IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al. Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, et al. Defendants.	)	Case No. 1:96CV01285 (Judge Robertson)

DEFENDANTS' RESPONSE TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF EQUITABLE RESTITUTION AND DISGORGEMENT

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April 9, 2008

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Summary

Plaintiffs seek over $58 billion in damages, cloaked in the guise of an equitable disgorgement claim. Memorandum In Support Of Equitable Restitution And Disgorgement [Dkt. 3515] (Pls. Mem.). That relief is not available in this Court. The Administrative Procedure Act (APA) does not waive the United States' sovereign immunity with respect to such a claim which, no matter how artfully Plaintiffs try to disguise it, is for money damages. Plaintiffs seek a monetary award as a substitute, to compensate them for allegedly withheld funds that they contend would have been revealed if the Department of the Interior (Interior) completed the historical accounting this Court found required by the American Indian Trust Fund Management Reform Act of 1994 , Pub. L. No. 103-412, 108 Stat. 4239 (1994 Act). The 1994 Act does not, however, contemplate the payment of money and no legal basis exists to justify such an award. Plaintiffs have cited no case in which a district court has ordered "disgorgement" under the APA or otherwise granted monetary relief under a general theory of equitable powers, and we are aware of none.

The only live claim brought by Plaintiffs and the only relief available to them pursuant to the 1994 Act is an accounting; the Court early on struck from the complaint Plaintiffs' claims that would have required a "cash infusion" into the IIM system. This Court's recent conclusion that it will be impossible to complete the historical accounting does not alter the jurisdictional landscape or justify an equitable disgorgement remedy. Given the Court's conclusion, the appropriate remedy now is either a remand (for Interior to explore other avenues) or dismissal.

Plaintiffs' multi–billion dollar claim is also barred because this case is certified as a class action under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2). These provisions generally permit only common declarative or injunctive relief. This rule protects individual class members who do not suffer from a common monetary injury that can be addressed by class-wide relief. Such protection is necessary here because the financial effect of the alleged failure to perform a historical accounting would vary among account holders, account types, income streams and the timing of those streams. This rule, followed consistently within this circuit, proscribes the monetary relief Plaintiffs now seek.

Because the equitable disgorgement claim should be rejected on the existing record, no need exists to conduct the trial scheduled for June, 2008. Should the June trial proceed, an analysis of the aggregate amount of funds that were collected by Interior and posted to the accounts of individual Indians will not provide a factual predicate for an award of $58 billion. This throughput data comprises aggregate information that does not reflect upon the adequacy of a historical accounting for individual Indian money (IIM) accounts or provide a basis to analyze any individualized monetary remedy. Assuming this Court does review the aggregate throughput data, it will not find evidence that funds are missing from IIM accounts. Plaintiffs

cannot meet their burden of proving that their $58 billion claim is a reasonable approximation of any benefit obtained by the government. To the contrary, all available evidence, including accounting work performed since the inception of this litigation, indicates that funds belonging to IIM account holders have been posted to their accounts. Plaintiffs' efforts to paint a different picture suffer from numerous, fundamental, factual flaws. Thus, Plaintiffs ultimately are left arguing that this Court should simply shift the burden of proof and require Defendants to prove that every single transaction over the course of more than a century was accurate. This argument is likewise factually flawed and legally unsupportable.

Remarkably, Plaintiffs now even ask this Court to order the undoing of all transactions related to individual Indian land -- including the return of allotted land sold almost a century ago -- and their associated proceeds. This demand is factually, legally and procedurally flawed and is well beyond the jurisdiction of this Court and the scope of this case. It, and Plaintiffs' other related management claims, should be summarily dismissed.

Argument

This Court's determination that a complete historical accounting of the IIM system is impossible means that, in some percentage of cases, IIM account holders covered by the 1994 Act cannot receive confirmation of past transactional activity, i.e., the purpose to be served by the historical accounting. Nowhere does the 1994 Act or any other statute provide that, if Interior is unable to provide a complete accounting for each and every eligible account holder, which Congress did not consider possible in any event, it should not provide an accounting of any kind to any account holder but should instead pay all account holders the difference between the estimated aggregate IIM system revenues and provable disbursements for the past 120 years.

But that is the very thing Plaintiffs now seek, and they do not draw the line at this unwarranted embellishment of Interior's accounting obligation. They also demand the value of the supposed benefits or improper advantages gained by the government from the alleged misuse of funds allegedly wrongfully withheld. In addition, Plaintiffs also demand that the government transfer to them the value of all individual Indian trust land transactions and uses where the government cannot prove that fair value was previously paid.

Granting the relief Plaintiffs now seek would manifestly require the Court to order an "infusion of cash" into the IIM system, an order this Court previously and without challenge by Plaintiffs held that it lacks authority to issue. Plaintiffs have not proposed to the Court a remedy for Defendants' alleged breach of the accounting duty but, rather, an alternative claim, one in which they are attempting to convert their case from a claim for an "accounting of the money that already exists in the IIM trust" to a claim for a payment of money completely outside the IIM system. Plaintiffs have not and cannot demonstrate – and the Court should not assume – that the money claimed is currently in the Treasury. Despite this, Plaintiffs are trying to obtain from the Court, under the guise of restitution and disgorgement, the identical relief which is plainly unavailable from this Court through trust mismanagement claims. For these and a variety of other substantial reasons, discussed below, the Court should dismiss the case now that Plaintiffs have made clear that they seek compensation for the government's alleged “unlawful withholding” as a substitute for the accounting. No purpose would be served by holding a trial to determine the size of a monetary award that this Court cannot grant.

I. The Court Lacks Authority To Award Money To Plaintiffs

A. The United States Has Not Waived Its Sovereign Immunity

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."[1] United States v. Mitchell, 463 U.S. 206, 212 (1983) (Mitchell II). Such consent may not be implied, but must be "unequivocally expressed." United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992).

Plaintiffs contend that the necessary waiver of sovereign immunity is found in section 702 of the APA. Pls. Mem. at 45.[2] Because section 702 only waives sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages," 5 U.S.C. § 702, Plaintiffs recognize that they must characterize their current claim for money as something other than a claim for money damages. Pls. Mem. at 47. Unfortunately for Plaintiffs, as the Supreme Court has recognized, "'[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they

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[1] Although the United States is not a named Defendant, all claims against individuals acting in their official capacity are treated as if the claims were brought against the federal government itself. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) (an official-capacity lawsuit is in effect against the sovereign).

[2] Plaintiffs suggest that, alternatively, their action can be "brought as an action to enforce statutory trust duties as informed by common law" and cite Chamber of Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996), for the proposition that the government's sovereign immunity is waived for non-APA claims. Pls. Mem. at 45 n.89. Defendants acknowledge that the law in this Circuit is that "[t]he APA's waiver of sovereign immunity applies to any suit whether under the APA or not." Id. Defendants respectfully reserve the right to challenge this expansive view in subsequent proceedings. In any event, all of Plaintiffs' common law claims have already been dismissed and, therefore, Plaintiffs cannot bring the action described in their Memorandum within the confines of this case. Cobell V, 91 F. Supp. 2d at 28, 31.

seek no more than compensation for loss resulting from the defendant's breach of legal duty.'" Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 210 (2002) (quoting Bowen v. Massachusetts, 487 U.S. 879, 918-919 (1988) (Scalia, J., dissenting)).

Plaintiffs principally rely upon Bowen and its progeny, see Pls. Mem. at 47-50, but misapply its principles in determining whether a claim for money is a claim for "money damages," within the meaning of section 702. In Bowen, the Supreme Court held that Massachusetts could sue under the APA to "set aside" an order by the Department of Health and Human Services disallowing reimbursement for certain expenses under its Medicaid program. The Court held that a suit is for "money damages" – and not maintainable under the APA – if it seeks a sum of money as compensatory relief to substitute for a suffered loss. 487 U.S. at 893-95. However, a remedy requiring the payment of money may be specific relief – and not precluded by section 702 – when it "give[s] [the claimant] the very thing to which he was entitled." Id. at 895 (quoting Maryland Dep't of Human Resources v. HHS, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (quoting D. Dobbs, Handbook on the Law of Remedies 135 (1973)). The Medicaid statute in Bowen provided that the Secretary of HHS "shall pay" certain sums when specified services are provided. 487 U.S. at 900 (quoting 42 U.S.C. § 1396b(a)).

Bowen is predicated upon the fact that the relevant Medicaid statute imposed a direct obligation to provide the monetary relief being sought. Thus, on those facts, the Supreme Court concluded that Massachusetts did not seek damages but rather sought "to enforce the statutory mandate itself, which happens to be one for the payment of money." Bowen, 487 U.S. at 900. Accordingly, the state's claim was held to fall within section 702 of the APA.

In sharp contrast to Bowen, the 1994 Act does not expressly or impliedly impose a duty

to pay money to individual Indians. To the contrary, it requires Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to [the Act of June 24, 1938 (25 U.S.C. § 162a)]." 1994 Act, § 102(a), 25 U.S.C. § 4011(a). In short, unlike the Medicaid statute involved in Bowen, the 1994 Act does not mandate "the payment of money."

Moreover, the Court has already identified the "very thing" to which Plaintiffs are entitled: "In the case at bar, plaintiffs seek 'the very thing to which they are entitled,' an accounting of their money that actually exists in the IIM trust." Cobell v. Babbitt, 91 F. Supp. 2d 1, 28 (D.D.C. 1999)(Cobell V)(citing Dept. of the Army v. Blue Fox, Inc., 525 U.S. 255, 262-63 (1999) (Blue Fox) and Bowen, 487 U.S. at 895)). To be sure, the Court has recently determined that it is impossible to give Plaintiffs that "very thing" to which they are entitled because Congress will not pay for it. Cobell v. Kempthorne, 532 F.Supp.2d 37, 102 (D.D.C. 2008) (Cobell XX). However, for purposes of a sovereign immunity analysis under the APA within the meaning of Bowen, any remedy that Plaintiffs receive in this case – other than an accounting – is a substitute for the accounting they are entitled to receive under the 1994 Act. According to what Plaintiffs refer to as "the leading treatise on remedies," Pls. Mem. at 48, in distinguishing between a specific remedy and damages:

> The damages award is often a substitutionary remedy. That is, it substitutes money for the original condition or thing to which the plaintiff was entitled . . . *Damages* gives the plaintiff a money substitute. Frequently a substitutionary remedy in money is the only remedy available . . . In its substitutionary character damages contrasts with specific relief . . . .

1 Dan B. Dobbs, Law of Remedies § 3.1, at 279 (2d ed. 1993) (emphasis in original).

As discussed below, the money remedy Plaintiffs now request is not a reasonable

substitute for an accounting, but for purposes of a sovereign immunity analysis, *any* money remedy that Plaintiffs propose would merely be a substitute for the accounting – "the very thing to which they are entitled" – and would thus constitute "money damages" under section 702.

For this reason, Plaintiffs' reliance on cases holding that money damages are not being sought when money is the "very thing" to which a plaintiff is entitled is misplaced because, again, an accounting – not money – is the "very thing" to which Plaintiffs are entitled. See Pls. Mem. at 48-50 (citing United States v. Minor, 228 F.3d 352 (4th Cir. 2000) (plaintiff sought return of forfeited money pursuant to statute); Alaska Airlines, Inc. v. Johnson, 8 F.3d 791 (Fed. Cir. 1993) (airlines sought return of illegally withheld money pursuant to statute); America's Community Bankers v. FDIC, 200 F.3d 822 (D.C. Cir. 2000) (plaintiff claimed that statute required refund of payment); Aetna Casualty & Surety Co. v. United States, 71 F.3d 475 (2d Cir. 1995) (surety permitted to amend complaint to bring equitable subrogation claim against the United States); Alabama v. Bowsher, 734 F. Supp. 525 (D.D.C. 1990), aff'd sub nom. on other grounds Arizona v. Bowsher, 935 F.2d 332 (D.C. Cir. 1991) (action by states to recover unclaimed money in Treasury is barred by intergovernmental immunity component of Supremacy Clause rather than sovereign immunity)).[3]

Conspicuously absent from Plaintiffs' sovereign immunity discussion is any mention of Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999). There, the Supreme Court held

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[3] Plaintiffs' reliance on Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir. 1995), and SEC v. First City Financial Corp., 890 F.2d 1215 (D.C. Cir. 1989), is misplaced in their sovereign immunity analysis. Pls. Mem. at 49. Although each case involved a claim for money, Crocker addressed an action between private parties and the United States was the plaintiff in First City Financial, a civil action for disgorgement of profits for a violation of the Securities Exchange Act of 1934.

that an action to enforce an equitable lien does not come within the specific-relief rule of Bowen because a lien is merely the means to satisfy a money damages claim. The Court dismissed the notion that the "equitable" nature of the claimed relief was determinative of whether section 702 of the APA provided a basis to award monetary relief:

> Bowen's analysis of § 702 . . . did not turn on distinctions between "equitable" actions and other actions, nor could such a distinction have driven the Court's analysis in light of § 702's language. As Bowen recognized, the crucial question under § 702 is not whether a particular claim for relief is "equitable" (a term found nowhere in § 702), but rather what Congress meant by "other than money damages" (the precise terms of § 702). Bowen held that Congress employed this language to distinguish between specific relief and compensatory, or substitute, relief.

Blue Fox, 525 U.S. at 261.

The APA does not allow monetary relief which is essentially substitutionary in nature even if associated with allowable specific relief. For example, applying Bowen in a hiring discrimination case, the D.C. Circuit reversed a back pay award "because Congress has not expressed an unequivocal intent to waive sovereign immunity for such relief." Hubbard v. EPA, 982 F.2d 531, 532 (D.C. Cir. 1992) (en banc). The court held also that section 702 of the APA was not a waiver, because a back pay award would constitute "money damages":

> Specific remedies "attempt to give the plaintiff the very thing to which he was entitled." At the time the EPA violated Hubbard's rights by denying him an offer of a job as a criminal investigator, he had never worked for the EPA and thus was not entitled to any pay . . . . The only "entitlement" that the EPA deprived Hubbard of was the job offer he would have received except for the constitutional deprivation. Instatement is the specific relief for that deprivation, it gives Hubbard "the very thing" he was owed . . . .
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> [Moreover], Bowen's holding . . . does nothing for Hubbard's cause. Hubbard's basic claim is not for enforcement of any legal mandate that the EPA pay him a sum of money; rather, it is to force the EPA to offer him the job it denied him.

Id. at 533, 536 (internal citations omitted).

Similarly, when commissary employees sought reimbursement of all monies lost by unit employees as a result of the Army's failure to announce a change in a "pay lag" from ten days to twelve days,[4] the D.C. Circuit rejected the availability of monetary relief. Dept. of the Army v. FLRA, 56 F.3d 273 (D.C. Cir. 1995). While the Federal Labor Relations Authority found for the employees and directed the Army to reimburse them, the Court of Appeals, relying upon Bowen and Hubbard, determined that the monetary relief ordered was money damages and was not encompassed by the waiver of sovereign immunity in the enabling statutes, 5 U.S.C. §§ 7105(g)(3) and 7118(a)(7). The Court determined:

> In this case, proper notice of the pay-lag policy change was the thing to which the commissary employees were entitled. The interest charges for which the employees seek compensation are sums they lost only as a consequence of the Army's failure to give them the notice they were due. Accordingly, any compensation for such interest is properly characterized as "money damages." Hence, the question before the court is whether the Statute waives the immunity of the United States to liability for money damages.

Dept. of the Army v. FLRA, 56 F.3d at 276.

Plaintiffs' "basic claim" here is similarly not for the enforcement of any legal mandate that Defendants pay them a sum of money, but for the rendering of the accounting required by the 1994 Act. The performance of the accounting alone would not create an entitlement to money. Plainly, Bowen and its progeny do not support Plaintiffs' sovereign immunity argument.

The Court of Federal Claims' consideration of this jurisdictional issue in Pueblo of

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[4] Because pay was not deposited until twelve days after the end of the pay period, some employees had insufficient funds in their account to cover checks drawn and they incurred interest charges when overdraft lines of credit were used to honor the checks.

Laguna v. United States, 60 Fed. Cl. 133 (2004), appropriately frames the issue. Pueblo of Laguna involved an Indian tribe's claim for an accounting and the recovery of monetary damages for mismanagement of the trust. Aware of the Cobell litigation and the filing of at least ten related tribal trust cases in this Court, the court observed:

> It is unclear how the district court has jurisdiction over these matters, which, though veiled as requests for injunctive relief, appear ultimately designed to obtain monetary relief. On this point, the Federal Circuit, in Consolidated Edison Co. v. United States, 247 F.3d 1378 (Fed. Cir. 2001) (en banc), instructed that "[a] party may not circumvent the [Court of Federal Claims'] exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States." Id. at 1385 (quoting Rogers v. Ink, 766 F.2d 430, 434 (10th Cir. 1985)); cf. Cobell v. Norton, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001).

Pueblo of Laguna, 60 Fed. Cl. at 139 n.10 (citations omitted).

B. The Appropriations Clause Prohibits Monetary Relief

Because Plaintiffs are now seeking a payment of money from the Treasury, and have not identified a specific *res* from which this money would be paid, intertwined with any sovereign immunity analysis is the limit the Appropriations Clause of the Constitution places on the Court's power to order monetary relief. U.S. Const. Art. I, §9, cl. 7.

The D.C. Circuit discussed this issue in City of Houston v. HUD, 24 F.3d 1421, 1428 (D.C. Cir. 1994). There, relying upon Bowen, Houston sought to recover funds from a block grant awarded by the Department of Housing and Urban Development for a particular fiscal year, despite the fact that the appropriation for that fiscal year had been fully obligated and lapsed before Houston filed its suit. The Court of Appeals denied the claim as moot. The court first examined the settled law regarding its limited constitutional authority. Quoting National Association of Regional Councils v. Costle, 564 F.2d 583, 588-89 (D.C. Cir. 1977), the court

found:

> Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities. Id. at 588-89 (footnote omitted).

City of Houston, 24 F.3d at 1426. The court described the "equitable exception" as "narrow," and observed that "[i]t is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation." Id. (quoting Rochester Pure Waters Dist. v. EPA, 960 F.2d 180, 184 (D.C. Cir. 1992)) (emphasis added).

The Court of Appeals next turned to and rejected Houston's "chief argument" that Bowen and its progeny made relief available to the City because the injunctive relief it sought sounded in equity. The court quoted the Supreme Court in OPM v. Richmond, 496 U.S. 414, 424 (1990):

> The Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, provides that: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." For the particular type of claim at issue here, a claim for money from the Federal Treasury, the Clause provides an explicit rule of decision. Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute. . . . [The Appropriations Clause] means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress.

City of Houston, 24 F.3d at 1428.

The Court of Appeals then rejected Houston's final argument based upon Bowen, that it was entitled to recover as equitable monetary relief "no-year" funds that HUD had not reserved for use in any particular year or for particular projects. The court concluded:

> This argument, however, runs afoul of the APA section 702's fundamental requirement that a plaintiff seek relief "other than money damages." Section 702 permits monetary awards only when, as in Bowen, such an award constitutes specific relief – that is, when a court orders a defendant to pay a sum owed out of a specific *res*. See generally Hubbard v. EPA, 982 F.2d 531 (D.C. Cir. 1992) (en

> banc) (holding that back pay does not constitute specific relief available under APA section 702). An award of monetary relief from any source of funds other than the 1986 [Block Grant] appropriation would constitute money damages rather than specific relief, and so would not be authorized by APA section 702.

City of Houston, 24 F.3d at 1428 (emphasis in original).

The results of the Appropriations Clause analysis may seem harsh in a particular case. However, as Justice Frankfurter noted for the Supreme Court in Federal Crop Insurance Corp. v. Merrill, 332 U.S.380 (1947), denying recovery is not "callous," but "merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury." 332 U.S. at 385.

The City of Houston analysis is controlling here. Although Plaintiffs ask the Court to pay them approximately $58 billion to prevent the unjust enrichment of the United States, see Pls. Mem. at 44 & Attachment A, and imply that this amount is sitting somewhere in the United States Treasury waiting to be paid to them, Plaintiffs make no allegation whatsoever about where this money is located.[5] Indeed, by Plaintiffs' own reasoning, the money cannot be in the Treasury. They allege that the money "unlawfully withheld" was used to pay down the national debt, and that the benefit realized by this improper use of the money was a reduction in the need to borrow money to pay the national debt. Thus, on Plaintiffs' theory, the government does not

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[5] Although stated nowhere in their Memorandum, Plaintiffs may want to argue that the Judgment Fund provides a source for the constitutionally-required appropriation necessary to pay a claimant who can make out a substantive right to money, when there is no other, more specific appropriation. However, as the D.C. Circuit made clear in City of Houston, 24 F.3d at 1428, if monetary relief comes from any other source of funds apart from an identified res, it cannot possibly be viewed as the very thing to which a plaintiff was entitled – rather, it is substitutionary in nature, and therefore, damages. Use of the Judgment Fund is substitutionary and would constitute an award of money damages, thus falling outside of the waiver of sovereign immunity provided by section 702.

have more money, it simply has less debt.

It is beyond dispute that this money cannot be found in the IIM system. The average balance of money held for current IIM account holders over the years has been as high as approximately $400 million. See Cobell v. Norton, 428 F. 3d 1070, 1072 (D.C. Cir. 2005) (Cobell XVII), (citing March 9, 2005 Declaration of James E. Cason, Associate Deputy Secretary, U.S. Department of the Interior, In Support of Motion for Emergency Stay Pending Appeal, at 3). Indeed, Plaintiffs specifically disclaim any request that any payment to them would come from the money currently being held in the IIM system, by subtracting from their $58 billion claim the $423 million identified as the consolidated balance of the IIM accounts as of September 30, 2007. See Pls. Mem., Attachment A, Column I, & n.6.

Because no specific fund exists at Treasury or elsewhere to satisfy the $58 billion judgment Plaintiffs now demand, the prohibition established in OPM v. Richmond and City of Houston precludes such relief. Any payment would either violate the constitutional limits in the Appropriations Clause or constitute "money damages" contrary to the requirement of section 702 of the APA. City of Houston, 24 F.3d at 1428.[6]

C. Plaintiffs Have Not Stated A Claim Cognizable in Equity Jurisdiction

Even if the Court concludes that sovereign immunity has been waived by section 702 of the APA, that section does not confer jurisdiction and thus jurisdiction – if it exists – must be

[6] America's Community Bankers, 200 F.3d 822, does not help Plaintiffs. The D.C. Circuit reaffirmed, but distinguished, City of Houston from the case before it because the award of equitable monetary relief was based upon statute and "no transfer of funds would be necessary" because the award could be accomplished through offsets on future assessments made against the plaintiffs. 200 F.3d at 829-31. No such statutory payment scheme or offset option is available to Plaintiffs here. Any award would require a "transfer of funds."

found in some other statute. Plaintiffs rely on the general federal question statute, 28 U.S.C. § 1331. Pls. Mem. at 45. Section 1331 gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, Plaintiffs do not identify which law of the United States creates a general equitable restitution claim against the United States. The Court cannot have jurisdiction over such a claim unless Plaintiffs can provide a specific statute authorizing such relief. See, e.g., Cobell v. Norton, 226 F.R.D. 67, 75 (D.D.C. 2005) ("As this Court has previously made clear, 'plaintiffs' substantive rights are created by – and therefore governed by – statute. Thus, to the extent plaintiffs seek relief beyond that provided by statute, their claims must be denied.'") (quoting Cobell V, 91 F. Supp. 2d at 29).

Until now, Plaintiffs' claims have been grounded in the accounting requirement the Court of Appeals found in the 1994 Act. The 1994 Act obviously does not have a provision supplying monetary relief as a substitute for an accounting. Indeed, it does not provide monetary relief under any circumstances. Plaintiffs repeatedly cite Scott on Trusts and similar treatises but they fail to demonstrate that the language of the 1994 Act offers any unequivocally expressed assent for this Court to impose monetary liability upon the United States.

The premise underlying Plaintiffs' equitable claim to money is that this Court sits as a "Chancellor in Equity," Pls. Mem. at 8, but this premise is incorrect and has been expressly rejected by the Court of Appeals. When the D.C. Circuit vacated the Court's 2004 structural injunction that dictated how the historical accounting should be performed, it summarized: "To recap: the district court reissued an injunction dictating how Interior must fulfill its obligation to complete an accounting for the IIM trust fund in the absence of any pending request for

reissuance by any party and on the ill-founded assumption that the 1994 Act gave it the freedom of a private-law chancellor to exercise its discretion." Cobell XVII, 428 F.3d at 1077 (emphasis added). "Nor does the Act have language in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee. Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense." Id., 428 F.3d at 1074-75. Thus, because the 1994 Act defines the relief available, Plaintiffs are incorrect in asserting that this Court is free to serve as a traditional Chancellor in Equity.

Plaintiffs cite Mitchell II, Pls. Mem. at 2, 5 n.6, 7, 10, to support their argument that this Court has the authority to award equitable relief that includes a monetary reward, but Mitchell II undermines their argument. First, Mitchell II established the important point that acts of Congress are what constitute the trust instruments that "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." Mitchell II, 463 U.S. at 224. Thus, Mitchell II militates against expanding relief to provide something Congress never contemplated.

Second, Mitchell II was brought in the United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. Mitchell II, 463 U.S. at 211-12. It was a case in which 1,465 individual allottees, an allottees association, and a tribe sought recovery for alleged mismanagement of trust assets. It is hard to comprehend how Plaintiffs, knowing that Mitchell II was brought under the Tucker Act and pursued in the Court of Claims, can assert that "Mitchell II confirms that remedies typically available to other beneficiaries in breach of trust cases are also available to the Indian beneficiaries in these proceedings." Pls. Mem. at 10. Quite simply, Plaintiffs brought this case in a different court,

relying upon a different jurisdictional statute.

Plaintiffs' other authorities are no more helpful. Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir. 1995), cited for the proposition that an action in restitution can result in a defendant's payment of money, Pls. Mem. at 14, is not relevant to the statutory scheme in this case.[7] Nothing in that case, which involved a dispute between the private parties, overcomes the law of the case here that already addresses the effect of the 1994 Act.

Crawford v. La Boucherie Bernard, Ltd., 815 F.2d 117 (D.C. Cir. 1987), is similarly unhelpful. See Pls. Mem. at 12-13. It involved claims brought against private trustees (two brothers) by members of a profit-sharing plan. The issue was whether, under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA), a district court could offset the two brothers' interest in the profit-sharing plan against a judgment against them based on their breach of trust duties. Actually, if anything, Crawford supports Defendants' position by demonstrating that courts must look to the pertinent statutory language to ascertain the scope of their authority in a given case. Crawford, 815 F.2d at 119-20.

Plaintiffs cite Village of Brookfield v. Pentis, 101 F.2d 516 (7th Cir. 1939), and Beckett v. Air Line Pilots Ass'n, 995 F.2d 280 (D.C. Cir. 1993), for broad propositions that are not in dispute. See Pls. Mem. at 11-12. That "[c]ourts of equity have original inherent jurisdiction to

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[7] Plaintiffs' cite to Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-19 (1999), Pls. Mem. at 8, is inapposite for the same reasons. The dispute there was between a Mexican holding company/construction company and the respondent investment funds, and involved the legality of a district court's injunction intended to prevent the Mexican company from transferring its assets in which no lien or equitable interest was claimed. Rainbolt v. Johnson, 669 F.2d 767 (D.C. Cir. 1981), Pls. Mem. at 12, is likewise inapplicable because it involved private parties and the trust at issue was not created by statute.

decree and enforce trusts and to do whatever is necessary to preserve them from destruction," Pentis, 101 F.2d at 520-21, does not suggest that Plaintiffs may recover monetary relief in this Court. Nor does the unremarkable proposition that "beneficiaries of a trust . . . may sue to enforce the duties owed to them by [the] trustee" lead to the conclusion that the beneficiaries in this case can recover money pursuant to the 1994 Act. Beckett, 995 F.2d at 287.

Where Congress intends to allow an action for monetary relief, it clearly states that intention. This is true in cases involving the trust relationship between the government and Native Americans. See, e.g., Klamath and Modoc Tribes v. United States, 174 Ct. Cl. 483 (1966) (addressing the jurisdiction conferred on the Indian Claims Commission); Ute Indian Rights Settlement Act, § 507(c), 106 Stat. 4600, 4655 (1992) ("[T]he Tribe is authorized to bring an action for an accounting against the United States, if applicable, in the United States Claims Court for moneys owed plus interest at 10 percent."). The 1994 Act contains no such provision.

Plaintiffs cite several cases in which equity jurisdiction is implied from a statute. See Pls. Mem. at 3-4. These cases flow from the uncontroversial general equity principles set forth in Porter v. Warner Holding Co., 328 U.S. 395 (1946), and reiterated in Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288 (1960). None involved the United States as a defendant. Notably, as this Court has recognized, "the [g]overnment is simply not in the position of a private litigant or a private party under traditional rules of common law or statute." Cobell V, 91 F. Supp. 2d at 29 (quoting Nevada v. United States, 463 U.S. 110, 141 (1983)); see also United States v. Nordic Village, Inc., 503 U.S. 30, 39 (1992) ("Resort to the principles of trust law is also of no help to respondent. Most of the trust decisions respondent cites are irrelevant, since

they involve private entities, not the Government."). Indeed, in Robert De Mario Jewelry, and in every one of the cases involving implied equity jurisdiction cited in Plaintiffs' Memorandum, at 3-4, the United States was the plaintiff. The defendant in each case had been found to have violated a statutory provision and the question presented was whether the court had jurisdiction over a claim to recover any money gained as consequence of violating the statute brought by the federal agency charged with enforcing the statute.

In their Memorandum, Plaintiffs have not stated a claim, but rather a desire to receive money – and, as discussed below, an ill-conceived mechanism for calculating how much money they want. This Court does not have jurisdiction to give Plaintiffs the money they seek.

D. Equitable Restitution Is Not Available To Plaintiffs

Equitable restitution is not an available alternative remedy for Plaintiffs. Application of equitable restitution principles requires a specific fund of money within Defendants' possession.[8] Knudson, 534 U.S. at 214 ("[F]or restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."). If the specific fund of money is not in Defendants' possession, then, as in Knudson, "the kind of restitution that" the Plaintiffs seek "is not equitable – the imposition of a constructive trust or equitable lien on particular property – but legal – the imposition of personal liability for the benefits that they conferred upon" Defendants. Id.

In Sereboff v. Mid Atlantic Medical Services, Inc., 547 U.S. 356 (2006), the Supreme

[8] As the Supreme Court has noted, there is a limited but inapposite exception to this rule for "an accounting for profits." Knudson, 534 U.S. at 214 n.2. This form of equitable restitution would allow a plaintiff to recover profits produced by the defendant's use of property even if the plaintiff cannot identify a particular res containing the profits sought to be recovered. Id. (citing 1 D. Dobbs, Law of Remedies § 4.3(1), p. 588 (2d ed. 1993).

Court, in a unanimous opinion with no concurrences, again explored the differences between true equitable restitution (available under section 502(a)(3) of ERISA as "other appropriate equitable relief") and legal restitution, and again reemphasized that "particular funds or property in the defendant's possession" was an essential requirement of equitable restitution. Id. at 362. Whereas in Knudson the particular funds had already passed into a "Special Needs Trust" and were not the subject to a claim of equitable restitution, the funds in Sereboff were still in the possession of the defendants and Mid Atlantic identified a "particular fund" as opposed to the general assets of the Sereboffs. Id. at 363-64; accord Moore v. Capitalcare, Inc., 461 F.3d 1, 7-8 (D.C. Cir. 2006). Plaintiffs here cannot point to a particular fund that contains the funds to which they assert ownership nor is it likely that they can trace any of the claimed sums into a particular fund held by the United States. See In re Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 679 (S. D. Tex. 2003) (requesting ERISA monetary relief equal to the difference between what their pensions are worth and what they would have been worth using a true valuation of Enron stock). The Enron court noted that:

> unless Plaintiffs can trace some or all of the sum of money to which they claim entitlement, but which was never received by them or by the plan, through Enron's enormous business into the bonuses and increased salaries that went into these particular Defendants' personal pockets and which remains within their possession and control. Plaintiffs have set themselves a daunting task.

Id. Accordingly, equitable restitution is not available to Plaintiffs.

E. The District Court Lacks Jurisdiction Because Remedies for Breach of Trust Are Impliedly Forbidden Under The APA

Although styled as a claim for "equitable restitution," Plaintiffs' new demand for money is essentially a claim for recovery of money for breach of trust. Indeed, Plaintiffs repeatedly

allege a breach of trust in their Memorandum. See, e.g., Pls. Mem. at 1 n.2, 2, 3, 5, 6 n.9 & n.12, 7-10, 13, 18, 28, 31, 44, 51, 53-54, 58, 62. To be sure, Plaintiffs do not make it clear precisely which alleged breach they rely upon: at times they seem to rely on a failure to conduct an accounting, at others on some ill-defined notion that Defendants have improperly retained the IIM beneficiaries' trust money or at least unreasonably delayed in making payment, and at other points, Plaintiffs rely on a strained theory that Defendants have improperly commingled IIM trust money with United States money. In any event, whatever the alleged breach of trust may be, as an equitable remedy for such a breach, Plaintiffs claim the right to recover money. This Court does not have jurisdiction to entertain Plaintiffs' new breach of trust claim.

