleged  
22 misstatements.

23 JUDGE SENTELLE: You know, when we --

24 JUDGE TATEL: It sounds like, you know what it  
25 sounds like? It sounds like you're moving to -- are you

1 asking that we dismiss the injunction, dismiss the action  
2 because of the behavior of the district judge?

3 MR. STERN: No, Your Honor.

4 JUDGE TATEL: Oh. That's what it sounds like  
5 you're saying.

6 MR. STERN: No, we can't --

7 JUDGE TATEL: I mean, you haven't moved to recuse  
8 the district judge, have you?

9 MR. STERN: No, we have not moved to recuse the  
10 district judge. We take strong issue with a lot of what  
11 the --

12 JUDGE TATEL: I thought you were winding up, it  
13 sounded like you were winding up to do that right there.

14 MR. STERN: No.

15 JUDGE TATEL: No?

16 MR. STERN: Your Honor, what we're saying is  
17 that --

18 JUDGE TATEL: You said none of your, none of the  
19 good stuff you do gets considered by the district judge. I  
20 mean, I thought you were saying that the problem here is  
21 that you can't convince him that you're complying with the  
22 law.

23 MR. STERN: No, Your Honor, we don't get -- look,  
24 here's what happens on remand. You say remand to the  
25 agency, right? Within months, by the end of 2001, the

1 District Court says I'm holding a contempt trial, so the  
2 remand, and at that point he says to the Secretary, he  
3 says, you know, statistical sampling, that's so clearly  
4 contemptuous, I don't even know if we're going to try. So  
5 the period of a remand to the agency it concluded  
6 effectively in any meaningful sense by 2001. In mid-2002  
7 on the basis of the contempt trial, the District Court  
8 says, that's it, I'm totally revoking the remand. You're  
9 an unfit trustee-delegee. The fact that this Court then  
10 reversed the findings, the only ones that could have been  
11 relevant to taking things over prospectively, made no  
12 difference whatsoever. There's no pointing, there's no  
13 showing of any factual matter, even ones that were like in  
14 there that this Court didn't address that could possible  
15 support any injunction of any kind. Plaintiffs' brief  
16 can't point to any, and the District Court doesn't. I  
17 mean, what those things about were --

18 JUDGE SENTELLE: I'm risking being repetitious,  
19 but I still am not sure that I've gotten the answer to the  
20 question I wanted answered, and I think I heard it alluded  
21 to again. Are you saying that the Court did not have  
22 jurisdiction to enter any injunction or are you saying that  
23 this injunction is flawed?

24 MR. STERN: I'm saying that except, assuming --

25 JUDGE SENTELLE: You have to answer that with one

1 of those two --

2 MR. STERN: I'm saying, at this point I'm saying  
3 the second one. I'm saying that assuming that the Court  
4 had any jurisdiction, assuming that it had any  
5 jurisdiction, it could not have entered this injunction.  
6 There's, it's got multiple legal problems.

7 JUDGE SENTELLE: Now, are the particular sections  
8 that Judge Tatel alluded to the only ones that are  
9 overstepping or are there other overstepping provisions in  
10 the injunction?

11 MR. STERN: Well, there, there's some of it  
12 that's not a question of overstepping. It's just wrong. I  
13 mean, sort of with the accounting provisions. I mean,  
14 there, you know, there are all sorts of things, you know,  
15 we've got a \$335 million plan. That's very expensive to  
16 account for, you know, a trust that has \$400 million in it,  
17 and Congress back in 1992 sort of, you know, was worried  
18 about that.

19 JUDGE SENTELLE: Counsel, a lot of the problems  
20 that you're alluding to now are problems that arise not  
21 because of anything the District Court or any other court  
22 has done. They arise because the Department not in the  
23 present administration or the one before it, but over the  
24 term of decades did not do what it was supposed to do.  
25 Now, necessarily that's going to result in a lot of extra

1 additional expense down the end of the road. And I don't  
2 understand the relevance of that to the legal questions we  
3 have here.

4 MR. STERN: Well, the legal question is that  
5 informs Congress's intent, because it was Congress who said  
6 that, you know, a point that repeated again last year, they  
7 said that they had said this, and it's true, they had said  
8 this before the 1994 act. But fine, we've done this \$335,  
9 we stand behind the \$335 million plan. That's fine. What  
10 the District Court has said is I'm expanding the parameters  
11 of that plan so that you have to account not for open  
12 accounts, even though this is a statute that is worded in  
13 terms of providing daily and annual balances. You've  
14 got --

15 JUDGE SENTELLE: Are you objecting to the  
16 provision that says not to use statistical sampling?

17 MR. STERN: That's one of them. I mean, we've  
18 laid it out in our brief.

19 JUDGE SENTELLE: Are you objecting to the  
20 provision that says that you have to include a verification  
21 process by professional accountings? That's sub (a) all  
22 under 3.

