IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' RESPONDING BRIEF REGARDING THE SCOPE OF THE OCTOBER 10, 2007 HEARING

Pursuant to the Court's Minute Order entered May 14, 2007, Defendants submit the following brief regarding the proper scope of the October 10, 2007 hearing in response to Plaintiffs' Memorandum Regarding the Scope of the October 10, 2007 Trial, dated May 31, 2007 ("Plaintiffs' Brief" or "Pl. Br.") [Dkt. 3334].

INTRODUCTION AND SUMMARY

Despite its title, Plaintiffs' Brief does not actually address the scope of the October 10, 2007 evidentiary hearing or provide Plaintiffs' promised "road map" demonstrating how the October hearing could be used to resolve the "vast majority of issues in this litigation." Plaintiffs' May 24, 2007, Unopposed Motion for an Enlargement of Time, at 2 [Dkt. 3329]; May 14, 2007 Transcript ("Tr.") at 69-70. Instead of addressing how this case should proceed, Plaintiffs invite the Court to consider alternative monetary remedies.

Considering the importance of efficient and orderly litigation of this case, Defendants set forth a legally sound and reasonable course, consistent with the Court's instruction, that should be followed for the resolution of the important issues in this case. The hearing commencing on

October 10, 2007, should not address Plaintiffs' claims for money. Instead, it should focus on a review of Interior's progress in performing the historical accounting, as established through Interior's Historical Accounting Project Document (including Interior's 2007 Plan for Completing the Historical Accounting), the administrative record that supports Interior's plan to complete the accounting, samples of the Historical Statements of Account that Interior has prepared and is preparing to distribute, and any evidence or testimony that may be necessary to fill gaps that may exist in the record or to provide clarification or an explanation to the Court concerning the progress or elements of the accounting. With this information, the Court will be able to determine whether Interior is moving reasonably toward the completion of that accounting.

Plaintiffs seek a different course. Contrary to Plaintiffs' representations made years ago and the Court's striking of portions of the Complaint, to establish that Plaintiffs seek neither monetary relief nor an infusion of funds, Plaintiffs again seek such relief. The representations Plaintiffs made early in the litigation, which the Court relied upon to find jurisdiction and deny Defendants' motion to dismiss, are binding affirmations under principles of judicial estoppel that foreclose Plaintiffs from changing course.

In any event, Plaintiffs' monetary claims depend entirely upon the presumption that the Department of the Interior ("Interior") is either unwilling or unable to perform the historical accounting the courts have held that the American Indian Trust Fund Management Reform Act of 1994 (the "1994 Act") requires. Interior is, however, in fact, performing that accounting. Plaintiffs advanced a similar argument during the 2003 Phase 1.5 trial, contending that the historical accounting was "impossible" and that they should be entitled to money. They did not

prevail. They reiterated that request in 2005, again to no avail. The Court did not find that Interior could not perform the historical accounting and ignored Plaintiffs' request for monetary relief. Now, Plaintiffs renew yet again their rejected theory and urge that the October 10 hearing should essentially reopen the Phase 1.5 trial. No justification for doing so exists.

Focusing on Interior's progress in accomplishing the historical accounting conforms to the now well-established law of the case that the sole "live" claim in this case is for performance of an historical accounting as required by the 1994 Act. Congress never contemplated monetary relief, and the language of the 1994 Act does not support it. Accordingly, both this Court and the D.C. Circuit clearly limited Plaintiffs' remedy to ensuring that Defendants produce the requisite accounting of funds.

Should this Court consider granting relief greater than that permitted by the prior opinions, it would be faced with the same jurisdictional issue that the Court earlier avoided when it relied upon Plaintiffs' representations and struck portions of their complaint. Because the United States waives sovereign immunity pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (the "APA"), only for "[a]n action in a court of the United States seeking relief other than money damages," 5 U.S.C. § 702, this Court does not possess APA jurisdiction to entertain claims for money damages. Plaintiffs assert that the relief they seek does not constitute "money damages," but this assertion is wrong. Plaintiffs seek substitutionary relief that would require an infusion of funds and, thus, an impermissible award of damages. Alternatively, the APA provides for the review of agency action only when "there is no other adequate remedy in a court." 5 U.S.C. § 704. If Plaintiffs intend to seek money damages greater than $10,000, they should seek it in the United States Court of Federal Claims, subject to the Government's

defenses. Thus, section 704 also precludes a finding that the United States waived its sovereign immunity before this Court for this monetary claim. As a result, should this Court decide to address Plaintiffs' monetary claims, it should do so by determining that it lacks jurisdiction.

In addition to the jurisdictional issue, this case was certified as an injunctive relief class action under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), which do not by their terms provide for class notice or "opt out" by any class member. Controlling precedent in this circuit has determined that class actions certified under these subdivisions of Rule 23 may lack adequate due process protection for unnamed class members and thus are an improper vehicle when seeking a monetary recovery that is not merely incidental to the injunctive relief sought. Therefore, the class action posture of this case also precludes Plaintiffs from pursuing a substitutionary monetary award on behalf of the certified class.

Finally, to support their equitable claims, Plaintiffs seek to impose an improper evidentiary burden on Defendants. The Court should not consider Plaintiffs' contentions regarding the burdens of proof because they are not relevant to the hearing commencing on October 10. If it does, however, it should reject them.

DISCUSSION

The hearing commencing on October 10 should focus not on Plaintiffs' alternative remedies, but on a review of Interior's progress in completing the historical accounting. Several issues related to Interior's plan can be, and should be, preliminarily resolved to ensure a reasoned review during the hearing. Entertaining Plaintiffs' arguments on equitable remedies will only obfuscate the process. At any rate, based upon the above facts and the law of the case, the Court should reject Plaintiffs' monetary claims, as explained below.

I. The Court Should Resolve Issues Related To The Scope Of The Accounting Before The October 10 Hearing And, At The Hearing, Address Whether Defendants Are Taking Steps So Defective They Would Necessarily Delay Rather Than Accelerate The Accounting

As Defendants have previously stated, Interior's decisions, guided by its reasonable interpretation of the 1994 Act and considerations of scarce resources and time, may be reviewed to decide whether they somehow constitute "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell v. Norton, 240 F.3d 1081, 1110 (D.C. Cir. 2001) ("Cobell VI").