The APA's waiver of sovereign immunity is not available "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The D.C. Circuit has held in contract cases that the Tucker Act is one such statute, and that consequently all claims premised on contracts – regardless of whether the plaintiff seeks damages, specific performance, quantum meruit relief, or something else – are "impliedly forbid[den]" under the APA. See, e.g., Albrecht v. Comm. on Employee Benefits, 357 F.3d 62, 68 (D.C. Cir. 2004)("'the Tucker Act impliedly forbids – in APA terms – not only district court awards of money damages, which the Claims Court may grant, but also injunctive relief, which the Claims Court may not.'") (quoting Transohio Savings Bank v. OTS, 967 F.2d 598, 609 (D.C. Cir. 1993)); Sharp v. Weinberger, 798 F.2d 1521, 1524 (D.C. Cir. 1986) ("We know of no case in which a court has asserted jurisdiction [under the APA] either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligations."); see also Christopher Village, L.P. v. United

States, 360 F.3d 1319, 1327-29, 1332-33 (Fed. Cir. 2004) (Fifth Circuit lacked jurisdiction to issue a declaratory judgment as to HUD's liability on a contract, even as a predicate for a damages action in the Court of Federal Claims, because the APA does not waive the government's immunity from such a claim); Katz v. Cisneros, 16 F.3d 1204, 1209 (Fed. Cir. 1994) ("where contract damages are available in the Court of Federal Claims, the Tucker Act forbids specific performance or declaratory relief under its terms and thus impliedly forbids such relief via the APA"). Indeed, the legislative history of section 702 specifically cites the Tucker Act, 28 U.S.C. § 1491(a), as an example of a statute that "impliedly forbids" relief under the APA. See H.R. Rep. No. 94-1656 (1976), reprinted in 1976 U.S.C.C.A.N. 6121, 6133.

Of course, the Tucker Act covers not only claims on contracts, but also "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. § 1491(a). The Supreme Court has recognized that the Tucker Act, and its companion statute, the Indian Tucker Act, 28 U.S.C. § 1505, include claims for breach of trust relationships established by Congress. See, e.g., United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II).

Accordingly, just as Congress intended the Tucker Act to serve as the vehicle for litigating contract claims against the government – and thus impliedly forbade any relief (damages, equitable remedies, or otherwise) on a contract under the APA – it is not unreasonable to conclude that Congress likewise intended for breach of trust claims to proceed under the Tucker Act, and not under the APA.[9] The statutes creating the trust relationships with individual

[9] Of course, breach of trust claims involving less than $10,000 – not relevant here – are covered by the Little Tucker Act, 28 U.S.C. § 1364(a)(2). See, e.g., LeBeau v. United States, 474 F.3d 1334 (Fed. Cir. 2007).

Indians predate the APA. The Indian breach of trust cases discussed in recent years by the Supreme Court have all come up through the Court of Federal Claims under the Tucker Act, and the Indian Tucker Act. See, e.g., Mitchell II, 463 U.S. 206; United States v. Navajo Nation, 537 U.S. 488 (2003); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003).

Indeed, in Mitchell II the Supreme Court reviewed the legislative history of the Indian Tucker Act and found that "an important goal of the Act was to ensure that it would 'never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds.'" 463 U.S. at 214 (quoting 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson)). The Supreme Court noted that the House Report for the Indian Tucker Act stressed the same point on the need for legislation that would provide Indians access to the Court of Federal Claims to bring their breach of trust claims for obligations assumed by the federal government: "'If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States.'" 463 U.S. at 215 (quoting H.R. Rep. No. 1466, 79th Cong. 1st Sess., 5 (1945)).

The APA is a statute designed to provide remedies in cases that the Tucker Act does not touch, and the 1976 amendments to the APA were never intended to create a scheme to circumvent or supplement the Tucker Act and its limitations. Plaintiffs' proper remedy, if they have a valid breach of trust claim, lies, if anywhere, in the Court of Federal Claims under the Tucker Act, not in the district court.

To be sure, as long as Plaintiffs were pursuing their claim for an accounting under the 1994 Act, they were not pursuing a monetary claim impliedly forbidden by the Tucker Act.

Thus, in Megapulse Inc. v. Lewis, 672 F.2d 959 (D.C. Cir. 1982), the plaintiff sought to enjoin the public release of technical data that it had supplied to the Coast Guard pursuant to a contract, asserting that release of the data would violate the Federal Trade Secrets Act. In holding that the action was properly brought under the APA, the D.C. Circuit emphasized that the "source of the rights upon which the plaintiff base[d] its claims" was not the contract, but the Trade Secrets Act. See 672 F.2d at 968; see also id. at 969 (noting that the contract was relevant only to the government's defense to the trade secret claim, not to the plaintiff's affirmative case). Were it otherwise, the court recognized, dismissal would have been required: "[W]e agree that a plaintiff whose claims against the United States are essentially contractual should not be allowed to avoid the jurisdictional (and hence remedial) restrictions of the Tucker Act by casting its pleadings in terms that would enable a district court to exercise jurisdiction under a separate statute and enlarged waivers of sovereign immunity, as under the APA." Id. at 967.

Similarly, here, the accounting obligation imposed by the 1994 Act is enforceable under the APA. However, because Plaintiffs' money claims are now for a breach of trust, they are subject to the jurisdictional restrictions of the Tucker Act.

If Plaintiffs' "equitable restitution" claims are sufficient to vest APA jurisdiction in a district court, it would be difficult to imagine any breach of trust claim against a federal agency that could not similarly be restyled as an APA claim. As observed by the Court of Claims:

> Since the United States by reason of its nature acts only through agents, it is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA . . . . We refuse to believe that Congress intended, in enacting the APA, so to destroy the Court of Claims by implication.

Hoopa Valley Tribe v. United States, 596 F.2d 435, 445 (Ct. Cl. 1979) (quoting Warner v. Cox,

487 F.2d 1301, 1306 (5th Cir. 1974)); accord, e.g., Consolidated Edison Co. v. United States, 247 F.3d 1378, 1385 (Fed. Cir. 2001) ("This court and its sister circuits will not tolerate a litigant's attempt to artfully recast its complaint to circumvent the jurisdiction of the Court of Federal Claims.").

Because Plaintiffs' new money claim is in substance an action for breach of trust, relief under the APA is impliedly forbidden by the Tucker Act, and jurisdiction in the district court is foreclosed by 5 U.S.C. § 702.

F. Claims For The Payment Of Money Were Stricken From Plaintiffs' Complaint And The Only Relief Available To Them Is An Accounting Pursuant To The 1994 Act

Since the early stages of this case, the Court has consistently ruled that Plaintiffs' only claim is for an accounting and that the Court would not entertain a claim seeking an infusion of money into the IIM accounts. Thus, in 1999, the Court stated, "Plaintiffs do not, as explained below, make any type of claim for money in this case." Cobell V, 91 F. Supp. 2d at 27. The corresponding explanation left no room for doubt:

> Plaintiffs have expressly disavowed seeking an order for the payment of money in this case. Thus, accepting defendants' "true accounting" argument as correct for the moment, plaintiffs simply do not seek every element of a "true" accounting, as that phrase was meant at common law. Instead, and most importantly (as the government is fond of recognizing in other contexts) plaintiffs do not even properly seek a common-law claim for an accounting. See infra subpart III(C). Instead, they seek to enforce their statutory right to an accounting as that phrase is meant under the provisions of 25 U.S.C. § 162a(d)(1)-(7) and 25 U.S.C. § 4011. Although the interpretation of this statute does, as the government admits, demand that the court look to common law for guidance, it does not mean that plaintiffs must by necessity seek an order of money to be paid. To the contrary, plaintiffs narrowly seek to preclude defendants from acting contrary to law in abridging plaintiffs' rights granted by statute and to affirmatively force defendants to comply with the law as stated by Congress.

Id. (emphasis added).

The Court's holding in 1999 accords with its 1998 denial of Defendants' motion to dismiss, which asserted that Plaintiffs were seeking a monetary award which is beyond this Court's jurisdiction.[10] Accepting the assurances of Plaintiffs' counsel, the Court struck portions of their complaint and denied Defendants' motion to dismiss. The Court stated:

> Given the allegations contained in the Complaint and, importantly, certain representations of the plaintiffs' counsel, the Court holds that the retrospective allegations of the Complaint seek solely an accounting. Thus, the plaintiffs do not seek money damages.
>
> * * *
>
> The plaintiffs have repeatedly and expressly stated that their Complaint does not seek an additional infusion of money or other damages for other losses, but rather requests only an accounting. See Transcript of October 5, 1998, Motions Hearing at 39 ("[The government] also like[s] the phrase that we're seeking an infusion of money. That's just not what we're seeking. We're not seeking any new or additional money. The money is there. The amount is misstated. We seek to adjust the statement of the amount.") The Court will construe the Complaint in that light. This is a reasonable construction of certain ambiguous phrases contained in the Complaint upon which the defendants focus, such as "breach of

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[10] Defendants raised jurisdictional and sovereign immunity issues concerning Plaintiffs' request for monetary relief. This Court, based in large part on representations by Plaintiffs' counsel, avoided the issue, stating:

> Although the Complaint contains other references that could presumably lead to compensatory relief,[footnote omitted] the plaintiffs have plainly stated that they only seek an accounting, not a cash infusion. Thus, the defendants' argument supporting their motion to dismiss on this point is moot.17
>
> Fn17: Because the plaintiffs admit that they do not ask this court to order cash infusions into the account for lost or mismanaged funds, this case does not present an "artful pleading" problem.[see Chula Vista City Sch. Dist. v. Bennett, 824 F.2d 1573, 1579 (Fed. Cir. 1987); Motorola, Inc. v. Perry, 917 F.Supp. 43, 46 (D.D.C. 1996)] ... In the present case, the defendants claim that a cash infusion is really the gravamen of the plaintiffs' Complaint. The defendants' fear, however, is belied by the plaintiffs' express concession that they do not ask this Court to take such an action." Cobell v. Babbit, 30 F. Supp. 2d at 40 & n.17 (emphasis added).

> trust" and "made whole." Although the Complaint contains other references that could presumably lead to compensatory relief, the plaintiffs have plainly stated that they only seek an accounting, not a cash infusion. Thus, the defendants' argument supporting their motion to dismiss on this point is moot. Because the plaintiffs do not ask this Court to order the government to make cash infusions into the IIM accounts to recompense the plaintiffs for lost or mismanaged funds, but instead ask this Court solely for a declaration of the defendants' trust duties and an accounting of money already existing in the account, the Court will deem the plaintiffs' Complaint to state such a claim in that regard only.

Cobell v. Babbitt, 30 F. Supp. 2d 24, 39-40 (D.D.C. 1998) (Cobell I) (emphasis added and footnotes omitted). The Court struck language from the complaint which it found to be "clearly irrelevant to the relief the plaintiffs proclaim to seek":

> [T]he following references are stricken from the Complaint: (1) "[T]he true totals would be far greater than those amounts, but for the breaches of trust herein complained of." Plaintiffs' Complaint ¶ 2; (2) "[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries." Id. ¶ 3(d); (3) "and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted." Id. ¶ 4; (4) "Failure to exercise prudence and observe the requirements of law with respect to investment and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence." Id. 21(g).

Cobell I, 30 F. Supp. 2d at 40 n.18 (emphasis added).

In 2005, this Court reaffirmed that "[t]he plaintiffs' single 'live' cause of action seeks a remedy for this legal breach [failure to provide an accounting], and the remedy that this Court has fashioned is limited to ensuring that the defendants produce the requisite accounting of the Indian trust." Cobell v. Norton, 226 F.R.D. 67, 77 (2005). The Court noted that, "[a]s this Court has previously made clear, 'plaintiffs' substantive rights are created by – and therefore governed by – statute. Thus, to the extent plaintiffs seek relief beyond that provided by statute, their claims must be denied.'" Id. at 75 (quoting Cobell V, 91 F. Supp. 2d at 29). The Court of Appeals affirmed this point in 2006, stating that the accounting of the IIM accounts is the

"ultimate relief sought in this case" and "the ultimate relief sought by the class members." Cobell v. Kempthorne, 455 F.3d 301, 314-15 (D.C. Cir. 2006) (Cobell XVIII).

G. Plaintiffs' Renewed Efforts To Expand Their Remedies To Include Money Must Fail

Plaintiffs seek to avoid the above language from Cobell I, Cobell V, the Court's 2005 opinion, and Cobell XVIII by relying upon (1) Rule 54(c) of the Rules of Civil Procedure; and (2) selective quotes of general language within certain Cobell opinions, taken out of context. Pls. Mem. at 65-67. Those efforts should be rejected.

1. Federal Rule Of Civil Procedure 54(c) Does Not Provide A Basis For Plaintiffs' Equitable Disgorgement Claim

The previous decisions of this Court, which relied upon Plaintiffs' own representations, clearly recognize that the relief sought was not a "true accounting" as Plaintiffs now contend, Pls. Mem. at 5, and did not include "any claim for money," whether labeled as damages or some other sort of cash infusion. Cobell V, 91 F. Supp. 2d at 27 ("Plaintiffs have expressly disavowed seeking an order for the payment of money in this case. Thus, accepting defendants' "true accounting" argument as correct for the moment, plaintiffs simply do not seek every element of a "true" accounting, as that phrase was meant at common law.").

Reversing course, Plaintiffs now contend that Federal Rule of Civil Procedure 54(c) allows this Court to order the very equitable monetary relief expressly disclaimed earlier, in the form of "equitable restitution" or "equitable disgorgement." Pls. Mem. at 11 n.21. Plaintiffs' arguments stretch the application of Rule 54(c) beyond the point of reason and precedent and ignore a critical part of Rule 54, the requirement that the relief provided be based upon a claim that "entitle[s]" the party to that relief not specifically requested.

While Rule 54(c) permits the Court to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," it is also true, consistent with fundamental notions of due process and fair play, that "Rule 54(c) does not allow the district court to award relief based on a theory that was not properly raised at trial." Old Republic Ins. Co. v. Employers Reins. Corp., 144 F.3d 1077, 1080 (7th Cir. 1998). The First Circuit explained in Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168 (1st Cir. 1995):

> Rule 54(c) creates no right to relief premised on issues not presented to, and litigated before, the trier." Dopp [v. HTP Corp.], 947 F.2d 506, 518 (1st Cir. 1991); see also In re Revinius Inc., 977 F.2d 1171, 1177 (7th Cir. 1992) (holding that "Rule 54(c) does not allow a party to obtain relief based upon a . . . theory that was not properly raised at trial"); Evans Prods. Co. v. West Am. Ins. Co., 736 F.2d 920, 923-24 (3d Cir. 1984) (explaining that the rule permits relief predicted on a particular theory "only if that theory was squarely presented and litigated by the parties at some stage or other of the proceedings"); Cioffe v. Morris, 676 F.2d 539, 541 (11th Cir. 1982) (similar).

57 F.3d at 1173-74. In language directly applicable here, involving an explicit removal of certain theories of recovery at the outset of the case, the Court concluded:

> Thus, Rule 54(c)'s concern for appropriate relief does not include relief which a plaintiff has foregone because of failures in the pleadings or in the proof. See 6 James W. Moore et al., Moore's Federal Practice ¶ 54.62 (2d ed. 1985). . . . Rule 54(c) ['s] . . . safety net cannot be stretched so widely as to grant a plaintiff relief on an unpleaded theory of which the defendant had no notice.

Id.

Similarly, the Fourth Circuit explored the exception to the seeming compulsory nature of Rule 54(c), determining that "alternative relief" is not available when "granting it would be unjust." Gilbane Bldg. Co. v. Federal Reserve Bank of Richmond, 80 F.3d 895, 901 (4th Cir. 1996) (citing Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 716 (4th Cir. 1983); United States v. Marin, 651 F.2d 24, 31 (1st Cir. 1981)); accord Albemarle Paper Co. v. Moody,

422 U.S. 405, 424 (1975) ("[A] party may not be `entitled' to [Rule 54(c)] relief if its conduct of the cause has improperly and substantially prejudiced the other party."); Pinkley, Inc. v. City of Frederick, 191 F.3d 394, 400 (4th Cir. 1999). In Gilbane, relying upon the Atlantic Purchasers decision, the court determined that:

> Trebling a defendant's exposure after trial, we determined, would be unfairly prejudicial:
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> [A] substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c). We believe that this exception to the Rule is applicable in the present case.
>
> [The plaintiff]'s complaint gave no warning to [the defendant] that successful prosecution of the action could result in an award to [the plaintiff] of three times [its] actual damages. This default denied [the defendant] and its counsel the opportunity to make a realistic appraisal of the case, so that their settlement and litigation strategy could be based on knowledge and not speculation.

Gilbane, 80 F.3d at 901 (quoting from Atlantic Purchasers, 705 F.2d at at 716-17). In this case, the Plaintiffs now seek monetary relief after expressly disclaiming such a theory and accepting this Court's conforming amendments to their complaint. Allowing Plaintiffs to drastically alter their course after ten years is the very prejudice described in Gilbane and Atlantic Purchasers.

The Third Circuit, in Evans Products Co. v. West American Insurance Co., 736 F.2d 920, 923 (3d Cir. 1984), recognized that " fundamental notions of due process and fair play" limit the reach of Rule 54(c). "Put another way, relief may be based on a theory of recovery only if the theory was presented in the pleadings or tried with the express or implied consent of the parties. Monod v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969)."[11] Id., 736 F.2d at 923-24; Baker

[11] The "express or implied consent" language is embodied in Federal Rule of Civil Procedure 15(b). Rule 15(b) is often a corollary to Rule 54(c). See Int'l Harvester v. East Coast Truck, 547 F.2d 888, 890-91 (5th Cir. 1977) (trial court's granting of contract rescission was improper when not sought by the parties who had stipulated to the validity of the contract; the

v. John Morrell & Co., 266 F. Supp. 2d 909, 929-30 (N.D. Iowa 2003) (relief not specifically requested may be granted if the shift in thrust of the case does not prejudice the other party and issue were squarely presented and litigated at trial).[12] In the instant case, there clearly was no "express or implied consent" to proceeding on a theory of monetary relief based upon the complaint.

The cases cited by Plaintiffs do not support their reliance upon Rule 54(c). Pls. Mem. at 65-66. Plaintiffs' quotation from Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir. 1971) ("leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the basis of the facts proved ") is an unremarkable statement of the general rule; however, the court continued:

> There are only two limiting principles to the general rule which might avail the defendants. The first is that a remedy desired by none of the parties should not be forced upon them. [citations omitted] But that is not our case.
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> * * *
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> The one other limiting principle which might assist defendants' case is expressed

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pleadings could not have been properly amended under Rule 15(b) to include rescission and Rule 54(c) was not available because of prejudice to the defendant); see also Luria Bros. & Co., Inc. v. Alliance Assurance Co., Ltd., 780 F.2d 1082, 1088-90 (2d Cir. 1986) (citing International Harvester and reversing trial court's relief of rescission when the issues of rescission and restitution were not even discussed at trial until the court announced its decision).

[12] In USX Corp. v. Barnhart, 395 F.3d 161, 165 (3d Cir. 2004), the court appears to address the situation now presented to this Court:

> As the Advisory Committee explains, it "makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both." Fed.R.Civ.P. 54 advisory committee's note to 1937 adoption. In other words, Rule 54(c) addresses and cures a limited formal problem. It is not designed to allow plaintiffs to recover for claims they never alleged.

USX Corp., 395 F.3d at 165 (emphasis added).

in the following manner by Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962):

> If, however, it is made to appear that the failure to ask for particular relief substantially prejudiced the opposing party, Rule 54(c) does not sanction the granting of relief not prayed for in the pleadings.

Robinson, 444 F.2d at 802. Plaintiffs' citation to Dunkin' Donuts of America, Inc. v. Minerva, Inc., 956 F.2d 1566, 1575 (11th Cir. 1992), is even less helpful to them because the only discussion of Rule 54(c) in Dunkin' Donuts is in the dissenting opinion (Clark, J., concurring in part and dissenting in part). Moreover, the dissenting judge recognized the second limiting principle set forth in the Robinson case - prejudice to the opposing party. Id. That limiting principle is clearly applicable here where the Defendants are prejudiced by now having to respond to allegations and theories which Plaintiffs expressly disclaimed ten years ago to avoid jurisdictional and sovereign immunity issues.

Plaintiffs' reliance on Reynolds v. Slaughter, 541 F.2d 254 (10th Cir. 1976), and Matarese v. Moore-McCormack Lines. Inc., 158 F.2d 631 (2d Cir. 1946), is similarly misplaced. The plaintiffs there sought to recover on contract or quasi-contract theories. However, when the court found that no valid contract existed but value had been provided, the court selected restitution or unjust enrichment as appropriate remedies. Both appellate courts determined that the trial courts did not err because the proof at trial established the entitlement and the defendants were not prejudiced.

This case is not a case in which the relief now requested was "squarely presented and litigated at some stage" of the proceedings or was tried with the express or implied consent of the parties. To the contrary, Plaintiffs expressly and repeatedly disclaimed the relief now sought

when the issue was squarely presented to the Court. This Court accepted Plaintiffs' disclaimer of "any cash infusion" of lost or mismanaged monies, denied the Defendants' dispositive motions and struck from the Complaint the language that might support assertions that monetary relief was being sought. Before the Court can grant "alternative relief" under Rule 54(c), there must be an "entitlement" to that relief based upon the complaint or agreed upon modifications. This critical element is lacking here by Plaintiffs' own design. Because Rule 54(c) does not permit a litigant at the end of a proceeding to obtain the very relief previously disclaimed to defeat a motion to dismiss, Plaintiffs' reliance on Rule 54(c) fails.

2. Plaintiffs' Selected Citations From Certain Cobell Decisions Do Not Support An Equitable Disgorgement Claim

Plaintiffs' reliance upon selected quotations from Cobell I and Cobell VI is particularly misplaced. Plaintiffs quote this Court in Cobell I as stating generally that "to the extent that the plaintiffs state a claim for equitable relief for breach of trust duties, the defendant's motion for judgment on the pleadings must be denied." Pls. Mem. at 67 (quoting Cobell I at 33). Plaintiffs ignore that, in subsequent portions of the Court's decision, the Court unequivocally determined that "the retrospective allegations of the Complaint seek solely an accounting." Id. at 39.

Plaintiffs also quote the Court of Appeals in Cobell VI, wherein the court cited general tenets related to equitable remedies and stated more specifically that this Court "has substantial ability to order that relief which is necessary to cure the appellants' legal transgressions," and that this Court was "justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights." Cobell VI, 240 F.3d at 1108. Plaintiffs fail to acknowledge, however, that the only equitable remedy that was addressed by the Court of Appeals was the historical accounting.

No consideration was given to paying Plaintiffs money as an appropriate equitable remedy.

Indeed, the only discussion in Cobell VI regarding the payment of money in an Indian case was the observation that the courts have "repeatedly recognized the right of Native Americans to seek relief for breaches of fiduciary obligations, including suits for monetary damages under the Tucker Act where prospective remedies would be inadequate." Id. at 1104, 1107 (citing Mitchell II) (emphasis added)). The court correctly noted that Mitchell II involved the award of monetary relief not as an equitable remedy, but as "monetary damages where injunctive or declaratory relief would be insufficient. Mitchell II, 463 U.S. at 227." Cobell VI, 240 F.3d at 1108 (emphasis added). Significantly, the Court of Appeals in Cobell VI concluded that this court "should (and did) remand to the agency for the proper discharge of its obligations . . . " Id. at 1109.

Thus, the court's general language in Cobell VI regarding equitable remedies, read in context with the issues then before it and the fact that the court's decision did not even address equitable monetary relief, provides no support for an award of equitable restitution and disgorgement. As this Court summarized in 2005, "the remedy that this Court has fashioned is limited to ensuring that the defendants produce the requisite accounting of the Indian trust. Nothing in the Cobell VI Opinion can be construed to broaden the scope of this case to include issues unrelated to the defendants' obligation to provide an accounting of the trust . . . ." 226 F.R.D. at 77 (emphasis added). The Court of Appeals affirmed this point in 2006, stating plainly that the accounting of the IIM accounts is the "ultimate relief sought in this case" and "the

ultimate relief sought by the class members." Cobell XVIII, 455 F.3d at 314-15.[13]

Finally, Plaintiffs assert that the Court of Appeals "expressly reserved the right of this Court to address the impossibility of an accounting" in Cobell XVII, 428 F.3d at 1077. This is a misstatement. What the D.C. Circuit actually stated was:

> Under these circumstances, the district court abused its discretion by reissuing the injunction. We reach this conclusion without prejudice to plaintiffs' argument on appeal that execution of the reissued injunction is impossible . . .

Id. This holding only clarifies that the Court of Appeals did not rule upon Plaintiffs' impossibility argument regarding "the reissued injunction." It obviously did not address, let alone "expressly reserve," this Court's authority to entertain an equitable disgorgement claim based upon a conclusion that the accounting is impossible due to inadequate appropriations. Thus, Plaintiffs have presented no basis for this Court to award equitable disgorgement. The law of this case dictates just the opposite.[14]

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[13] To the extent the Court of Appeals has considered monetary relief in this case, it has expressed grave skepticism. See Excerpt, Appellate Oral Argument Transcript, at 41:23-58:5 (Sept. 16, 2005), included as Exhibit 1 filed contemporaneously with this memorandum..

[14] Defendants argued in their June 13, 2007 brief that the doctrine of judicial estoppel bars Plaintiffs from seeking monetary relief. Defendants' Responding Brief Regarding The Scope Of The October 10, 2007 Hearing [Dkt 3339], at 7-11. That argument is still valid. Because they previously persuaded the Court that they were not seeking an order for the payment of money and obtained favorable decisions on Defendants' dispositive motions as a result, they are now estopped from asserting the remedies of equitable restitution and disgorgement as substitutes for the accounting requested in their complaint. New Hampshire v. Maine, 532 U.S. 742, 748 (2001) (generally, rule of judicial estoppel prevents a party from prevailing in one aspect of a case on an argument and then relying on a contradictory argument to prevail in another aspect). In New Hampshire v. Maine, the Supreme Court identified three factors typically requiring judicial estoppel: (1) the party's later position is clearly inconsistent with the earlier position; (2) the party succeeded in persuading the court to accept the party's earlier position so the acceptance of the inconsistent position would create the perception that either the first or second court was misled; and (3) the party asserting the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opposing party if not

II. The Court's Impossibility Holding Does Not Justify Equitable Disgorgement Based Upon Aggregate Throughput Figures

In the Court's January 30, 2008 Findings of Fact and Conclusions of Law, Cobell v. Kempthorne, 532 F. Supp. 2d 37 (D.D.C. 2008) (Cobell XX), the Court concluded that Congress' "refusal to appropriate enough money" to pay for the historical accounting that the Court found legally required[15] "render[s] a real accounting impossible – or, perhaps, [ ] recognize[s] that such an accounting is impossible, unless it is 'nuts' enough to pay more than $3 billion to hunt down perhaps $3 billion of unexplained variances in the government's accounts."[16] Cobell XX at 102. The Court then stated that its conclusion that "Interior is unable

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estopped. As explained throughout this brief, those factors have all been met.

[15] Defendants respectfully note that the United States continues to hold a more limited view of the accounting obligation than the Court has articulated. Neither the 1994 Act nor common law trust principles specify the requirements for the accounting. See Cobell XVII, 428 F.3d at 1076 ("[N]either congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost."). Thus, the D.C. Circuit confirmed that

> the district court owe[s] substantial deference to Interior's plan. The choices at issue require[] both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators.

Id. In the final analysis, Cobell XVII confirms that the Secretary is entitled to substantial deference as to his decisions about allocating resources required to satisfy the accounting requirements of the 1994 Act and assembling the ledger of account transactions constituting that accounting.

[16] Defendants respectfully disagree with the Court's conclusions as to the scope of the accounting required by the 1994 Act, as well as the holding of impossibility that resulted from those conclusions. Even assuming that the Court was correct as to the "plain meaning" of the 1994 Act, a point with which we disagree, that plain meaning should not have led to the conclusion that Interior's efforts to implement the Act are futile. See Alabama Power Co. v. Costle, 636 F.2d 323, 360 n.89 (D.C.Cir. 1980), quoting United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1939), and citing District of Columbia v. Orleans, 406 F.2d 957, 959 (D.C. Cir. 1968) (recognizing the tenet of statutory construction that, notwithstanding the "plain

to perform an adequate accounting of the IIM trust does not mean that a just resolution of this case is hopeless. It does mean that a remedy must be found . . . ." Id. at 103. At a March 5, 2008, status conference regarding "an appropriate remedy," id., this Court invited Plaintiffs to file, for the first time ever, "a written claim for equitable disgorgement." March 5, 2008, Status Conference Transcript (Tr.) at 40. As explained below, entitlement to equitable disgorgement does not follow from the Court's impossibility holding and should not be based upon an aggregate throughput analysis in any event. Accordingly, Plaintiffs' claim should be denied and the trial scheduled for June 9, 2008 cancelled.

A. Interior's Ability To Perform An Aggregate Throughput Analysis Of All Funds Collected Is Not Relevant To What Remedy Is Available To Plaintiffs

As found in Cobell VI, the 1994 Act placed a statutory obligation upon Interior to perform individual historical accountings for thousands of individual trust accounts. The 1994 Act does not require, nor for the past eleven years did this litigation address, an aggregate throughput analysis by Interior of all funds ever collected by the agency but that were not posted to IIM accounts. See 25 U.S.C. § 162a(d) (the Interior Secretary shall prepare and provide "periodic statements of . . . account performance" and balances to individual account holders); Cobell v. Norton, 428 F.3d 1070, 1073-78 (D.C. Cir. 2005) (Cobell XVII) (addressing the scope of the accounting to be conducted on individual accounts of beneficiaries). In fact, Defendants twice proposed and were twice enjoined to perform an individual-by-individual, not aggregate, accounting. Because of this history, it is fundamentally unfair to attempt to now devise an

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meaning" of a statute, a court must look beyond the words to the purpose of the act where its literal terms lead to "absurd or futile results"). For the purpose of this brief, however, we do not further challenge those conclusions but address the consequences that flow from them.

equitable remedy based upon aggregate throughput figures. Despite that, Plaintiffs' arguments for equitable disgorgement are clearly based upon such an analysis.

The Court has itself suggested that an aggregate throughput analysis, rather than the completion of individual accountings for individual IIM accounts, may be appropriate. In 2007, for the first time in this case, the Court required that issues related to "throughput" be addressed as part of an evidentiary proceeding. June 18, 2007 Status Conference, Tr. 68-69. In its January 30 opinion, the Court identified "core questions" as to whether the aggregate information demonstrates "how many of the total dollars are accounted for in some way," and "whether the work done so far permits any reliable estimate of the difference (if any) between dollars in and dollars out." Cobell XX at 82. After receiving evidence on this "throughput" at the October 2007 hearing, the Court opined that "[t]he response of both parties to the throughput question can best be described as desultory." Id.

The Court appears now to be extending further the paradigm of an aggregate throughput analysis of all funds to the remedies phase of this case. In its January 30 opinion, the Court focused upon "$3 billion of unexplained variances in the government's account," and observed that Defendants' throughput estimate appeared "to show an expected shortfall of about $3 billion between receipts and postings." Id. at 86. The Court also found that the data contained in AR-171 "provide only a starting point in assessing the size of the IIM trust fund that cannot be accounted for." Cobell XX at 84. As established below in Part IV, supra, the approximately $3 billion difference between all funds collected by Interior and those funds posted to IIM accounts does not constitute a "shortfall" or "variances in the government's account." Irrespective of that fact, there is no factual reason for making an aggregate throughput analysis the predicate of a

monetary claim.

The throughput data Defendants compiled comprises aggregate information; it does not reflect upon the adequacy of historical accounting of individual accounts or serve as a basis to analyze any monetary remedy to Plaintiffs. Id. at 102. Indeed, there is a rational reason for the limited evidence the parties were able to present during the October, 2007 trial regarding the total amount of funds that have passed through the IIM and related accounts over the past 100 years or more. Simply put, the administration of IIM accounts has never been performed on an aggregate level, where aggregate dollar amounts were compiled and reconciled nationally. As the Court recognized, IIM accounts throughout history have been administered on an individual-by-individual basis, first in local offices and then, most recently, through the work of OHTA and its contractors. Cobell XX at 83; October 24, 2007 Tr. at 1917:6-10 (Fitzgerald). Aggregated IIM account data exists only to a limited extent and has not been readily available. This does not reflect a failure on the part of the Government; accounting data are compiled to serve identified needs, and the accounting duty at issue in this case pertains to the provision of statements of account to individual account holders. The 1994 Act did not mandate the provision of an aggregate trust accounting statement.