23 MR. STERN: In, as the District Court, in the way  
24 that the District Court like has said that, yes. I mean,  
25 the District Court says we've got a verification process

1 by, that's there --

2 JUDGE SENTELLE: So yes is the answer to that  
3 question, right?

4 MR. STERN: Yes, it is.

5 JUDGE SENTELLE: Are you objecting to the 120  
6 days with reference to the industry production databases?  
7 That would be subparagraph (p), excuse me, (p).

8 MR. STERN: Yes.

9 JUDGE SENTELLE: Okay. Judge Tatel already  
10 covered 3(b), (c), and (d). Are there other provisions  
11 that we should look to particularly as the provisions  
12 you're objecting to?

13 MR. STERN: Your Honor, we --

14 JUDGE SENTELLE: And don't tell me this decree  
15 says, tell me the provisions, if there are any.

16 MR. STERN: Your Honor, I mean, I, you know, we  
17 have laid this out in our brief. I can sort of, sort of go  
18 back, you know. I mean, and, you know, I mean, and I just  
19 want to make clear that aside for particular problems on a  
20 provision-by-provision basis, since we think that they  
21 reflect, all reflect errors of law and absence of fact, so  
22 in the end I'm going to say we object to everything. Some  
23 of them are more problematic as a practical matter than  
24 others. None of them has a basis in law. But, you know,  
25 to the extent that this Court wants to talk about, you

1 know, have you, what have you done in the accounting, what  
2 about your accounting plan --

3 JUDGE SENTELLE: Unless my colleagues have --

4 JUDGE TATEL: I have one.

5 JUDGE SENTELLE: Okay, Judge Tatel has a  
6 question.

7 JUDGE TATEL: I just have one question. I want  
8 to be sure I understand the Government's position about the  
9 impact of the rider, the appropriations rider. Is it the  
10 Government's position that it does not dictate the decision  
11 in this case by this Court with respect to Section 3 of  
12 Judge Lamberth's order?

13 MR. STERN: No, we, what we think is that the,  
14 what, I mean, I think that properly understood that since  
15 this is a claim, since the claim in this case was about a  
16 historical accounting, and that's what this Court had said,  
17 we think that what Congress meant was that you can't go and  
18 order a huge array of, a huge array of actions based on the  
19 accounting claim, and the fact that the District Court,  
20 because, then said, well, you know, in fact, this doesn't  
21 even have anything to do with the accounting.

22 JUDGE TATEL: Okay, so then is the answer to my  
23 question yes, that it knocks out Section 3 --

24 MR. STERN: Yes.

25 JUDGE TATEL: -- of the District Court's order?

1 MR. STERN: Yes, that's the position we've taken  
2 in our brief, Your Honor. That is covers everything.

3 JUDGE TATEL: Okay. So assuming it's  
4 constitutional, right, then I go back to the very first  
5 question I asked you. Assuming it's constitutional, your  
6 view is that Section 3 is barred by the appropriations  
7 rider, and therefore, and I know you argue that Section 3,  
8 that the appropriations rider is actually broader than  
9 historical accounting, but if we don't agree with you about  
10 that, then the only thing, then we still have to decide  
11 what to do with the fiduciary obligation section of the  
12 court order. It's labeled 3, but I think he meant 4 and 5  
13 monitoring, right? That's it.

14 MR. STERN: Yes. If you disagree, that's right.

15 JUDGE TATEL: And how, I hate, I hate to risk  
16 losing a clear answer, but just one follow-up question.  
17 How is that consistent with your argument that all Congress  
18 was doing was preserving the status quo for us to decide  
19 the case?

20 MR. STERN: You are risking kind of losing a  
21 clear answer, but I just plead that --

22 JUDGE TATEL: Strike it. No, go ahead, answer  
23 the question. I really, I don't understand. It can't be  
24 both ways, right?

25 MR. STERN: I agree with you. I'm only referring

1 to what Congress itself said, Your Honor, but I'm not  
2 disagreeing. However, the point would be that --

3 JUDGE TATEL: The plain language of the rider, if  
4 I just read the plain language of the rider, you agree,  
5 then, that if it's constitutional, it knocks out the  
6 historical accounting provision of the District Court's  
7 order, right?

8 MR. STERN: Yes.

9 JUDGE TATEL: Okay, thank you.

10 JUDGE SENTELLE: Okay. We'll hear from the  
11 appellee.

12

13 ORAL ARGUMENT OF ELLIOTT H. LEVITAS

14 ON BEHALF OF THE APPELLEES

15

16 MR. LEVITAS: May it please the Court. My name  
17 is Elliott Levitas. I represent the plaintiffs-appellees  
18 in this matter, and I'm accompanied today by my colleague,  
19 Mr. Austin, Mr. Gingold, and Mr. Harper.

20 The appellees are here today to seek this Court's  
21 affirmance of the District Court's motion and order  
22 structural injunction, and this Court should affirm unless  
23 it finds that the District Court was clearly erroneous.  
24 And the same is true as to the facts found by the District  
25 Court.

1 JUDGE WILLIAMS: Well, that standard obviously  
2 has no application to the interpretation or validity of  
3 108-108, right?