As discussed at the May 14, 2007, hearing, Tr. at 45-46, several legal issues involving the scope of the historical accounting can be resolved prior to the October hearing. The parties have now briefed those issues. Their resolution will not require the weighing of evidence or the taking of testimony but will effectively narrow the scope of the hearing. See Defendant's Responding Brief Regarding The Nature And Scope Of The Historical Accounting, filed June 11, 2007 [Dkt. 3339], at 12-34.

In its Order dated April 20, 2007, the Court explained its intention that the hearing address "the methodology and results of the accounting project up to the time of the hearing," and resolve whether Defendants are curing the breach previously found or have unreasonably delayed the completion of the required accounting; whether the Historical Statements of Account will satisfy Defendant's fiduciary duties; and what further relief, if any, should be ordered. April 20, 2007 Order [Dkt. 3312]. Defendants' plan for the October 10 hearing will meet those objectives.

Defendants filed Interior's Historical Accounting Project Document, including Interior's 2007 Plan for Completing the Historical Accounting of Individual Indian Money Accounts [Dkt. 3333] , on May 31, 2007, and will submit an administrative record supporting that plan within the next several weeks. In addition, Interior is in the process of preparing Historical Statements of Account related to land-based accounts in the Electronic era (1985-2000) and will submit samples of this work as well as samples of already completed Judgement and Per Capita accounts to permit the Court to gauge progress on the historical accounting. Together, these materials will demonstrate the methodology used by Interior to perform the historical accounting and allow the Court to determine the progress of the accounting project.

Defendants understand that the Court contemplates a site visit to the American Indian Records Repository in Lenexa, Kansas. This could occur before the hearing. In addition, prior to the hearing, Plaintiffs should be required to clearly articulate in writing any challenges to Interior's methodology or its progress and, at the hearing, will have the burden of sustaining those challenges. See Cobell v. Norton, 392 F.3d 461, 474 (D.C. Cir. 2004) ("Cobell XIII") ("[T]he court's innovation of requiring defendants to file a plan and then to say what 'might' be wrong with it turns the litigation process on its head. However broad the government's failures 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.").

The hearing should be relatively brief. After resolving the legal issues set forth above, the central remaining issue will be – consistent with the Court's April 20, 2007 Order – whether Defendants have remedied the unreasonable delay this Court previously found or are taking

"steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell VI, 240 F.3d at 1110.

II. Plaintiffs Are Judicially Estopped From Seeking Monetary Relief After Having Expressly Disclaimed Such Relief To Avoid Dismissal Of The Case

In response to the Court's question concerning "what further relief, if any, should be ordered," Plaintiffs advance "equitable remedies" as grounds for monetary relief, assuming that the Court determines that an "adequate accounting" cannot be performed by the defendants. Pl. Br. at 2. Plaintiffs are judicially estopped from requesting monetary relief.

Plaintiffs filed their Complaint on June 10, 1996. Defendants moved to dismiss the Complaint because, among other grounds, its allegations revealed that Plaintiffs were actually asserting a claim for money damages that the Court lacks jurisdiction to entertain pursuant to the APA [Dkt. 112]. The Government's APA and waiver of sovereign immunity arguments focused on the type of relief which Plaintiffs sought. In two early decisions, the Court squarely rejected these arguments. Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998) ("Cobell I"); Cobell v. Babbitt, 91 F. Supp. 2d 1, 25 (D.D.C. 1999) ("Cobell V"). Relying upon Plaintiffs' repeated assertions that neither "money damages" nor an infusion of money was being sought, the Court held, in its first opinion:

> 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.
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> 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 trust" and "made whole." Although the Complaint contains other references that could presumably lead to compensatory relief,[16] 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] 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. Given the representations made by the plaintiffs, the Court deems any other language in the Complaint that could be construed to the contrary to be information unnecessary to sustain the plaintiffs' claim for an accounting.[18] The Court is not presented with a request to order money damages to the plaintiffs or to add to the collective balance of the accounts, so the Court cannot possibly grant such relief.

16. For example, the Complaint states that "[b]y this action [the plaintiffs] . . . seek . . . [an order] to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted." Plaintiffs' Complaint ¶ 4.

17. 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. An artful pleading problem exists in the context of making a determination on whether the plaintiffs truly seek money damages or specific relief when the plaintiffs ask for cash infusions but allege their action in terms of equitable relief. 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.

18. For the sake of clarity, and because the Complaint does contain statements that are clearly irrelevant to the relief the plaintiffs proclaim to seek, the 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). The elimination of these references conforms the Complaint to the plaintiffs' theory of their case and eliminates the basis for the government's concerns that the plaintiffs are asking this Court to order a cash infusion into the accounts.

Cobell I, 30 F. Supp. 2d. at 39-40 (emphasis added).

In the later opinion, the Court found:

> 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.
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> 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. Blue Fox, 119 S.Ct. at 692 (quoting Bowen, 487 U.S. at 895, 108 S. Ct. 2722). Therefore, defendants' arguments on these jurisdictional points fail.

Cobell V, 91 F. Supp. 2d at 27-28 (emphasis added).

Having clearly advanced the position that they sought "no cash infusion" and that all of the money already exists in the individual Indian Money ("IIM") trust, Plaintiffs are judicially estopped from now advancing contradictory arguments. 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 estopped. The enumeration of these factors does not create inflexible prerequisites and additional considerations may help inform the doctrine's application in specific cases, id. at 751, and ensure that the integrity of the court and the judicial process are protected from litigants who are "playing fast and loose." See Donovan v. United States Postal Serv., 530 F. Supp. 894, 902 (D.D.C. 1981); cf. Patriot Cinemas Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).