No consolidated IIM trust exists. Rather, there are hundreds of thousands of individual trusts. October 24, 2007 Tr. 1919:11-23 (Fitzgerald). An individual beneficiary of a commingled trust can receive a full accounting without an accounting of the entire trust, much as banks provide with common trust funds. Id. at 1929:18-24. Furthermore, while each beneficiary is entitled to enforce his or her accounting right, no individual has the right to an accounting of all other beneficiaries' money. Id. at 1919:24-1920:5. Accordingly, the 1994 Act contemplates

an accounting for individual beneficiaries, 25 U.S.C. § 162a, and Interior has spent over $127 million working for years on an individual-by-individual historical accounting, to present individual beneficiaries with transactional data regarding their particular IIM accounts. It is this accounting, and not an aggregate throughput analysis of all funds received by Interior, that is the subject of the 1994 Act and this case. Indeed, the Court twice issued detailed structural injunctions directing how Interior should proceed in accounting for the individual accounts based upon the plan Interior submitted as ordered by the Court. An aggregate throughput analysis of funds including those that have not been posted to IIM accounts thus falls outside the scope of this case.

To now require Interior to redirect its focus and perform an aggregate throughput analysis in a matter of months is unreasonable and will not lead to information related to the required historical accounting and is not a duty required by the 1994 Act or any other statute. To the extent the available "throughput" evidence has any relevance, it is only to gauge the magnitude and cost of the total historical accounting project for IIM funds. See e.g., AR 641, July, 2002 Report to Congress at 29. However, a consolidated throughput analysis of all collections would not represent the sum of the individual accountings performed for individual plaintiffs. For example, an aggregate accounting would be greater than the sum of the individual accountings which the Court possesses the jurisdiction to monitor because, among other things, it would encompass accounts maintained for individuals who have long since passed away and have no representatives among the plaintiff class. See Cobell XX at 98 (a statutory right exists for IIM beneficiaries living as of October 25, 1994). It would also include throughput related to previous judgments and settlements which would have to be netted out to preclude double

payments. E.g., United States v. Mitchell, 463 U.S. 206 (1983). Therefore, as a measure of equitable restitution or what ought to be "disgorged," an aggregate throughput analysis is not probative because it merely provides a rough estimate applicable to the entire class – plus a large number of persons outside the class – but not to individual account holders.

B. The Court's Impossibility Holding Does Not Lead To Consideration Of, Or Justify, A Monetary Payment To Plaintiffs

Plaintiffs appear to assume that the Court's conclusion that it will be impossible for Interior to complete the entire historical accounting because of inadequate congressional funding somehow leads directly to monetary relief as "an appropriate remedy." That assumption is unfounded. Indeed, Plaintiffs have cited no case in which a conclusion of impossibility due to inadequate congressional funding has resulted in the disgorgement of money in an APA case. Rather than a multi-billion dollar monetary award which the 1994 Act never contemplated, the Court's conclusion of impossibility can lead to only two appropriate outcomes: (1) Interior continues to perform the best accounting practicable with the Court retaining jurisdiction to monitor the agency to assure that it is proceeding as diligently as possible with the appropriations provided by Congress; or (2) the case is dismissed because the complete relief sought is now impossible to receive and, thus, unattainable.

Regarding the first outcome, a conclusion of impossibility due to inadequate congressional appropriations does not automatically eliminate a federal agency's duty to perform its statutory obligations. See Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) (although impossibility due to inadequate resources serves as a defense against a charge of contempt, it does not relieve a federal agency from performing its statutory obligations); cf.

Cobell V, 91 F. Supp. 2d. at 48 (lack of congressional funding cannot impair the trustee-delegates' fiduciary duties). Here, the Court of Appeals' determination in Cobell VI that the 1994 Act obligates Interior to perform a historical accounting is still the law of the case. 240 F.3d at 1102-04. In addition, Congress has continued to appropriate millions of dollars for the preparation of individual historical accountings.[17] See Cobell XX, 532 F. Supp. 2d at 58. Furthermore, the Court's January 30 opinion did not order Interior to cease performing its historical accounting work.

Because its obligation to conduct the accounting has not ceased, Interior is still performing historical accounting work. While Interior continues to perform its accounting work Congress will determine whether to dedicate appropriations to cover the cost. The Court assumed that Congress would not appropriate such funds. However, it is up to Congress to decide how to react to the Court's conclusions. In re Complaint of Nautilus Motor Tank Co., 85 F.3d 105, 113 n.10 (3rd Cir. 1996) ("[O]ur role is not to anticipate legislative developments."). As of now, the historical accounting – not monetary relief – is the only remedy contemplated by

[17] Defendants respectfully disagree with the Court's conclusion that the appropriation bills that have followed passage of the 1994 Act have not "amended" the requirements of the 1994 Act. Cobell XX at 102. First, without even considering whether the bills could be viewed as implicitly modifying the 1994 Act, the Court of Appeals has made it clear that a determination as to what the original 1994 Act requires cannot be made without consideration of subsequent appropriation bills because the appropriations "unequivocally control what may be spent on historical-accounting activities during the period of their applicability." Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005). Second, where the vitality of a statute, here the 1994 Act, depends on subsequent appropriations bills, the appropriations bills can be viewed as implicitly modifying the statute. Friends of the Earth v. Armstrong, 485 F.2d 1, 7-8 (10th Cir. 1973).

Congress and available to Plaintiffs under the 1994 Act.[18]

The second possible outcome, dismissal of the case, is an unavoidable result of the Court's conclusion that the historical accounting required by law is impossible. As explained above, the only remedy available to Plaintiffs is the historical accounting. If the Court's conclusion of impossibility is correct, Plaintiffs' only live claim has been rendered unattainable. Dismissal would, therefore, be warranted. See Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002), citing 5A Wright & Miller, Federal Practice and Procedure § 1357, at 347-48 (2d ed. 1990) ("dismissal is appropriate where the allegations contradict the claim asserted"); see also In re Barr Lab., Inc., 930 F.2d 72 (D.C. Cir. 1991) (writ of mandamus denied where agency's inadequate resources led to Congress' goals being unfulfilled and the court did not have the power to remedy those resource problems); accord Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1116 (D.C. Cir. 2000) (It is "possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.").

C. The Doctrine Of Laches And The Statute Of Limitations Bar Claims For Equitable Restitution And Disgorgement

Plaintiffs' new claim for equitable restitution and disgorgement relies upon an aggregate throughput analysis of funds dating back more than a century to the beginning of the earliest IIM accounts, together with an assertion of repudiation, but these very assertions raise a bar to the relief under the doctrine of laches, as well as the applicable statute of limitations.

Laches applies where a plaintiff has unfairly and prejudicially delayed bringing a claim.

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[18] Plaintiffs have been urging the Court to grant equitable monetary relief since 2003, but neither this Court nor the D.C. Circuit has wavered in holding that the accounting is the "ultimate relief sought in this case." Cobell XVIII, 455 F.3d at 314-15.

CarrAmerica Realty Corp. v. Kaidanow, 321 F.3d 165, 171 (D.C. Cir. 2003). The rationale for this defense is settled:

> As claims become increasingly stale, pertinent evidence becomes lost; equitable boundaries blur as defendants invest capital and labor into their claimed property; and plaintiffs gain the unfair advantage of hindsight, while defendants suffer the disadvantage of an uncertain future outcome.

Id. (quoting NAACP v. NAACP Legal Def. & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)). That rationale is especially applicable here.

Plaintiffs, after years of disclaiming anything but an accounting, now demand at least $58 billion in monetary relief divorced from any accounting. This claim comes after nearly twelve years of litigation and millions of tax dollars appropriated and spent to conduct historical accountings and prepare statements of account for IIM account holders to address Plaintiffs' original demand for IIM accountings. The record in this case is replete with allegations of the government's failure to render full statements of account to IIM account holders. Plaintiffs accordingly elected over a decade ago to forego monetary relief in favor of injunctive relief seeking improvements in individual accounts administration and individual accountings for all class members. The Court approved the injunctive-relief-only limitation and the government relied upon it.

Plaintiffs' current, cumulative remedy, however, presumes a duty existed to keep meticulous records of the gross flow of funds through the entire IIM system from the first day that IIM flowed to account holders. If account holders or a class thereof believed that their funds were wrongfully diverted (or their lands were wrongfully alienated) on a wholesale basis, claims could have been brought many years ago, and Interior could have assembled records to defend

against such a macro-level claim. It certainly is too late now to assert such a claim.

The unfairness of Plaintiffs' mass claim and the prejudice to Defendants are apparent. Interior maintained a decentralized record keeping system for decades, a fact presumably known to Plaintiffs. But now, Plaintiffs demand a cumulative statement of transactions. Had Plaintiffs provided timely notice of their most recent theory, Interior's recordkeeping practices might have been modified decades ago. Just since the filing of this action, Interior has spent over $127 million and years collecting, coding, imaging, and utilizing documents containing transactional information regarding the accounts of individual Indians, in an effort to reconcile individual transactions within their accounts. Interior has not engaged, until very recently, in an examination of aggregate throughput numbers regarding the overall funds collected. Different documents could have been searched, and different data could have been compiled and analyzed. After over eleven years of litigation (much less the decades that preceded the filing of this action), it is difficult to assess the extent of the harm more clearly. What is clear, however, is that to have less than a year to collect throughput data on an aggregate basis is prejudicial to Defendants' defense of this monetary claim.

Defendants are now left to refocus their efforts and accounting resources on the paradigm shift precipitated by Plaintiffs' mass restitution and disgorgement claim, while still performing their statutory duty to account, which would hand to Plaintiffs the "unfair advantage of hindsight." CarrAmerica Realty Corp., 321 F.3d at 171. Indeed, Plaintiffs now argue that it is up to Defendants to prove the reasonableness of each and every transaction, including the disposition of real property, completed over more than a century. Pls. Mem. at 22. Laches is meant to prevent such unfairness and should, therefore, bar Plaintiffs' monetary claim.

In addition, the Court earlier in this case denied Defendants' motions to dismiss and for partial summary judgment, which were based upon the argument that Plaintiffs' claims were barred by the statute of limitations and the doctrine of laches. In rejecting those arguments, the Court ruled that laches was inapplicable and the statute of limitations could not run because Plaintiffs did not allege in their complaint, nor did Defendants establish, that Defendants had repudiated their trust obligations. Cobell v. Norton, 260 F. Supp. 2d 98, 108-10 (D.D.C. 2003); Cobell I, 30 F. Supp. 2d at 45.

Plaintiffs now contend, as discussed below, that Defendants repudiated their duty to account. E.g., Pls. Mem. at 1, 13. Should the Court agree that Defendants repudiated their accounting duty and also determine that this somehow constitutes repudiation of the trust, the doctrine of laches would bar Plaintiffs' claims pursuant to the prior rulings of this Court. Plaintiffs do not identify when the alleged repudiation took place. However, because Plaintiffs appear to base their repudiation claim clearly upon the absence of a comprehensive historical accounting, the claimed repudiation would have occurred decades ago.

Plaintiffs' assertion that there has been a repudiation and their new theory of liability revive the statute of limitations defense as another basis on which to conclude that their new remedy is prohibited because the claim is stale, as a matter of law. This Court has considered the limitation bar in deciding a summary judgment motion Defendants asserted prior to the Phase 1.5 trial in early 2003. Cobell v. Norton, 260 F. Supp. 2d 98 (D.D.C. 2003). There the Court stated that "[b]ecause plaintiffs have alleged claims for relief against the United States, their claims are barred by the statute of limitations if they were not brought within six years after their right of action accrued." Id. at 103. This determination rests on the limitations provision in 28 U.S.C.

§ 2401(a), and the Court, therefore, recognized that the "key issue thus becomes whether plaintiffs' claims have 'accrued' for purposes of 28 U.S.C. § 2401(a)." Id. at 104. The Court concluded, however, that the statute did not begin to run until the trustee has repudiated the trust. Id. at 107. The Court found no basis for finding repudiation, and hence, a limitation bar, at the summary judgment stage. Now, however, Plaintiff concede the matter of repudiation, which substantially alters the circumstances under which the Court previously examined the limitations question. As a result, any monetary remedy must be correspondingly limited to six years from the date by which Plaintiffs knew or should have known of the alleged breaches of trust on which the new money remedy is based.[19]

III. Plaintiffs Cannot Pursue Monetary Relief On Behalf Of The Certified Class

The class representatives urge that an unprecedented election be approved by the Court – on behalf of hundreds of thousands of IIM account holders – effectively forcing these individuals to forego their accounting right as defined by the Court to instead pursue an alternate claim for money. Even more striking is Plaintiffs' suggestion that such a monumental surrender of the accounting rights be ordered, without even letting class members have a say in how such a decision would affect them or what benefit they might receive in this "bargain," for as the class is certified, all class members will be involuntarily bound to the class outcome. Partly because of these serious ramifications, the rules governing class actions prohibit the class remedy Plaintiffs seek.

Plaintiffs' effort to couch the multi-billion dollar monetary claim in the fiction of an

[19] At this juncture, Defendants accept the repudiation requirement as law of the case but respectfully note their continued belief that repudiation need not occur for the statute to run.

equitable recovery does not alter the hard truth that such a monetary remedy is not available in this class action. This case is certified to proceed as a class action under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2). Under these provisions, Plaintiffs are limited to common declarative or injunctive relief. As the D.C. Circuit recently observed, "[a] court may certify a class pursuant to Rule 23(b)(2) only when 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.'" Richards v. Delta Air Lines, Inc., 453 F.3d 525, 530 (D.C. Cir. 2006) (quoting Fed. R. Civ. P. 23(b)(2)). Rule 23(b)(1)(A) has a similarly limited focus, and Plaintiffs identify no lesser standard under that subdivision for the remedy they seek.[20] To the extent Plaintiffs now abandon their remedy of a common order for specific performance of an accounting and pursue a substitute remedy involving the recovery of money, their new remedy is unavailable to this class.

It makes no difference whether Plaintiffs label their remedy as seeking money damages, equitable restitution, or disgorgement. The relief they seek now is unavailable because: (1) it abandons the injunctive relief that underpins and justified the original basis for class certification; (2) it replaces a demand for common injunctive relief with a claim that is

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[20] "Rule 23(b)(1)(A) takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (quotation and citations omitted). This subdivision of Rule 23 is not intended to address potential inconsistent damages awards. E.g., In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1545 (11th Cir. 1987) ("Many courts . . . have held that Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages . . . reason[ing] that inconsistent standards for future conduct are not created because a defendant might be found liable to some plaintiffs and not to others.").

predominantly one for monetary relief; and (3) the remedy sought is neither common across the class nor one in which all class members share an undivided interest. As demonstrated below, these defects raise substantial concerns under the Rules Enabling Act and the Constitution and foreclose Plaintiffs' class monetary remedy.

A. The Class Certification Order Entered In This Case Limits Plaintiffs To Declaratory Or Injunctive Relief

Plaintiffs' class complaint and the long history since its filing limit the persons who can obtain a remedy and the type of remedy the Court can order. The complaint, as already noted, see, infra, Part I, was stripped of all claims for a money award and was deliberately limited to obtaining specific performance of the accounting for IIM funds to members of the certified class. This injunctive-relief-only configuration also affected the way the case was certified as a class action under Federal Rule of Civil Procedure 23. When the Court granted certification over a decade ago, it "granted leave to proceed as a class action under Rule 23(b)(1)(A) and (b)(2) of the Federal Rules of Civil Procedure." Order of February 4, 1997, at 2 [Dkt. 27]. The class was never certified to seek money damages under Rule 23(b)(3) of the Federal Rules, nor was such a consideration necessary. Plaintiffs pressed for specific performance of the accounting until this Court determined on January 30, 2008, as a matter of law, that the remedy of providing the accounting to each class member is impossible, and the Court has now embarked on exploration of available alternative or substitute remedies. As this class is now structured, however, the Court may not award a monetary recovery, whether labeled equitable relief or damages.

1. Plaintiffs' Request For Monetary Relief Obligates The Court To Reconsider Class Treatment

At a minimum, the remedy now sought would require recertification of the class under

Rule 23(b)(3). Plaintiffs, however, have neither moved to amend the class certification order nor made any showing of eligibility for certification under Rule 23(b)(3). "[A] class plaintiff has the burden of showing that the requirements of Rule 23(a) are met and that the class is maintainable pursuant to one of Rule 23(b)'s subdivisions." Richards, 453 F.3d at 529 (citing Amchem, 521 U.S. at 613-14; Love v. Johanns, 439 F.3d 723, 727 (D.C. Cir. 2006); McCarthy v. Kleindienst, 741 F.2d 1406, 1414 n.9 (D.C. Cir. 1984)). In light of the substantial recharacterization of the remedy now sought and Plaintiffs' failure to move for certification under Rule 23(b)(3), with proof of eligibility thereunder, the multi-billion dollar remedy they seek is unavailable.[21] Cf. Disability Rights Council v. WMATA, 239 F.R.D. 9, 29 (D.D.C. 2006) (a general conclusion that plaintiffs' claims "fall within the stated parameters of Rule 23(b) does not end the certification inquiry").

This required reexamination of amenability to class treatment is not a mere procedural nicety.[22] The Supreme Court has cautioned that even when settling a class action, "of overriding importance, courts must be mindful that the Rule [23] as now composed sets the requirements

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[21] Plaintiffs tacitly concede the issue by arguing, in the alternative, that the problem can be ameliorated by giving class notice prior to a remedies trial. Pls. Mem. at 64. Notice to the class and a right of opt-out, however, do not remove the fundamental individual issues and inherently conflicting interests across the class that the Court needs to examine. Indeed, proper consideration of class certification in the face of Plaintiffs' monetary remedy would most likely lead to decertification.

[22] When the Court considered and certified the case as a class action in February 1997, the Court did not have the benefit of the D.C. Circuit's seminal decision in Eubanks v. Billington, 110 F.3d 87 (D.D.C. 1997) to guide it. (Eubanks was not handed down until June 1997.) This circumstance makes it all the more critical that the Court reexamine the propriety of continued class certification in the face of Plaintiffs' request for a monetary award. See Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998) (vacating as an abuse of discretion a Rule 23(b)(2) class certification order permitting opt-outs from consent decree and remanding for further consideration in light of D.C. Circuit's subsequent decision in Eubanks).

they are bound to enforce." Amchem, 521 U.S. at 620. This requirement serves multiple fundamental and substantive purposes. One, the Court must protect the due process rights of unnamed class members who would otherwise be involuntarily bound to any alternative remedy that might be imposed, without their knowledge or consent. See generally Ortiz v. Fibreboard, 527 U.S. 815, 847 (1999) (noting the "inherent tension between representative suits and the day-in-court ideal" of due process). Two, the judicial interest in finality of judgments can be at risk and a defendant placed in jeopardy of piecemeal litigation if the class procedure is not properly observed. In re Veneman, 309 F.3d 789, 796 (D.C. Cir. 2002) ("The drafters of the 1966 amendments, which gave rise to the rule as we know it today, were concerned with the binding effect of class actions and . . . drafted the rule to clarify that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class.") (quotation omitted).[23]

2. The "Mandatory" Nature Of The Present Class Limits Available Remedies

The class as presently certified is "mandatory," meaning that no IIM account holder can opt out and every account holder falling within the class definition will be bound involuntarily by whatever final judgment the Court enters. "Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory . . . [class] action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless of either their

[23] The Court of Appeals in Veneman further recognized that a "defendant in such an action has a right ('standing') to demand that adequate notice be given to class members, so as to avoid a situation where the defendant would be bound by a loss yet class members would not be bound by its win." Id. at 795.

consent, or, in a class with objectors, their express wish to the contrary." Ortiz, 527 U.S. at 846 (certification of a mandatory class that includes a claim for monetary relief may compromise individual class members' due process and Seventh Amendment rights). Indeed, the Supreme Court has stated that it is at least a "substantial possibility" that class actions seeking money damages can only be certified under Rule 23(b)(3)." Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (per curiam) (dismissing certiorari as improvidently granted). Mindful of these substantial concerns, the D.C. Circuit has held that "where both injunctive and monetary relief are sought, the need to protect the rights of individual class members may necessitate procedural protections beyond those ordinarily provided under (b)(1) and (b)(2)." Eubanks v. Billington, 110 F.3d 87, 95 (D.D.C. 1997); accord Disability Rights Council, 239 F.R.D. at 29. Here, however, the very nature of the remedy Plaintiffs now advocate lies well beyond anything contemplated under subdivision (b)(1) or (b)(2).

This difference is rooted in the fact that Rule 23(b)(1) and (b)(2) were designed to serve different situations than Rule 23(b)(3), not the least of which is the presumption of a unitary, undivided interest of all class members in the outcome. Rule 23(b)(1)(A) addresses situations in which it is preferable for the defendant to have one standardized duty as to an identified class of persons. This provision was originally invoked to support class certification here, for example, because it is in the public interest for the government to have one consistent standard applied to its duty to account under the 1994 Act. The very purpose of this provision – establishing uniform conduct – is immaterial to and actually conflicts with individual consideration of each IIM account holder's funds and identifying which accounts, if any, have conferred an unjust enrichment upon the government because, under Plaintiffs' theory, it cannot provide a full

statement of account as defined by the Court. Monetary relief is completely at odds with this purpose.[24] In Ortiz, the Supreme Court held that the sister provision in subdivision (b)(1)(B) cannot support division of a class settlement fund because the considerations behind the fund conflicted with the purpose behind that subdivision of Rule 23. Ortiz, 527 U.S. at 818.

3. Rule 23(b)(1)(A) Certification Does Not Contemplate Monetary Relief

Plaintiffs assert, Pls. Mem. at 51, that the court in Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997), found monetary relief available under Rule 23(b)(1)(A).[25] They are wrong. Eubanks involved only a class certified under Rule 23(b)(2) and so did not have occasion to address or apply Rule 23(b)(1). The D.C. Circuit has not squarely addressed whether monetary relief is ever available under Rule 23(b)(1)(A), and other circuits have reached differing conclusions. Some courts have held that, unlike Rule 23(b)(2), monetary relief is very rarely, if ever, appropriate to a Rule 23(b)(1)(A) class. See, e.g., Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.10 (9th Cir. 1976) ("Infrequently, if ever will [Rule 23(b)(1)(A) be satisfied] when the action is for money damages."). The Manual for Complex Litigation omits mention of Rule 23(b)(1) in addressing monetary considerations in class certification decisions. See Manual for Complex Litigation

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[24] See, supra, note 20.

[25] In their Memorandum, Plaintiffs attribute a verbatim statement to the D.C. Circuit in Eubanks that simply does not exist. At pages 51-52, Plaintiffs state that monetary relief is allowed in "actions under Rule 23(b)(1) or (b)(2) where the 'awards are either (1) equitable in nature or (2) secondary or ancillary to the general scheme of injunctive or declaratory relief sought by the plaintiffs.' Eubanks, 110 F.3d at 92." The purported quotation from Eubanks, however, cannot be found anywhere in that case, nor have we found any similar language in any other case decided in this Circuit.

§ 21.221 (2005) ("A class action seeking injunctive and declaratory relief may also include a claim for monetary relief, and the judge must decide whether a class should be certified under Rule 23(b)(2) or (b)(3).").

As Plaintiffs do not contend that the remedy permitted under subdivision (b)(1)(A) is any broader or that its requirements for monetary relief are more liberal or flexible than under subdivision (b)(2), we focus on the standards for Rule 23(b)(2) certification, where the case law is more fully developed in this Circuit and elsewhere. If the remedy Plaintiffs now seek is unavailable to them as a Rule 23(b)(2) class, it is also foreclosed under Rule 23(b)(1)(A). See generally Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1193 (9th Cir. 2001) (rejecting Rule 23(b)(1)(A) class where medical monitoring remedy sought primarily monetary relief).

4. Plaintiffs' Disgorgement Theory Is Incompatible With Rule 23(b)(2)

Rule 23(b)(2) provides some limited availability for an incidental award of money when it is a complement to the main injunctive or declaratory relief. Such circumstances do not exist here. This subdivision is especially suited to "[c]ivil rights cases against parties charged with unlawful, class-based discrimination." Amchem, 521 U.S. at 614. "According to the Advisory Committee Notes, however, (b)(2) certification is not proper where 'the appropriate final relief relates exclusively or predominantly to money damages.'" In re Veneman, 309 F.3d at 792 (quoting committee notes).[26] For a Rule 23(b)(2) class to be appropriate for monetary relief, however, the award should be calculable mechanically, address the class as a whole, and not predominate over the injunctive or declaratory relief that made certification under Rule 23(b)(2)

[26] Such monetary awards often arise in employment discrimination cases, see Manual for Complex Litigation § 21.221, where matters such as back pay are an incident of an injunction ordering reinstatement. This is not such a case.

appropriate at the outset. See Manual for Complex Litigation § 21.221. None of these requisites exists here.

a. Claiming The Remedy Is "Equitable" Does Not Affect The Analysis

In determining whether subdivision (b)(2) applies to a case in the face of a request for monetary relief, it does not matter whether Plaintiffs label their new monetary claim as equitable restitution or disgorgement of unjust enrichment (even though it is, at bottom, really a damages claim).[27] As the Fourth Circuit recently held, "[t]he text of Rule 23(b)(2) says nothing whatsoever about equitable relief, but authorizes class treatment only when the plaintiff seeks predominantly 'injunctive' or 'declaratory' relief." Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 331 (4th Cir. 2006) (denial of class certification proper where insureds sought restitution of paid premiums) (citations omitted). "To be sure, injunctive and declaratory relief are equitable remedies. But if the Rule's drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so." Id. (citations omitted). The Rule in this Circuit is no different. Eubanks, 110 F.3d at 95 ("That back pay is characterized as a form of 'equitable relief'. . . does not undercut the fact that variations in individual class members' monetary claims may lead to divergences of interest that make unitary representation of a class

[27] In affirming the denial of a certified class for claimed equitable relief in Richards v. Delta Air Lines, Inc., the Court of Appeals recognized that "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." 453 F.3d at 530-31 (quoting Knudson, 534 U.S. at 210).

problematic" under 23(b)(2)).[28] Thus, the first consideration is not its legal or equitable name but whether the relief is monetary, and if so, whether it predominates over the injunctive or declaratory relief sought.

Here, Plaintiffs expressly elect an alternate remedy seeking money, Pls. Mem. at 3 ("plaintiffs may elect such remedies to vindicate their rights"), over the specific performance of a full accounting, effectively abandoning the very relief upon which their eligibility for class treatment rests under Rule 23(b)(2). By this election, Plaintiffs give predominance to the monetary remedy. This choice is made by four individual class representatives, but the consequences of their decision – with no notice or right of opt out – would forever alter the entitlement of more than 300,000 other account holders to the accounting for IIM funds that lies at the heart of this litigation. The significance and finality of this shift in position cannot be gainsaid and is too important a choice for a class that would be bound without recourse to the named Plaintiffs' decision.

b. Regardless Of The Test Applied, A Monetary Remedy Would Dominate

This Court has squarely addressed the predominance issue in two cases and has twice refused to certify a class where the monetary relief involved was not incidental to the injunctive or declaratory relief sought. Garcia v. Veneman, 211 F.R.D. 15, 23 (D.D.C. 2002) (denying certification, in part, because $20 billion monetary claim predominated over the injunctive relief

[28] To the extent Plaintiffs cite Coleman v. PBGC, 196 F.R.D. 193 (D.D.C. 2000), Pls. Mem. at 53, for the proposition that an equitable claim for money is excused from the predominance consideration, it is answered in the negative by Eubanks, 110 F.3d at 95. Moreover, in Coleman, the putative class sought to enforce a pension plan term common to the whole class, the enforcement of which could require restoring money to the plan. Here, there has been no showing that the funds at issue belong to the whole class.

"under any applicable test"); Love v. Veneman, 224 F.R.D. 240, 242 (D.D.C. 2004) ("money damages [sought] are far from incidental"). Id. at 245. The D.C. Circuit has not only endorsed this view but gone further to hold that when – as here – "the requested injunctive or declaratory relief merely attempts to reframe a damages claim . . . the class may not be certified pursuant to Rule 23(b)(2)." Richards, 453 F.3d at 530 (rejecting class treatment where plaintiff "effectively seeks a declaratory judgment that Delta owes monetary damages and an injunction requiring Delta to pay them."); see also In re School Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986). Here, Plaintiffs' strained restitution theory "reframes" what is tantamount to a compensatory damages claim for the government's asserted inability to provide a full accounting of all IIM funds. Under Richards, as well as this Court's analysis in Garcia and Love, such a claim cannot proceed on behalf of a Rule 23(b)(2) class.

Plaintiffs' attempt to shoehorn this case within the construct of the Fifth Circuit's "incidental" award analysis in Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998), as well as the Second Circuit's "more flexible"[29] approach in Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001), is misguided. Plaintiffs ignore the significant choice that the class representatives are deigning to make on behalf of all class members: the surrender of a right to information in return for money. None of the cases Plaintiffs rely upon involve such a crucial election.

Although this Court has predicted that the D.C. Circuit would favor an ad hoc approach,

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[29] Garcia, 211 F.R.D. at 23 (describing Second Circuit's approach as a more flexible "ad hoc balancing of the relative importance of the remedies sought"); accord Taylor v. District of Columbia Water & Sewer Auth., 205 F.R.D. 43, 50 (D.D.C. 2002) (Allison's "bright line rule is not consistent with D.C. Circuit case law, which emphasizes an ad-hoc approach . . . .").

as adopted by the Second Circuit in Robinson, over a bright line rule, typified by Allison, the analysis suggested by the Robinson court assumes that the certification question is coming at the start of the case where the injunctive and monetary relief are requested together, rendering its analysis unhelpful here, where the monetary remedy comes to light later and will, in effect, replace the injunctive or declaratory relief. More relevant, perhaps, is Robinson's express caution that "[i]nsignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." Id. at 164. One district court in the Second Circuit recently denied certification under Robinson where the original aim of the injunctive relief was no longer the impetus to the suit. Parker v. Time Warner, 239 F.R.D. 318, 332-33 (E.D.N.Y. 2007) (denying certification for settlement class upon finding proposed injunctive relief akin to a sham under Robinson, in part, because defendant had ceased the challenged conduct.); see Richards, 453 F.3d at 530 (D.C. Circuit observing that certification is improper under (b)(2) "when the relief sought would simply serve as a foundation for a damages award"). The same considerations bar substitution of a monetary award here.[30]

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[30] In their attempt to demonstrate the substance of the injunctive relief sought, Plaintiffs strain credulity by citing a litany of temporary, procedural orders, as well as the 2003 structural injunction. Pls. Mem. at 57 n.94. Plaintiffs' reliance on those orders reveal that their request for injunctive relief is pretense rather than substance. The 2003 structural injunction was not only vacated on appeal but Plaintiffs expressly disavowed the injunction on appeal, while carefully avoiding mention of their desire for money damages. See Cobell v. Norton, 428 F.3d 1070, 1070 (D.C. Cir. 2005) ("Even the plaintiffs agree that the injunction should not stand"). Requests for interim or temporary remedies, on the other hand, do not demonstrate eligibility for class treatment under Rule 23(b)(1) or (b)(2). See C. Wright, A. Miller & M. Kane, 7AA FED. PRAC. & PROC. CIV. 3D § 1775 ("request for a temporary-restraining order or a preliminary injunction does not qualify under Rule 23(b)(2)"). It is, rather, the substance of the final remedy stated in the complaint that determines class eligibility under subpart (b)(1) or (b)(2). The Court has also noted the material distinction between collateral issues, such as IT security, and the

c. Plaintiffs' New Remedy Invokes Individual, Not Common Questions

Plaintiffs also ignore a primary concern evident in the cases decided in this Circuit. As Eubanks recognizes, "the underlying premise of (b)(2) certification – that the class members suffer from a common injury that can be addressed by classwide relief – begins to break down when the class seeks to recover . . . other forms of monetary damages to be allocated based on individual injuries." 110 F.3d at 95 (citing Holmes v. Continental Can Co., 706 F.2d 1144, 1154-57 (11th Cir. 1983)). Plaintiffs contend that their claim for restitution based upon unjust enrichment applies to the class as whole, but the contention is unfounded. This case does not involve one trust corpus and many beneficiaries who hold undivided interests. To the contrary, the record irrefutably establishes that this case involves several hundred thousand individual trusts, each with unique property interests and separate income streams. Oct 24, 2007 PM Tr., 1919:11-1920:5 (Fitzgerald). The record demonstrates irrefutably that IIM account holder funds derive from revenues on their separate allotments, and those allotments number in the thousands. Some, for example, represent rental income from commercial developments in California, others reflect range lease income in Montana, while still others are distributions of settlement shares. October 15, 2007 PM Tr. 603:12-640:3 (Herman). Granted, the government's duties as to each beneficiary's money may be generally the same, but the rights of each beneficiary to any dollar that the government holds at any one time varies substantially and materially depending on the

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accounting sought by the complaint. 2005 Trial Tr. at 72 (May 23, 2005) ("There is no trial on the merits of the IT issues. This is just to get us to the ultimate trial on the merits."). Finally, to the extent Plaintiffs point to "fixing the system" reforms, that relief is prospective and distinct from the historical accounting claim that Plaintiffs assert as the premise for their new monetary remedy.

source of the revenue. Thus, Plaintiffs' assertion that their unjust enrichment claim involves relief that matters to the class as a whole is fundamentally wrong and belied by uncontroverted fact.