4 MR. LEVITAS: I'm sorry, Your Honor.

5 JUDGE WILLIAMS: That standard has nothing at all  
6 to do with the validity or application of 108-108. That's  
7 a pure question of law, right?

8 MR. LEVITAS: Oh, that is correct, Your Honor.

9 JUDGE WILLIAMS: Right, right.

10 MR. LEVITAS: And I'll address the midnight rider  
11 issue.

12 JUDGE WILLIAMS: There's nothing that invalidates  
13 legislation adopted between 11 p.m. and midnight, is there?

14 MR. LEVITAS: Or thereabouts.

15 JUDGE SENTELLE: Sometimes we may wish there was,  
16 but --

17 MR. LEVITAS: It implies the last-minute effort  
18 to put this provision in. But the rider is egregiously  
19 unconstitutional for many reasons. In the first instance,  
20 if it is in fact a timeout, a legislative stay, if you  
21 will, the courts have held that that is unconstitutional  
22 going as far back as 1792 in Hayburn's Case.

23 JUDGE TATEL: But on its face, it's only staying  
24 it to give Congress time to act.

25 JUDGE WILLIAMS: It's staying an obligation.

1 JUDGE TATEL: Right.

2 JUDGE WILLIAMS: Or something that had been found  
3 to be an obligation of a particular party for a particular  
4 period, right?

5 MR. LEVITAS: Yes. Yes.

6 JUDGE WILLIAMS: What's the case that says  
7 Congress can't stay obligations?

8 MR. LEVITAS: In the, if, if the midnight rider  
9 addresses the duty to account, which this Court has found  
10 is a right of the plaintiffs, any effort to take that right  
11 away --

12 JUDGE WILLIAMS: We're shifting, we're shifting  
13 now to a taking theory, is that --

14 MR. LEVITAS: Yes. Yes, Your Honor.

15 JUDGE WILLIAMS: Why is it a taking when you have  
16 presumably accrued interest as a result of any delay in  
17 giving a remedy to say that a particular remedy will be  
18 delayed for, let's say a year to simplify, with the,  
19 incidentally, of course, with the statute of limitations  
20 for unmade claims suspended for that period. Why is that a  
21 taking?

22 MR. LEVITAS: If, if my client --

23 JUDGE WILLIAMS: The compensation by means of  
24 interest is inadequate?

25 MR. LEVITAS: Well, I think, I think that the

1 right to an accounting of one's own property, if that is  
2 abrogated after it has been found, as it was by this Court  
3 in Cobell VI, that is the taking of a very valuable  
4 property right.

5 JUDGE WILLIAMS: I don't understand the taking.  
6 It's a delay in provision of the remedy. What's the  
7 taking?

8 MR. LEVITAS: No, if the, Your Honor --

9 JUDGE WILLIAMS: Equity laws, trust management  
10 law is famous for the delays that occur. Are every one of  
11 those a taking?

12 MR. LEVITAS: The Court is absolutely correct.  
13 But if this rider is construed to change the substantive  
14 law as opposed to simply being a timeout or a legislative  
15 stay, if it is changing the substantive law, the  
16 substantive law at issue is the right of the plaintiffs to  
17 have an accounting of their property.

18 JUDGE WILLIAMS: It seems to me you're creating a  
19 completely false dichotomy. The substantive law that 108-  
20 108 appears to amend is the proposition that the '94 act  
21 compels this immediate process of the full-dress District  
22 Court-approved type of accounting, right?

23 MR. LEVITAS: I think it goes beyond that.

24 JUDGE WILLIAMS: That's a substantive timeout,  
25 right?

1 MR. LEVITAS: I think that this rider and its  
2 effort, if it is an effort to change substantive law, which  
3 we suggest it is not, but if it is an effort to change  
4 substantive law, the substantive law that they are  
5 attempting to change is not just the '94 act, but the '94  
6 act as construed by this Court in Cobell VI.

7 JUDGE WILLIAMS: Well, so what? I mean, how is  
8 that different from the bridge in the Wheeling Bridge case?

9 MR. LEVITAS: Because at this point, without any  
10 change in the law, our client --

11 JUDGE WILLIAMS: There is a change in the law.  
12 The change in the law is that the duty to go forward with  
13 an accounting for this particular period of time is  
14 suspended.

15 MR. LEVITAS: If it is suspended, then I suggest  
16 to you that that is a legislative timeout. It's a  
17 legislative stay. It's not a change in the law. It just  
18 says we're going to post, as you suggest, Your Honor, a  
19 postponement of the day at which that occurs.

20 JUDGE WILLIAMS: And why is that bad?

21 MR. LEVITAS: But the, but the --

22 JUDGE WILLIAMS: Excuse me, why is that bad?  
23 Suppose in the Wheeling case Congress had said, well, we  
24 don't really know about this bridge. Maybe, maybe it  
25 should stay, maybe it shouldn't. Nothing should happen on

1 the mandated removal of the bridge for one year. Bad?  
2 Why?