Plaintiffs' present position concerning remedies is clearly inconsistent with their earlier one. In 1998 and 1999, Plaintiffs represented, and the Court accepted, that "[w]e're not seeking any new or additional money. The money is there," and the court struck from the litigation the claims to "restore trust funds wrongfully lost, dissipated or converted." Cobell I, 30 F. Supp. 2d at 40, 40 n18. Plaintiffs now assert that equitable restitution and disgorgement should be used to compel Defendants "to restore that which they have gained in violation of law and in breach of trust." Pl. Br. at 25.[1] It is not important whether the equitable remedies now advanced are

[1] The Complaint sought an order requiring Defendants to perform the accounting required by the 1994 Act. However, in 2005, Plaintiffs, disclaiming support for the structural injunction concerning the accounting to be performed, took the position that "they believe it to be

compensatory or "substitutionary." Pl. Br. at 26. In either case, Plaintiffs now seek the payment of money and an infusion of monies into the IIM trust fund from other sources – a position they earlier disclaimed. Having persuaded the Court to accept that position and obtaining a favorable decision, they are estopped from asserting these equitable remedies of restitution and disgorgement as substitutes for the accounting requested in the Complaint.[2]

III. Plaintiffs' Premise That Defendants Are Unwilling Or Unable To Provide An Historical Accounting Is Groundless

Plaintiffs assert repeatedly, as if repetition alone will make the allegation true, that Interior is unwilling or unable to provide an historical accounting. Pl. Br. at 5, 17, 36. This assertion is groundless. It is based upon outdated information and stale argument. As demonstrated through Interior's Quarterly Reports and its recently-filed Historical Accounting Project Document [Dkt. 3333], Interior has spent approximately $127.1 million performing work on the historical accounting over the past four years. That work has established that the documents necessary to do the accounting exist, and that an historical accounting is possible.[3]

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impossible to perform." Cobell v. Norton, 428 F.3d 1070, 1072 (D.C. Cir. 2005) ("Cobell XVII"). This change in their interests likely explains their inconsistent arguments.

[2] Plaintiffs cannot advance equitable remedies based upon a common law accounting. Pl. Br. at 20-21. The Court rejected this argument. Cobell V, 91 F. Supp. 2d at 28. Further, the Court stated, "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." Id. at 27. In rejecting common law accounting claims, the Court avoided the issue whether the true accounting remedy at common law yields a substitutionary award.

[3] Plaintiffs wrongly contend that "while defendants may choose how they will account for 'all funds' so long as the method is adequate for the task, it is not within their discretion to limit the scope of the accounting or narrow the scope of the certified class of all former and present trust beneficiaries." Pl. Br. at 22 n.11. It is clearly within the Secretary of the Interior's discretion to determine the scope of the accounting required by the 1994 Act. In Cobell XVII,

Plaintiffs' assertion that Interior is unwilling or unable to provide an historical accounting is based on the faulty premise that because some documents related to the IIM trust accounts were missing or destroyed through the passage of time, the historical accounting can never be accomplished. See Pl. Br. at 17. That premise is, however, inconsistent with the views of both Congress and the courts. Congress has funded Interior's accounting activities through annual appropriations without remotely suggesting that the accounting is impossible or that a money substitute could be awarded. Similarly, in its 2001 opinion, the Court of Appeals was cognizant of Plaintiffs' allegations that underlying records for an accounting may be unavailable, but the appellate court – as did Congress in enacting the 1994 Act, with knowledge of many of the claims Plaintiffs now assert – adhered to the concept of an historical accounting:

> The government's broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial subsidiary duties on those

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Defendants argued that this Court erred in rejecting Interior's 2003 accounting plan in favor of the structural injunction and addressed the same specific issues related to the scope of the accounting that are being raised now. In vacating the entire structural injunction, the Court of Appeals was clear:

> Thus neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost. This being so, the district court owed substantial deference to Interior's plan. The choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators.

Cobell XVII, 428 F.3d at 1076 (emphasis added). Moreover, after rejecting the district court's "ban on statistical sampling" because it "reflected no deference to defendant's expertise or to their judgment regarding the allocation of scarce resources," the Court of Appeals instructed this Court that "[t]he other specific challenges to the injunction raised by defendants should be resolved (if necessary) by the district court under the same principles that we have applied here." Id. at 1078-79 (emphasis added). Most of the "other specific challenges" referred to by the Court of Appeals addressed the scope of the accounting. Accordingly, precedent establishes that it is within the discretion of the Secretary to determine the scope of the accounting.

> government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.

Cobell VI, 240 F.3d at 1105. The accuracy of Plaintiffs' assertions is belied by the facts (including Interior's work at the American Indian Records Repository in Lenexa, Kansas).

Despite no factual support, Plaintiffs allege that Defendants recognize the "'patent futility' of attempting to perform an accounting of each IIM account as 'critical records no longer exist'" and, therefore, concede that "they are unable to fulfill their fiduciary duty to render the declared accounting due to the loss and systemic destruction of critical trust records." Pl. Br. at 5 n.5; see Pl. Br. at 17. These allegations are derived from a single ten-year-old document that Plaintiffs misquote and take out of context. In Defendants' January 21, 1997 Memorandum of Points and Authorities in Response to Plaintiffs' Motion for Class Certification [Dkt. 24], upon which Plaintiffs rely, Defendants informed the Court about the parties' efforts (which ultimately proved unsuccessful) to reach an agreement on the use of statistical sampling. In that context, Defendants stated:

> the parties have invested significant time and resources exploring the feasibility of whether, through their envisioned cooperative approach, the balances of the current IIM accounts could be reasonably ascertained through statistical sampling and modeling. The parties have pursued this approach – and are continuing to do so – in recognition of the enormous cost and patent futility of attempting to perform an accounting for each IIM account. It is simply impracticable and wasteful to attempt to perform over 300,000 accountings when many or critical records no longer exist or cannot be located in an economical manner.

Id. at 17 (emphasis added). Plaintiffs remarkably delete both the beginning and end of the last quoted sentence in citing this document to the Court. This document, when viewed completely

and in context, obviously does not establish that "defendants concede that. . . any accounting mandated by this Court would be pointless." Pl. Br. at 17. Instead, it merely indicates the Government's limited knowledge ten years ago regarding the state of the relevant IIM records and the potential utility of statistical sampling.