In addition, some class members can obtain a full accounting as prescribed by the Court. One clear example are the thousands of per capita and judgment account holders, whose income streams are largely, if not completely, exempt from the difficult questions, such as probate distributions, that arise in many land-based accounts. See, infra, Part IV. C. 3. Thus, it is certain that there exist class members for whose funds a complete accounting is possible, meaning that no basis exists for any alternate remedy. Nevertheless, as class members, Plaintiffs contend they share a common right to restitution. On these facts, it necessarily follows that any unjust enrichment varies among account holder, account type, income stream and the timing of that stream. The government's alleged "misuse" of IIM funds is not uniform across the class and so raises individualized concerns that cannot be addressed on a common basis under Rule 23(b)(1)(A) or (b)(2).[31] See Fisher v. J.P. Morgan Chase & Co., 230 F.R.D. 370, 379 (S.D.N.Y. 2005) (denying class certification for restitution claim, because "it seems likely that individualized issues – such as for example the tracing of money for equitable restitution purposes – will predominate").

Plaintiffs' asserted remedy succumbs to the very danger that the Court of Appeals warned about in Eubanks: the class members do not "suffer from a common injury that can be addressed by classwide relief," and that common bond "break[s] down when the class seeks to recover . . .

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[31] Plaintiffs offer only conclusory assertions, but no proof, that their proposed remedy would be common to the entire class.

other forms of monetary damages." 110 F.3d at 95. Although the circumstances here may be novel, the inability to certify under Rule 23(b)(2) is not uncommon. The approach Plaintiffs espouse has been repeatedly rejected. E.g., Richards v. Delta Airlines, 453 F.3d at 530 (D.C. Circuit affirming denial of certification); Zinser v. Accufix Research Inst., Inc., 253 F.3d at 1193 (class denied where injunctive order for medical monitoring was incidental to monetary claim); Bolin v. Sears, Roebuck & Co., 231 F.3d 970 (5th Cir. 2000) (mere recitation of a request for declaratory relief cannot transform damages claims into proper class claims, because the declaratory relief must, as a practical matter, afford injunctive relief or serve as a basis for later injunctive relief); In re Electronic Data Sys. Corp. "ERISA" Litig., 224 F.R.D. 613 (E.D. Tex. 2004) (no class certifiable for rescission claim on sale of stock); In re Jackson Nat. Life Ins. Co. Premium Litig., 193 F.R.D. 505 (W.D. Mich. 2000) (requests for injunctive relief in the form of disgorgement and constructive trust were designed primarily to facilitate monetary relief); Sarafin v. Sears, Roebuck & Co., 446 F. Supp. 611, 615 (N.D. Ill. 1978) (use of a declaratory judgment in a class action when the real goal is a damage award undermines the purpose of the rule).

d. A Monetary Remedy Would Also Predominate For All Former IIM Account Holders

Rule 23(b)(2) certification also is improper when the putative class includes a significant proportion of members who would not derive benefit from prospective relief, as is true here. E.g., Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241 (C.D. Cal. 2006) (former restaurant managers not suited to an injunctive relief class under Rule 23(b)(2)); Sepulveda v. Wal-Mart Stores, Inc., 237 F.R.D. 229 (C.D. Cal. 2006) (class denied where over half the putative class

members were former employees and thus would not benefit from injunctive relief); In re Paxil Litig., 218 F.R.D. 242 (C. D. Cal. 2003) (Rule 23(b)(2) certification denied for claims challenging drug maker's business practices where class included past and current users of drug); see also Ford v. Chartone, Inc., 908 A.2d 72, 92 (D.C. 2006) (denial of certification affirmed where injunctive relief would be "of comparatively little interest" to defendant's former customers). The entire focus of Plaintiffs' claim is for past, historical acts; the class definition includes former as well as present IIM account holders; and the money sought would not be incidental to injunctive or declaratory relief but would substitute for it. On these additional facts, the present construction of the class cannot support a monetary award.

e. The Disgorgement Claim Conflicts With Traditional Rule 23(b)(2) Cases

For all the reasons discussed above, awards of money in Rule 23(b)(2) class actions have been typically limited to employment disputes where plaintiffs seek an order of reinstatement with back pay. See, e.g., Taylor, 205 F.R.D. at 48 (back pay "incidental" to injunctive relief); C. Wright, A. Miller & H. Kane, 7AA Federal Practice & Procedure § 1776 (2008). To avoid devolving into individualized considerations defeating the commonness of the class claim, any monetary award should be "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case." Taylor, 205 F.R.D. at 48 (quoting Allison, 151 F.3d at 415). Thus, when a case, although facially involving injunctive relief, is actually focused on an award of money, the rule in this Circuit requires that the monetary claim, if certifiable at

all, be subjected to consideration under Rule 23(b)(3).

B. Class Notice and Opt-Out Rights Are Insufficient to Cure the Problem

1. Mere Notice And Opt-Out Opportunity Are Insufficient

As demonstrated above, Plaintiffs' demand for monetary relief by its very nature and scope cannot be pursued as a Rule 23(b)(1)(A) or (b)(2) class claim. Although Eubanks concerned requests by individual class members to opt out of a pending class settlement and not a late request for an entirely different remedy, other cases following Eubanks hold that when a putative class plaintiff pursues monetary claims not certifiable under subdivision (b)(2), he or she may move for class treatment of the damages remedy under Rule 23(b)(3); this is referred to as the "hybrid approach." E.g., In re Veneman, 309 F.3d at 795-96 (recognizing Eubanks' approval of hybrid classes but expressing reservations about deferring the (b)(3) certification question until later in case); Taylor v. District of Columbia Water & Sewer Auth., 205 F.R.D. at 52 (denying motion to dismiss class discrimination claims after observing that compensatory damages claims might be certifiable, inter alia, under "(b)(2), (b)(3) or hybrid or partial [certification] approaches"); Keepseagle v. Veneman, Civ. A. No. 9903119EGS1712, 2001 WL 34676944 (D.D.C. Dec. 12, 2001) (approving hybrid approach but deferring decision on (b)(3) certification). Plaintiffs, however, baldly assert that merely adding class notice and a right of opt out to the existing Rule 23(b)(2) class cures their dilemma. To the contrary, Eubanks is unmistakably clear that when a monetary recovery reduces the "cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class," the court "may adopt a 'hybrid' approach, certifying a (b)(2) class as to the claims for declaratory or injunctive relief, and a (b)(3) class as to the claims for monetary relief, effectively granting (b)(3) protections including

the right to opt out to class members at the monetary relief stage." 110 F.3d at 96. Eubanks reserves the alternative of bypassing Rule 23(b)(3) requirements to just give notice and a right of opt out for those rare situations in which "claims of particular class members are unique or sufficiently distinct from the claims of the class as a whole, and that opt-outs should be permitted on a selective basis." Id. (emphasis added). Indeed, Plaintiffs cite no case that has applied the Eubanks opt-out alternative in any circumstances remotely akin to this case. Cf. Pls. Mem. at 64 (citing Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), which found abuse of discretion where district court permitted opt-outs from mandatory class without applying Eubanks analysis).

2. Plaintiffs Do Not Seek And Cannot Obtain Rule 23(b)(3) Certification

Plaintiffs bear the burden of demonstrating eligibility for class certification, e.g., Disability Rights Council, 239 F.R.D. at 24-25, and have a continuing obligation to represent the entire class, e.g., Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 395 (1996) ("duty to represent absent class members is a continuing one"). Their failure to make a prima facie case under subdivision (b)(3) forecloses the new remedy they seek. See Reynolds v. Sheet Metal Workers, 702 F.2d 221, 225-26 (D.C. Cir. 1981) ("class certification problems are constantly subject to reconsideration as the facts develop at trial"). Absent a motion and a prima facie showing, the Court may properly deny Plaintiffs' new remedy on this basis without a need to consider the merits. Nevertheless, several reasons exist why the monetary claim would not qualify even under Rule 23(b)(3). Plaintiffs entirely fail to address important prerequisites of the predominance of common questions over individual ones, that class treatment will remain superior to other available methods of adjudication, and that the case will remain manageable

with such an enormous monetary claim involved. See Fed. R. Civ. P. 23(b)(3). Plaintiffs also fail to demonstrate how they will afford proper notice to class members as required by Fed. R. Civ. P. 23(c)(1)(B).

In Garcia II, 224 F.R.D. 8 (D.D.C. 2004), this Court recently considered similar circumstances, where plaintiffs sought to certify a hybrid class action against the Department of Agriculture, but the Court denied certification under Rule 23(b)(3), because "if this case were permitted to proceed as a class action, it would 'quickly devolve into hundreds or perhaps thousands of individual inquiries about each claimant's particular circumstances,' and that '[e]ven if the presence of classwide discrimination were established, individual issues would be much more important to any claimant's recovery." 224 F.R.D. at 16. Plaintiffs omit mention of these important issues and thus fail to demonstrate that the concerns the Court observed in Garcia are not also present here. Absent affirmative resolution of these class issues, Plaintiffs are not entitled to seek a class recovery of money.

Tellingly, Plaintiffs do not say how money recovered from the government for unjust enrichment would be distributed to class members. Because the claims involve hundreds of thousands of wholly separate trusts and independent fund corpuses that are not static over time, one essential consideration is whether each class member would obtain his or her proper due if Plaintiffs obtain a recovery.

The Supreme Court has observed that a class representative's duty to act in the interest of all class members is a continuing one.

> In Phillips Petroleum Co. v. Shutts, this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right

> to opt out, and adequate representation. 472 U.S. at 812. "[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." Ibid. (citing Hansberry v. Lee, 311 U.S. 32, 42-43, 45 (1940)). As the Shutts Court's phrase "at all times" indicates, the class representative's duty to represent absent class members adequately is a continuing one. 472 U.S. at 812; see also Gonzales v. Cassidy, 474 F.2d 67, 75 (5th Cir. 1973) (representative's failure to pursue an appeal rendered initially adequate class representation inadequate, so that judgment did not bind the class).

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. at 395. Thus, the Cobell representatives have a continuing duty to demonstrate that they are acting in the interests of all class members. At the very least, then, Plaintiffs must demonstrate that their remedy, if obtained, will inure appropriately to each class member. Plaintiffs' construct takes no account of the fact that the unjust enrichment they claim varies among class members, and that certain class members (e.g., per capita and judgment IIM account holders) have no basis at all for participation in any alternative remedy.

When Plaintiffs' theory of recovery is set beside the specific facts of this case, it cannot escape the same result this Court reached in Garcia: rejection of class treatment even under Rule 23(b)(3). Because the IIM accounts, across the entire class, represent independent income streams from separate property interests unique in time, space, and size, any funds allegedly withheld by the government affected class members disparately. This situation is readily and significantly distinguishable from cases involving a single res, where every class member has an undivided interest in the whole. Indeed, it is the antithesis: thousands of separate trusts, all with independent interests. Plaintiffs cannot even prove that the government unjustly withheld money belonging to every class member.[32] As demonstrated at trial last October, some class members

[32] In fact, the only parties found to be "typical" of the entire class are the named plaintiffs. Their IIM accounts and those of their predecessors were extensively researched, and

have large income streams, on the order of several thousands of dollars, while others have tiny revenue streams of a few dollars or even a few cents at a time. See Oct 11, 2007, PM Tr. 434:3-Oct. 15, 2007 PM Tr. 664:14 (Herman); Ex. DX 109, 113-119; PX 869-870 Plaintiffs tender no method to prove by which class members' funds, or by how much, the government was unjustly enriched.

A per capita or pro rata distribution here would be contrary to fact and law, for it would penalize some class members while bestowing a windfall on others.[33] The Second Circuit recognized this in McLaughlin v. American Tobacco Co., 2008 WL 878627, at *9-10 (2d Cir. 2008), where it categorically rejected the very approach Plaintiffs urge. There, the court ordered decertification of a class approved under Rule 23(b)(3), in part because the common recovery theory proposed by the plaintiffs would violate the Rules Enabling Act and the Due Process Clause. The McLaughlin plaintiffs, a class of cigarette smokers, sought to avoid individualized proof of loss and, like Plaintiffs here, proposed a recovery for the "class as a whole," involving calculation of the difference between prices that "light" cigarette manufacturers historically

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the results reveal no hint of "undistributed" or improperly withheld funds. To the contrary, the $20 million forensic undertaking found only trivial bookkeeping error. Cobell XX, 532 F. Supp. 2d at 49-50. As the "typical" plaintiffs in this case, the named class representatives' own IIM account records highlight the fallacy behind Plaintiffs' contrived remedy theory.

[33] Given Plaintiffs' complaints about the government's alleged failure to make timely distributions of IIM funds, it is curious that Plaintiffs nowhere state how they would actually distribute any recovery among the class or how any class member's amount would be determined. We assume that either a per capita or some kind of pro rata method would be used, in light of Plaintiffs' reliance on Mehling v. New York Life Ins. Co., 246 F.R.D. 467 (E.D. Pa. 2007), see Pls. Mem. at 61-63, which approved a settlement class for an employee benefit fund using a form of pro rata distribution. Mehling is also inapposite because, in Mehling, the "breach of fiduciary duty to the Plans would affect all Plan participants in the same manner [and] were assessed against all accounts," id. at 477, but no such commonality exists here.

charged and the lower prices consumers would have paid had the real dangers of "light" cigarettes been disclosed. The Second Circuit found defects both in the calculation of the loss and in the planned distribution of a recovery among the class. As proposed here, the damages in McLaughlin would be determined for the class as a whole, and the award "would be allocated among class members based on the number of 'light' cigarettes purchased by each within the relevant geographic area and time." Id. at *11 n.9 (quoting the district court).

The court disapproved, noting that such "fluid recovery" has been forbidden in that circuit since Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1008 (2d Cir.1973) ("[N]o 'fluid recovery' procedures are authorized by the text or by any reasonable interpretation of amended Rule 23."), vacated on other grounds, 417 U.S. 156 (1974))." Id. at *11. The court saw serious fundamental problems with a recovery for the "class as a whole."

> We reject plaintiffs' proposed distribution of any recovery they might receive because it offends both the Rules Enabling Act and the Due Process Clause. The distribution method at issue would involve an initial estimate of the percentage of class members who were defrauded (and who therefore have valid claims). The total amount of damages suffered would then be calculated based on this estimate (and, presumably, on an estimate of the average loss for each plaintiff). But such an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants. This kind of disconnect offends the Rules Enabling Act, which provides that federal rules of procedure, such as Rule 23, cannot be used to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072(b).

Id. (emphasis added). The court further explained, "Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." Id. Quoting Eisen, the McLaughlin court emphasized that "if the 'class as a whole' is or can be

substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous. . . . Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law." McLaughlin at *12 (quoting Eisen, 479 F.2d at 1018). Plaintiffs fail to address any of these considerations.

Indeed, the "fluid recovery" approach that Plaintiffs espouse has been rejected not only by the Second Circuit, but by the Fourth and Ninth Circuits as well. Democratic Central Comm. v. WMATA, 84 F.3d 451, 455 n.2 (D.C. Cir. 1996) (observing that the Second, Fourth and Ninth Circuits have banned "fluid recovery distribution methods in class actions"). We are aware of no case in this Circuit in which a fluid recovery of the type Plaintiffs' espouse has ever been approved to justify a class action. See, e.g., id. (approving cy pres type distribution in a non-class case); Diamond Chemical Co. v. Akzo Nobel Chemicals, B.V., 517 F. Supp. 2d 212 (D.D.C. 2007) (cy pres distribution of left over settlement funds). Thus, the novel relief Plaintiffs now seek is unavailable as a class action remedy, regardless of which Rule 23(b) subdivision is applied.

IV. IIM Funds Are Not Missing

A. Plaintiffs Bear A Substantial Burden Of Proof With Regard To The Quantification Of Any Amount Allegedly Owed For Restitution Or Disgorgement

Plaintiffs' argument regarding quantification of amounts allegedly owed for restitution or disgorgement is fundamentally flawed in numerous respects. Putting aside arguments about the components of Plaintiffs' facially absurd $58 billion calculation, see Pls. Mem. at 44 and Attachment A, Plaintiffs largely disregard their burden in quantifying the amount they claim and

assert they are entitled to a lump-sum total, with no mechanism for distribution of that amount to the individuals on whose behalf the class was certified.

1. Plaintiffs' Attempt To Shift The Burden Of Proof To The Government Fails To Satisfy Controlling Law, Which Imposes Upon The Plaintiffs The Initial Burden Of Proving A "Reasonable Approximation" Of The Amount Allegedly Due For Restitution Or Disgorgement

Relying upon case law that recites basic reporting and trust management duties imposed upon trustees, Plaintiffs apparently seek to shift to Defendants the burden of proving the amount to be disgorged under Plaintiffs' claim of unjust enrichment. Pls. Mem. at 22-23. The law of the D.C. Circuit and other courts, however, plainly provides that Plaintiffs bear the burden of establishing a "reasonable approximation" of the amount to be disgorged. E.g., SEC v. First City Fin. Corp., 890 F.2d 1215, 1231-32 (D.C. Cir. 1989) (party seeking disgorgement bears the burden of establishing "reasonable approximation" of amount to be disgorged, and upon doing so, burden shifts to other party "clearly to demonstrate that the disgorgement figure was not a reasonable approximation"); SEC v. Hughes Capital Corp., 917 F. Supp. 1080, 1085 (D.N.J. 1996) ("Once the plaintiff has established that the disgorgement figure is a reasonable approximation of unlawful profits, the burden of proof shifts to the defendants, who must 'demonstrate that the disgorgement figure is not a reasonable approximation.'") (citing, among others, First City Financial Corp.).

The rationale for this burden is described in a recent Fifth Circuit opinion:

> Because disgorgement is meant to be remedial and not punitive, it is limited to "property causally related to the wrongdoing" at issue. Accordingly, the party seeking disgorgement must distinguish between that which has been legally and illegally obtained.

Allstate Ins. Co. v. Receivable Fin. Co., 501 F.3d 398, 413 (5th Cir. 2007) (quoting and citing First City Financial Corp.). Indeed, the burden imposed on Plaintiffs is fundamental common law, as the latest draft of the Restatement (Third) of Restitution and Unjust Enrichment recognizes:

> A claimant who seeks a disgorgement remedy has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the wrongdoer.

Restatement (Third) of Restitution And Unjust Enrichment § 51, ¶ 4(d) ("Enrichment Of Wrongdoers: Disgorgement; Accounting") (Tent. Draft 5) (June 2007). This burden is even recognized in the final authority cited by Plaintiffs in their discussion of burden of proof: "The plaintiff must prove that there is a balance due or the amount the plaintiff believes he or she is entitled to recover . . . ." 1A C.J.S. Accounting § 44 (Feb. 2008), cited at Pls. Mem. at 22.

Contrary to this controlling law, which, as noted, even Plaintiffs acknowledge in other sections of their brief, Plaintiffs effectively avoid any burden to establish the amount they claim. Rather, their brief simply sets forth a methodology that generates a grossly overstated lump-sum amount – akin to the approach proffered by their discredited financial modeling expert, Mr. Richard Fasold, in the October 2007 hearing – and asks this Court to make it Defendants' burden to craft a reasonable approximation of the amount to be disgorged.

Plaintiffs' methodology is patently flawed. While the government is continuing in its efforts to address fully the shortcomings in Plaintiffs' presentation, a number of elements (discussed further below) squarely reveal the unreasonableness of Plaintiffs' approach. Among these fatal flaws, which Defendants will be prepared to show at the June trial, are the following:

- Plaintiffs' "linear interpolation" analysis is simplistic and disregards real-world occurrences that contra-indicate the approach. See Pls. Mem. at 32 and n. 48. While a reader of their footnote 48 might infer their analysis is sophisticated, in fact, it simply connects two data points to provide unknown intervening data points. By doing so, Plaintiffs have ignored events that undoubtedly impacted the "straightness" of the line between, for example, 1926 and 1955, when revenues undoubtedly suffered negative impacts from events like the Great Depression.

- Plaintiffs' analysis of Osage headright revenues is grossly flawed because it wrongly includes payments in excess of $880 million (based upon Plaintiffs' own figures), which never pass through the IIM trust. Rather, headright revenues are first deposited into the Osage Tribe's account. Then a substantial portion -- estimated by Plaintiffs as over $880 million to date -- is paid directly to the owners of the headrights. The remainder is paid into the IIM system for beneficiaries such as minors, other incompetent beneficiaries, and estates.

- While Plaintiffs utilize historical data for revenues for a number of years, see Pls. Mem., Attachment A (highlighted numbers in Column B), they generally apply a constant "disbursement" rate of 69.82 percent, id. (Column E and note 4). In doing so, they do not utilize historical disbursements data available in the same reports they use for revenue data for 1909, 1910, 1911, 1926, and 1955. If Plaintiffs had used the actual disbursements data for those years, their methodology would have applied an average disbursement rate that is substantially higher than 69.82 percent.

- Based upon additional historical data still being assembled by Defendants' historians, the average disbursement rate for the period of 1908-1955 was, in fact, substantially higher than 69.82 percent.

The law does not authorize the shifting of burdens urged by Plaintiffs when Plaintiffs' showing is so plainly insufficient as a matter of law. Because a review of various aspects of Plaintiffs' proposed approach confirms that Plaintiffs have wholly failed to present any basis to establish a reasonable approximation of the amount they claim should be disgorged, Plaintiffs have not made a colorable showing to sustain their initial burden of proof.

2. Plaintiffs' Burden of Proof Arguments Rely Upon Easily Distinguishable Case Law

While Plaintiffs do recognize, in other parts of their brief, that they bear the burden of

establishing the amount to be disgorged, e.g., Pls. Mem. at 18 (quoting SEC v. First City Fin. Corp., 890 F.2d at 1231-32), Plaintiffs' quantification argument seeks to transform this into the lightest and most superficial of burdens. Rather than demonstrating that $58 billion is a reasonable approximation of amounts to be disgorged to individual class members, which it clearly is not, Plaintiffs engage in the same type of analysis presented by Mr. Fasold at the October 2007 hearing, which sought to shift the burden to the government to disprove his grossly inflated modeling results. Compare Tr. 1660:9-11 (Fasold, 10/23/07 PM) (Fasold offers to describe "how [Plaintiffs' calculations] are arrived at toward these grandiose totals you're seeing") and Tr. 1662:14-17 (Fasold, 10/23/07 PM) (Court states, "[M]y question is of what utility is a number of $80.7 billion, which assumes that no disbursements were made, when everybody knows that disbursements were made?"), with Pls. Mem. at 22 ("The Burden of Proof is Defendants' to Prove Each Transaction in the Trust.").

In presenting their argument, which essentially makes the government responsible for determining the reasonable approximation of the disgorgement amount, Plaintiffs principally rely on four distinguishable cases – one D.C. Circuit opinion and three intermediate appellate state court opinions – which address issues of no relevance to a restitution or disgorgement claim. Specifically, in Rainbolt v. Johnson, 669 F.2d 767 (D.C. Cir. 1981), the D.C. Circuit reversed the district court for failing to provide "binding and conclusive effect" to a party's failure to answer requests for admissions, and remanded the case with instructions to enter judgment for plaintiff-appellant and to appoint a new trustee and auditor-master to conduct an accounting. Id. at 768-69. Plaintiffs rely upon the appellate court's instructions to the district court, which simply stated the general proposition, "Under established principles of trust law, if the former trustee

has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary." Id. at 769 (citing G. Bogert, The Law of Trusts and Trustees § 962 (1962)), cited at Pls. Mem. at 22. The brief opinion in Rainbolt, which accompanied a per curiam judgment, is plainly distinguishable because it involved an order to perform an accounting;[34] it has no relevance to the quantification issues which would be addressed in the June trial, in which Plaintiffs allege they are entitled to disgorgement as a remedy for Interior's inability to provide an accounting.

The three intermediate appellate state court opinions are equally distinguishable. Kennedy v. Miller, 582 N.E.2d 200 (Ill. App. Ct. 1991), cited at Pls. Mem. 22, involved a joint venture and simply stated the general rules applicable where a party demonstrates entitlement to an equitable accounting: "[T]he party managing or controlling the venture and possessing the records of the venture has a fiduciary duty to the party seeking the accounting and has the burden to produce the accounting. Any doubts created by errors or omissions in the accounting are resolved against the party producing it." 582 N.E.2d at 205 (citations omitted). Like Rainbolt, this case simply states the general rules that apply when a party must perform an accounting; it is

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[34] Plaintiffs' quotation from Rainbolt omits a significant portion of the opinion. An examination of the complete quote, including the material omitted by Plaintiffs, makes it clear that the case does not stand for the proposition that broad equitable remedies are available as a substitute for an accounting:

> Under established principles of trust law, if the former trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary. See G. Bogert, the Law of Trusts and Trustees § 962 (1962). Once the accounting is completed, the District Court shall provide such additional relief for plaintiff-appellant as may be appropriate.

Id. at 769 (emphasis added to highlight portion of text omitted by Plaintiffs' quotation).

irrelevant to quantification of amounts allegedly owed in disgorgement.[35]

The other two cases cited by Plaintiffs – Bryan v. Security Trust Co., 176 S.W.2d 104 (Ky. Ct. App. 1943), and Bravo v. Sauter, 727 So. 2d 1103 (Fla. Dist. Ct. App. 1999) – involved allegations of trust mismanagement and are plainly distinguishable. As this Court is well aware, trust mismanagement issues were stricken from Plaintiffs' complaint in Cobell I, 30 F. Supp. 2d 24, based on Plaintiffs' representations to the Court. In so doing, the Court stated, "Because the plaintiffs do not ask this Court to order the government to make cash infusions into the IIM accounts to recompense the plaintiffs for lost or mismanaged funds, but instead ask this Court solely for a declaration of the defendants' trust duties and an accounting of money already existing in the account, the Court will deem the plaintiffs' Complaint to state such a claim in that regard only." Id. at 40. By comparison, in Bryan, the court noted that in a case challenging the propriety of four transactions, the trustee bore the burden "to justify the situation and transaction, to prove that its actions conformed to every standard of duty, and to establish not only the fair dealing but the proper degree of prudence and care in making the investments." 176 S.W. 2d at

[35] Even if Plaintiffs' arguments about the accounting standards imposed upon private trustees were relevant in assessing amounts to be disgorged, the law does not hold government officials to the same standards because public officials are entitled to a presumption of regularity in the performance of their duties. See, e.g., Fed. R. Evid. 803(6)-(8); White Mountain Apache Tribe v. United States, 26 Cl. Ct. 446, 449 (1992), aff'd, 5 F.3d 1506 (Fed. Cir. 1993). Plaintiffs are required to introduce evidence to rebut that presumption of regularity. See, e.g., Breeden v. Weinberger, 493 F.2d 1002, 1005-06 (4th Cir. 1974); Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982); cf. Cobell XIII, 392 F.3d at 474 ("However broad the government's failure as trustee . . . we can see no basis for reversing the usual roles in litigation and assigning to defendants a task that is normally the plaintiffs' – to identify flaws in the defendants' filings.").

109.[36] In Bravo, the court simply addressed challenges to a successor trustee's "burden of proving that she had incurred miscellaneous expenses for stamps, mailings, faxes, telephone calls, and travel, as well as maintenance expenses . . . ." 727 So. 2d at 1107. Bravo is simply a case in which the trustee is being charged with substantiating that various miscellaneous expense charges were justified; it has no relevance to issues regarding quantification of the amount allegedly requiring disgorgement.

Plaintiffs' misplaced focus on trust mismanagement issues, rather than accounting issues, is also reflected in their assertion that "[d]eterrence is viewed by many authorities as critical under circumstances such as these, where defendants have an indisputable, continuing record of gross mismanagement of the IIM Trust." Pls. Mem. at 15. Plaintiffs' sole authority for their claim is a general statement in Cobell VI's overview of the individual Indian trust, Pls. Mem. at 15 n.23 (citing Cobell VI, 240 F.3d at 1086), but the appellate court's statement was not a finding with regard to the accounting. By contrast, this Court's conclusions in Cobell XX squarely contradict a finding of a "continuing record of gross mismanagement" with regard to the accounting:

> [Interior] has made an impressive (and very expensive) effort in recent years to find, scan, and preserve whatever documents still exist. If the government has failed to prove that all documents necessary for the completion of its historical accounting have been or will be found, plaintiffs have also failed to establish that the problem of lost or destroyed documents renders the historical accounting

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[36] Even Plaintiffs apparently recognize that Bryan involves trust mismanagement allegations, rather than the failure to perform an accounting. They cite Bryan as support for their assertion that the government must "(1) prove that each and every very transaction and expenditure entered into was justified; (2) prove that its actions had conformed to every standard of duty; and (3) 'establish not only fair dealing but proper degree of prudence and care' in connection with each transaction." Pls. Mem. at 22.

project entirely pointless.

Cobell XX, 532 F. Supp. 2d at 46-47 (footnote omitted).

3. Neither Equity Nor Law Warrants Imposing Strict Liability

While paying lip service to a reasonableness standard, Plaintiffs claim entitlement to restitution and disgorgement essentially on the basis of all money collected which Defendants cannot prove was disbursed to Plaintiffs, regardless of whether all or any part of such amount was in fact disbursed. Missing documentation is the predicate for Plaintiffs' claim, but imposition of this form of strict or absolute liability is unwarranted.

Outside of a statutory requirement, a trust beneficiary's right to an accounting is, as Plaintiffs' own expert witness acknowledged, an on-request right. October 24, 2007 PM Tr. (Fitzgerald) 1919:24 - 1920:5. By definition, the Plaintiff class consists of individuals who never previously sued for an accounting.[37] Even if laches does not bar Plaintiffs' claims, given the passage of time, they are in no position to seek to impose liability on the basis of missing documentation for transactions occurring decades ago.

In Fort Mojave Indian Tribe v. United States, 32 Fed. Cl. 29 (1994), aff'd, 64 F.3d 677 (Fed. Cir. 1995) (Table), tribes claimed breach of trust in representing their interests in water rights litigation. The court noted that, "[n]ot surprisingly," as a result of the passage of three decades since the relevant events, "many records that describe the government's actions at the relevant time have been destroyed." 32 Fed. Cl. at 34. The court noted that "unfortunately for

[37] This Court's Order of February 4, 1997, adopted verbatim the class definition that plaintiffs had drafted and proposed. That Order certified "a plaintiff class consisting of present and former beneficiaries of Individual Indian Money accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)." Order of February 4, 1997 at 2-3.

plaintiffs, this passage of time apparently has hampered plaintiffs' ability to carry their burden," id., but did not hold the United States strictly liable on the basis of document destruction. To the contrary, the court held that

> [r]econstructing a complete picture of what happened over three decades ago, including why certain decisions were made and why certain positions were taken, has proved impossible. When the court considers all the evidence presented at trial, the court cannot say with certainty that the United States did not commit any errors. But at the same time, the court cannot conclude that the United States acted in an unreasonable or imprudent manner in representing the Tribes' interests. After reviewing the entire record, the court concludes that in representing the Tribes' interests in *Arizona I*, the United States acted diligently and with vigor and considerable skill. To the extent that some errors can be argued to have been made, such errors appear far more likely to have occurred and larger in scope when viewed under the sharp focus of hindsight rather than when placed in an appropriate historical context.

Id. at 42 (emphasis added).

Furthermore, the law does not authorize courts to hold the United States liable under a theory of strict or absolute liability such as Plaintiffs advance here. Plaintiffs rely on the theory that, if a trustee cannot prove that a distribution of trust property occurred, the trustee is liable whether the distribution occurred or not. Whatever merit such a theory might have in a case against a private trustee, it is invalid against the United States. It is well settled that the United States has not consented to strict or absolute liability, which Plaintiffs' theory connotes. See Laird v. Nelms, 406 U.S. 797, 799 (1972); Dalehite v. United States, 346 U.S. 15 (1953).

4. Plaintiffs' Argument Fails To Present A Reasonable Approximation Of The Amount To Be Disgorged Because It Disregards The Individual Nature of the Harm Allegedly Resulting From The Government's Failure To Provide Individual Class Members With The Historical Statements of Account

Plaintiffs brought this action on behalf of individual members of the class and repeatedly

have stated that the action seeks to compel the provision of the historical statements of accounts owed to the individual class members. The harm to be remedied is the failure of the government to provide individual accountings. E.g., 25 U.S.C. § 4011(a) ("The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938.") (emphasis added); Cobell VI, 240 F.3d at 1103 ("[T]the 1994 Act plainly reaffirm[s] the government's preexisting duty to provide an accounting to IIM trust beneficiaries . . . .") (emphasis added). Thus, to the extent disgorgement is ordered, it should be particularized funds to particular individuals.

Plaintiffs' proposal provides no reasonable approximation of amounts to be disgorged to individuals. Instead, it simply generates a gross, imprecise, lump-sum figure. This flaw is fatal; even assuming the government cannot reconcile differences shown to exist between amounts collected and amounts disbursed, Plaintiffs' macro analysis, which treats individual members collectively as a unitary entity, fails to establish which individuals, if any, allegedly suffered any harm or the amount to be disgorged to any such individuals.

If the Court adopts Plaintiffs' approach, the end result undoubtedly will be the quantification of a gross sum of money, with no methodology for determining which class members are entitled to receive disgorged funds or the amount to be disgorged to each class member. Such an approach cannot be sustained as producing a reasonable approximation of the amount to be disgorged, particularly given the undeniable differences among the circumstances of class members, who have widely varying beneficial interests.