3 MR. LEVITAS: Well, first of all, in that case,  
4 you don't have an individual property right at issue. In  
5 this case, you do have an individual --

6 JUDGE WILLIAMS: Yes, but now we're on takings  
7 again. But, again, I fail to see why so long as they have  
8 a right of reimbursement of interest accrued during this  
9 period there's any taking.

10 MR. LEVITAS: The change in the substantive law  
11 that Your Honor has just described results in having the  
12 plaintiffs' right for a period of time deprived. If I have  
13 a right to an accounting --

14 JUDGE WILLIAMS: The process of remedy always  
15 involves delay by definition. And here the, what seems to  
16 make it comparably easy is built into the system is  
17 provision for interest, right?

18 MR. LEVITAS: If, but in that instance, Your  
19 Honor, what the Court has now defined the delay to be, that  
20 is no more than a legislative timeout until the issue is  
21 actually visited. What is the purpose of delaying --

22 JUDGE SENTELLE: That's not actually what  
23 Hayburn's Case was about. In Hayburn you actually had a  
24 decision, did you not, which the Court, I mean, which the  
25 Congress purported to change. It wasn't a stay order. It

1 was a final judgment in Hayburn, wasn't it?

2 MR. LEVITAS: Yes.

3 JUDGE SENTELLE: So this is, perhaps Hayburn  
4 suggests this. In fact, I think it does. But it isn't  
5 squarely on point, is it?

6 MR. LEVITAS: Well, but what Hayburn said, and  
7 the other cases related to this, is that an Article III  
8 court cannot be told what to do once it has entered a  
9 judgment with respect to delaying its enforcement. That's  
10 a right of an Article III court. It is not the right of  
11 Congress to tell the courts when to decide the case and how  
12 to decide the case. That's up to the Article III court.  
13 And that's why this decision or this legislative effort is  
14 a direct interference with the most fundamental and  
15 earliest defined responsibilities and duties of Article III  
16 courts.

17 And even in the situation presented by Your Honor  
18 about if it's simply a delay of the accounting, no, Your  
19 Honor, it goes beyond that. It goes beyond that because  
20 what it attempts to do is tell this Court or tell the  
21 courts how to decide and interpret the '94 act.

22 JUDGE WILLIAMS: Well, let's go back on that.  
23 That argument interested me. It is true that the statute  
24 is worded, the '94 act, any other statute, principle of  
25 common law, shall not be construed or implied to require.

1 Suppose Congress had chosen slightly different wording and  
2 said to the extent that the '94 act, any other statute, any  
3 principle of common law requires, and the rest of the  
4 sentence, it is hereby repealed, but the repeal will be  
5 canceled if the year 2004 passes without further action.  
6 So? That would be okay, I take it, because that's not  
7 speaking in terms of interpretation, that just says the  
8 obligation is repealed for a period, right?

9 MR. LEVITAS: If the --

10 JUDGE WILLIAMS: So your quarrel with Congress  
11 turns on apparently an incredibly subtle problem of word  
12 choice, not substantive meaning.

13 MR. LEVITAS: That, my quarrel with Congress is  
14 that they, Congress has no right to tell an Article III  
15 court that its judgment must be delayed to some later  
16 point. A legislative stay is impermissible, and --

17 JUDGE WILLIAMS: I guess I find that concept odd,  
18 because if Congress can tell an Article III court that its  
19 judgment will be completely reversed, as in the Wheeling  
20 Bridge case --

21 MR. LEVITAS: Yes.

22 JUDGE WILLIAMS: -- it's hard for me to see why  
23 it can't say we're not sure about reversal. We may do  
24 that. We just don't want a lot of waste of resources while  
25 we think about it. That's bad?

1 MR. LEVITAS: Well, I think that's a different  
2 issue, Your Honor.

3 JUDGE WILLIAMS: Well, I'm trying to figure out  
4 what your contention is as to why --

5 MR. LEVITAS: My contention --

6 JUDGE WILLIAMS: -- this timeout, as you choose  
7 to call it, is constitutionally more vulnerable than the  
8 simple reversal in the Wheeling Bridge case.

9 MR. LEVITAS: Well, in the -- two points, Your  
10 Honor. First of all, in this case, what the author of the  
11 legislation himself called a legislative timeout is no more  
12 than a legislative stay.

13 JUDGE SENTELLE: Who was that? Who was that?

14 MR. LEVITAS: The gentleman from North Carolina,  
15 Your Honor, Mr. Taylor.

16 JUDGE SENTELLE: It rather surprised me.

17 MR. LEVITAS: I would have to agree with Your  
18 Honor.

19 JUDGE SENTELLE: There are several thousand  
20 Cherokee voting in that district.

21 MR. LEVITAS: That's what I am informed, and I  
22 trust they've communicated with Mr. Taylor by this time, in  
23 any event. But the point is, Your Honor, that a  
24 legislative stay, postponing a right that the Court has  
25 already decided is inappropriate, and it has been found to

1 be a violation of separation of powers going back to the  
2 first --

3 JUDGE WILLIAMS: You haven't explained to me why  
4 it's worse than completely canceling the right found by the  
5 Court.