With continued appropriations from Congress, Interior will continue to perform the historical accounting work required by the 1994 Act and estimates that this work will be completed by 2011.[4]

IV. Plaintiffs Seek Monetary Relief Which This Court Is Not Authorized To Award

A. Plaintiffs Are Not Entitled To Monetary Relief On Equitable Grounds

Plaintiffs contend that "this is principally an Indian trust case," and that their "principal claims are grounded in trust law." Pl. Br. at 6, 10. From these contentions spring Plaintiffs' argument that "[u]nder trust law, this Court has broad inherent equitable powers to provide plaintiffs whatever remedy is necessary to protect their interests. . . ." Pl. Br. at 6; see also Pl. Br. at 20-21. This Court and the Court of Appeals, however, have consistently rejected both contentions.

As noted above, this Court previously concluded that "plaintiffs do not even properly seek a common-law claim for an accounting." Cobell V, 91 F. Supp. 2d at 27. Even if they did, such a remedy would be unavailable. As far back as Cobell V, this Court stated that "it is the statutes and regulations that create and define the enforceable trust relationship. . . . Whatever the scope

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[4] Plaintiffs' assertion that "defendant's plan has been almost fully funded" is simply wrong. Pl. Br. at 2. The Historical Accounting Project Document filed on May 31, 2007 [Dkt. 3333], demonstrates the gap in funding to date. Historical Accounting Project Document, Part 2, at 4 ("For fiscal years 2004, 2005, and 2006, the President's budgets requested a total of nearly $400 million for historical accounting, but Congress appropriated only about $170 million.")

of the government's legal duties under the IIM trust, the source is statutory law." Cobell V, 91 F. Supp. 2d at 30. To the extent that Plaintiffs raised claims based upon common law trust principles, this Court rejected and dismissed them. Id. at 28. Thus, this Court stated: "Consequently, to the extent that plaintiffs seek relief solely alleged to be afforded to them by rights arising under the common law of trusts, plaintiffs have failed to state a claim. . . . For these reasons, the court will dismiss plaintiffs' pure common-law claims." Id. at 31. The Court of Appeals did not disturb that dismissal. See Cobell VI, 240 F.3d at 1104 ("No common law claim for an accounting is cognizable. . . ."); Cobell XIII, 392 F.3d at 472 ("Insofar as plaintiffs may have said that [they could invoke all the rights that a common law trust entails against the government in this case], they were wrong.") (quoted in Cobell v. Norton, 226 F.R.D. 67, 76 n.6 (D.D.C. 2005)).

Subsequently, the Court made clear:

> The 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, 226 F.R.D. at 77 (emphasis added). Indeed, the Court observed 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 confirmed this point, stating plainly in 2006 that the accounting of the IIM trust 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").

Given this history, it is now well established that the sole claim in this case is the one for performance of an historical accounting required by the 1994 Act. Plaintiffs have provided no basis for straying from this settled precedent. They either wish for the Court to ignore these past decisions or wish to re-litigate their substance in order to obtain monetary relief. Either way, the Court should decline the invitation.

Plaintiffs, in an unavailing effort, offer a block quotation from Cobell V for the proposition that they have "actionable rights" that "stem from and are shaped by three bodies of law. . . ." including (1) "the provisions of the APA;" and where certain government actions cannot be reviewed under the APA, by (2) "non-statutory review;" and, finally, (3) "the rights effectively given to them by the Supreme Court in Mitchell II [United States v. Mitchell, 463 U.S. 206 (1983)]." Pl. Br. at 14 (quoting Cobell V, 91 F. Supp. 2d at 29-30). Plaintiffs, however, omit a key portion of that section of Cobell V which they quote; it reads:

> Plaintiffs' actionable rights in this case stem from and are shaped by three bodies of law. In all three cases, 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. Plaintiffs' statutorily-based claims against the government can be brought under the APA. See Rockbridge, 449 F.2d at 573. . . .

Cobell V, 91 F. Supp. 2d at 29 (emphasis added). The underscored, omitted sentences establish the very opposite of Plaintiffs' contention. Plaintiffs' claims are governed by the 1994 Act and, more importantly, the omitted sentences establish that any relief sought beyond that provided by the 1994 Act "must be denied." Id.; see id. at 30 (where the Court states in summary that,

regardless of which of the "three bodies of law" Plaintiffs' rely upon, "[i]n either instance, the court's review and plaintiffs' rights are derived from and determined by statute").[5]

Plaintiffs further contend that "[t]he Phase II Trial is an accounting trial – a matter traditionally heard by the Chancellor in Equity, the capacity in which this Court sits." Pl. Br. at 17. Based on this premise, Plaintiffs conclude that this Court "sitting as a court of equity, may provide plaintiffs equitable restitution for defendants' breaches of trust and order defendants to 'disgorge gains received from the improper use of [trust property] or entitlements.'" Pl. Br. at 7. Plaintiffs' premise that this Court sits as a "Chancellor in Equity" is incorrect and has been expressly rejected by the Court of Appeals. When the Court of Appeals 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). 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.

The Court of Appeals' rationale is clearly determinative:

> But because the IIM trust differs from ordinary private trusts along a number of dimensions, the common law of trusts doesn't offer a clear path for resolving statutory ambiguities.

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[5] See also Cobell, 226 F.R.D. at 77 ("The D.C. Circuit made clear that the common law of trusts has but one application in this litigation – to aid in the elaboration of the government's fiduciary duties. . . .") (emphasis added).

> Where a trustee has by misconduct or negligence made a proper accounting more difficult, the trustee may be charged for the accounting's cost, and no precept of common law constrains the cost of such an accounting, . . . though obviously bargaining between trustee and beneficiaries might eliminate some excesses. Absent such misconduct or negligence, however, the costs of an accounting would fall on the trust estate itself, which, as we said before, would automatically give private beneficiaries an incentive not to urge extravagance. Cobell XIII, 392 F.3d at 473. While Congress in the 1994 Act plainly faulted the United States' management . . . the Act's general language doesn't support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost. . . . 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.