5. Plaintiffs Also Fail To Establish The Requisite Causal Relationship Between Their Claimed Amount And The Alleged Wrong

An equitable remedy must bear some causal relationship to the wrong alleged. First City Fin. Corp., 890 F.2d at 1231 (court may order disgorgement "only over property causally related to the wrongdoing"); see CFTC v. Sidoti, 178 F.3d 1132, 1138 (11th Cir. 1999) (a district court may not disgorge funds "obtained without the aid of any wrongdoing"); CFTC v. American Metals Exchange Corp., 991 F.2d 71, 79 (3d Cir. 1993) (requirement exists "that there be a relationship between the amount of disgorgement and the amount of ill-gotten gain").[38] Even assuming that they have established that a disgorgement remedy is somehow available to them, which they have not, Plaintiffs' claim fails to demonstrate any causal relationship between the $58 billion remedy and the "wrong" being addressed.

The only "wrong" that is being addressed through this remedy phase is Interior's allegedly unreasonable delay in performing the historical accounting as a result of Congress' limited appropriations to fund the work. Cobell XX, 532 F. Supp. 2d at 102-03.[39] Plaintiffs have

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[38] As noted above, the Second Circuit recently ordered decertification of a cigarette smokers' class action, in part, because plaintiffs' attempted to use a "class as a whole" damage theory based upon excess profits that manufacturers had allegedly earned from misleading the market about smoking risks. McLaughlin, 2008 WL 878627, at *9-10. In its holding, the Second Circuit relies on Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 559 (2006), where the Supreme Court observes that "attenuated connection between [Plaintiffs'] injury and the [Defendant]s' injurious conduct . . . implicates fundamental concerns. . . ."

[39] Defendants dispute that Interior, as trustee, is unreasonably delaying the accounting when it is fully utilizing all funds appropriated by Congress, the settlor of the trust. The Court's conclusion that the required accounting is impossible due to the limited appropriations from Congress, coupled with its correct finding that Interior has used the appropriated funds in a dedicated, professional manner, contradicts its conclusion that Interior has continued to unreasonably delay performance of its accounting obligations. It cannot be unreasonable to delay doing the impossible. See Mashpee Wampanoag Tribal Council, Inc. v.

offered no causal relationship between that "wrong" and the $3 billion difference between the funds Interior collected and the funds that were posted to IIM accounts. As a matter of logic, there clearly is no causal connection. Even assuming that Congress had funded and Interior had completed the accounting required by this Court, the records themselves would not change and the $3 billion difference would still exist because it consists of money that does not belong to, and thus should not be credited to, individual IIM account holders. This $3 billion throughput number bears no relationship to any breach determined, as a matter of law. The lack of a complete historical accounting did not cause the $3 billion difference and Plaintiffs have offered no reasonable argument to the contrary. Instead, they simply assume without factual support – and invite the Court to assume – that Defendants "have improperly withheld billions of dollars." Pls. Mem. at 28. That assumption is patently insufficient to establish a causal relationship. See Allstate Ins. Co., 501 F.3d at 413-14 (after reaffirming that disgorgement "is limited to 'property causally related to the wrongdoing," the court reversed the damages award as "based on conjecture and speculation as to what amount the defendants obtained through . . . fraud"). Accordingly, the $3 billion difference cannot be the premise for an equitable remedy.

Norton, 336 F.3d 1094 (D.C. Cir. 2003) (where the Department of Interior's delay was "attributable, at least for the most part, to a shortage of resources addressed to an extremely complex and labor-intensive task," the Court erred by "holding the decision of the Secretary had been unreasonably delayed without first considering the BIA's limited resources"); cf. Restatement (Third) of Trusts, § 73 (2007)("[a] trustee has a duty not to attempt to comply with a trust provision directing the trustee to do an act if the trustee knows or should know (a) that compliance is impossible, or (b) that the expense of attempting to comply is unreasonable.") However, as noted in footnote 1, we are not in this brief addressing the Court's January 30, 2008 holdings.

6. Plaintiffs' Failure To Establish A Reasonable Approximation Of An Amount To Be Disgorged Or A Means To Determine Amounts To Be Disgorged To Individuals Will Prejudice Defendants' Ability To Assert Res Judicata And Any Future Court's Ability To Determine Which Issues Are Precluded By This Litigation

Because Plaintiffs have neither established a basis for ascertaining a reasonable approximation of the amount they claim should be disgorged or to establish a means for ascertaining the amount they claim should be disgorged to individual class members, no one will be able to determine which issues have been precluded by proceedings in this Court. This presents serious problems because under the principles of res judicata, a final judgment bars relitigation not merely of claims actually resolved by litigation but of claims that should have been raised in the earlier lawsuit. E.g., Allen v. McCurry, 449 U.S. 90, 94 (1980) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."), cited in National Resource Defense Council v. EPA, 513 F.3d 257, 261 (D.C. Cir. 2008); SBC Communications, Inc. v. FCC, 407 F.3d 1223, 1230 (D.C. Cir. 2005) ("[T]he purpose of claim preclusion is to prevent 'litigation of matters that should have been raised in an earlier suit.'") (quoting Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 376 n. 1 (1985) (emphasis added in SBC Communications opinion)), cited and quoted in National Resource Defense Council v. EPA, 513 F.3d at 261.

Simply put, Plaintiffs' claim is so amorphous that no future court or potential plaintiff will be able to determine whether any final judgment resulting from this lawsuit precludes future litigation. Even Plaintiffs openly state that this lawsuit will not foreclose future litigation by individuals. Pls. Mem. at 64 ("Nevertheless, this action does not preclude any beneficiary from

filing an individual damage claim in the U.S. Court of Federal Claims."). To the extent such claims are permitted to proceed, Defendants will suffer prejudice, as well, because of the unjustified need to defend against claims that actually were or should have been resolved here and the potential for multiple recoveries upon those claims.[40]

B. Plaintiffs Incorrectly Assume – With No Proof – That A Wrong Has Been Done

Plaintiffs offer no proof that the government actually diverted funds from any IIM accounts even though such proof, if it actually existed, could be readily developed by Plaintiffs. After almost 12 years of litigation, Plaintiffs have not presented a single example of the substantial underpayment they claim has been occurring for over a hundred years.

While Defendants have the burden of performing a historical accounting for the beneficiaries who are class members, as the court in Cobell VI found, Defendants do not bear the initial burden of creating a reasonable estimate of restitution amounts for class members for whom an accounting has been concluded to be impossible. Regardless of this Court's "impossibility" holding, the Court also concluded that Interior's historical accounting work is of value. That work includes the LSA project, the Paragraph 19 work and NORC's meta-analysis, AR-440, as well as the Treasury Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks, DX-242 (May 31, 2000), and OST's tracking of electronic and other non-check disbursements. Tr. 884:5 - 895:4 (Winter) (discussing DX-236, DX-237, DX-

[40] For example, it is unclear whether this action will resolve claims for alleged underpayment of interest, loss of specific revenues, or other mismanagement claims. There can be no clear answer to that question, particularly because Plaintiffs apparently now rely upon trust mismangement authorities in their memorandum, notwithstanding their prior representations upon which this Court repeatedly has relied.

238, DX-242). Added to that work are the documented results of the Mass Cancellation project, the Settlement of Accounts Packages prepared by Treasury and GAO auditors from the late 1800s through 1950, see generally AR-344; AR-348; AR-436; AR-533; AR-626, and more recent audits of Interior, AR-374 - AR-378; DX-259 - DX-268, none of which support Plaintiffs' assertions that money was wrongfully diverted from the accounts of individual Indians.

Plaintiffs' assertion that $58 billion is sitting in the government's coffers is baseless. Instead, Interior's collection of compelling accounting work and related information confirms that Defendants did not commit a wrong or series of wrongs that somehow amount to a "repudiation" anything remotely approximating Plaintiffs' quantification of restitution. In short, even a claim of a $3 billion difference, much less Plaintiffs' $58 billion request, is unreasonable as a matter of law.

1. Because Defendants Did Not Repudiate Their Accounting Duty, Plaintiffs Are Not Entitled To Monetary Relief On That Basis

Plaintiffs rely exclusively on Interior's "repudiation of its accounting duty" as entitling them to the equitable relief of restitution and disgorgement. Pls. Mem. at 1 (first of 24 references to "repudiation" or "repudiate"). Thus, they state, "[t]he trustee's repudiation of its accounting duty, a fiduciary duty that is crucial to every trust relationship, means that plaintiffs' ability to achieve justice rests on the fairness of equitable restitution and disgorgement remedies fashioned by this Court." Id. "Here, the trustee has repudiated its duty to account; therefore, it is critical for this Court to exercise its inherent equitable authority and fashion 'such relief . . . as

the beneficiaries may be entitled to receive.'" Pls. Mem. at 13 (citation omitted).[41]

According to Plaintiffs, "this Court has the authority to fashion equitable relief that vindicates plaintiffs' rights, rights that now have been compromised irreparably by the trustee's repudiation of its accounting duty and which cannot be vindicated without equitable restitution and disgorgement, as the accounting is impossible." Pls. Mem. at 4. In other words, Plaintiffs contend that repudiation is the basis for their claim for monetary relief. Yet this Court made no finding of repudiation, and, therefore, the "wrong" upon which Plaintiffs have based their entire claim is nonexistent.

Neither "repudiate," nor "repudiation" nor any variation of those terms appears in Cobell XX, 532 F. Supp. 2d 37. Previously, this Court held that the statute of limitations for providing an accounting to Plaintiffs could not run until Defendants repudiated the trust. Cobell v. Norton, 260 F. Supp. 2d at 105. The Court found specifically that Defendants had not repudiated their duty to account. 260 F. Supp. 2d at 108-110. In its 2008 decision, this Court found that Interior

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[41] Throughout their Memorandum, Plaintiffs reiterate that their right to restitution is dependent upon a finding that Interior repudiated its duty to account. Pls. Mem. at 23 ("if the trustee fails, or as here, repudiates the duty to 'render a proper account,' the consequences of that failure fall fully on the trustee"); id. at 28 ("As plaintiffs calculate the benefit conferred on the government, it must be remembered that any imprecision is entirely attributable to the trustee's repudiation of the declared accounting duty."); id. at 53 ("because defendants have repudiated their duty to account, plaintiffs are left with restitutionary remedies"); id. at 56 ("declaratory judgment that has been repudiated by the trustee "); id. at 53 ("Such declaratory relief is an essential predicate to the equitable monetary relief plaintiffs seek, due to the trustee's repudiation of its duty to account, rendering the accounting impossible as a matter of law."); cf. id. at 54 ("Plaintiffs, here, similarly seek equitable monetary relief, including restitution and disgorgement based on this Court's declaratory judgment, holding that defendants are in breach of their fiduciary duties and the trustee's repudiation of the declared accounting."); id. at 58 ("The trustee-delegates' history of failing to properly steward the IIM Trust also provides support for allowing the plaintiff class to obtain equitable monetary relief through this action under the ad hoc balancing approach."); id. at 62 (discussing relative weight of monetary versus other relief).

"deserves substantial credit for its effort to strike a 'balance between exactitude and cost.'" Cobell XX, 532 F. Supp. 2d at 102 (quoting Cobell XVII, 428 F.3d at 1076).[42] Moreover, the Court concluded that the accounting was impossible because Congress will not provide adequate funds. Id. at 86. This, contrary to Plaintiffs' contentions, is not a finding of repudiation.

Finally, repudiation has been held to be a distinct act amounting to denial of the trust's existence, not a mere failure to perform the trustee's duty. Chard v. O'Connell, 120 P.2d 125, 128 (Cal. App. 1 Dist. 1941) (citing England v. Winslow, 237 P. 542, 547 (Cal. 1925)); see also Goodman v. Goodman, 907 P.2d 290, 294 (Wash. 1995) ("repudiation must be plain, strong, and unequivocal"). Furthermore, repudiation requires renunciation of the entire trust, which consequently terminates. Connell v. U.S. Steel Corp., 516 F.2d 401, 408 n.11 (5th Cir. 1975); see also In re Singer, 818 N.Y.S.2d 417, 420 (N.Y. Surr. Ct.) (trust relationship is "repudiated" where putative fiduciary denies having had or retained any fiduciary obligations, including duty to account), aff'd sub nom. Singer v. Tydings, 817 N.Y.S.2d 241 (N.Y.A.D. 2006). Plaintiffs

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[42] The record hardly demonstrates that Interior has repudiated its duty to account. As this Court noted, Interior's first detailed plan to perform the historical accounting was described in its July 2, 2002 report to Congress, which included Interior's estimate that the accounting effort would cost $2.425 billion to complete. Cobell XX, 532 F. Supp. 2d at 48. The House Committee on Resources responded in a December 9, 2002 letter to the Secretary of the Interior, which informed the Secretary that the Committee found Interior's report "'troubling in several areas,' and request[ed] that the Secretary 'promptly consider ways to reduce the cost and the length of time necessary for an accounting . . . [including] alternative accounting methods.'" Id. (quoting AR-184) (second brackets and ellipsis in original). The Court further noted that Interior's 2003 Plan, which included statistical sampling and a reduced projected cost, was in response to the directive from the House Committee on Resources. 532 F. Supp. 2d at 48-49. Finally, the Court noted that the 2007 Plan, which further reduced the scope of the accounting work, followed congressional appropriations of only $127.1 million during the period of 2003-2007, far less than the $335 million Interior had estimated for the five-year plan back in 2003. Id. at 56; see also id. at 58 (2007 Plan was product of both limited congressional appropriations and more current estimate that 2003 Plan would cost approximately $1.675 billion to complete) (citing AR-566).

allege no such facts. For this reason and those stated above, their claim of repudiation must be rejected.

2. Even Assuming This Court's Impossibility Holding Constitutes A Finding Of Repudiation Of The Accounting Duty, The Finding Implicates Congress, Not Defendants

No basis exists to assert that Defendants repudiated their trust obligations when the Court clearly determined that it was the level of congressional funding that rendered the historical accounting impossible. Plaintiffs mischaracterize this Court's holding in Cobell XX when they assert that "the failure of the trustee to adequately fund the declared accounting has exacerbated the government's undue delay and has made the accounting impossible as a matter of law." Pls. Mem. at 5 (citing Cobell XX, 2008 WL 253035, at *64 & n.21). The Court did not reach such a conclusion. Instead, this Court stated:

> This case must be governed by Congress's plain demand for an accounting of "all funds held in trust by the United States for the benefit of an . . . individual Indian." In its refusal to appropriate enough money to pay for such an accounting, Congress has not amended that demand or the common law of accounting. What it has done, instead, is to render a real accounting impossible - or, perhaps, to *recognize* that such an accounting is impossible, unless it is "nuts" enough to pay more than $3 billion to hunt down perhaps $3 billion of unexplained variances in the government's accounts.

Cobell XX, 532 F. Supp. 2d at 102 (emphasis in original).

With regard to individual Indian beneficiaries, Interior is a trustee-delegate, as Plaintiffs repeatedly point out. Congress is the settlor of the individual Indian trust. Cobell v. Norton, 283 F. Supp. 2d 66, 268 (D.D.C. 2003), vacated in part on other grounds and remanded, 392 F.3d 461 (D.C. Cir. 2004); see Expert Report of Professor Langbein at 6 (Defs.' Phase 1.5 Trial Ex. 37); Tr., June 2, 2003, p.m., at 53:13-14, 59:5 (J. Langbein). Acts of Congress are the trust

instruments which "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities." Mitchell II, 463 U.S. at 224.[43] Therefore, even if the impossibility holding could be construed as a conclusion that a "wrong" was done to Plaintiffs, the wrong was attributable to the appropriations determinations of Congress, the settlor of the trust, and not to Defendants.

Finally, of course, Congress could not repudiate the accounting duty since it is neither a named defendant nor the entity with the obligation to perform the accounting under the 1994 Act. Also, Congress has continued to fund the performance of a historical accounting and has offered no indication that it repudiated the terms of the 1994 Act. This Court, in fact, ruled that "Congress "has not amended that demand [for an accounting]," which makes clear that this Court did not find Congress had repudiated the 1994 Act. Cobell XX, 532 F. Supp. 2d at 102. Plaintiffs' contrary assertions are unavailing.

3. Plaintiffs Fail To Assert That Interior's Actions Are A Wrong Committed Against Any Of The Named Plaintiffs

Plaintiffs make no reference to any of the named plaintiffs or their predecessors in interest in arguing that the government repudiated its duty to account or was unjustly enriched. The claims of the named plaintiffs, as class representatives, are supposed to typify the claims of the class members generally. Since 2001, Plaintiffs have been in possession of the over 162,000

[43] In Mitchell II, the dissenting opinion (Justice Powell joined by Justice Rehnquist and Justice O'Connor) reasoned that Congress was "settlor" of the Indian trust. 463 U.S. at 234 n.8. Likewise in Mitchell I (United States v. Mitchell, 445 U.S. 535 (1980)), the dissenting opinion (Justice White joined by Justice Brennan and Justice Stevens, all of whom were in the majority in Mitchell II) reasoned that the statutory language at issue "would surely be a manifestation of intent to create a trust if the settlor were other than the United States." Id. at 547 (emphasis added).

"Paragraph 19" documents and since 2003, have had access to the "virtual ledger," which support the accounting and reconciliation work done for the named plaintiffs and their predecessors, a total of 37 individuals. Cobell XX, 532 F. Supp. 2d at 49-50. Yet Plaintiffs make not a single reference to any of that information.

The Paragraph 19 documentation included all of the types of documents that would enable Plaintiffs to determine whether money collected on behalf of the named plaintiffs or their predecessors was actually posted to the appropriate IIM accounts. These documents include title documents, leases, bills of collection, schedules of collection, deposit tickets and paper ledgers as well as printouts from Interior's computer systems. Phase 1.5 Tr. Jun. 9, 2003 AM, 55:1-21 (Rosenbaum). Interior produced documentation supporting 86 percent of the 12,617 transactions reviewed in the accounts of these individuals, which represented 93 percent of the total dollar value of those transactions. Cobell XX, 532 F. Supp. 2d at 50. Plaintiffs' failure to address this essential compilation of evidence establishes that they have failed to carry their burden to be entitled to equitable restitution or disgorgement.

In sum, Plaintiffs have failed to show how Defendants lost or misdirected collections for any of the named plaintiffs. As a result, Plaintiffs cannot show how any of the named plaintiffs was harmed by Defendants' inability to perform a complete historical accounting for all class members. In turn, Plaintiffs have no basis for continuing this lawsuit as a claim for restitution or disgorgement.

C. Plaintiffs' Assertion That They Are Entitled To An Award Of Billions of Dollars Is Refuted By The Historical Accounting Work Already Performed By Interior

Plaintiffs allege entitlement to an award of $58 billion, based upon the thinnest of

analysis and the request that this Court shift the burden of proof to Defendants to substantiate a smaller amount. See, e.g., Pls. Mem. at 22 (arguing that Defendants bear the burden of "prov[ing] each transaction in the trust"), 28 (arguing, without support, that Interior has repudiated its duty to account).

Contrary to Plaintiffs' bald assertions, the results of accounting work performed since the inception of this litigation clearly demonstrate the unreasonableness of Plaintiffs' multi-billion dollar quantification of unjust enrichment, as a matter of law. As this Court observed in Cobell XX:

> [Interior] has made an impressive (and very expensive) effort in recent years to find, scan, and preserve whatever documents still exist. If the government has failed to prove that all documents necessary for the completion of its historical accounting have been or will be found, plaintiffs have also failed to establish that the problem of lost or destroyed documents renders the historical accounting project entirely pointless.

Cobell XX, 532 F. Supp. 2d at 46-47 (footnote omitted). Perhaps more significantly, the Court concluded, "I am not prepared to state that the agency's methodological approach to historical accounting is wrong or invalid. It does appear that the various projects reviewed in the findings of fact will generally produce helpful information concerning the history of the IIM trust." Id. at 93. A review of some of the projects referenced in this conclusion confirm that Plaintiffs' multi-billion dollar approximation is legally insufficient as a "reasonable approximation" of the amount to be disgorged. See First City Financial Corp., 890 F.2d at 1231-32.

1. The "Paragraph 19" Project

The Court first reviewed the "Paragraph 19 project." Cobell XX, 532 F. Supp. 2d at 49-50. As the Court explained, Defendants undertook to respond to Paragraph 19 of the First Order

for Production of Information to produce documentation related to the named Plaintiffs and their predecessors-in-interest. Id. The Paragraph 19 project cost approximately $20 million and resulted in the production of over 2,000 Treasury documents and approximately 162,000 Interior documents for the thirty-seven accounts analyzed in this project. Id. The documents dated back to as early as 1914. Id. at 50.

Joseph Rosenbaum, a partner with Ernst & Young, subsequently reviewed the documents and testified about the results of this analysis at the Phase 1.5 trial. Id. Mr. Rosenbaum found, among other things:

- Documents necessary for assembling transaction histories for the named Plaintiffs and their predecessors were available;
- TFAS balances from December 31, 2000 were sufficiently supported by supplemental documentation;
- Supporting documentation was discovered for 86 percent of the 12,617 transactions reviewed, representing 93 percent of the total dollar value of those transactions, or approximately $1.12 million.

Id. at 50.

While the Paragraph 19 Project demonstrated that a large volume of documentation for the IIM system exists, notwithstanding many previously held expectations to the contrary, the finding of greatest significance for purposes of assessing Plaintiffs' restitution claim is that only small variances were noted in the course of performing the $20 million project. Id. In fact, Mr. Rosenbaum's expert report of February 28, 2003 (Dkt. 2186) (under seal) found only a single transaction was not recorded in the available ledgers: a collection of $60.94 that was incorrectly

credited to the IIM account of an individual with a similar account number. Id. at 3, ¶ 3.[44] As this Court summarized Associate Deputy Secretary Cason's testimony, "Interior understood the results of the Paragraph 19 project as indicating that, although there were errors in the accounts, the errors were relatively few, the errors tended to be small, and the errors were on both sides of the ledger." Cobell XX, 532 F. Supp. 2d at 50 (citing Tr. 62:12-21 (Cason)).

As the Court noted, the Paragraph 19 project was undertaken following the findings of contempt in Cobell II, based upon the failure to comply with document production orders, see Cobell XX 532 F. Supp. 2d at 49, and it initially may have been undertaken to establish that documents no longer existed to perform the historical accounting. The results of the Paragraph 19 project, however, demonstrate the contrary, and stand in stark contrast to Plaintiffs' assertion that as much as $3.6 billion is missing from the IIM system.

2. The Litigation Support Accounting Project

As this Court explained, in late 2003, following Congress' direction that Interior temporarily suspend historical accounting efforts, Interior began the Litigation Support Accounting ("LSA") project. Cobell XX, at 59. The project was so named because "Interior borrowed the term 'litigation support' from the appropriations bill . . ., which temporarily halted both the agency's obligation to perform an historical accounting of the IIM trust and, arguably, temporarily prohibited any work other than 'litigation support' on land-based IIM accounts . . . ."

[44] Because the transaction was misposted, one member of the class was credited with $60.94 more than he should have received, while another class member was not credited with the $60.94. In other words, the error did not implicate recording of the revenue to the IIM system; it only reflected a misposting between two account holders.

Id. (discussing Pub. L. No. 108-108, 117 Stat. 1241 (2003)).[45]

This Court's Cobell XX opinion discusses the LSA project in detail and at length, but the following evidence considered by the Court is particularly relevant to Plaintiffs' latest allegations:

> The government retained NORC to draw samples for the LSA project, which ultimately involved the reconciliation of 6,599 transactions from land-based accounts in the electronic era. NORC's goal in performing the LSA project was to deepen its understanding of the system in order to better target future historical accounting efforts. Tr. 974:18-975:1 (Scheuren). NORC – along with various accounting firms assisting with the LSA project – learned many lessons while performing this relatively small number of reconciliations. First, it learned that the cost of reconciling transactions in land-based accounts is significant. Tr. 964:23-965:16 (Scheuren). Second, however, NORC encountered far fewer errors and missing records than it had expected to discover. Tr. 977:15-22 (Scheuren). The large sample sizes contained in the 2003 Plan had been based on Interior's assumption – an assumption informed by historical reports, anecdotal evidence, and decades of criticism – that records would be missing, erroneous, and in disarray. Those assumptions, NORC concluded, were overblown and incorrect.

Cobell XX, 532 F. Supp. 2d at 60 (emphasis added). The Court further described the results of NORC's analysis as follows:

> Accounting firms working with the sampled transactions provided by NORC were able to reconcile 2,363 of the 2,372 debit transactions sampled, and 2,117 of 2,128 credit transactions sampled. Tr. 997:1-12, Tr. 1000:2-12 (Scheuren); AR-438 (tables 4 and 7). A posted transaction from the IRMS or TFAS database was considered "reconciled" if contractors found supporting documents sufficient to determine whether the transaction was correct or erroneous. Tr. 997:5-8 (Scheuren); . . . . No errors were found among the reconciled debit transactions, and 25 errors were found among the reconciled credit transactions. Tr. 997:1-12, Tr. 1000:7-20 (Scheuren). For statistical purposes, NORC also considered all

[45] Commencement of the LSA project following enactment of Public Law 108-108 provides yet further refutation of Plaintiffs' groundless assertion that Interior repudiated its duty to provide historical statements of account to beneficiaries. Rather than relying on this law as a reason to stop work of use to the accountings, Interior both complied with the law and continued to perform work to gather useful information for the accounting efforts.

> unreconciled transactions erroneous (nine debit transactions and eleven credit transactions). 9/30/2005 NORC LSA Report, AR-438 at 14, 17. Both variable and attribute sampling were employed in the LSA project, as contractors noted both the presence of errors as well the total amount of dollars in error.

532 F. Supp. 2d at 62. Finally, the sample design for the LSA project provided for a 100 percent reconciliation of all transactions of $100,000 or more. Id.; Tr. 990:12-991:7 (Scheuren 10/17/07 AM). Interior's accountants were able to reconcile all of those large transactions. Tr. 1001:16:1002:6 (Scheuren 10/17/07 AM); AR-437.

The Court noted correctly that the LSA project was not a complete analysis of the entire population of IIM transactions. Cobell XX, 532 F. Supp. 2d at 92-93 (discussing, among other things, testimony of Dr. Hinkins from NORC). Interior did not represent it to be a complete or finished analysis, and that was the reason Interior contemplated completing other tests, such as the "Land-to-Dollars" Test, the "Data Completeness Validation" project, Interest Recalculation, and Test of Restored Transactions described in the 2007 Plan. E.g., AR-566, ¶ V.B ("What Work Remains" for Electronic Era), at 33-03-18 to -19; see 532 F. Supp. 2d at 93 (referring to "several other tests [to be done], chief among them, the Land-to-Dollars tests"). Still, as noted earlier, the Court concluded that "the various projects reviewed in the findings of fact will generally produce helpful information concerning the history of the IIM trust." Id. The results of the LSA project are thus another confirmation that Plaintiffs' assertion of entitlement to a multi-billion dollar award is wholly unsupported and that Plaintiffs have failed to meet their burden of establishing a reasonable approximation of the amount they claim should be disgorged.

3. Judgment and Per Capita Account Reconciliations

Interior's 2003 Plan contemplated reconciling 100 percent of all 96,823 Judgment and Per Capita accounts, utilizing transaction-by-transaction testing. See Cobell XX, 532 F. Supp. 2d at 56. By the time Interior issued its 2007 Plan, Interior had reconciled 83,226 accounts, i.e., 86 percent of all accounts, and "deferred further work on reconciling the remaining [Judgment and Per Capita] accounts to shift scarce resources to efforts related to land-based account historical accounting." AR-566, ¶ V.A.1 ("What Work Remains" for Judgment and Per Capita Accounts), at 33-03-18; see 532 F. Supp. 2d at 56-57.

The results of the reconciliations of these accounts, however, further confirms that Plaintiffs' quantum assertions are legally indefensible. Differences noted during the reconciliation process were minimal, see, e.g., Cobell XX, 532 F. Supp. 2d at 71 ("After applying [the Interest Recalculation] test to Judgment and Per Capita accounts, Interior concluded that most discrepancies in individual accounts were minor, typically only a dollar over or two dollars under the posted interest amount. Tr. 116:4-9 (Cason).").

4. Other Projects and Tests

Cobell XX described numerous other projects and tests undertaken by Defendants both before and during this litigation. See, e.g., Cobell XX, 532 F. Supp. 2d at 50-52 ("Mass Cancellation project"), 67-69 ("Data Completeness Validation Project"), 69-70 ("Posting Test" and "Land-to-Dollars Test"), 70-71 ("Interest Recalculation Project"). While most of these projects and tests were not completed as of the 2007 hearing, nothing adduced from the work completed as of that point even remotely supports Plaintiffs' grossly inflated claims of unjust enrichment.

The DCV testing was particularly robust. "[B]etween four and eight employees have worked between three and four years conducting DCV testing on some 113 million transactions." Cobell XX, 532 F. Supp. 2d at 67. Among the accomplishments was the "mapp[ing of] over 6 million of the 6.4 million checks issued to IIM beneficiaries during the 'electronic era.' Tr. 535:2-536:13 (Herman). More than 97 percent of the checks analyzed between 1987 and 2002 were successfully mapped. Tr. 565:2-566:6 (Herman)." Id. at 69.

In addition, the Land-to-Dollars pilot testing at the Horton Agency uncovered no evidence that money that should have been received was not. AR-565 at 21. The test also demonstrated that all the money received moved into IIM accounts. Id. While this pilot test was not necessarily representative of results throughout BIA regions or agencies, Plaintiffs offered no evidence at the October 2007 hearing and they do not argue now that additional land-to-dollars testing would support their theory of missing revenue.

Aside from those tests and projects, other evidence squarely contradicts Plaintiffs' assertions. E.g., Cobell XX, 532 F. Supp. 2d at 63-64 (discussing NORC's meta-analysis); 2005 Tr. 83:7-84:8 (Sandy 6/5/05 PM) (during IT hearing, auditor called by Plaintiffs confirmed, on cross-examination, that in 20-plus years of work, she had never heard of an instance in which someone manipulated data within Interior's systems and arranged to have an Individual Indian Trust beneficiary's payment sent to someone other than the intended Trust beneficiary); Tr. 1313:2-1314:15; Tr. 1324:17-1326:17 (Red Thunder, 10/22/07 AM) (Plaintiffs' witness, who worked in BIA for approximately 37 years, identified only two instances where she was concerned about possibility that disbursements were not going directly to a beneficiary and, in each case, the matter was either being resolved or found not to be an issue.).

Like the long-ago held and since discredited belief that no documents exist to perform the historical accounting, Plaintiffs' multi-billion dollar allegations lack any basis in fact much less satisfy their burdens of proof. To the contrary, all work done to date, including but not limited to the work described in this section, squarely undercuts the validity of Plaintiffs' claim.

D. Plaintiffs' Methodologies For Estimating Alleged Benefit To The Government Are Fatally Flawed

The methodologies underlying Plaintiffs' claim that the government has withheld "billions of dollars of trust funds," Pls. Mem. at 28, are fatally flawed in numerous respects. The following provides an overview of some of the major flaws.

1. Plaintiffs' Claim That Defendants Failed To Disburse Over $3 Billion Of Trust Funds Grossly Misconstrues The Data In AR-171 And DX-365

a. AR-171 Does Not Support The Claim That The Government Has Failed To Distribute $3.6 Billion

Plaintiffs' analysis begins with a gross misrepresentation of the conclusions to be drawn from AR-171. As the Court explained in its review of this document, AR-171 represented an effort by the government to respond to the Court's "throughput" inquiry. Cobell XX, 532 F. Supp. 2d at 83–84. The Court noted that a $3.6 billion difference existed between total estimated receipts (including Osage quarterly annuity amounts, "Tribal IIM" monies, and other non-IIM amounts) and total disbursement, and the Court also recognized that "[these] figures are of course estimates, calculated according to unverified hypotheses, using data that are opaque." Id. at 84.

i. Plaintiffs Wrongly Assume That No Disbursements Occurred Prior to 1972

The Court's review of AR-171 demonstrates flaws in Plaintiffs' conclusion that AR-171 reflects the government's failure to disburse $3.6 billion. At the outset, Plaintiffs' analysis wholly ignores this Court's observation that "[n]otably missing from [AR-171] is disbursement estimates between 1909-1971: years for which the chart estimates some $3.2 billion in collections." Cobell XX, 532 F. Supp. 2d at 84. Plaintiffs' assertion that AR-171 shows the government failed to disburse $3.6 billion is predicated upon the assumption that nothing was disbursed prior to 1972. Even Plaintiffs must concede that disbursements occurred prior to 1972. Cf. Tr. 1662:14-17 (10/23/07 PM) (Court asked Plaintiffs' expert, Mr. Fasold, "[M]y question is of what utility is a number of $80.7 billion, which assumes that no disbursements were made, when everybody knows that disbursements were made?").

ii. Plaintiffs Wrongly Include "Tribal IIM" Receipts

As the Court observed:

> Tribal trust money has been deposited into the IIM system over the years, even though it is not attached to IIM allotments. Tr. 659:22-660:10 (Herman). Tribes utilized IIM accounts for convenience - as a relatively easy way to obtain checks from the IIM system. Such accounts, oxymoronically, are referred to as "tribal IIM accounts" containing "tribal IIM money." Tr. 342:14-343:18 (Ramirez).

Cobell XX, 532 F. Supp. 2d at 84. The "receipts" associated with Tribal trust money deposits are reflected in Column E of AR-171, entitled "Tribal IIM," which totals $1.513 billion. AR-171 (Column E); see 532 F. Supp. 2d at 84.