6 MR. LEVITAS: I don't think --

7 JUDGE WILLIAMS: Terminating.

8 MR. LEVITAS: I don't think --

9 JUDGE WILLIAMS: Reversing.

10 MR. LEVITAS: Excuse me, Your Honor.

11 JUDGE WILLIAMS: Deep-sixing. Why is a year's  
12 delay worse than that?

13 MR. LEVITAS: I don't think the Court, I don't  
14 think Congress --

15 JUDGE WILLIAMS: Constitutionally.

16 MR. LEVITAS: -- can cancel the right that the  
17 plaintiffs have to an accounting.

18 JUDGE WILLIAMS: In Wheeling Bridge it canceled  
19 the right of the people to have the bridge removed, right?

20 MR. LEVITAS: In the spotted owl case, the  
21 Robertson case, the Audubon Society case, what was done  
22 there prospectively, not retroactively, also did not  
23 involve --

24 JUDGE WILLIAMS: This is prospective. A  
25 suspension of ongoing activities is prospective.

1 MR. LEVITAS: But it did not involve the rights  
2 of any individuals. They were public rights that were  
3 involved. It was a program for dealing with protecting  
4 endangered species. Here we have property rights of  
5 individuals at issue, and they cannot be dealt with as  
6 cavalierly as that, and the historical accounting that has  
7 been provided by Cobell VI and the '94 act is not  
8 prospective. It is a right that already exists and is  
9 retrospective. And there is nothing that Congress can do  
10 constitutionally to take away that right, which has already  
11 been found by this Court. And so for that reason, the  
12 midnight rider or the rider is egregiously unconstitutional  
13 even if it tries to amend a substantive law.

14 JUDGE SENTELLE: If we could move, change some  
15 gears for a moment to specific provisions, are there not  
16 specific provisions in this particular injunction that  
17 might arguably invade the province of the executive?

18 MR. LEVITAS: Let me address that. No, I don't  
19 believe so.

20 JUDGE SENTELLE: I'm asking you to address that,  
21 actually.

22 MR. LEVITAS: Okay. Let me address it, Your  
23 Honor. And that question was brought up earlier by the  
24 Court when you were talking about structural injunctions.

25 JUDGE SENTELLE: Yes.

1           MR. LEVITAS: Structural injunctions, the  
2 jurisprudence of structural injunctions, which was  
3 carefully addressed by the District Court in its opinion,  
4 provides a mechanism for the reform of political or social  
5 institutions if they take into account and balance the  
6 specific needs of the judiciary to see that its orders are  
7 enforced with the general need --

8           JUDGE SENTELLE: Counsel, let me interrupt you,  
9 because time is dragging here. We do have another case to  
10 here, actually, and I have a great sympathy for those  
11 people. Paragraph, subparagraph (k) of Part 3 forbidding  
12 the use of statistical sampling, does that not seem to  
13 operate on a level of specificity that normally would be  
14 executive rather than judicial when you're talking about an  
15 Executive Branch?

16           MR. LEVITAS: I'm glad Your Honor brought up that  
17 specific matter, because what the District Court did, it  
18 adopted the defendants' plan except where, as this Court  
19 had advised, where it, the adoption of that plan would  
20 serve to further delay, and what the Court found with  
21 respect to the statistical sampling, a specific finding  
22 that if you adopted statistical sampling for purposes of  
23 achieving an accounting, you would only delay further,  
24 because a statistical sample cannot produce an accounting.  
25 And that evidence in the trial was provided by the

1 defendants' expert witness. A statistical sampling is  
2 incapable of providing an accounting. It can be used to  
3 verify or test, but to use statistical sampling for the  
4 purpose of creating an account which shows how much money  
5 was deposited, what changes were made, what disbursements  
6 occurred, that cannot be done by a statistical sampling  
7 method, and therefore to adopt that, Your Honor, would have  
8 no result except to further delay the accounting that will  
9 ultimately have to be provided.

10 JUDGE WILLIAMS: But that's not a delay issue.  
11 That's a substantive notion of what is required by way of  
12 accounting.

13 JUDGE SENTELLE: Yes.

14 JUDGE WILLIAMS: That's, the driving force of  
15 that argument comes entirely from that.

16 MR. LEVITAS: It would be a delay in this sense,  
17 Your Honor.

18 JUDGE WILLIAMS: It's completely independent of  
19 delay. Hmm?

20 MR. LEVITAS: It would be a delay in this sense,  
21 that if you --

22 JUDGE WILLIAMS: It would be a delay only if that  
23 notion of what is legally required is correct, right?

24 MR. LEVITAS: Well, but if the Court, the  
25 District Court in effect said we're telling you this now so

1 you don't proceed with it, because if you proceed with it,  
2 all you're going to end up is having us reject it later on,  
3 because a statistical sampling cannot provide an account,  
4 which is what the expert witness brought forth by the  
5 defendants in this case testified in the court.