Cobell XVII, 428 F.3d at 1074-75 (emphasis added).[6]

Plaintiffs cite United States v. Mitchell, 463 U.S. 206 (1983) ("Mitchell II"), to support their argument that this Court has the authority to award equitable relief that includes a monetary reward, but Mitchell II undermines, rather than supports, their argument. First, Mitchell II established the important point, noted above, that acts of Congress are what constitute the trust instruments that "establish a fiduciary relationship and define the contours of the United States'

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[6] Plaintiffs' suggestion that Cobell XVIII supports the granting of equitable monetary relief because this is principally a trust case as opposed to an action grounded in the APA misstates the court's holding. Similarly, Plaintiffs' assertion that Cobell XVIII "reiterat[ed] that in this case 'the narrow judicial powers appropriate under the APA do not apply,'" is ill-founded. Pl. Br. at 6. In the select excerpt from Cobell XVIII Plaintiffs quote, the Court of Appeals was simply reviewing its decision in Cobell XII, and Plaintiffs take this one snippet out of context. Indeed, the court in Cobell XVIII went on to discuss its Cobell XIII decision, noting that:

> we acknowledged the role played by the common law of trusts, which "flesh[es] out the statutory mandates" assigned to Interior. [392 F.3d] at 473. Yet even the "availability of the common law of trusts cannot fully neutralize the limits placed by the APA and the [Supreme] Court's Lujan and Southern Utah decisions," as similar limits exist even within that venerable body of law. . . .

455 F.3d at 305.

fiduciary responsibilities." Mitchell II, 463 U.S. at 224. Thus, Mitchell II militates against expanding relief to something never contemplated by Congress.

Second, Mitchell II was brought in the United States Court of Claims, based upon the plaintiffs' invocation of that court's jurisdiction 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 and an allottees association sought retrospective money damages, similar to the monetary relief Plaintiffs now improperly seek. With these stark differences in mind, 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 "[i]n essence, Mitchell II stands for the unremarkable proposition that remedies typically available to other beneficiaries in breach of trust cases are also available to Indian beneficiaries in this case." Pl. Br. at 15 (emphasis added). Quite simply, Plaintiffs brought this case under a different jurisdictional statute and in a different court.

Significantly, in 1999, this Court found the caution expressed by the dissent in Mitchell II applicable to this case:

> The federal power over Indian lands is so different in nature and origin from that of a private trustee . . . that caution is taught in using the mere label of a trust plus a reading of Scott on Trusts to impose liability on claims where assent is not unequivocally expressed.

Cobell V, 91 F. Supp. 2d at 29 (quoting Mitchell II, 463 U.S. at 234 (Powell, Rehnquist, and O'Connor, JJ., dissenting)).[7] Notably, in their May 31, 2007 brief, Plaintiffs cite Scott on Trusts

[7] Notably, at the same time, this Court also quoted the Supreme Court in Nevada v. United States, 463 U.S. 110, 141 (1983), stating "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.

and similar treatises approximately thirteen times; they nevertheless fail to demonstrate that the language of the 1994 Act offers any unequivocally expressed assent for this Court to impose liability upon the United States for monetary relief. Given Plaintiffs' continuing effort to re-litigate trust issues that were resolved as far back as 1999, this Court's criticism of Plaintiffs' reliance on Mitchell II remains relevant:

> Plaintiffs wish to rely upon Mitchell II for the establishment of the trust, but then they seek to ignore Mitchell II when it comes to the establishment of rights. . . . Accordingly, even though the IIM trust is a trust, as that term is used in Mitchell II, plaintiffs must point to rights granted by statute if they are to be enforced against the government. There is simply no persuasive basis for doing so on a purely common-law basis.

Id. at 30.

Plaintiffs' misplaced reliance on Mitchell II is further highlighted when they quote the D.C. Circuit's discussion of Mitchell II: "While Mitchell II involved a claim for damages, nothing in that decision or other Indian cases would imply that appellants are not entitled to declaratory or injunctive relief. Such remedies are the traditional ones for violations of trust duties." Pl. Br. at 17 (quoting Cobell VI, 240 F.3d at 1101) (emphasis added). This quoted language does not support Plaintiffs' request for monetary relief. To the contrary, it establishes that declaratory or injunctive relief, not monetary relief, is the only appropriate remedy.

Finally, Plaintiffs cite several cases and treatises for the general proposition that a trustee is liable for whatever remedies may be appropriate if the trustee did not faithfully perform the trust or keep adequate accounts. These cases did not involve implementation of, or rights created by, the 1994 Act and are all thus inapposite. Further, most of these cases do not involve the United States as trustee and are inapposite for this additional reason. See 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.").

Thus, although Plaintiffs cite Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir. 1995), for the general proposition that the District Court "has broad inherent equitable powers," Pl. Br. at 18, the law of this case establishes that the 1994 Act governs Plaintiffs' substantive rights and limits this Court's equitable authority. Cobell XVII, 428 F.3d at 1075, 1077. Similarly, Plaintiffs' reliance on Crocker for the proposition that an action in restitution can result in a defendant's payment of money, Pl. Br. at 25, is misplaced because Crocker, which addressed an action between private parties, is not relevant to the statutory scheme in this case.[8] Nothing in that case 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 to Plaintiffs. See Pl. Br. at 16-17, 20-21. The case involved claims brought against private trustees (two brothers) by members of a profit-sharing plan. The issue addressed was whether, under the Employee Retirement Income Security Act, a district court could offset the two brothers' interest in the profit-sharing plan against a judgment against them that was based on their breach of trust duties. If anything, Crawford supports Defendants' position by demonstrating

[8] Plaintiffs' cite to Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318-19 (1999), is inapposite for the same reasons. Pl. Br. at 19. 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), Pl. Br. at 21, is likewise not applicable because it involved private parties and the trust at issue was not created by statute.

that courts 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 decisions in 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 and do not advance their argument. Pl. Br. at 14, 19. That "[c]ourts of equity have original inherent jurisdiction to decree and enforce trusts and to do whatever is necessary to preserve them from destruction," 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. 995 F.2d at 287.

B. Plaintiffs' Claim For Monetary Relief Constitutes A Request For Damages That This Court Cannot Entertain

Should the Court consider granting relief foreclosed by the prior case law, the Court must address the same jurisdictional issue that the Court earlier avoided by relying upon Plaintiffs' representations and striking portions of their complaint to preclude a monetary award.

The APA permits only actions that seek relief other than "money damages," 5 U.S.C. § 702, and where no other adequate remedy exists, id. § 704. Here, because Plaintiffs seek what amounts to money damages, this Court does not possess the authority to award such relief. Although Plaintiffs claim that they "are not seeking damages in this action in equity," Pl. Br. at 22 (emphasis in original), that is exactly what they are doing.