Plaintiffs' $3.6 billion analysis includes the statement, "Nevertheless, once the income categories are totaled, AR-171 estimates that approximately $14.3 billion had been collected."

Pls. Mem. at 29 (citing Cobell XX, 532 F. Supp. 2d at 84). While Plaintiffs refer to this Court's opinion as authority for the $14.3 billion amount, Plaintiffs disregard the Court's earlier recognition that the $14.3 billion included money deposited into "accounts, oxymoronically, . . . referred to as 'tribal IIM accounts' containing 'tribal IIM money.'" 532 F. Supp. 2d at 84. Thus, Plaintiffs seek to include slightly over $1.5 billion which this Court has already recognized is not properly to be included in IIM accounts.

iii. Plaintiffs Wrongly Include More Than $920.1 Million of Interest Paid As Being Akin to Royalty and Lease Revenues

In addition, the $14.3 billion amount derived from AR-171 includes $920.1 million in interest receipts for the period of 1972-2005. AR-171 (Column A); see Cobell XX, 532 F. Supp. 2d at 84. As this Court heard at the October 2007 hearing, interest prior to 1972 was not separately reported on the AR-171, but, instead, was a component of the pre-1972 "Other Receipts." Tr. 837:1-13 (Herman, 10/16/08). As such, the amounts reported for interest prior to 1972 represent a return on the beneficiaries' investments and not separate revenue streams, such as royalty payments and lease revenues. Plaintiffs' analysis makes no effort to distinguish these receipts.

b. Defendants' Table (DX-365) Does Not Establish That As Much As $3 Billion In Collected IIM Revenues Should Have Been But Were Not Posted To IIM Accounts

Citing DX-365, Plaintiffs assert that "at least $3 billion in trust revenue had been collected and held by defendants, but never credited to beneficiaries' IIM accounts." Pls. Mem. at 30 (emphasis in original). Although an estimated 23 percent of funds collected in the

individual Indian trust system were not credited to IIM accounts, this fact has no bearing on any liability to any member of the plaintiff class. Instead, Defendants provided this information in an effort to provide the Court as complete a picture of the flow of funds as possible.

The tables in DX-365 were developed expressly for the October 2007 hearing, pursuant to the Court's outlined requests, to show how much "throughput" would be covered by the historical accounting project given various assumptions concerning the characteristics of IIM accounts. Unfortunately, the term "throughput" is imprecise. Out of an abundance of caution, Interior employed a broad definition to include funds collected but subsequently determined not to be creditable to IIM accounts. Nothing in the exhibit or in the related trial testimony by Assistant Deputy Secretary Haspel, see Oct. 2007 Tr. 1110:14-1141:13 (10/17/07 PM) (Haspel), shows the other 23 percent of "total collections" to have been mishandled, misdirected or lost.[46] Nor, as the Court noted, did Plaintiffs cross-examine Dr. Haspel on that point. Cobell XX, 532 F. Supp. 2d at 85. Nothing in the exhibit or related testimony indicates that the other 23 percent should have been deposited in IIM accounts.

That the Court questioned the meaning of the 77 percent figure, see 532 F. Supp. 2d at 85-86, does not translate to a finding or a presumption that Defendants should have deposited $3 billion more to IIM accounts. Indeed, the Court expressed doubt that the displayed difference could mean what Plaintiffs now assert.

> Presumably the government did not mean to suggest that between $2.5 and $3 billion of funds intended for IIM accounts were lost or misdirected, as it has resisted such suggestions throughout this litigation. Perhaps Mr. Haspel's

[46] The exhibit also states that "Estimated Credits into IIM Accounts is Currently Estimated as 77% of Total Collections and is Subject to Change upon Further Analysis." DX-365 (stated at bottom of each page in bold lettering).

> assumption means that the government expects there to be supporting documentation for $13 billion in receipts, but only documentation for $10 billion of the expected $13 billion in credits. All this is speculation-suffice it to say that although on the face of Haspel's exhibit there appears to be a shortfall of about $3 billion, I do not believe that is what the exhibit intended to communicate.

Id. (emphasis added). The Court is correct; the exhibit was not intended to communicate a "shortfall," and no such shortfall exists.

Leading up to the October 2007 hearing, every effort was made to try to provide answers to specific questions the Court had raised regarding throughput. As noted previously, given the historically decentralized administration of data, compilations with the characteristics needed to perform an aggregate IIM account are limited. With the focus on marshaling as much of that data as possible, little time remained to try to answer additional questions the data might raise to the extent we could anticipate such questions. The difference between collections and credits was one such follow-on question.

As it was, the government's first witness, Associate Deputy Secretary James Cason, was cross-examined on the subject of "collections" versus "receipts." That testimony, which Plaintiffs do not cite, addresses essentially the subsequently introduced DX-365 statistics which Plaintiffs now cite for the proposition that $3 billion was collected for, but never credited to, IIM account holders. Nothing in that testimony states, implies, or even suggests that Interior has collected any sum of money for individual Indians which it should have, but failed to, pass through to them. Mr. Cason testified, in part, as follows:

> [By Mr. Dorris]
> Q. Now, look on the next page [of AR 63-13]. I want to look at the second highlighted item there, "'collections' versus 'receipts'"?
>
> A. Mm-hmm.

Q. Is this an indication that you had a discussion at this point as to what to call things as you wrote up the plan, whether to call them collections or receipts?

A. Yes.

Q. And was it your decision to use "receipts" as opposed to "collections"?

A. I would say it's a collective decision or understanding.

Q. Okay. And why did you make a decision to call it receipts rather than collections?

A. One of the things that we've experienced in this litigation is that all of us end up parsing words carefully, and that there is a difference in meanings between collections and receipts, and if I can illustrate, I'm going to do a timber sale, and I have five timber companies who bid on the timber sale. And I collect a hundred dollars from each one. So I have collections of $500, but only one of those companies win the bid. So in the end I have a receipt of $100 that goes to the IIM beneficiary, because that timber company won the bid and that's what they bid, and then we have a responsibility to return the other $400 to the unsuccessful bidders.

So in working our way through this process, we thought we needed to be as clear as we could be in using common terminology for the differences between collections and receipts.

Q. And what you've described is just one example of many you could talk about in terms of the difference between collections and receipts, correct?

A. Yes. It's one example.

Q. Because you wanted to use "receipts" as meaning funds that were posted to a beneficiary's account, correct?

A. They were entitled to and posted.

Q. What did you just say?

A. That the IIM beneficiary was entitled to the funds and that it was posted to their account.

Q. That's what receipts is, correct?

A. Yes.

Q. For you. So that money could be collected by the Department of the Interior and it be admittedly individual Indian trust monies. That would be collected, correct?

A. When I receive the money, you could call it a collection, and then when I post it it becomes a receipt, but I can also collect money we end up having to return, so we've collected the money but it didn't end up being a receipt, because we have to return it to somebody.

Q. Exactly. And you can collect money that is individual Indian trust monies that never get posted to an individual's account, right?

A. I suppose that's a theoretical possibility, sure.

Q. Well, that's what's all the money that's in the special deposit accounts, right?

A. No. No, special deposit accounts are basically temporary accounts that are used where we're not clear who has the rightful interest in the money, and a special deposit account may be used for the very example I gave. I received the $500, I posted it to the special deposit account till it's clear that the timber sale has been completed, who the winning bidder is, the bid from the winning bidder goes to the IIM account holder and the rest gets refunded.

Tr. 154:14-156:24 (10/10/07 PM) (Cason).

In the foregoing testimony, the term "receipts" corresponds to "credits" as used in DX-365 where a further attempt was made to reflect more accurately the distinction between total funds collected and total funds posted to IIM accounts. In June 2008, to the extent this distinction is considered relevant, the government will provide additional evidence showing that Interior follows an established accounts receivable process designed to collect revenues of which certain portions are intended for IIM accounts and other portions are properly disbursed to third-party recipients, including tribes.

2. Plaintiffs Incorrectly Assert That All Osage "Headright" Revenues Constitute IIM Subject to Disgorgement

Plaintiffs argue that all Osage headright funds should be considered IIM subject to disgorgement. In so doing, they disregard the legal character of such funds and wrongly treat all Osage headright revenues as though they pass through the IIM system.

Plaintiffs' discussion regarding Osage headright revenues begins with a general recitation of the accounting requirement set forth in the 1994 Act, Pls. Mem. at 33, and summarily concludes that Osage headright revenues are "funds held in trust by the United States for the benefit . . . of an individual Indian." Id. (quoting 25 U.S.C. § 4011(a)). Plaintiffs base their argument upon Section 4 of the Osage Allotment Act of 1906, Pub. L. No. 59-321, 34 Stat. 539, 544, which describes the general allocation formula for distributing royalties from oil, gas, coal, and other minerals. Pls. Mem. at 33. Plaintiffs ignore, however, other statutory provisions that refute their claim.

For example, Section 3 of the Osage Allotment Act of 1906, which precedes the section cited by Plaintiffs, establishes "[t]hat the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage Tribe for a period of twenty-five years . . . ." 34 Stat. 539, 543. See West v. Oklahoma Tax Commission, 334 U.S. 717, 721 (1948) ("Section 3 of the Act stated that the minerals covered by these lands were to be reserved to the Osage Tribe for a period of 25 years and that mineral leases and royalties were to be approved by the United States."). Congress later amended this section to reserve such revenues to the Osage Tribe "in perpetuity." Osage Act of October 21, 1978, § 2(a), Pub. L. No. 95-496, 92 Stat. 1660, 1660 (extension "in perpetuity"); see Osage Act

of June 24, 1938, § 3, 52 Stat. 1034, 1035 (extending reservation of royalties to Osage Tribe to April 8, 1983, unless otherwise provided by Congress).

Further, as Plaintiffs must concede, over the years, the headright shares have been sold, bequeathed, and otherwise alienated, and the current owners of headright shares (like the owners as of the enactment of the 1994 Act) constitute a broad mixture of Osage, non-Osage Indian, non-Indians, and other entities. Consequently, Plaintiffs' assertion that "each of whom [individual Osage headright owner] is a member of the plaintiff class," Pls. Mem. at 33, is simply wrong.

The true character of headright revenues is demonstrated by an analysis of contemporaneously prepared accounting records related to such interests. As an example, we have attached excerpts of accounting documents related to the March 2000 quarterly payment, and we will be prepared to explain them, and similar records, in greater detail at the upcoming trial. Exhibit (Ex.) 2.[47] These excerpts consist of documents prepared by the Osage Agency, and the first three pages show a transfer of funds from the Osage Tribe's tribal account (entitled "Osage Tribe") to IIM system general ledger accounts. Ex. 2, pages 1-3. The third page shows these funds going into two general ledger accounts in the IIM system, one for "IIM Accts, Estates, Guardianships, Minors & Whereabouts Unknown"[48] and the other for "Non-Indians & Private Organizations." Ex. 2, page 3. The amounts going into these two general ledger

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[47] "Ex." refers to exhibits filed contemporaneously with this memorandum.

[48] As with other forms of revenue from Indian land interests, particularly judgment and per capita payments, among the headright owners are individual Indians who are minors, incompetents, or estates of deceased individual Indians. For those individuals, the headright revenue is paid into IIM accounts. See AR-171 column C ("Osage Qtr. Annuity"); AR-176 at 3, 47-60.

accounts represent the only funds going from the Osage Tribe account into the IIM system. The fifth through seventh pages pertain to payments made from the Osage tribal trust account directly to headright owners. Ex. 2, pages 5-7. The fifth page, again, shows the source of the funds being the Osage Tribe account, and the payees are "Various Annuitants" (described as 2,924 records). Ex. 2, page 5. The final page shows this amount as being "DIRECT PAID" in the "Accounting Classification" box, i.e., the payment does not enter the IIM system. Ex. 2, page 7. Finally, the amounts shown for this transaction tie into the schedule of Osage payments referenced by Plaintiffs in their arguments about Osage headright revenues. AR-176 (page DOOO-OOO-HTA-WDC-000056-0007-00670; see Pls. Mem. at 34 (referencing AR-176).

In summary, while Plaintiffs' analysis of Osage headright revenues treats all such revenues as being IIM, the Osage Agency business records reflect a markedly different treatment. Specifically, payments are allocated between funds that go to IIM beneficiaries – principally minors, incompetents, estates, and "Whereabouts Unknowns" – and others, including payments directly from the Osage tribal trust account to headright owners. Plaintiffs' analysis wrongly treats all of the funds as being IIM monies.

Plaintiffs' erroneous characterization of Osage headright revenues as being IIM revenues is reflected in Column D of Attachment A to their memorandum, entitled "Osage, Corrected."

The amounts shown in Column C of Attachment A are comparable to those shown in the "Osage Qtr. Annuity" column in AR-171; the difference between Column C and the AR-171 amounts is that Plaintiffs have included estimates for the years 1887-1908 and for 2006-2007 in Column C. Column D of Attachment A is simply derived from a one-page document on an Osage Tribe website server that lists the history of total payment amounts for each headright

interest from 1880 to the first quarter of 2008. By definition, these amounts include all of the payments made from the Osage Tribe to Osage tribe members, non-Osage Indians, non-Indians, and other entities. Column E, entitled "Total Revenues," simply includes the amount of total Osage headright payments, including the payments made directly by the Osage Tribe.

Thus, while Column D purports to be the correct Osage total revenue amount, Plaintiffs have overstated Osage revenues because they include revenues that never entered the IIM system. While Defendants' AR-171 correctly estimated Osage IIM revenue as totaling $571.2 million for the years 1909-2005, Plaintiffs' Attachment A adds to these amounts all payments made by the Osage Tribe to the Osage headright owners, resulting in an overstatement approaching $900 million.[49]

3. Plaintiffs' Exclusion of Automated Clearinghouse And Electronic Funds Transfer Transactions Significantly Understates Disbursements Made to IIM Account Holders

Plaintiffs admit that their "calculation of disbursements does not include estimates of Automated Clearinghouse or Electronic Funds Transfer (ACH/EFT) transactions." Pls. Mem. at 40. In fact, Plaintiffs concede that they "do not dispute that some funds might have been distributed to class members via ACH/EFT." Id. at 40-41. Plaintiffs justify this plain omission, however, by asserting that "such electronic transactions are a demonstrably insignificant part of the total amount of disbursements." Id. at 41.

Plaintiffs' conclusion is based on their analysis of NORC's report entitled "Electronic

[49] For the years covered by both AR-171 and Attachment A, i.e., 1909-2005, Plaintiffs' overstatement approximates $810 million. If one further includes the amounts set forth in Attachment A for the years 1887-1908 and 2006-2007 (an additional $73.4 million), Plaintiffs' overstatement totals $883.4 million.

Payment Prototype for the Alaska Region." AR-388 (Sept. 30, 2003), cited in Pls. Mem. at 41 n.73. This conclusion is fatally flawed because Plaintiffs utilized a percentage based on the number of transactions to conclude that the dollar amount of related disbursements is small. In fact, the average dollar amount associated with electronic transfers is much higher than the average dollar amount associated with check disbursements. Defendants will demonstrate this at the upcoming trial utilizing data from PACER[50] and CP&R[51].

4. The Evidence At The October 2007 Trial Demonstrated That Virtually All Revenue Disbursed by Check Reached the Beneficiaries

Plaintiffs assert erroneously that only about 94 percent of the revenues disbursed by checks to IIM account holders actually reached the beneficiaries. Pls. Mem. at 40 (referencing Pls. Att. C "Disbursement Calculation," column H). Plaintiffs arrive at this number by assuming that the percentage of checks paid is equal to the percentage of revenue disbursed. They offer no evidence to support this assumption. In fact, the evidence produced at the October 2007 hearing

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[50] Treasury's Payments, Claims and Enhanced Reconciliation (PACER) system provides federal agencies with on-line access to check and EFT information, including issuance and payment status, check images, and the disposition of EFT and check payments. http://fms.treas.gov/pacer/index.html; http://fms.treas.gov/pacer/background.html.

[51] Treasury's Check Payment and Reconciliation ("CP&R") system was used to track the status of all Treasury checks beginning in March 1987. Interior Status Report to the Court Number 27, at 5 (Nov. 1, 2006). The checks include those issued by Interior under disbursing symbol 4844. Tr. 535:4-14 (Herman); see Twenty-Sixth Ouarterly Report for the Department of the Treasury, at 2 (June 1, 2006) ("Treasury 26th Report"). In 2006, Treasury's Financial Management Service ("FMS") implemented the Treasury Check Information System ("TCIS") to replace the CP&R system for information about Treasury checks received after May 23, 2006 and entered into TCIS beginning June 1, 2006. Treasury 26th Report at 2. The CP&R System remains the central repository for information about Treasury checks from approximately March 1987 to June 1, 2006. Id.

shows that nearly 100 percent of the revenue disbursed by check reached the beneficiaries for the years studied.

At trial, the evidence showed that Interior issued approximately $2.8 billion worth of IIM checks between January 1991 and December 2005, and that checks totaling only about $5.2 million were not cashed. DX-273; DX-275; Tr. 1300:15-1302:23 (Cymbor). This amount of uncashed checks represents approximately 0.2 percent of the total dollar value of checks issued. In other words, 99.8 percent of the dollar value of issued checks were cashed.

Consistent with the above finding, Treasury's Check Study, DX-242, established that for a twelve-month period from September 1998 through August 1999, Interior issued $177 million in IIM checks. Of those IIM checks, less than one percent, with a value of approximately 0.2 percent of the total dollar value, were not cashed. DX-242 at 13, 16-17; Tr. 884:25-885:13 (Winter).

For checks issued from 1954 to 1989, when Treasury initiated "limited payability" of checks to one year from the date of issuance, DX-231 at 1, 18; Tr. 323:17-324:4 (Ramirez), Interior identified 38,554 uncashed checks to IIM beneficiaries with a face value of no more than $1.6 million. Tr. 357:10-12 (Ramirez). Plaintiffs estimate IIM revenue for 1954 through 1989 as over $8.5 billion. See Pls. Mem. Att. A (Column E). Using the evidence produced at the October, 2007, trial and Plaintiffs' revenue estimate (an estimate the government disputes), the total amount of non-cashed checks represents less than 0.02% of IIM revenue.

Finally, the Plaintiffs also assume wrongly that revenue from uncashed checks is turned over to and benefits the government, which it does not. Treasury recredits Interior for uncashed checks, Tr. 1294:16-1295:18, Tr. 1300:15-24 (Cymbor); Tr. 290:14-291:2 (Ramirez), and

Interior in turn recredits the IIM accounts for those uncashed checks. Tr. 846:17-847:5 (Winter); Tr. 292:4-296:3 (Ramirez).

In sum, the evidence presented at the 2007 trial shows a nearly 100 percent disbursement rate for revenue paid by check in the years studied. If the Plaintiffs had used this number, instead of the unjustified rate of approximately 94 percent, their calculation of the amount owed to them would be dramatically lower. Applied to Plaintiffs' $15.13 billion total revenue estimate for 1887 through 2007 (an amount Defendants dispute), the higher disbursement rate produces an additional $900 million in disbursements and reduces Plaintiffs' "Accumulated Benefit Conferred" by approximately $11.5 billion. See Pls. Mem. Att. A ("Total" row for columns F, G, J).

5. Plaintiffs' Allegation Of A Benefit To The Government Is Based Upon An Erroneous Depiction Of The Cash Management Function Of The Treasury General Account And The Budgetary Accounting Function of The 14X6039 IIM Account

In trying to support their claim of an alleged benefit to the government totaling $58 billion, Plaintiffs misstate or misunderstand excerpted testimony related to the Treasury's General Account (TGA) and the IIM account 14X6039. A careful review of this complex subject reveals that Plaintiffs' contentions are baseless. Citing the July 7, 1999 trial testimony of Richard L. Gregg, then-Commissioner of the Financial Management Service, Plaintiffs incorrectly contend that "the government benefits from IIM Trust funds that are commingled in the [TGA] and withheld from the plaintiff class because Treasury treats such funds of the plaintiff class as government funds." Pls. Mem. at 6. This contention mistakenly conflates concepts of cash management and budgetary accounting.

Treasury does not treat funds within 14X6039 as government funds; they are not owned by the government. 14X6039 constitutes a "deposit fund" and, as explained in OMB Circular A-11, a deposit fund

> is an account established to record amounts held temporarily by the Government until ownership is determined (for example, earnest money paid by bidders for mineral leases) or held by the Government as an agent for others (for example, State and local income taxes withheld from Federal employees' salaries and not yet paid to the State or local government).

OMB Circular A-11, Section 20.3, at 4 (2007) (attached hereto as Ex. 3) (emphasis added); see 1999 Tr. 3310:8-19 (7/7/99) (Gregg) (the IIM account is "referred to as a deposit fund account"). Section 20.12(b) of OMB Circular A-11 similarly explains:

> Section 20.12(b) Overview of funds types: . . . Agencies account for amounts that are not Government funds in deposit funds. The following table summarizes the characteristics of these funds. The text following the table discusses the types of funds in more depth.
>
> | Fund Type/Account

Treasury Account Symbol | What is the purpose of the account |
> |---|---|
> | Deposit funds
(6000-6999) | Record deposits and disbursements of monies not owned by the Government or not donated to the Government (amounts donated to the Government are deposited in a special or trust fund account). |

OMB Circular A-11, Section 20.12(b), at 36-37 (2007) (emphasis added); see id. at 37 ("use deposit funds to account for monies that do not belong to the Government").

It is correct that, as a matter of cash management, when Interior deposits funds for credit to the IIM account, the funds themselves go into the TGA. However, it is not correct that those funds go into the TGA in terms of budgetary accounting. That is, the movement of cash between

a financial institution designated to accept a government deposit and the TGA at the Federal Reserve is distinct from the government's budgetary accounting. As will be explained at the June trial, this distinction is significant because it is the budgetary accounting that determines any "benefit" to the trust fund. During a transaction, the agency (here, Interior) making the deposit will also post the transaction to a Treasury budgetary account, which in this case would increase the fund balance of 14X6039, the IIM fund. The concentration of cash in the TGA at the Federal Reserve subsequent to a deposit does not affect the amount posted to the IIM fund balance, including the amount available for future authorized transactions. Thus, while every dollar that any government entity – including IIM fund managers – deposits to Treasury and disburses from Treasury passes through the TGA, that is simply not relevant to this case.

Thus, contrary to Plaintiffs' assertion, Pls. Mem. at 27-28, no IIM funds have been unlawfully withheld in the TGA. The TGA is a cash management tool and its cash balances must be distinguished from amounts classified to an asset account, like the IIM fund, in a budgetary accounting system. If a collection amount is recorded to increase the assets credited to the IIM fund balance, it is not possible to have withheld monies in the TGA, regardless of the cash balance in the TGA on a given day or over time. The level of the transient operating cash in an account like the TGA has no effect on the budgetary balance of the IIM fund, nor does it affect the earnings generated by the investable balance and credited to the fund. Conversely, benefit or harm to the IIM fund are simply not a function of the TGA cash balance.

Plaintiffs' reliance on Commissioner Gregg's testimony in an effort to convince the Court that, contrary to the above explanation, IIM money is "unlawfully withheld in the TGA," Pls. Mem. at 27, is thus seriously misplaced. In their Memorandum, Plaintiffs quote fully

Commissioner Gregg's answer to a specific question he was asked during the 1999 trial; however, their paraphrase of the question that he was asked is flawed. Commissioner Gregg was not asked "Who gets the benefit of the monies in the [Treasury General A]ccount?" Pls. Mem. at 27. He was instead asked "Who gets the benefit of the monies in the account?" 1999 Tr. 3315:10 (7/7/99) (Gregg) (emphasis added). "The account" about which Commissioner Gregg was being questioned was not the TGA. Instead, as is clear from the transcript, Commissioner Gregg was being questioned about a Treasury account that he identified as 20X1807. Id., 1999 Tr. 3314:21-3315:13. (Attachment 3, enclosed.) Therefore, the quoted portion of Commissioner Gregg's testimony does not support Plaintiffs' position. Indeed, Commissioner Gregg never testified that the government derives benefit from IIM allegedly withheld from the plaintiff class.[52]

Finally, contrary to Plaintiffs' contention, the credits and debits to the TGA that relate to IIM activities have a neutral effect on the government's borrowing and national debt costs. The cash that comes into the TGA is offset by the cash that leaves the TGA to fund the IIM investments and payments. As for 14X6039, the net of all collections and disbursements is recognized as a liability in the central accounting system, because the funds do not belong to the federal government. Plaintiffs offer no proof to the contrary.[53]

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[52] The excerpted testimony of Commissioner Gregg cited in Pls. Mem. at 27 n.40 also does not support Plaintiffs' position. It does not relate to IIM funds, but instead addresses generally "funds" and "funds available to Treasury." It is not inconsistent with the above explanation of how the purposes of the TGA and the IIM account must be distinguished.

[53] Plaintiffs are also wrong that the funds held by the Department of the Treasury and Interior have never been reconciled. Pls. Mem. at 26. Although there was an imbalance for several years, the agencies eliminated the approximately $2.5 million imbalance effective March 31, 2003. Interior's 13th Quarterly Report, at 29, 36-37 [Dkt. 2049] and Treasury's 14th

6. Plaintiffs' Computation Of An Alleged Benefit To The Government Is Simply An Inflated Estimate Of Prohibited Prejudgment Interest

To reach their $58 billion disgorgement figure, Plaintiffs utilize the 10-year Treasury Note rate of interest to "calculate the benefit to the government for its withholding of plaintiffs' trust funds in breach of trust." They describe the "benefit" as "savings to the Government." Pls. Mem. at 44. These contentions are invalid.

Although Plaintiffs characterize their calculations as a means to determine "the benefit to the government," they are nothing more than calculations of pre-judgment interest. In fact, Plaintiffs acknowledge that "[t]o ensure that investment income is not double-counted, plaintiffs have reduced the reported collections by the amount of interest credited to plaintiffs' trust accounts by the government." Pls. Mem. at 44 n.88 (emphasis added). Their calculations merely arrive at a compensatory interest payment, net of prior payments, and clearly beyond this Court's jurisdiction to award.

It is well-settled that "interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest." Library of Congress v. Shaw, 478 U.S. 310 (1986); accord Amax Land Co. v. Quarterman, 181 F.3d 1356, 1359-60 (D.C. Cir. 1999) (where "Congress has not expressly provided by statute or contract for recovery of interest against the government, and in the absence of such a waiver of sovereign immunity, interest cannot be awarded against the United States"); Thompson v. Kennickell, 797 F.2d 1015, 1016-17 (D.C. Cir. 1986). The express waiver for interest payments must be separate from general waivers of immunity to suit. "This requirement of a separate waiver reflects the

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Quarterly Report, at 3 [Dkt. 2082].

historical view that interest is an element of damages separate from damages on the substantive claim." Library of Congress v. Shaw, 478 U.S. at 314; accord Soc. Sec. Admin., v. FLRA, 201 F.3d 465, 468 (D.C. Cir. 2000) ("Even where Congress has waived immunity to suit, a litigant against the government cannot recover interest unless Congress affirmatively, separately, and unambiguously contemplated an award of interest.").

The courts have been consistent that calling "interest" by another name does not make it any more recoverable. Thus, after reviewing numerous preceding cases, the United States Court of Claims concluded, in United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1322 (1975), that "the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." See also Shaw, 478 U.S. at 322 ("interest and compensation for delay are functionally equivalent").

Moreover, the immunity of the government from claims for interest is not altered by considerations of equity or that it would be "right or just" for the claimant to recover interest. In United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947), the Supreme Court reversed the United States Court of Claims' award of interest on customs duty refund claims. The lower court had felt that officials of the General Accounting Office had delayed too long in determining the ownership of the refund claims. The Supreme Court disallowed the interest claim, reasoning, "Had Congress desired to permit the recovery of interest in situations where the Court of Claims thought it was just or equitable, it could have so provided. The absence of such a provision is conclusive evidence that the court lacks any power of that nature." Id. at 660. Likewise, had Congress desired to permit disgorgement of "savings" to the government in

situations where the courts thought it would be just or equitable, it could have so provided, but it plainly did not do so.

Instead, in the case of IIM account holders, the 1994 Act amended 25 U.S.C. § 161a to add provisions requiring the payment of interest on all funds held in trust by the United States to the credit of individual Indians. 25 U.S.C. § 161a(b).[54] Section 103(d) of the Act limited the applicability of 25 U.S.C. § 162a(b) to interest earned on amounts deposited on or after October 25, 1994. However, another section of the 1994 Act provides that the Secretary "shall make payments to an individual Indian on any claim for interests on amounts deposited or invested on behalf of such Indian before the date of this Act retroactive to the date that the Secretary began investing individual Indian monies on a regular basis" to the extent that the claim is identified by a reconciliation process on IIM accounts or is identified by the individual and supported with adequate documentation and is verified by the Secretary. 25 U.S.C. § 4012. Generally, Interior began centralized investing of IIM in the mid-1960s and has records showing the rates for the semi-annual payment of interest (1966-1989) and the monthly payment of interest (1989 to present).

In light of the 1994 Act's express provisions, therefore, an individual Indian beneficiary might properly assert, as part of a damage claim in the Court of Federal Claims, a claim for

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[54] Prior to the 1994 Act, consistent with several court decisions, the Comptroller General of the United States concluded that the BIA was not liable to IIM account holders for loss of interest because the governing statute at that time did not require the payment of interest on IIM accounts. "Judicial precedent is unrelenting in the application of this [no-interest] rule to IIM funds. Courts have consistently held that [25 U.S.C.] section 162a does not constitute a waiver of sovereign immunity because, quite simply, it does not require the payment of interest." In re Liability of Bureau of Indian Affairs for Interest on Individual Monies, B-243029, 1991 WL 197151 (Comp. Gen. March 25, 1991).

simple interest (not compound interest, nor interest based on the 10-year Treasury note rate, as Plaintiffs claim) on deposits for the period from approximately1966 to the present. However, given the absence of a clear and unambiguous retroactive waiver of sovereign immunity, prior to 1994, Plaintiffs would not be entitled to interest based on the alleged mismanagement of IIM, nor at any time would they be entitled to the disgorgement of alleged "savings" to the government.

V. The Court Should Deny Plaintiffs' Request To Return Trust Lands And Their Proceeds

Plaintiffs ask the Court to order the return of trust lands[55] and their associated proceeds in seven different ways. Plaintiffs ask the Court to:

(1) "set aside all trust land sales, other transfers . . . , leases, easements, rights-of-way, and royalty agreements to itself and to third parties . . . for which defendants do not prove fair market value . . . ."

(2) return such lands to the trust "exclusively for the benefit of the plaintiff class . . . ."

(3) disgorge the proceeds of such land transfers if return of the lands is "unreasonable"

(4) eject third parties from trust lands under "leases, rights-of-way, easements, and royalty agreements . . for which market value has not been paid to the plaintiff class . . . ."

(5) eject third party trespassers from plaintiffs' lands

(6) disgorge "the value of all profits inuring to the benefit of the government" for its use

[55] Though Plaintiffs claimed at the March 5 status conference that the government at one time held "54 million acres of land," Tr.24:15-16 (03/5/08 PM), they have revised that figure to 40,848,172 in their brief. Pls. Mem. at 19 n.28. Similarly, though seeking "recovery of up to 44 million acres of land" during the status conference, Tr.32:3-4 (03/5/08 PM), Plaintiffs report 29,000,000 acres of land transferred out of trust in their brief. Pls. Mem. at 19 n.28.

of "lands taken, used, or otherwise occupied by the trustee for which fair market value has not been paid to the plaintiff class . . . ."

(7) eject the government and "his authorized representatives" from trust lands "for which the trustee has not paid the plaintiff class market value . . . ." Pls. Mem. at 20-21. "Parenthetically," Plaintiffs also demand that the Court order disgorgement of "all securities" purchased by the government with "trust funds to the extent that [the government] cannot prove that such securities have been redeemed and the funds paid to the plaintiff class." Id. at 21 n.34. Relatedly, though not demanding payment for subsurface rights on trust lands, Plaintiffs imply that the government should produce "data regarding aggregate subsurface rights held in trust . . . ." Id. at 20 n.28. Because Plaintiffs' demands regarding land, subsurface rights, and securities concern asset management issues, the Court should deny these claims in their entirety and not permit Plaintiffs to raise them at the June 9 trial.

The Court should not permit Plaintiffs to treat land and related proceeds in the same way that Plaintiffs treat IIM funds. As the D.C. Circuit explained in Cobell XIII, "the IIM funds have quite a different legal status from the allotment land itself." Cobell XIII, 392 F.3d at 464. Contrasting the status of the IIM funds, the Court stated, "Accordingly, the Supreme Court held in Mitchell I that the Dawes Act did not, alone, establish a fiduciary duty on the part of the United States to manage the allotted lands." Id. (internal citation omitted). Trust land is not the subject of this case. "The trust corpus consists of the revenues derived from land that was carved out of preexisting Indian reservations under the 1887 Act." Cobell v. Norton, 392 F.3d 251, 254 (D.C. Cir. 2004) (citation omitted) (emphasis added).