6 JUDGE SENTELLE: Again, doesn't that sound like  
7 an administrative decision or an executive decision rather  
8 than adjudication, when you're saying that method of  
9 enumeration cannot produce the kind of accounting we have  
10 to have at the end?

11 MR. LEVITAS: Yes. Yes.

12 JUDGE SENTELLE: Okay. Let me ask one other --

13 MR. LEVITAS: Let me make a --

14 JUDGE SENTELLE: -- before I --

15 JUDGE TATEL: I have just one question. Oh, you  
16 go ahead.

17 JUDGE SENTELLE: Let me ask you one other while  
18 I've got you here. Under paragraph 5, sub 3, the Court  
19 required that the defendants shall provide the judicial  
20 monitor and the agents of the same with unlimited access to  
21 the defendant's facilities and to all information relevant  
22 to the implementation of the order. Given the breadth of  
23 this order, doesn't that paragraph arguably take over the  
24 Department in the way that the Government is arguing?

25 MR. LEVITAS: I think providing access does not

1 in and of itself take over the running of a department.  
2 And particularly so, Your Honor, when the District Court  
3 goes to great pains to spell out in this injunction that  
4 this judicial monitor can do nothing to direct actions to  
5 be taken or to direct actions to be refrained from being  
6 taken. It is a fact-finding monitoring to assist the  
7 District Court in determining whether this structural  
8 injunction is being complied with. And one of the --

9 JUDGE SENTELLE: I'll get out of Judge Tatel's  
10 way now and let him ask his question.

11 JUDGE TATEL: Just one. I just want to ask you  
12 about a different part of the order. Section 3, which is  
13 labeled compliance with fiduciary obligations, sub (a)  
14 directs implementation of the Department's comprehensive  
15 plan, right?

16 MR. LEVITAS: I'm trying to locate it  
17 (indiscernible).

18 JUDGE SENTELLE: It's on page 744 of the Joint  
19 Appendix.

20 JUDGE TATEL: Do you have it there?

21 JUDGE SENTELLE: I think he's being handed it.

22 MR. LEVITAS: Oh, I have it now, Your Honor.

23 JUDGE TATEL: Okay. Now, this part of the order  
24 goes beyond the accounting elements of the Government's  
25 fiduciary obligation, right? This covers the second of the

1 District Court's orders?

2 MR. LEVITAS: If it's the compliance with  
3 fiduciary duties.

4 JUDGE TATEL: Yes.

5 MR. LEVITAS: Not, it goes beyond the accounting.

6 JUDGE TATEL: Right. Now, for the accounting  
7 part of the order, there were findings by the District  
8 Court that the Interior Department had violated its  
9 fiduciary obligation with respect to accounting, and the  
10 order, the historical accounting order, rested on those  
11 findings. I didn't see in the District Court's order any  
12 findings that the Interior Department had violated the  
13 other elements of its fiduciary obligations. So what does  
14 this order rest on?

15 MR. LEVITAS: Let me address that, because the  
16 appellees, the appellants have raised the question as to  
17 whether or not the trust reform aspects are even in  
18 these --

19 JUDGE TATEL: No, I'm willing to accept your  
20 argument that they are.

21 MR. LEVITAS: Okay.

22 JUDGE TATEL: Just for purposes of discussion  
23 here. I mean, I think that's what Cobell VI says, but --

24 MR. LEVITAS: The --

25 JUDGE TATEL: But my question for you is assuming

1 they are properly in the case, that the Government's  
2 fiduciary obligations extend beyond an accounting to other  
3 elements of the relationship, the Government is saying,  
4 well, there were no, the District Court can't order relief  
5 until it first finds a violation of those obligations,  
6 which it hasn't found, at least I don't see them in the  
7 order, so.

8 MR. LEVITAS: What is wrong with that is two  
9 things, Your Honor. First of all, this Court in Cobell VI  
10 said that we're making a decision about an accounting  
11 breach, but the breach of an accounting duty carries with  
12 it substantial, significant subsidiary duties.

13 JUDGE TATEL: I understand that, but I'm going  
14 beyond the accounting to the provisions of Section 3, which  
15 deal with other elements of the fiduciary responsibility,  
16 not the subsidiary obligations for the accounting process.