Plaintiffs erroneously rely upon Bowen v. Massachusetts, 487 U.S. 879 (1988), and its progeny. 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. Id. 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 directly imposed 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, which provides a waiver of sovereign immunity for claims other than money damages.

In sharp contrast to Bowen, no statute expressly or implicitly imposes a duty to pay money in this case. The 1994 Act certainly does not expressly or implicitly provide for the payment of 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). The "statutory mandate" – the only

"live" claim – the courts have found to be required by the 1994 Act is Interior's provision of an historical accounting. Congress did not authorize a court to conclude that no satisfactory accounting is possible and, on that basis, to calculate monetary liabilities to impose on the Treasury. As the Court of Appeals stressed: "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." Cobell XVII, 428 F.3d at 1075. The 1994 Act simply does not mandate "the payment of money."[9] Bowen is thus distinguishable and does not support Plaintiffs' argument.

Several of the other cases cited by Plaintiffs are distinguishable for the same reason. See America's Community Bankers v. FDIC, 200 F.3d 822, 829-30 (D.C. Cir. 2000) (court considered an agency rulemaking denying the refund of quarterly assessments and the plaintiff claimed that the statute required payment of refund); Anselmo v. King, 902 F. Supp. 273, 275 (D.D.C. 1995) (plaintiffs sought funds to which a statute allegedly entitled them); Fletcher v. United States, No. 04-5112, 2005 WL 3551108, at *5 (10th Cir. Dec. 29, 2005) (court addressed the plaintiffs' contention that the government had a statutory duty to pay them money, specifically royalties from

[9] Where Congress has intended to allow an action for monetary relief, it has clearly indicated 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 clearly does not contain such a provision.

oil and gas production, to which they were entitled pursuant to statute).[10] In contrast, Plaintiffs make no claim that the 1994 Act created a "statutory duty to pay them money," nor could they.

Plaintiffs' reliance upon Bowen is more futile because they claim it supports their argument that this Court is authorized to provide equitable monetary relief based upon its equitable powers as Chancellor in Equity. Pl. Br. at 7, 17. The Supreme Court rejected the notion that a party may obtain monetary relief because it constitutes equitable relief in Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 264 (1999), a case Plaintiffs fail to mention. In Blue Fox, the Supreme Court held 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. Writing for the unanimous Court in Blue Fox, the Chief Justice, one of three dissenters in Bowen, 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. He wrote:

> Bowen's analysis of [APA] § 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.

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[10] Plaintiffs omit a key second basis for the decision in Fletcher: the plaintiffs were seeking only prospective relief and not the payment of royalties that may have been withheld in the past. Fletcher, 2005 WL 3551108 at *5. In sharp contrast, Plaintiffs are clearly seeking retrospective relief. Cobell v. Norton, 407 F. Supp. 2d 140, 145 (D.D.C. 2005).

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 en banc 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, Plaintiffs' "basic claim" here is 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 law of this case and the terms of the 1994 Act establish this beyond cavil. Further, the performance of the accounting alone does not create an entitlement to money. Plainly, Bowen does not support Plaintiffs' theory.

The Court of Federal Claims' consideration of this jurisdictional issue in Pueblo of 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). Moreover, the Administrative Procedure Act waives sovereign immunity for district court suits only if "there is no other adequate remedy." 5 U.S.C. § 704 (2000). Yet, to the extent that these other actions seek an accounting, that remedy is available here as a prelude to the award of monetary damages.

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

A final bar to Plaintiffs' recovery of monetary relief is City of Houston v. HUD, 24 F.3d 1421, 1428 (D.C. Cir. 1994). In that case, the City of Houston, relying upon Bowen, sought to recover funds from a Block Grant awarded by the Department of Housing and Urban Development ("HUD") for a particular fiscal year, despite the fact that the appropriation for that fiscal year had been fully obligated and lapsed before Houston had 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). This reasoning is controlling here.

Plaintiffs, based upon information provided by Interior, claim that $13 billion has been deposited into the IIM trust since its inception and imply that this amount is sitting in a specific account either at the Department of the Treasury (Account No. 14X6039) or in the Treasury General Account, available for payment to Plaintiffs as equitable monetary relief. Pl. Br. at 27. The average balance of money held in the IIM trust over the years has been as high as approximately $400 million and the balance, at any given time, is held for the current IIM account holders. See Cobell XVII, 428 F.3d at 1072 (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). There is no specific fund of money at Treasury or elsewhere from which the Court could draw to pay Plaintiffs the $13 billion that historically went through the IIM trust. Plaintiffs seem to acknowledge this point, when they allege – without any evidence – that the money deposited in the IIM trust was used to pay down the national debt and for payments to some unknown third parties, rather than to pay Indian beneficiaries. See Pl. Br. at 27-28. Accordingly, the prohibition established in OPM v. Richmond and City of Houston preclude the equitable recovery Plaintiffs seek from the Treasury. Any payment would either violate constitutional limits or constitute "money damages" contrary to the requirement of section 702 of the APA. City of Houston, 24 F.3d at 1428.[11]

[11] See America's Community Bankers, 200 F.3d at 829-31, where the D.C. Circuit reaffirmed the precedent of City of Houston, but distinguished City of Houston from the case before it because the award of equitable monetary relief there was based upon statute and could be accomplished through offsets on future assessments made against the plaintiffs.

V. Plaintiffs Are Ineligible To Pursue Money Damages On Behalf Of The Class

Plaintiffs represent a certified class of IIM account holders which, as presently constituted, is prohibited from seeking a monetary award on behalf of the class. When the Court certified this class action 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," on behalf of the plaintiff class. Order of February 7, 1997 at 2 [Dkt. 27]. Both subdivisions of Rule 23 create a mandatory class. Therefore, neither subdivision can serve as a basis to authorize the class representatives to seek the monetary relief that Plaintiffs now pursue, because of the need for measures to safeguard the due process rights of individual class members. See e.g., Eubanks v. Billington, 110 F.3d 87, 94-95 (D.C. Cir. 1997) ("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 [Rule 23](b)(1) and (b)(2)"). The class certification order makes no provision for such due process measures as notice to the class or a right to opt-out from class membership, which are often necessary when a class seeks monetary relief.