Plaintiffs' allegations that the government did not obtain "fair market value" for trust

lands are classic asset mismanagement claims which have no place in this litigation. As this Court noted at the March 5, 2008 status conference:

> [T]here's no question . . . that there is a whole universe of issues that aren't even touched by this case. And they're the issues that we've come to call . . . the management issues, and have to do with whether the sufficient monies were collected . . . whether high enough prices were charged, how funds were managed once they were within the Treasury Department, and so forth. And I think everybody agrees that those issues are not part of the case that is before us now.

Tr.14:14-22 (03/5/08) (emphasis added). Whether related to fair market value for lands or to redemption of securities, Plaintiffs' claims implicate asset management issues. As such, they are outside the scope of this litigation. See id. at 14:24-15:2 ("What I am talking about . . . was monies that were in fact collected and made it into Treasury - into trust funds in some way, but have not been adequately accounted for.").

Jurisdictionally, to maintain this action as a statutory claim under the 1994 Act, rather than a common law complaint, the Court may not permit Plaintiffs to raise asset management issues: "Nothing in the Cobell VI Opinion can be construed to broaden the scope of this case to include issues unrelated to the defendants' obligation to provide an accounting of the trust, such as matters related to asset management . . . ." Cobell, 226 F.R.D. at 77. Issues related "to the way in which trust assets are managed" are outside the scope of this litigation. Id. at 85. This is true even if Plaintiffs were to present colorable asset management claims:

> Of course, the possibility that the defendants' right-of-way negotiation process could be deficient to the financial detriment of trust beneficiaries is grave cause for concern. Nevertheless, this case is about the defendants' duty to render a full and accurate historical accounting of the Indian trust, not about the way in which the defendants manage trust assets. Therefore, questions about nature of the defendants' conduct during the negotiation and conveyancing of rights-of-way, having nothing to do with the defendants' capacity to render the requisite accounting, are beyond the scope of discovery in this case.

Id. at 84-85. Clearly, then, Plaintiffs' claims regarding lands and related proceeds "bear[] on whether full and fair value is being given for encumbrances under the defendants' asset-management processes" and thus are beyond the issues properly addressed in this litigation. Id. at 85.

Not only are Plaintiffs' asset management claims outside the scope of this litigation, many and perhaps most of the lands they reference are outside the scope of Defendants' accounting duty, as delineated by this Court in its January 30 opinion. In its January 30 opinion, this Court declared that Interior's accounting duty extended to those beneficiaries alive as of the Act's enactment, and to the heirs of those beneficiaries who predeceased the Act's enactment. Cobell XX, 532 F.Supp 2d at 98. Regarding heirs, the Court declared a duty to account for "the allotment assets and IIM funds that were their inheritance . . . ." Id. To the extent, then, that lands passed out of trust before becoming part of a predecessor's estate, such lands are not part of Interior's duty to account, whereas the funds themselves in the estate generated by the lands would be subject to the accounting duty. In other words, once the land parcel leaves trust status, it is no longer an allotment asset that is part of an inheritance. When that occurs, the accounting is concerned with the funds in the account generated by that parcel, but no longer with the parcel itself. With more than half of allotted lands leaving trust status before passage of the Indian Reorganization Act of 1934,[56] it is not likely that many beneficiaries or heirs alive as of the Act's

[56] Pursuant to the Dawes Act of 1887, the BIA allotted 40,848,172 acres of Indian land. By September 1934, 23,225,472 acres of this allotted land had passed out of trust status. Pls. Mem. Exhibit 4, 1935 Indian Land Tenure, Economic Status, and Population Trends, at 36. Later years showed large declines in acreage, though not as dramatic as the decline leading up to 1934. Between 1934 and 1936, the BIA acquired just under 600,000 acres of land for tribes, including individually allotted lands. Theodore W. Taylor, Report on Purchase of Indian Land and Indian Land in Trust, 1934-1975, May 1976, at 3-5 [hereinafter Taylor]. In fiscal year 1951,

enactment would have an interest in land parcels. Therefore, Plaintiffs' land management claims are largely outside of Interior's accounting duty as declared by the Court, along with being outside the scope of the entire litigation.

In asking for the return of trust lands and associated proceeds, Plaintiffs offer no instances of alleged asset mismanagement. Rather, they ask the Court to return such lands and proceeds unless Defendants "prove that fair market value . . . has been paid to the Plaintiff class." Pls. Mem. at 20. The Court should not countenance Plaintiffs' attempted burden shifting, as such a burden shift "turns the litigation process on its head," Cobell XIII, 392 F.3d at 474, and is inconsistent with this Court's understanding of the order of the June trial. See Tr.39:19-21 (03/5/08 PM) ("I will accept Mr. Gingold's offer that it's the plaintiffs' case and the plaintiff goes first.")

As stated above, the Court should not permit Plaintiffs to address land issues at the scheduled trial because such asset management issues are not part of this litigation. If, however, the Court permits Plaintiffs to present evidence regarding land alienation, Defendants will tender testimony and documents showing that the reduction in individually allotted lands is due mostly to individual Indians selling those lands after receiving fee patents. See, e.g., Pls. Mem. Exhibit 4, 1935 Indian Land Tenure, Economic Status, and Population Trends, at 6 ("Indians who retained their land after coming into full control over it were rare exceptions. The granting of fee

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individual Indians sold just over 41,000 acres of allotted lands. Annual Report of the Commissioner of Indian Affairs for the Fiscal Year Ended June 30, 1951, at 369. In fiscal year 1954, approximately 500,000 acres of individually allotted lands were alienated. Annual Report of the Commissioner of Indian Affairs for the Fiscal Year Ended June 30, 1954, at 245. Between 1945 and 1968, the total amount of allotted lands declined from more than 17 million acres to just under 11 million acres. Taylor, supra, at 16-20, 95-96.

patents has been practically synonymous with outright alienation."); see also Francis Paul Prucha, 2 The Great White Father: The United States Government and American Indians (1984) at 896 (As of 1934, "23 million acres were alienated by Indians who had received fee patents to their allotments."). If the Court permits land management to be addressed at trial, the evidence certainly will show that the trust lands did not "vanish."[57]

Even if the Court permits Plaintiffs to present allegations of land mismanagement, the relief sought by Plaintiffs is unreasonable on its face. In their brief, Plaintiffs seek ejectment from land of third parties, trespassers, and the government itself, Pls. Mem. at 21, in addition to the setting aside of "all trust land sales, other transfers of legal or beneficial ownership, and leases, easements, rights-of-way, and royalty agreements to itself and to third parties" unless Defendants prove fair market value. Id. at 20. Although Plaintiffs acknowledge that their relief sought may be "unreasonable" with regards to third parties, id., in reality such relief is patently impracticable. Plaintiffs do not even mention how they intend to serve and join these third parties as defendants in this case – the minimum step required to afford them due process. See Fed. R. Civ. P. 19(a)(1)(B); 19(a)(2). Moreover, the lands have likely been alienated multiple times since they first went out of trust. Obviously, the ejectment of third parties would frustrate the Court's desire to conclude this litigation expeditiously, as such an order undoubtedly would require joinder of these aggrieved third parties. Moreover, whatever equitable powers the Court

[57] At the March 5 status conference, class counsel quoted OHTA's Director as stating at a 2002 deposition that approximately 40 million acres of trust land "must have just vanished." Tr. 28:13-18 (03/5/08). During that 2002 deposition, OHTA's Director never used any variation of the word "vanish." When asked to explain the reduction in trust land, the witness stated, "A lot of land got taken from Indians one way or another, . . ." [i]t got overrun . . . in the Black Hills, . . ." "[i]t was sold, transferred out of Indian ownership," and "land gets sold every day." Tr. 276:17-277:18 (Edwards deposition, 12/18/02).

may possess in this action, surely they do not extend to forcing non-parties from current or former Indian land. For all the reasons stated above, the Court should summarily dismiss Plaintiffs' land and related management claims in their entirety.

Conclusion

Plaintiffs have failed to demonstrate either a factual or legal basis for their claims for equitable restitution and disgorgement. Accordingly, for the reasons established above, Defendants respectfully request that those claims be denied.

Dated: April 9, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 9, 2008 the foregoing *Defendants' Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v. No. 05-5068

GALE A. NORTON, SECRETARY OF THE INTERIOR, et al.,

Defendants-Appellants.

Friday, September 16, 2005

Washington, D.C.

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

BEFORE:

CIRCUIT JUDGES GARLAND AND SENIOR CIRCUIT JUDGES WILLIAMS AND SILBERMAN

APPEARANCES:

ON BEHALF OF THE APPELLANTS:

MARK B. STERN, ESQ.

ON BEHALF OF THE APPELLEE:

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MR. AUSTIN: This is what we want.

THE COURT: Excuse me.

MR. AUSTIN: We want remand to the Court.

THE COURT: Let me finish my statement or question.

MR. AUSTIN: Yes, sir.

THE COURT: If I understood this case to be about a request for an accounting, if you now don't want an accounting, why are you here?

MR. AUSTIN: We filed a lawsuit nine years and three months ago, seeking to compel an accounting. You're absolutely correct. Judge Williams in the Cobell XIII described the accounting right as a purely instrumental right. The ability to shine the light back in time, and in this case that's got to be a pretty powerful light because you're talking about 120 years, to see what has gone on so that our clients, the beneficiaries, then have some idea as to the value of their claims. That instrumental right, I would submit to you, is an invaluable property interest. So we have for, nearly a decade sought to enforce that obligation. But we've got to face facts and that's what we're here to urge this Court to help us, join with us in seeing and directing the District Court to do it as well.

The facts dictate the kind of remedy that can reasonably be provided. We submit, the way to determine what the facts allow, with respect to an appropriate equitable

remedy is not to proceed to address the arguments being raised and by the way they've been raised, my goodness, Cobell XII, Cobell XIII --

THE COURT: Counsel. Counsel.

MR. AUSTIN: -- Cobell VI --

THE COURT: Counsel, wait a minute. Stop.

MR. AUSTIN: Not to address those to remand --

THE COURT: Counsel.

MR. AUSTIN: Yes, sir.

THE COURT: Stop for a second. You don't want an accounting?

MR. AUSTIN: We want a remand to the District Court to look --

THE COURT: Counsel. I'm asking --

MR. AUSTIN: -- at additional facts.

THE COURT: I'm asking this question. Are you seeking an accounting or not?

MR. AUSTIN: We are definitely, we have sought an accounting but --

THE COURT: No, are you at this point?

MR. AUSTIN: -- we recognize under principles of equity -- excuse me, sir.

THE COURT: Excuse me. At this point are you abandoning the request for an accounting?

MR. AUSTIN: No. The accounting is this invaluable

right as Judge Williams recognized in Cobell XIII. We are not abandoning it but we recognize if so much has been done to prevent that right from being exercised in any meaningful way, then under principles of equity we have to look elsewhere. We have to accept this is not a perfect world. My goodness, given the record --

THE COURT: Doesn't that sound --

MR. AUSTIN: -- of this case --

THE COURT: Doesn't that sound like you're abandoning the request for an accounting?

MR. AUSTIN: No, not at all. We are asking this Court to do the following: 1. Remand to the District Court.

THE COURT: For what?

MR. AUSTIN: To direct the District Court to do the following. Immediately commence proceedings to determine whether in fact the order directly them that an adequate account, consistent with Cobell VI be done, determine whether it is impossible for fulfillment. That is the key next issue. And then to resolve that question, Your Honor --

THE COURT: Let's assume it's impossible.

MR. AUSTIN: -- based on the facts.

THE COURT: You say it's impossible. So let's assume it's impossible. Then what?

MR. AUSTIN: That's when the principles of equity that exist and that have been utilizing in comparable

situations are brought to bear.

THE COURT: Which are?

MR. AUSTIN: The principles are to be found in leading treatises, the second restatement of trust --

THE COURT: Counsel, just state them.

THE COURT: Don't tell us where they come from.

MR. AUSTIN: Okay. Well, let me do my best.

THE COURT: Tell us what they are.

MR. AUSTIN: And the reason I wanted to make that clear, Judge Williams, is that there are any number of principles that are brought to bear because equity, as this Court knows, inherently flexible in about achieving justice, but let me, let me provide the Court with a couple of principles that would guide the District Court from this point.

After obtaining additional facts, and confirming the futility of this directed enterprise, then looking to alternatives and pursuant to principles of equity, Judge, looking to the information that exists, looking to the principles that apply with respect to what's not available, what we have here is as follows.

THE COURT: Counsel. Counsel. Stop for a second.

MR. AUSTIN: Yes, sir.

THE COURT: It is not unreasonable, for this Court to ask, at this point, what specific remedy are you seeking if

you're not seeking an accounting?

MR. AUSTIN: We are seeking an equitable remedy.

THE COURT: Careful, you're, it's --

MR. AUSTIN: But we need the facts.

THE COURT: As I understand it you're not seeking a gold plated accounting of the sword embodied in the structural injunction. You may be seeking some kind of lesser wand.

MR. AUSTIN: We are seeking enforcement of the obligation that the District Court was attempting to achieve compliance with. But there have to be other mechanisms to achieve that.

THE COURT: You always move to a higher level of generality. We're trying to get you to a lower level of generality. You can understand that.

THE COURT: What's the remedy?

MR. AUSTIN: The challenge for me, Your Honor, is this. This information has come to light and I know the Court has questioned the significance of the March 9th filings but they included a statement in the motion filed by defendant's counsel that spending all this money and doing all this work would be of "no value to class members." Now, I would submit no one, to this point, has suggested, spend 13 billion dollars and achieve no value but that is what the government is now telling us.

THE COURT: The judge needs to have a sense --

THE COURT: Counsel. Counsel, aren't you ducking an issue --

MR. AUSTIN: Your Honor --

THE COURT: -- that presents real jurisdictional problems which is basically I'm getting the suspicion and what you're going to ask for is money in lieu of accounting.

MR. AUSTIN: Your Honor, we're asking for --

THE COURT: And that has a real problem in terms of whether you're in the right court. Isn't that your fundamental problem?

MR. AUSTIN: We're asking for an equitable remedy and given that we're proceeding in equity --

THE COURT: What is the equitable remedy? You want to go shoot somebody, you want to put them in jail? What? Do you want money? What is it that you want?

MR. AUSTIN: At this point, as I said, and I apologize if I've not made this clear. You got to have the facts to know what remedies are to be contemplated.

THE COURT: But now you've said you don't --

MR. AUSTIN: So more facts need to be obtained.

THE COURT: -- want the gold-plated approach to ascertaining the facts and I can't get from you a statement whether, in the light of that, you want a sort of ordinary iron and steel approach to getting the facts or no approach at all.

MR. AUSTIN: Even as I think this discussion we're having confirms, you can direct, as Judge Lambert has done, faithful to the mandates of this Court, that steps be taken to rectify the long-standing breach of trust duty. You can spend 13 billion dollars, you can spend 10 times that amount, but if the information is not there, if the records --

THE COURT: Well, 13 billion was aimed at --

MR. AUSTIN: -- have been despoiled for so long --

THE COURT: -- generating information.

MR. AUSTIN: But the point is this, we don't advocate and know that the district judge would not advocate by imposing impossible remedy that winds up achieving no justice. That is our concern. Our position is direct the matter to the District Court. Let the additional facts bearing on this issue be presented and then have the district judge apply the principles of equity to what we do know and determine what it is we don't know, and come up with an appropriate resolution. Let me take a stab --

THE COURT: In summary, except for wanting the District Court to do it and to look at facts of a classification of which you don't give us, you're unwilling to state the nature of what you want.

MR. AUSTIN: Let me share with you what we said of January of 2003 in our plan to the district judge, what we advocated. Don't go forward with a structural injunction on

our accounting plan because it's of no value. Look to other ways. We advocate an equity based, for lack of a better term rough justice approach. There is submitted in our August 4, 2003 proposed conclusions of law, that we submitted after the 1.5 trial had been completed and the part of (indiscernible) defendants, we submitted three pages, page 8 to 10 of that submission that described a series of cases where courts, most of them state appellant, a few federal, were confronted with this type of situation. For whatever reason, no information to be used, in doing the accounting required by law. It is difficult to summarize --

JUDGE SILBERMAN: So what remedies did these courts --

MR. AUSTIN: This is what they did. They took the information available, Judge, and they did the best they could. And let me give you a scenario where that would be applied here. The parties agreed, at least 13 billion dollars had been paid into this trust. We regard that as a very conservative estimate, but Mr. Casen's March 9 declaration refers to that figure and let's take that for purposes of discussion --

THE COURT: I thought that 13 billion was the cost not the amount of money.

MR. AUSTIN: No, the 13 billion dollars, Your Honor, that has been agreed upon as having been put into this trust,

in other words, money that went into the trust, that was supposed to then be distributed to our clients, the beneficiaries. That is an agreed upon sum. That is over the history of the trust so we're talking about a sum of money that would earn interest, that would yield other additional value, but that's a starting point.

THE COURT: Is that gross or net?

MR. AUSTIN: That is the throughput amount. The amount that went into the trust. How much went out, we'll never know.

THE COURT: Well if 12 billion went out --

MR. AUSTIN: That's the problem.

THE COURT: If 12 billion went out --

MR. AUSTIN: No, that's what the government says. They have no way of knowing.

THE COURT: -- the 13 billion is wholly irrelevant.

MR. AUSTIN: Your Honor, they have represented 12 billion went out. They have no way of knowing.

THE COURT: I don't know but --

MR. AUSTIN: And where?

THE COURT: I have no idea what --

MR. AUSTIN: Where? I know.

THE COURT: -- the facts are.

MR. AUSTIN: I have no idea.

THE COURT: But the 12 billion sounds, from your

account, totally irrelevant.

MR. AUSTIN: Well, let me tell you the problem. You said 12 billion went out. Maybe --

THE COURT: I didn't say 12 billion went out. I proposed a hypothetical.

MR. AUSTIN: But where did it go?

THE COURT: You really have to try to grasp that.

MR. AUSTIN: Okay, I'm sorry.

THE COURT: If 12 billion went out then the net is a billion. Right?

MR. AUSTIN: But the problem is --

THE COURT: You understand that.

MR. AUSTIN: -- we don't have the information. There aren't the records available to know how much went out and more importantly, to whom, where? Did our beneficiaries in fact receive any of it. The problem is exacerbated by the fact that the Department of the Treasury failed, until a few years ago, to keep the checks that would be executed by the beneficiaries and --

THE COURT: Let me step back a moment.

MR. AUSTIN: -- so there's an absence of ecru.

THE COURT: Is it your current position that if it's agreed and I don't know whether this is true that 13 billion went in, at some point, to these trusts?

MR. AUSTIN: Yes.

THE COURT: We have no idea how much went out to beneficiaries?

JUDGE SILBERMAN: Well, the Government's position as page 9361, that's Mr. Casen's affidavit, that's what you're referring to, right?

MR. AUSTIN: Yes.

JUDGE SILBERMAN: That says, an estimated 13 billion flowed in and about 12.6 has been distributed leaving an overall balance of 416.2 million.

MR. AUSTIN: Right.

JUDGE SILBERMAN: That's the government's position. Now I take it you disagree that the balance should still be 416 million?

MR. AUSTIN: Here's the problem. I don't, I don't know about the current balance but the fundamental problem is this. We don't know where the 12.6 billion dollars went --

THE COURT: Yes.

MR. AUSTIN: -- or to whom.

THE COURT: But let me just --

MR. AUSTIN: Yes. And there is no --

THE COURT: -- finish.

MR. AUSTIN: -- information that can be looked to to answer.

THE COURT: I want to get your answer to my hypothetical and that is, we have a large sum of money going

in. We have dispute as to how much went out and where it went. Am I correct in understanding that your preferred solution is that 13 billion be distributed to somebody without further inquiry of any kind, either the sort of comparatively cautious approach of the secretary, or the solid gold approach of the district judge as to what has happened besides the 13 billion going in?

MR. AUSTIN: Let me take your hypothetical and I have tried as best I can at this point to listen to the words.

THE COURT: Because you seem to be in the position of --

MR. AUSTIN: Yes.

THE COURT: -- repudiating not merely the incredibly wasteful accounting, but even a sensible accounting.

MR. AUSTIN: And that is not our position or what I should be conveying to the Court. In the situation you described, Judge, in your hypothetical, we would submit, based on what we currently know without the District Court looking further into the matter developing additional competent evidence on this subject, we would propose schedule the second part of this bifurcated proceeding now. That is the phase two that was supposed to have occurred years ago, that we were told would occur by 2000 but has not yet been scheduled owing to the problems reflected in the record. Schedule that proceeding and say to the Government present your proof with

respect to what you're able to show happened to the 13 billion dollars. The government presents its proof insofar as it can subtract from that sum, the resulting figure with imputed interest and other yields that would be appropriate again as determined by a court sitting in equity, get applied. Now there may be other factors based upon the further fact finding we believe the District Court should engage in, that bear on what I just outlined and that's the problem and I --

THE COURT: That does seem to take you pretty straight to the jurisdictional problem that Judge Silberman mentioned.

MR. AUSTIN: I don't believe that it does at all. A court in equity can invoke a remedy that is about in part, monetary reimbursement. We're talking about our clients money. This is per the circuit rule in the Alaska Airlines case, not a case of damages. We have made it clear from the outset and the District Court has made it clear as well. This is a suite in equity. We are not here, not in a position to seek damages. But we can do what equity allows to get as much of our clients property if it has to come back in money, then that's how it must be, back. We are talking about a vested property interest in the instrumental right that Judge Williams, you described in Cobell XIII, was supposed to be the key that could be used to tell our clients who had been in the dark for 100 years, what the value of their rights is. How

much are they entitled to get? Well, it would appear that such a mess has been made of trust administration that they're not going to get an answer to that question. Which they filed a lawsuit to compel the answer to. So we look to other means an --

THE COURT: If I'm hearing you correctly --

MR. AUSTIN: -- equity can produce.

THE COURT: If I'm hearing you correctly --

MR. AUSTIN: Yes.

THE COURT: -- what you are asking is that an effort, reasonable in relation to the sums apparently at stake, you need to ascertain exactly, not exactly, you need to ascertain how much should be in the accounts. That sounds to me like a request for a reasonable accounting procedure, one in which trade-offs are made between the desirability for perfect accuracy and the real world.

MR. AUSTIN: Yes, and maybe just a --

THE COURT: Could you say is that what you would like?

MR. AUSTIN: No, I can't agree for this reason. And I don't mean to be so difficult but it's so important that I use my words correctly. An accounting is an understood term. This Court recognized and delineated what that obligation entailed. Going back to the beginning accounting for all items and by that, every deposit, every withdrawal, every

accrual, interest, that was the term accounting consistent with trust law principles, was described as consisting of by this Court four and a half years ago. So we're not seeking since we say the accounting we're entitled to get and they're advised by law to provide, we're saying we can't have that so the Court is challenged exercising it's equitable authority to come up with another fair way. A way that's fair to both sides.

THE COURT: Bottom line is you want money in lieu of your accounting?

MR. AUSTIN: Judge, I wish it were easy to say of course that will take care of it. But the problem is this. We have this purely instrumental right. I would say it's invaluable. It's priceless. We have no idea. Our clients have been kept in the dark for so long they don't know the worth of that --

THE COURT: So you don't want any money?

MR. AUSTIN: No, we want the Court --

THE COURT: Right?

MR. AUSTIN: We want the Courts to do the best it can --

THE COURT: So you do want money or you don't want money?

MR. AUSTIN: Your Honor, if that is the best remedy, that a court sitting in equity can provide our clients. If

they can't be provided the information that they are entitled to --

THE COURT: You won't turn down the --

MR. AUSTIN: -- have --

THE COURT: You won't turn down the money?

MR. AUSTIN: Your Honor, we want a just and fair outcome.

THE COURT: Counsel, this is not a game.

MR. AUSTIN: And Judge, perhaps --

THE COURT: My understanding is you want money in lieu of your right to an accounting. Is that correct?

MR. AUSTIN: It may be that's the best a court sitting in equity can do. I will respond as Bill Austin, lawyer advocating plaintiffs. This is me talking, Your Honor, in response to your question.

THE COURT: That's usually the way it works in appellant argument.

MR. AUSTIN: It frustrates me. It saddens me as a citizen of this country --

THE COURT: It won't sadden you so much if you get money, right?

MR. AUSTIN: -- with faith in our government, it distresses me, Your Honor. It distresses me that that may be the best that can be done in regard to this situation because if that's how it's resolved, I personally am convinced that

whatever sum is selected by a court sitting in equity will be woefully inadequate for this reason. It's not just that this instrumental right is being deprived of us. It's that it also takes from us any way of knowing what happened over the last century, where the 40 million acres of land that have vanished from the trust went to, who got enriched by that disappearance, who are the trust beneficiaries anyway. The problem is, Interior has stricken hundreds of thousands of accounts, proposes that anyone who died over the last century and was not alive as of October 25, 1994, you're out of luck.

THE COURT: Have you yet requested of the district judge money in lieu of the accounting right?

MR. AUSTIN: Your Honor, we have requested that the judge invoke equitable remedies. We presented in the phase 1.5 trial --

THE COURT: Counsel. Counsel, I have tried equity cases. Typically the plaintiff asks for a specific remedy.

MR. AUSTIN: We presented --

THE COURT: They don't go in and give me whatever relief you think might be appropriate. They ask the judge specifically for a remedy. Have you indicated to the district judge that you want money in lieu of your accounting?

MR. AUSTIN: Our position in the January 6, 2003 plan and the position presented at trial, was that there were alternative means available of coming up with a just amount, a

just sum.

THE COURT: Did you specify what those alternative means, did you tell him, did you tell the district judge that what you're seeking is as a remedy is money in lieu of the accounting? Yay or nay?

MR. AUSTIN: We presented expert testimony in support of an alternative approach but I need to make, emphasize the following point and I don't think I've done a good job at this point of doing this. What we want is a correction of the accounts. That was the ultimate remedy that we asked for nine years ago and that the bifurcated proceedings --

THE COURT: Yes, I understand but have you indicated you wanted alternative remedy of money?

MR. AUSTIN: We wanted a sum that would represent a fair and equitable correcting of the account balances. We believe our clients are entitled and certainly the 1994 Act reinforces this. Our clients are entitled to have trustee delegates that put their house in order and can provide an account.

THE COURT: The answer is yes, you've told the district judge -- do I understand -- is it fair for me to draw the conclusion from this dialogue that you told the district judge you want money in lieu of the accounting?

MR. AUSTIN: What we told the district judge was

that looking backward in time, with respect to the historical accounting issues, that an alternative needed to be provided. We did not take the position then, or today in front of this court that we are giving up a right to an accounting. As I stated earlier --

THE COURT: But you said --

MR. AUSTIN: -- it is an invaluable right going forward.

THE COURT: -- you're, I don't understand, Counsel, why you're ducking this question. Is the alternative that you're thinking of money?

MR. AUSTIN: I'm not doing an effective job of presenting our position if I'm giving you the impression that I'm ducking the question. The problem is you've got the backward looking historical accounting issue.

THE COURT: Counsel, are you seeking --

MR. AUSTIN: And there's a --

THE COURT: Are you seeking --

MR. AUSTIN: -- there's a current and forward looking obligation.

THE COURT: -- money in lieu of the accounting?

MR. AUSTIN: With respect to --

THE COURT: Yes?

MR. AUSTIN: With respect to the --

THE COURT: Counsel.

MR. AUSTIN: Yes.

THE COURT: Are you seeking money in lieu of the accounting, yes or no?

MR. AUSTIN: Your Honor, with respect to the backward looking part, we are asking for a sum of money that would represent an appropriate, applying equitable principles, correction of the account balance, and that is what we are seeking.

THE COURT: And do you have any theory as to have an appropriate amount is to be calculated?

MR. AUSTIN: That's where the principles of equity are brought to bear.

THE COURT: And how do those relate to the process of an accounting?

MR. AUSTIN: Well, they take what information one would like to have for accounting purposes --

THE COURT: Well, they can't take what information one would like to have. They can only take information that somebody has.

MR. AUSTIN: You take what you have and then apply trust principles and let me provide an example.

THE COURT: And so it's your position that the amount of information currently in hand is sufficient? You really can answer that question. Is the amount of information currently in hand sufficient?

MR. AUSTIN: I'll tell you why there needs to be further proceedings. Because in the face of --

THE COURT: I'm just talking about accounting proceedings.

MR. AUSTIN: No, there needs to be the Government showing what it's got, what information it has, and that is such a significant question in our case, where it would appear that there is no reliable trust information to be found anywhere. That is a determination that would either be made by the District Court further in the proceeding and in the first instance. What can the government show us with respect to where the money --

THE COURT: In essence --

MR. AUSTIN: --where the money has gone.

THE COURT: -- your answer is, you want, I don't want to put words in your mouth. It's very hard. You want as much effort in terms of additional or improved accounting as is reasonable. Is that correct?

MR. AUSTIN: We want an improvement that is --

THE COURT: Try answering yes or no and then the explanation. Okay?

MR. AUSTIN: Yes, but with this explanation. We want a correction of the account balances that is adequate in view of the information available to make the determination. Let me explain. The 13 billion dollar --

FAX TO: BRANCH OF TRIBAL ACCOUNTS MANAGEMENT
FAX # 505/248-5785

TT-2

CASH TRANSFER FROM TRIBAL TO NON-CONVERTED IIM
(CASH - DISB)

Control ID: 437

ACCOUNT NO: PL7386706 ACCT NAME: OSAGE TRIBE

Enter the amount you wish to disburse in the PAID PRINCIPAL or INVESTED INCOME field.

PAID PRINCIPAL (P1): 2,272,544.88
INVESTED INCOME (P3): _____

DISBURSEMENT CODE: 4 Transfer to Another Account

PAID TO TAX ID#: TRIBE2NONIIM NAME: TRIBAL TRANSFER TO NONCONVERTED AREA

PAID FOR TAX ID#: SAME

PRODUCE CHECK Y/N: N (For NO)

EXPLANATION: ~~BB#~~ BB03T0099G 3/2/00 ~~2/24/00~~
(Enter the BB number (in BBmmTnnnnnn format), and the date) MM / DD / YY

ASSET REFERENCE: BLANK
TREAT AS INCOME: BLANK
FOR ACCRUALS: NO
P#: BLANK
INCLUDE 1099R Y/N: N
DATE INCOME APPLIES: *

EXPANDED EXPLANATION (if needed – each line has a maximum of 50 characters)

Line 1: *Transfer to IIM Account#:* VARIOUS ANNUITANTS
Line 2: QUARTERLY ANNUITY PAYMENT FROM OIL + GAS
(Indicate the type of income)
Line 3: _____
Line 4: _____

* Attach copy of the Intra Bureau Cash Transaction Authorization (BIA-4285) form.

Prepared by: Rhonda J. Terrell Phone: (918) 687-2310 Date: 2/24/00
Approved by: _____ Phone: _____ Date: 2/28/00
Entered by: Lauren Coppola Batch #: 018161 Trans #: 1123/3/00
Verified by: _____ Phone: _____ Date: MAR 06 2000

Workticket Last Updated: 5/21/99

ENCODE

HOLDINGS LIST PRICED AS OF: 3/02/00 PAGE 1 OF 3
PL7386706 OSAGE TRIBE - 7386-70-6 CASH BASIS
COMMAND ===>

S	SECURITY DESCRIPTION / SHARES/PV	MARKET VALUE	FEDERAL COST	%MKT	P	ANNUAL INC/ UNREAL G/L	CURR YIELD
	US TREASURY OVERNIGHTER						
	GOVERNMENT OVERNIGHTER		ST0001005		1	129,038	
	2,304,247.5200	2,304,247.52	2,304,247.52	53.6		0	5.6
	DISCT NOTES & PRIN STRIPS-360						
	FHLB DISCOUNT NOTE @ 5.72% 5/05/00		313384WL9		1	12,119	
	218,000.0000	215,689.20	210,064.80	5.0		5,624	5.6
	FNMA DISCOUNT NOTE @ 6.04% 5/15/00		313588WW1		1	30,101	
	511,000.0000	504,714.70	499,619.18	11.7		5,096	6.0

F1-HELP F2-HINT F3-END F4-SKIP F5-RFIND F6-PRINT F7-UP F8-DOWN F10-LEFT
4-© 1 Sess-1 192.168.161.210 T01DCD5D 3/15

Bureau Form BIA-4285
Revised March 1990

Date: 02-23-2000

BUREAU OF INDIAN AFFAIRS
INTRA BUREAU CASH TRANSACTION AUTHORIZATION

This transaction will be reported on BIA's SF-224 report to the Treasury is appropriate for the accounting period ending: _____

Document No.: BB03T00994

Effective Date: 03-02-2000

DISBURSEMENT (OR REVERSE COLLECTION)		COLLECTION (OR REVERSE COLLECTION)	
Approp., Fund or Receipt	Amount	Approp., Fund or Receipt	Amount
PL7386706 (PRINCIPAL) 823	$2,272,544.88	G06/-01/x/6039/0039/90/0611	$2,232,730.58
		G06/-01/x/6039/0039/90/0670	$39,814.30
Total:	$2,272,544.88	Total:	$2,272,544.88

INFORMATION: DESCRIPTION OF TRANSACTION OR REFERENCE TO ATTACHED DOCUMENTATION.

TO TRANSFER FUNDS FOR THE MARCH 2000 QUARTERLY PAYMENT INTO VARIOUS INDIVIDUAL ACCOUNTS AT THE OSAGE AGENCY.