17 MR. LEVITAS: The, well, I'm, I just need to  
18 conclude one point, though, Your Honor. What the Court,  
19 this Court said is that that, in order to provide for an  
20 accounting, you've got to make it possible for there to be  
21 an appropriate software for a comprehensive system to track  
22 the money. You've got to have adequate personnel. All of  
23 that is necessary to do the accounting, but to address  
24 specifically your concern concerning these other  
25 obligations, the trial 1.5 and the contempt trial addressed

1 these issues. The trust reform that Your Honor is  
2 inquiring about has been part and parcel of this case from  
3 the very beginning. When the HLIP, the high-level  
4 implementation plan, was revised, it had, if I remember  
5 correctly, 13 elements to it. Twelve of the 13 elements  
6 related to trust reform. The reason the Court required  
7 reports of progress was to determine whether or not the  
8 duties of trust reform were being met. When the District  
9 Court said what are you doing as far as trust reform, the  
10 TAN (phonetic sp.) system, adequate personnel, data  
11 cleanup, those all related to the trust reform duties. And  
12 it's interesting to me that the defendants now say, well,  
13 this case had nothing to do with trust reform, when in fact  
14 according to the defendants, they didn't challenge the  
15 activities of the District Court with regard to trust  
16 reform. They only challenged in the appeal the accounting  
17 duties. And therefore the trust reform duties, where the  
18 Court had held time and again there was an inadequacy as  
19 well as a delay in compliance were seemingly conceded by  
20 the defendants, because they never challenged the District  
21 Court's conclusions of noncompliance. Remember, Your  
22 Honor --

23 JUDGE WILLIAMS: I'm sorry, so, I mean, your  
24 answer, then, to Judge Tatel is not that there's no problem  
25 about going forward with a remedy in the absence of

1 findings of breach on the non-accounting aspects. Your  
2 answer is there have been findings of breach.

3 MR. LEVITAS: Yes.

4 JUDGE WILLIAMS: And we'll find them clearly in  
5 the record.

6 MR. LEVITAS: Let me make this point --

7 JUDGE WILLIAMS: I mean, I noted that stipulation  
8 that we referred to in the 2001 opinion, but I don't recall  
9 us alluding to any findings of this sort.

10 MR. LEVITAS: There's an important point that I  
11 would like to be able to make, Your Honor, at this, before  
12 I conclude, and that is this: We talked about --

13 JUDGE SENTELLE: First, I'm not sure I'm hearing  
14 you answer Judge Williams's question. Is this going to be  
15 an answer to that question?

16 MR. LEVITAS: Sorry, Your Honor. I'm sorry, I --

17 JUDGE SENTELLE: He asked you, as I understand  
18 it, if your point is not that there can't be remedies  
19 unrelated to the accounting duties but related to other  
20 fiduciary duties without finding a breach of those duties  
21 or your point is there has been such a finding. Which is  
22 your position on that? Does that accurately state --

23 JUDGE WILLIAMS: That's exactly my question.

24 MR. LEVITAS: It's the latter. It's the latter,  
25 and in fact --

1 JUDGE SENTELLE: The latter, okay.

2 JUDGE WILLIAMS: Okay, and we'll find them.

3 MR. LEVITAS: It's the latter. And let me also  
4 point out this, this Court citing Franklin v. Gwinnett  
5 County pointed out that once the breach has been found,  
6 once the duty, the violation of the duty has been found, a  
7 court of equity has broad powers in fashioning the type of  
8 relief and remedy that is necessary to, in this case, to  
9 satisfy compliance with the trust duties. So my argument  
10 would be, Your Honor --

11 JUDGE WILLIAMS: Is it your view that the proper  
12 relationship between the Court and the Department of  
13 Interior is the relationship between a court of chancery  
14 and a common law trustee?

15 MR. LEVITAS: The common law --

16 JUDGE WILLIAMS: In other words, there's no  
17 account taken of the proposition that this trustee is an  
18 executive department of the United States?

19 MR. LEVITAS: Well, of course, Your Honor, that  
20 has to be taken into account, but --

21 JUDGE WILLIAMS: Well, I mean, the chancellor --

22 JUDGE SENTELLE: It does make a difference.

23 JUDGE WILLIAMS: -- exercising jurisdiction over  
24 a common law trust has very wide-ranging powers. But those  
25 are not, those don't involve a great department of a great

1 government.

2 MR. LEVITAS: But Your Honor, in this case, the  
3 United States is the trustee.

4 JUDGE WILLIAMS: I understand.

5 MR. LEVITAS: The Interior Department or the  
6 Secretary of Interior and the Secretary of Treasury are  
7 trustee-delegates. And the chancellor has broad power to  
8 make certain that the trust fiduciary duties which are not  
9 being carried out by the trustee-delegates can be enforced.  
10 That's --

11 JUDGE WILLIAMS: But anyway, then it is your  
12 contention sort of none of the language, for example, for  
13 the APA relating to the things that justify a court setting  
14 aside agency action, none of those things is applicable?  
15 We are straight in the straight court of chancery model?

16 MR. LEVITAS: I don't think it's a straight  
17 model, Your Honor, but I think the, this is a trust case.  
18 This Court itself has pointed out, for example, that  
19 Chevron deference doesn't apply. This Court has -- in this  
20 case. The Court has pointed out that the trustee-delegates  
21 cannot willy-nilly take off the hat of the trustee to don  
22 the mantle of the administrator. The fact that the common  
23 law principles are imposed upon the duties of the trustee  
24 make it clearly a trust case. And that does give within,  
25 there are bounds, within bounds of equity and within bounds

1 of the Constitution limitations. But by and large, once  
2 the Court has found, the court of equity has found the  
3 breach of the trust duty, it can impose and select a broad  
4 range of remedies in order to bring about compliance.