Rule 23 authorizes a class action when the party seeking certification demonstrates that the case meets the numerosity, commonality, typicality and adequacy conditions for class treatment. Fed. R. Civ. P. 23(a) (specifying class treatment "only if" the aforementioned conditions exist). In addition, if the conditions of subdivision 23(a) are satisfied, the case must also meet one of the criteria specified in subdivision 23(b) before a court may grant class treatment. Fed. R. Civ. P. 23(b).[12]

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[12] Rule 23(b) provides in relevant part:

An action may be maintained as a class action if the prerequisites of subdivision

Here, the Court certified the case under subdivisions 23(b)(1)(A) and 23(b)(2), but neither provision is intended as a vehicle for seeking monetary relief. The Court of Appeals expressly acknowledged this problem in Eubanks, 110 F.3d at 95. Eubanks presented the question whether an injunctive relief class certified in an employment discrimination case under subdivisions 23(b)(1)(A) and (b)(2) could also seek recovery of back pay. The D.C. Circuit explained:

> 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). . . . [T]he 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 back pay or other forms of monetary damages to be allocated based on individual injuries. In that situation, an employment discrimination case will implicate the concerns that led to the adoption of more stringent procedural protections in [23](b)(3) actions, and the potential for conflicts of interest may necessitate measures, such as permitting opt-outs, that safeguard the due process rights of individual class members. That back pay is characterized as a form of "equitable relief" in Title VII cases 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 problematic in the damages phase.

> (a) are satisfied, and in addition:
> **(1)** the prosecution of separate actions by or against individual members of the class would create a risk of **(A)** inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or **(B)** adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
> **(2)** 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; or
> **(3)** the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

Fed. R. Civ. P. 23(b)(3).

110 F.3d at 95 (citations omitted) (emphasis added). Confirming this view, the Supreme Court in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), stated that "the inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class. 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 consent, or, in a class with objectors, their express wish to the contrary." Id. at 846-47.[13]

Because the class here is certified as a mandatory class, with no certification under Rule 23(b)(3), Plaintiffs have no authority to seek a monetary recovery. The D.C. Circuit in Eubanks recognized that Rule 23 affords flexibility to address these important due process considerations, 110 F.3d at 94, but Plaintiffs have ignored them. Plaintiffs may respond that these additional due process protections are unnecessary, because the law does permit an injunctive relief class, certified under Rule 23(b)(2), to recover money that is "incidental" to the equitable relief. See, e.g., Taylor v. Dist. of Columbia Water & Sewer Auth., 205 F.R.D. 43, 47-48 (D.D.C. 2002) (back pay "incidental" to injunctive relief). Such an argument, however, would be misplaced. When a case such as that posited by Plaintiffs, although facially involving injunctive relief, is actually focused entirely on an award of money, Eubanks requires the class to be certified under Rule 23(b)(3), or some equivalent accommodation:

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[13] Ortiz involved the application of subdivision 23(b)(1)(B) to certify an asbestos tort class action for settlement purposes. Rule 23(b)(1)(B) is not at issue in this case, but like subdivisions 23(b)(1)(A) and (b)(2), a subdivision 23(b)(1)(B) certification results in a mandatory class.

> we conclude that when a (b)(2) class seeks monetary as well as injunctive or declaratory relief the district court may exercise discretion in at least two ways. The court may conclude that the assumption of cohesiveness for purposes of injunctive relief that justifies certification as a (b)(2) class is unjustified as to claims that individual class members may have for monetary damages. In such a case, 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. Alternatively, the court may conclude that the 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.

110 F.3d at 96 (citations omitted). Plaintiffs' demand for monetary relief invokes this very requirement. They have abandoned the specific relief of an historical accounting and now desire substitutional relief in the form of money. Whether styled as restitution or disgorgement, however, such a claim for relief requires that the case first be certified under Rule 23(b)(3) (or some alternative accommodation). Plaintiffs' brief entirely fails, however, to address any important prerequisite to treatment under subdivision 23(b)(3).[14]

Notwithstanding Plaintiffs' silence on these concerns, this case is not amenable to certification for class-wide money damages. In Garcia v. Veneman, 224 F.R.D. 8, 16 (D.D.C. 2004), aff'd in relevant part, Garcia v. Johanns, 444 F.3d 625 (D.C. Cir. 2006), this Court considered similar circumstances where Hispanic farmers requested certification as a hybrid class action under Eubanks in a lending and government benefits discrimination case, but the Court denied certification under Rule 23(b)(3). The reasoning for the Court's denial of certification is

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[14] Such prerequisites would include demonstrating predominance of common questions over individual ones; that class treatment remains superior to other available methods of adjudication; and that the case will remain manageable with money claims involved. See Fed. R. Civ. P. 23(b)(3). Plaintiffs also fail to describe how they will afford proper notice to class members as required by Rule 23(c)(1)(B). See Fed. R. Civ. P. 23(c)(1)(B).

applicable here: "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.'" Id. (citation omitted). Plaintiffs omit any mention of these important issues and thus fail to demonstrate that the concerns the Court observed in Garcia are not also present here. Plaintiffs, therefore, are not entitled to seek a class recovery of money.

VI. Plaintiffs Misstate The Burdens Of Proof In An Effort To Support Their Equitable Restitution Claim

In an effort to further support their "equitable" claim, Plaintiffs contend that "[t]he burden lies upon defendants to establish how much of the thirteen billion dollars collected and deposited in trust has been paid to each member of the plaintiff class," and that "[a]ny uncertainty about what has been paid having been caused by defendant's own conduct, all doubts must be resolved in favor of plaintiffs." Pl. Br. at 7 (citations omitted). See also, Pl. Br. at 27 (absent proof from the government that each "check is negotiated, presented for payment, and paid to the beneficiary . . . the trust balances must be corrected and restated at $13 billion").

These contentions are contrary to the law of evidence. Thus, the United States Court of Claims, in addressing the Government's duty to account under the Indian Claims Commission Act, stated that the availability of the general law of fiduciary relationships in making determinations involving the United States as a trustee

> does not mean . . . that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. [Such inapplicable rules might include] the principle that once a breach of

> fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980).