206.11 - IIM ACCTS, ESTATES, GUARDIANSHIPS, MINORS & WHEREABOUTS UNKNOWN.
206.70 - NON-INDIANS & PRIVATE ORGANIZATIONS

(EFFECTIVE DATE: MARCH 2, 2000)

3/3/00

Requesting Office		Processing Office	
Organization:	OST, OTFM, IIM	Organization:	OST
Area/Agency/	MUSKOGEE/OSAGE AGENCY	Area/Agency:	K01-S1
Location:	G06	Location:	505 Marquette NW
Prepared by:	Joy Oakes JO	Reviewed by:	
Telephone #:	(918) 287-1420	Telephone #:	
Approved by:		Date:	02/25/00
Rec'mm'd by:	ACTING SUPERINTENDENT, OSAGE AGENCY	Recommended Action:	3/3/00
		Process:	Reject:

CERTIFICATION

I CERTIFY THAT THE TRANSACTION LISTED HEREIN ARE CORRECT AND PROPER FOR PAYMENT FROM AND TO THE APPROPRIATION(s) DESIGNATED.

BACKUP

Rhonda L. Terrell — 2/24/00 — (918) 687-2310
(Authorizing Official) (Date) (Telephone No.)

Gary Hennessy 2/24/00

OTF ABQ 100000128086

VS036OOSO
check

_____CASH
MANUAL BLOTTER

_____ CAPS & PADS

TRIBAL

BATCH #: 36

MAR 03 2000
BATCH DATE: ___/___/___

PORTFOLIO CASH CHANGES	MANUAL BLOTTER	REJECT FROM QA	SYSTEM BLOTTER TOTAL	NOT PROCESSED ON SYSTEM	RESET BLOTTER TOTAL
PRINCIPAL (+/-):					
INCOME (+/-):					
INVESTED INCOME (+/-):					

TOTAL CASH CHANGE (+/-): (1,728,464.68)

Net Unit Change (+/- or UNK): _____

BATCHED BY: MT mwacondo

POSTED BY: [signature] 3/3/00

SYSTEM GENERATED BATCH NUMBER: DT263

BEGINNING TRANSACTION NUMBER: 1

ENDING TRANSACTION NUMBER: _____

LIST ANY EXCEPTIONS:

ADJUSTMENTS: CASH: _____ UNITS: _____

ACCOUNT	AMOUNT	UNITS	REASON	APPROVED BY

07 213

[signature] 3/3/00

SCREEN PRINT DURING THE CLOSE ROUTINE WITH THE WORDS "BATCH CLOSED".

OTF ABQ 100000127937

03/02/2000 19:17 91868724790 OTFM:MUSKOGEE PAGE 03

FAX TO: BRANCH OF TRIBAL ACCOUNTS MANAGEMENT

FAX #: 505/248-5785

TD-6

TRIBAL NON-SCHEDULED CHECK REQUEST

(CASH - DISB) Control ID: 437

ACCOUNT NO.: PL7386706 ACCT NAME: OSAGE TRIBE

Enter the amount you wish to disburse from P1 or P3 (only one portfolio per workticket).

PAID PRINCIPAL (P1): 1,738,464.68

OR

INVESTED INCOME (P3): _____

DISBURSEMENT CODE: Select ONE of the following:

___ Forestry (22) ___ Judgement Per Capita (26)

___ Education Expense (35) ___ Requested by Accountholder (47)

OR select code from the Disbursement codes list: Code #: 50 Description: OSAGE QUARTERLY ANNUITY

PAID TO TAX ID#: _____ (Enter if refund for Performance Bonds or Advance Deposits, else leave blank.)

NAME: _____ (Enter name of the Paid To Tax ID.)

Enter the payee's Name & Address below (Each line is 36 characters).

NAME: VARIOUS ANNUITANTS

ADDR: Tape # 202681

ADDR: Records - 2924

ADDR: _____

PAID FOR TAX ID#: OSAGE 01 NAME: OSAGE TRIBE OF OKLA OTC (MINERALS)

(Enter TAX ID and NAME for the tribe that this is paid for)

PRODUCE CHECK Y/N: N for NO. VSD3G00050 3-3-00

EXPLANATION: MARCH 2000 QUARTERLY PAYMENT

(This explanation will appear on the check - Maximum 50 characters)

ASSET REFERENCE: BLANK P#: BLANK

TREAT AS INCOME: BLANK INCLUDE 1099R Y/N: N

FOR ACCRUALS: NO DATE INCOME APPLIES: *

EXPANDED EXPLANATION (if needed – each line has a maximum of 50 characters)

Line 1: _____

Line 2: _____

Line 3: _____

Line 4: _____

* Must attach the SF-1034 Disbursement Authorization.

* Cutoff Time – Fax to Branch of Tribal Accounts Mgmt. by 10:00 a.m. MT for same day processing.

Prepared by: Rhonda L. Terrell Phone: (918)687-2310 Date: 2/24/00

Approved by: Mizz Congo Phone: _____ Date: MAR 03 2000

Entered by: Deb Batch #: 203 Tran #: _____

Verified by: [illegible] Phone: [illegible] Date: 3/9/00

Workticket Last Updated: 5/21/99

MAR 03 2000

HOLDINGS LIST PRICED AS OF: 3/02/00 PAGE 1 OF 3
PL7386706 OSAGE TRIBE - 7386-70-6 CASH BASIS
COMMAND ===>

S	SECURITY DESCRIPTION / SHARES/PV	MARKET VALUE	FEDERAL COST	%MKT	P	ANNUAL INC/ UNREAL G/L	CURR YIELD
	US TREASURY OVERNIGHTER						
	GOVERNMENT OVERNIGHTER		ST0001005		1	129,038	
	2,304,247.5200	2,304,247.52	2,304,247.52	53.6		0	5.6
	DISCT NOTES & PRIN STRIPS-360						
	FHLB DISCOUNT NOTE @ 5.72% 5/05/00		313384WL9		1	12,119	
	218,000.0000	215,689.20	210,064.80	5.0		5,624	5.6
	FNMA DISCOUNT NOTE @ 6.04% 5/15/00		313588WW1		1	30,101	
	511,000.0000	504,714.70	499,619.18	11.7		5,096	6.0

F1-HELP F2-HINT F3-END F4-SKIP F5-RFIND F6-PRINT F7-UP F8-DOWN F10-LEFT
4-© 1 Sess-1 192.168.161.210 T01DCB2E 3/15

EXHIBIT 2
Defendants' Response to Plaintiffs' Memorandum
in Support of Equitable Restitution and Disgorgement
Page 6 of 7

03/03/2000 11:13 91868724790 OTFM: MUSKOGEE PAGE 02

Revised October 1997
Department of the Treasury
I TFM 4-2000
1055-122

PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

VOUCHER NO

U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION

DATE VOUCHER PREPARED

CONTRACT NUMBER AND DATE

REQUISITION NUMBER AND DATE

SCHEDULE NO. VS03G0050

PAID BY

Summary 3.3.00

PAYEE'S NAME AND ADDRESS: OSAGE TRIBE
VARIOUS ANNUITANTS

DATE INVOICE RECEIVED

DISCOUNT TERMS

PAYEE'S ACCOUNT NUMBER

SHIPPED FROM TO WEIGHT

GOVERNMENT B/L NUMBER

NUMBER AND DATE OF ORDER	DATE OF DELIVERY OR SERVICE	ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary)	QUANTITY	UNIT PRICE COST	UNIT PRICE PER	AMOUNT ($)
		MARCH 2000 QUARTERLY PAYMENT Rosemary Woods TRIBAL SIGNATURE				
(Use continuation sheet(s) if necessary)		(Payee must NOT use the space below)			TOTAL	1,728,464.68

PAYMENT:
- ☐ PROVISIONAL
- ☐ COMPLETE
- ☐ PARTIAL
- ☐ FINAL
- ☐ PROGRESS
- ☐ ADVANCE

APPROVED FOR =$

EXCHANGE RATE =$1.00

BY[2] Ale Sloan

TITLE ACTING SUPERINTENDENT, OSAGE AGENCY

DIFFERENCES

Amount verified, correct for

(Signature or initials)

Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.

2/24/00 (Date) | Rhonda L. Terrell (Authorized Certifying Officer)[2] | Financial Trust Operations Specialist (Title)

ACCOUNTING CLASSIFICATION

PL7386706-823-PRINCIPAL

~~VS03G0050~~ VS03G0050

EFFECTIVE DATE: ~~03-02-00~~ 03-03-00

RDO (DIRECT PAID) $1,728,464.68

PAID BY

CHECK NUMBER	ON ACCOUNT OF U.S. TREASURY	CHECK NUMBER	ON (Name of bank)
CASH $	DATE	PAYEE[3]	

[1] When stated in foreign currency, insert name of currency.
[2] If the ability to certify and authority to approve are combined in one person, one signature only is necessary; otherwise the approving officer will sign in the space provided, over his official title.
[3] When a voucher is receipted in the name of a company or corporation, the name of the person writing the company or corporate name, as well as the capacity in which he signs, must appear. For example "John Doe Company, per John Smith, Secretary", or "Treasurer", as the case may be.

PER

TITLE

Previous edition usable

NSN 7540-00-634-4206

PRIVACY ACT STATEMENT

The information requested on this form is required under the provisions of 31 U.S.C. 82b and 82c for the purpose of disbursing Federal money. The information requested is to identify the particular creditor and the amounts to be paid. Failure to furnish this information will hinder discharge of the payment obligation.

EXHIBIT 2
Defendants' Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement
Page 7 of 7

CIRCULAR NO. A–11

PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
JULY 2007

SECTION 20—TERMS AND CONCEPTS

Table of Contents

Summary of Changes

Provides a definition of "collections" (section 20.3).

Clarifies that changes in uncollected customer payments from Federal sources should net to zero over time unless program levels are increasing or decreasing (section 20.4(b).

20.1 What is the purpose of this section?

In this section, we define budget terms—such as budget authority, obligation, and outlay—that you need to know in order to understand the budget process and this Circular. We also explain certain of the terms in depth.

20.2 How do I use this section?

- If you just need a brief definition of a term commonly used in the budget process, go to the next section (section 20.3). That section lists the terms in alphabetical order.
- If you need a fuller explanation of the terms and concepts listed in the section titles of the Table of Contents above, go to sections 20.4–20.13.
- If you need to know about investing fund balances in Federal securities or other securities, go to section 113, investment transactions.
- If you need to know more about the credit terms defined in section 20.3, go to section 185, Federal credit.
- If you need definitions of performance terms, go to section 200, Overview of strategic plans, annual performance plans, and annual program performance reports.

20.3 What special terms must I know?

Advance appropriation means appropriations of new budget authority that become available one or more fiscal years beyond the fiscal year for which the appropriation act was passed. (See section 20.4(c).)

Advance funding means appropriations of budget authority provided in an appropriations act to be used, if necessary, to cover obligations incurred late in the fiscal year for benefit payments in excess of the amount specifically appropriated in the act for that year, where the budget authority is charged to the appropriation for the program for the fiscal year following the fiscal year for which the appropriations act is passed. (See section 20.4(c).)

Agency means a department or establishment of the Government for the purposes of this Circular. (Compare to bureau.)

Allowance means a lump-sum included in the budget to represent certain transactions that are expected to increase or decrease budget authority, outlays, or receipts but that are not, for various reasons, reflected in the program details. For example, the budget might include an allowance to show the effect on the budget totals of a proposal that would affect many accounts by relatively small amounts, in order to avoid unnecessary detail in the presentations for the individual accounts. The President doesn't propose that Congress enact an allowance as such, but rather that it modify specific legislative measures as necessary to produce the increases or decreases represented by the allowance.

Amendment means a proposed action that revises the President's budget request and is transmitted prior to completion of action on the budget request by the Appropriations Committees of both Houses of Congress. (See section 110.2.)

Apportionment means a distribution made by OMB of amounts available for obligation in an appropriation or fund account into amounts available for specified time periods, program, activities,

projects, objects, or any combinations of these. The apportioned amount limits the obligations that may be incurred. An apportionment may be further subdivided by an agency into allotments, suballotments, and allocations.

Appropriated entitlement—See entitlement authority.

Appropriation means a provision of law (not necessarily in an appropriations act) authorizing the expenditure of funds for a given purpose. Usually, but not always, an appropriation provides budget authority (see section 20.4.)

Baseline means an estimate of the receipts, outlays, and deficit or surplus that would result from continuing current law through the period covered by the budget. (See section 80.)

BEA means the Budget Enforcement Act of 1990, as amended. (See section 20.9.)

Borrowing authority is a type of budget authority that permits obligations and outlays to be financed by borrowing. (See section 20.4(b).)

Budget means the Budget of the United States Government, which sets forth the President's comprehensive financial plan and indicates the President's priorities for the Federal Government. (See section 10.1.)

Budget authority (BA) means the authority provided by law to incur financial obligations that will result in outlays. Specific forms of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. (See section 20.4.)

Budget totals means the totals included in the budget for budget authority, outlays, receipts, and the surplus or the deficit. Some presentations in the budget distinguish on-budget totals from off-budget totals. On-budget totals reflect the transactions of all Federal Government entities, except those excluded from the budget totals by law. Off-budget totals reflect the transactions of Government entities that laws exclude from the on-budget totals (those of the Social Security trust funds and the Postal Service). The budget presents combined on- and off-budget totals to derive totals for Federal activity, sometimes called the unified budget totals. For example, see the end of the chapter "Federal Programs by Agency and Account" in the Analytical Perspectives volume of the most recent budget.

Budgetary resource means an amount available to enter into new obligations and to liquidate them. Budgetary resources are made up of new budget authority (including direct spending authority provided in existing statute and obligation limitations), and unobligated balances of budget authority provided in previous years.

Bureau means the principal subordinate organizational units of an agency.

Cash equivalent transaction means a transaction in which the Government makes outlays or receives collections in a form other than cash, or in which the outlays or receipts recorded in the budget differ from the cash because the cash does not accurately measure the value of the transaction. (See section 20.8.)

Cancellation means a proposal by the President to reduce budget resources (new budget authority or unobligated balances of budget authority) that is not subject to the requirements of Title X of the Congressional Budget and Impoundment Control Act of 1974. Resources that are proposed by the President for cancellation cannot be withheld from obligation pending Congressional action on the proposal. The term is sometimes used more broadly to refer to any legislative action taken by the Congress to reduce budgetary resources, including rescission proposed by the President. Cancellation can either be temporary or permanent. (See section 20.4(i).)

Cancellations as a type of reduction should not be confused with the canceled phase of annual and multi-year authority (see section 20.4(c)) or cancellations of budgetary resources in no-year accounts pursuant to 31 U.S.C. 1555 (See Appendix F, line 6A).

Collections are monies collected by the Government that the budget records as either a governmental receipt, an offsetting collection, or an offsetting receipt (see section 20.7).

Contract authority permits you to incur obligations in advance of an appropriation, offsetting collections, or receipts to make outlays to liquidate the obligations. Typically, Congress provides contract authority in an authorizing statute to allow you to incur obligations in anticipation of the collection of receipts or offsetting collections that will be used to liquidate the obligations. (See section 20.4(b).)

Cost means the price or cash value of the resources used to produce a program, project, or activity. This term is used in many different contexts. When used in connection with Federal credit programs, the term means the estimated long-term cost to the Government of a direct loan or loan guarantee, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays (see section 185). For specific instructions on estimating costs, refer to the pertinent OMB instructions: for cost principles for educational institutions, see Circular No. A–21; for estimating costs for user charges, see Circular No. A–25; for rental and construction costs of Government quarters, see Circular No. A–45; for allowable costs for audits, see Circular No. A–50; for cost estimates in performing commercial activities, see Circular No. A–76; and for cost principles for State, local and Indian Tribal Governments, see Circular No. A–97.

Credit program account means a budget account that receives and obligates appropriations to cover the subsidy cost of a direct loan or loan guarantee and disburses the subsidy amount to a financing account. (See section 185.)

Current services estimates—See baseline.

Deficit means the amount by which outlays exceed receipts in a fiscal year. It may refer to the on-budget, off-budget, or unified budget deficit. (See budget totals.)

Deferral means any executive branch action or inaction that temporarily withholds, delays, or effectively precludes the obligation or expenditure of budgetary resources. The President reports deferrals to Congress by special message. They are not identified separately in the budget. (See section 112.)

Deposit fund means an account established to record amounts held temporarily by the Government until ownership is determined (for example, earnest money paid by bidders for mineral leases) or held by the Government as an agent for others (for example, State and local income taxes withheld from Federal employees' salaries and not yet paid to the State or local government). (See section 20.12.)

Direct loan means a disbursement of funds by the Government to a non-Federal borrower under a contract that requires the repayment of such funds with or without interest. The term also includes certain equivalent transactions that extend credit. (See section 185.) (Compare to loan guarantee.)

Direct spending—See mandatory spending.

Discretionary spending means budgetary resources (except those provided to fund mandatory spending programs) provided in appropriations acts. (See section 20.9.) (Compare to mandatory spending.)

Entitlement authority means the authority, generally provided by an authorizing statute, to make payments (including loans and grants) to persons or non-federal entities who meet the requirements established by law. Examples of entitlement authority include benefit payments for Social Security, Medicare, and unemployment insurance. Some programs, such as the food stamp program, veteran's compensation, and Medicaid, are classified as entitlements even through they are funded by

appropriations acts, because the authorizing statute for the program obligates the United States to make payments. These are referred to as mandatory appropriations or appropriated entitlements. Also see mandatory spending (section 20.9.)

Expenditure transfer—See transfers.

FACTS II means the Treasury Federal Agencies' Centralized Trial-balance System II. Agency staff use this system to electronically submit the accounting data that (a) support the SF 133 Report on Budget Execution and Budgetary Resources and (b) are used for much of the initial set of past year data in MAX schedule P. (See sections 82.15 and 130.2)

Federal funds group refers to the moneys collected and spent by the Government through accounts other than those designated as trust funds. The Federal funds group includes general, special, public enterprise, and intragovernmental funds. (See section 20.12.) (Compare to trust funds group.)

Financing account means a non-budgetary account that records all of the cash flows resulting from direct loan obligations or loan guarantee commitments made on or after October 1, 1991. At least one financing account is associated with each credit program account. Separate financing accounts are required for direct loan cash flows and for guaranteed cash flows if the program account provides subsidy cost for both forms of credit. The transactions of the financing accounts are a means of financing and not included in the budget totals. (See section 185.) (Compare to liquidating account.)

Fiscal year means the Government's accounting period. It begins on October 1 and ends on September 30, and is designated by the calendar year in which it ends.

Forward funding means appropriations of budget authority that become available for obligation in the last quarter of the fiscal year for the financing of ongoing grant programs during the next fiscal year. (See section 20.4(c).)

Full-time equivalent (FTE) employment is the basic measure of the levels of employment used in the budget. It is the total number of hours worked (or to be worked) divided by the number of compensable hours applicable to each fiscal year. (See section 85.)

Functional classification means the array of budget authority, outlays, and other budget data according to the major purpose served—for example, agriculture, national defense, and transportation. (See section 79.3.)

General fund means the accounts for receipts not earmarked by law for a specific purpose, the proceeds of general borrowing, and the expenditure of these moneys. It is part of the Federal funds group.

Impoundment means any executive action or inaction that temporarily or permanently withholds, delays, or precludes the obligation or expenditure of budgetary resources.

Intragovernmental fund—See revolving fund.

Liquidating account means a budget account that records all cash flows to and from the Government resulting from direct loan obligations and loan guarantee commitments made prior to October 1, 1991. Unlike financing accounts, these accounts are included in the budget totals. (See section 185.) (Compare to financing account.)

Loan guarantee means any guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender. The term does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions. (See section 185.) (Compare to direct loan.)

Deposit advances without orders as follows:

If the advance is from...	Deposit the advance in...
A non-Federal source	Deposit fund account (6500)
A Federal source	An intragovernmental clearing account (F3885)

When a reimbursable agreement with another Federal account is accompanied by a cash advance, you may disburse to pay obligations associated with that advance. However, if you are authorized to incur obligations against customer orders from other Federal accounts without an advance, the order establishes obligational authority only and you may not disburse the account into a negative position (see section 145.2 on Antideficiency Act violations.

20.12 What do I need to know about accounts and fund types?

(a) *Accounts*.

The term account may refer to a receipt or expenditure account. Governmental receipts and offsetting receipts are deposited into receipt accounts (see section 20.7). Receipt accounts are not available for incurring obligations or making outlays. Expenditure accounts are provided with budget authority (e.g., appropriations or offsetting collections) and are used to incur obligations and make outlays. Receipt and expenditure accounts are further classified into fund types (e.g., general funds and special funds). Fund types are discussed in subsections 20.12(b) through 20.12(f).

The term account may also refer to Treasury accounts and budget accounts. When Congress provides budget authority for a particular purpose or under a particular title, it also provides a specific period of time for which the budget authority is available for obligation. This time period of availability (POA) may be annual, multi-year, or no-year.

Treasury establishes expenditure accounts based on the POA of the resources in the account. That is, Treasury establishes separate accounts with separate Treasury appropriation fund symbols (TAFS) for each POA, i.e., annual, multi-year, or no-year amount. For budget execution, which is governed largely by the Antideficiency Act, you must report data for each of the TAFS expenditure accounts established by Treasury (see section 130).

A budget account generally covers an organized set of activities, programs, or services directed toward a common purpose or goal. For budget formulation, the appropriations and other budget authority provided to TAFS accounts with the same appropriation title for the years covered by the budget are combined and presented as a single account under a single title, e.g., "Salaries and expenses." As an illustration, the FY 2007 column of the program and financing schedule for a "Salaries and expenses" account in the Appendix would include, as appropriate, outlays made in FY 2007 from the unexpired FY 2007 appropriation, the FY 2005–2007 multi-year appropriation, the no-year appropriation, and the five expired annual appropriations (FY 2002 through FY 2006).

For receipt accounts, the budget and Treasury accounts are usually the same.

For information on account identification codes, see section 79.2.

(b) *Overview of fund types*.

Agency activities are financed through general funds, special funds, and revolving funds (public enterprise revolving funds, intragovernmental revolving funds, credit financing accounts), which constitute the Federal funds group, and trust funds and trust revolving funds, which constitute the trust

funds group. General, special, and trust fund collections and disbursements may be held temporarily in clearing accounts pending clearance to the applicable account. Agencies account for amounts that are not Government funds in deposit funds. The following table summarizes the characteristics of these funds. The text following the table discusses the types of funds in more depth.

CHARACTERISTICS OF FUND TYPES AND THEIR ACCOUNTS

Fund Type/Account **Treasury Account Symbol**	**What is the purpose of the account?**	**Are receipt accounts and expenditure accounts linked?**	**Are these funds included in the budget?**
Federal funds:			
General fund receipt accounts (0000–3899)	Record unearmarked receipts.	No.	Yes.
General fund expenditure accounts (0000–3899)	Record budget authority, obligations, and outlays of general fund receipts and borrowing. Record offsetting collections authorized by law, such as the Economy Act, and associated budget authority, obligations, and outlays.	No, general fund appropriations draw from general fund receipts collectively.	Yes.
Special fund receipt accounts (5000–5999)	Record receipts earmarked by law for a specific purpose (other than business-like activity).	Yes.	Yes.
Special fund expenditure accounts (5000–5999)	Record budget authority, obligations, and outlays of special fund receipts. Record offsetting collections authorized by law, such as the Economy Act, and associated budget authority, obligations, and outlays	Yes.	Yes.
Public enterprise revolving funds (4000–4499)	Record offsetting collections earmarked by law for a specific purpose and associated budget authority, obligations, and outlays for a business-like activity conducted primarily with the public.	Not applicable. Collections are credited to the expenditure account.	Yes.[1]
Intragovernmental revolving funds (including working capital funds) (4500–4999)	Record offsetting collections earmarked by law for a specific purpose and associated budget authority, obligations, and outlays for a business-like	Not applicable. Collections credited to the expenditure account.	Yes.

Fund Type/Account Treasury Account Symbol	What is the purpose of the account?	Are receipt accounts and expenditure accounts linked?	Are these funds included in the budget?
	activity conducted primarily within the Government.		
Trust funds:			
Trust fund receipt accounts (8000–8399 and 8500–8999)	Record receipts earmarked by law for a specific purpose (other than a business-like activity).	Yes.	Yes.[1]
Trust fund expenditure accounts (8000–8399 and 8500–8999)	Record budget authority, obligations, and outlays of trust fund receipts. Record offsetting collections authorized by law, such as the Economy Act, and associated budget authority, obligations, and outlays.	Yes.	Yes.[1]
Trust revolving funds (8400–8499)	Record offsetting collections earmarked by law for a specific purpose and associated budget authority, obligations, and outlays for a business-like activity conducted primarily with the public.	Not applicable. Collections credited to the expenditure account.	Yes.
Other: (non-budgetary)			
Clearing accounts (F3800–F3885)	Temporarily hold general, special, or trust fund Federal Government collections or disbursements pending clearance to the applicable receipt or expenditure accounts. (Amounts in clearing accounts should not be used to make outlays or payments.)	Not applicable. Deposits and disbursements are recorded in the same account.	Yes, once they are posted to either a receipt or expenditure account.
Deposit funds (6000–6999)	Record deposits and disbursements of monies not owned by the Government or not donated to the Government (amounts donated to the Government are deposited in a special or trust fund account).	Not applicable. Deposits and disbursements are recorded in the same account.	No.

[1] By law, the budget authority and the outlays (net of offsetting collections) of the Postal Service Fund (a revolving fund), and the receipts, budget authority, and outlays of the two social security trust funds (the Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund) are excluded from the on-budget totals. The budget documents present these amounts as "off-budget" and adds them to the budget totals to show totals for the Federal Government (sometimes called unified budget totals).

(c) *Federal funds*.

Federal funds comprise several types of accounts or funds. A general fund receipt account records receipts not earmarked by law for a specific purpose, such as individual income tax receipts. A general fund expenditure account records appropriations from the general fund and the associated transactions, such as obligations and outlays. General fund appropriations draw from general fund receipts collectively and, therefore, are not specifically linked to receipt accounts.

The Federal funds group also includes special funds and revolving funds, both of which earmark collections for spending on specific purposes. We establish a special fund where the law requires us to earmark collections from a specified source to finance a particular program, and the law neither authorizes the fund to conduct a cycle of business-type operations (making it a revolving fund) nor designates it as a trust fund. For example, a law established the Land and water conservation fund, earmarking a portion of rents and royalties from Outer Continental Shelf lands and other receipts to be used for land acquisition, conservation, and recreation programs. The receipts earmarked to a fund are recorded in one or more special fund receipt accounts. More than one receipt account may be necessary to distinguish different types of receipts (governmental, proprietary, etc.) and receipts from significantly different types of transactions (registration fees vs. fines and penalties, for example). The fund's appropriations and associated transactions are recorded in a special fund expenditure account. Most funds have only one expenditure account, even if they have multiple receipt accounts. However, a large fund, especially one with appropriations to more than one agency (such as the Land and water conservation fund), may have more than one expenditure account. The majority of special fund collections are derived from the Government's power to impose taxes, fines, and other compulsory payments, and they must be appropriated before they can be obligated and spent.

Revolving funds conduct continuing cycles of business-like activity. They charge for the sale of products or services and use the proceeds to finance their spending. Instead of recording the collections in receipt accounts (as offsetting receipts), the budget records the collections and the outlays of revolving funds in the same account. The laws that establish revolving funds authorize the collections to be obligated and outlayed for the purposes of the fund without further appropriation. The law of supply and demand is expected to regulate such funds. However, in some cases, Congress enacts obligation limitations on the funds in appropriations acts as a way of controlling their expenditures (for example, a limitation on administrative expenses). There are two types of revolving funds in the Federal funds group. Public enterprise funds, such as the Postal Service Fund, conduct business-like operations mainly with the public. Intragovernmental funds, such as the Federal Buildings Fund, conduct business-like operations mainly within and between Government agencies.

(d) *Trust funds*.

Trust funds account for the receipt and expenditure of monies by the Government for carrying out specific purposes and programs in accordance with the terms of a statute that designates the fund as a trust fund (such as the Highway Trust Fund) or for carrying out the stipulations of a trust agreement where the Nation is the beneficiary (such as any of several trust funds for gifts and donations for specific purposes). Like special funds and revolving funds, trust funds earmark collections for spending on specific purposes. Many of the larger trust funds finance social insurance payments for individuals, such as Social Security, Medicare, and unemployment compensation. Other major trust funds finance military and Federal civilian employees' retirement, highway and mass transit construction, and airport and airway development.

A trust fund normally consists of one or more receipt accounts to record receipts and an expenditure account to record the appropriation of the receipts and associated transactions. Some trust funds have multiple receipt accounts for the same reasons that special funds have them. Also, like special funds, large trust funds (such as the Highway Trust Fund) may have multiple expenditure accounts. A few trust funds, such as the Veterans Special Life Insurance fund and the Employees Life Insurance Fund, are established by law as revolving funds. These funds operate the same way as revolving funds in the Federal funds group, and we call them trust revolving funds. They conduct a cycle of business-type operations. The collections are credited to the expenditure account as offsetting collections and their outlays are displayed net of collections in a single expenditure account.

The Federal budget meaning of the term "trust", as applied to trust fund accounts, differs significantly from its private sector usage. In the private sector, the beneficiary of a trust usually owns the trust's assets, which are managed by a trustee who must follow the stipulations of the trust. In contrast, the Federal Government owns the assets of most Federal trust funds, and it can raise or lower future trust fund collections and payments, or change the purposes for which the collections are used, by changing existing laws. There is no substantive difference between these trust funds and special funds or between trust revolving funds and public enterprise revolving funds. Whether a particular fund is designated in law as a trust fund is, in many cases, arbitrary. For example, the National Service Life Insurance Fund is a trust fund, but the Servicemen's Group Life Insurance Fund is a Federal fund, even though both are financed by earmarked fees paid by veterans and both provide life insurance payments to veterans' beneficiaries. There are a few Federal trust funds that are managed pursuant to a trust agreement. These are identified in the budget as "gift funds". In addition, the Government does act as a true trustee on behalf of some entities outside of the Government where it makes no decisions about the amount of these deposits or how they are spent. For example, it maintains accounts on behalf of individual Federal employees in the Thrift Savings Fund, investing them as directed by the individual employee. The Government accounts for such funds in deposit funds (see the section after next).

(e) *Clearing accounts*.

You use clearing accounts to temporarily account for transactions that you know belong to the Government while you wait for information that will allow you to match the transaction to a specific receipt or expenditure account. For example:

- To temporarily credit unclassified transactions from the public when there is a reasonable presumption that the amounts belong to a Federal Government account other than miscellaneous receipts in the Treasury.

- To temporarily credit unclassified transactions between Federal agencies, including Intragovernmental Payment and Collection (IPAC) transactions.

You should not use clearing accounts to mask an overobligation or overexpenditure of an expenditure account.

(f) *Deposit funds*.

You use deposit funds to account for monies that do not belong to the Government. This includes monies held temporarily by the Government until ownership is determined (such as earnest money paid by bidders for mineral leases) or held by the Government as an agent for others (such as State and local income taxes withheld from Federal employees' salaries and not yet paid to the State or local government). We exclude deposit fund transactions, as such, from the budget totals because the funds are not owned by the Government. Therefore, the budget records transactions between deposit funds and budgetary accounts as transactions with the public. For example, when the mineral leasing process has been completed, the winning bidder's earnest money is transferred from the deposit fund to the appropriate receipt account and the budget records a receipt. Similarly, outlays are recorded in an

agency's salaries and expense account when a Federal employee is paid, even though some of the amount is transferred to a deposit fund for State and local income taxes withheld and paid later to the State and local government. Deposits and associated disbursements are recorded in the same account.

20.13 What do I need to know about reimbursable work?

Agencies can perform reimbursable work for the public or other Federal agencies. The types of laws that allow you to use advances or reimbursements in return for providing others with goods and services are:

- Laws that establish revolving funds, including franchise funds and working capital funds;
- Provisions in appropriations or substantive laws that allow agencies to use the amounts they collect; and
- The Economy Act (31.U.S.C. 1535).

(a) *Revolving funds*.

You may use a revolving fund when a law establishes the revolving funds and authorizes you to credit payments to the revolving fund that performs the work. Revolving funds operate on a reimbursable basis when working capital (undisbursed cash) is available. Otherwise, advance payments must accompany orders. You may *not* disburse revolving funds into a negative cash position in anticipation of Federal or non-Federal reimbursements because of the Antideficiency Act.

(b) *Payments from the public*.

If the law authorizes an expenditure account to perform work for the public and to credit collections from the public as spending authority, you may cover obligations incurred by the account by:

- Advances collected up to the amount of accompanying orders (see section 20.11 for treatment of amounts greater than the order).
- Working capital that is available for this purpose.

(c) *Economy Act*.

The Act authorizes the head of an agency or major organizational unit within an agency to place an order with a major organizational unit within the same agency or another Federal agency for goods or services provided that:

- The ordering agency has enough money to pay for the order.
- The head of the ordering agency or unit decides the order is in the best interest of the United States Government.
- The agency or unit to fill the order is able to provide or get by contract the ordered goods or services.
- The head of the ordering agency decides that the ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.