5 And it is for that reason, Your Honor, that we believe  
6 in this instance the chancery has exercised that option  
7 appropriately, and unless it is found that in some way he  
8 has acted clearly erroneously, this Court should affirm  
9 that exercise.

10 JUDGE SENTELLE: Unless there's further  
11 questions, then I know the time was long since used up, but  
12 in the spirit of eternal optimism, I'll give the Government  
13 two minutes for rebuttal.

14 JUDGE WILLIAMS: Which it's not obliged to take.

15

16 REBUTTAL ARGUMENT OF MARK B. STERN, ESQ.

17

ON BEHALF OF THE APPELLANTS

18

19 MR. STERN: Thank you for that, Your Honor. A  
20 couple of very brief points. There's a lot of, of course,  
21 this is all set out in a lot of detail on our briefs.

22 Just to sort of come in, and we were at the end on  
23 (indiscernible) with opposing --

24

25 JUDGE SENTELLE: I'm going to ask you to try to  
speak a little more clearly, if you would, please, counsel.

1 MR. STERN: Absolutely, Your Honor. Without in  
2 any way trying to take common law trust duties out of the  
3 case, assuming that they're in the case, there's a lot of  
4 discussion, I'm going to refer the Court to the testimony  
5 of Professor Langbine (phonetic sp.) and others in this  
6 case about the difference, assuming that you were going to  
7 draw analogies and that you could inform duties by  
8 reference to trust duties, you cannot transpose those  
9 duties wholesale for many reasons, including the fact that  
10 when the chancellor would direct a trustee to spend money,  
11 he's directing that money to basically come out of the  
12 corpus of the trust. Now, as Professor Langbine points out  
13 in his report, you can't cherry-pick among the way, about  
14 which you like and what you don't like about the way common  
15 law trusts operate, and all this money is coming out of  
16 federal appropriations, not out of the trust. And I'm not  
17 saying that doesn't mean that trust principles apply, but  
18 it certainly makes things awfully different. And I'd also  
19 submit that this Court --

20 JUDGE SENTELLE: I'm not sure that I understand  
21 your position that you can't cherry-pick. Are you saying  
22 we have to accept all of the law of chancellorship, equity,  
23 or none?

24 MR. STERN: No, Your Honor, I think that what  
25 this Court, I mean, I think that, I know that, I think that

1 this Court got it right in Cobell, in the 2001 Cobell  
2 decision when it said, look, you're telling me that there's  
3 been no unreasonable delay. When I think about whether  
4 there's been unreasonable delay here, I've got to consider  
5 the fact that you had obligations to Indians for a long  
6 time that predated --

7 JUDGE SENTELLE: You know, I have no idea what  
8 your answer has to do with my question.

9 MR. STERN: I'm sorry, Your Honor, the --

10 JUDGE SENTELLE: You said we can't cherry-pick.

11 JUDGE WILLIAMS: Isn't it absolutely clear that  
12 there's got to be cherry-picking?

13 JUDGE SENTELLE: Yes, there has to be, doesn't  
14 there have to be cherry-picking?

15 MR. STERN: Well, it's got to be --

16 JUDGE SENTELLE: Are you saying that either none  
17 of the duties of common law or chancellor equity  
18 trusteeship apply or all of them apply?

19 MR. STERN: I'm saying that this Court got it  
20 right when it said that you look to --

21 JUDGE SENTELLE: Whoa. Don't say we ever did  
22 anything before. Take it as if we never acted before.

23 MR. STERN: All right. Yes, you have to cherry-  
24 pick, but the way that that is done, and this Court had it  
25 absolutely right, it says you fill in the interstices.

1 When you've got a statute, you try to understand what's  
2 going on. Yes, you can look to fill in the interstices by  
3 reference to background presumptions. However, when  
4 Congress actually acts and does things, including the  
5 amount of money it appropriates and everything else, I  
6 mean, Congress is the settler of this trust. I mean, so  
7 what Congress wants and what Congress does, and Professor  
8 Langbine talks about this at great length, what Congress  
9 wants and what Congress does, even by just a straight out  
10 analogy to common law trust principles is entirely  
11 relevant.

12 So that, and that also brings us back into why this  
13 Court was also correct in 2001 when it analyzed this within  
14 the framework of the APA. And you've got to have final  
15 agency action or else you've got to have action  
16 unreasonably delayed, and whatever this Court said in 2001,  
17 we think it's consistent with what the Supreme Court later  
18 said in Southern Utah, but if it wasn't, then it has to  
19 give way to what the Supreme Court said in Southern Utah.

20 JUDGE SENTELLE: Okay. I think the time is up  
21 and the case is submitted.

22 MR. STERN: Thank you very much, Your Honor.

23 (Recess.)

24

25

CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

*Carol Schlenker*

*9-20-07*

Carol Schlenker

Date

DEPOSITION SERVICES, INC.