In Red Lake Band v. United States, 17 Cl. Ct. 362, 407 (1989), the Claims Court observed that, as against the United States, there is a "presumption of regularity which attaches to the conduct of government employees," and that "the lack of underlying documentation is more likely due to the lapse of time and difficulty of assembling materials than to theft or abuse of trust." Id. at 408-09. "[T]here is a strong presumption that government officials act in good faith and within the scope of their authority." White Mountain Apache Tribe of Ariz. v. United States, 26 Cl. Ct. 446, 449 (1992), aff'd, 5 F.3d 1506 (Fed. Cir. 1993) (citing Andrade v. United States, 485 F.2d 660, 665 (Ct. Cl. 1973)).

IIM trust records are government records compiled by public officials and constitute substantive and probative evidence of the facts reported therein. See, e.g., Fed. R. Evid. 803(6)-(8). "[The] presumption of regularity surrounds public officers to the extent that, in the absence of contrary evidence, a reviewing court assumes that they have properly discharged their official duties." Kephart v. Richardson, 505 F.2d 1085, 1090 (3d Cir. 1974) (citing 2 Davis, Administrative Law Treatise § 11.06). In Kephart, the court held that this presumption leads to the conclusion – in the absence of contradictory evidence from the plaintiff – that "the Secretary properly compiled the . . . data" appearing in official records. The court held that the burden rested with the plaintiff to introduce evidence showing the accuracy (or inaccuracy) of the information that had been submitted to the Secretary "in the first instance." Id. at 1090.

Stated otherwise, Plaintiffs cannot simply rely on the Government's inability to produce source documents for a particular IIM transaction as substantive proof that such a transaction did not occur or that data in the IIM electronic database is erroneous.[15] See, e.g., Fed. R. Evid. 1004 (original not required and other evidence of the content of a writing is admissible if all originals have been lost or destroyed or original cannot be obtained by any available judicial process or procedure). Instead, Plaintiffs must introduce evidence to rebut the presumption of regularity. See Breeden v. Weinberger, 493 F.2d 1002, 1005-06 (4th Cir. 1974); Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982) (presumption of regularity applied even though Army destroyed documents; "It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to prove otherwise."); cf. Cobell XIII, 392 F.3d at 474 ("[T]he court's innovation of requiring defendants to file a plan and then to say what 'might' be wrong with it turns the litigation process on its head. However broad the government's failures 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.").

Even if, arguendo, this case were to be treated as a suit for an accounting under private trust law, Interior's inability to produce a particular original source document supporting an account transaction posted in the IIM database would not be dispositive. The validity of account transactions can be proven through other means. See, e.g., Red Lake Band, 17 Cl. Ct. at 412

[15] Nor can Plaintiffs baldly assert that, because certain records evidencing disbursements are unavailable, the disbursements did not take place and the related funds remain in the Treasury General Account.

("[T]he court will accept evidence other than vouchers or claims settlements as circumstantial evidence to establish the fact of payment and adherence to regulations.").

The Court can determine the validity of an account transaction based on various forms of evidence. See, e.g., Navajo Tribe, 9 Cl. Ct. at 385 n.42 ("The court feels that defendant has satisfied its burden, in a general manner, viewing the record as a whole"); Hines v. Solomon (In re Mansour's Estate), 185 S.W.2d 360, 369 (Mo. App. 1945) (permitting trustee, in absence of vouchers or receipts, to "prove them by other satisfactory evidence"); Maloney v. Kinkead, 24 A.2d 824, 826-7 (N.J. 1941) (in the absence of voucher, trustee produced receipted bills or canceled checks which was sufficient, and was permitted to "explain th[e] discrepancy" between voucher and canceled check); In re Wilber, 276 P. 876, 877 (Wash. 1929) ("Our statutes do require vouchers to be presented, but it is nowhere provided that a failure to present vouchers shall work a forfeiture or bar the allowance of expenditures properly and actually made, . . . nor of the guardian's good faith."); In re Guardianship of Rudonick, 456 P.2d 96, 101 (Wash. 1969) ("[a]lthough this corroborating evidence would normally be supplied by vouchers and receipts, other forms of evidence may be sufficient"); Disque v. McCann, 360 P.2d 583, 586 (Wash. 1961) (allowing testimony by parties to transactions to prove expenditures in the absence of receipts); Title Guar. & Trust Co. v. Wilby, 69 N.E.2d 429, 434 (Ohio App. 1946) ("Proof by production of vouchers is not indispensable."); 39 CJS, Guardian & Ward § 213 ("Proper vouchers for each expenditure should be furnished, but their absence does not necessarily bar allowance of expenditures where the guardian has acted in good faith and adduces other proof of the correctness of his accounts."); see also Maricle v. Casablanca Convertors, Inc., 546 So.2d 275, 278 (La. App. 1989) ("[A]n audit cannot be so burdensome as to require a corporation to produce

the original of every cancelled check, or deposit slip, or invoice of the corporation."); Fed. R. Evid. 1004.

Even assuming arguendo that these arguments were correct, Plaintiffs' contentions regarding the burden of proof are not relevant to the October 10 hearing. The Court has indicated that the hearing is intended to address "the methodology and results of the accounting project up to the time of the hearing," and to resolve whether Defendants are curing the breach previously found, or have unreasonably delayed the completion of the required accounting; whether the Historical Statements of Account will satisfy Defendant's fiduciary duties; and what further relief, if any, should be ordered. April 20, 2007 Order [Dkt. 3312]. A hearing consumed by the presentation of evidence and testimony regarding the disbursement of $13 billion is contrary to the Court's stated intention, as well as contrary to the past decisions of this Court and the Court of Appeals regarding the relief available to Plaintiffs, contrary to the scope of review permitted by the APA, and contrary to the basic concept of a class action with representative plaintiffs.

CONCLUSION

The October 10 hearing should consist of a review of Interior's plan to complete the historical accounting, the administrative record and the work performed to date to determine whether Interior's actions somehow constitute "steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." Cobell VI, 240 F.3d at 1110. A number of legal issues involving the scope of the 1994 Act are already before the Court and ready for resolution. For the reasons set forth above, the hearing should not address Plaintiffs' claims for monetary relief, which, in any event, are not properly before this Court.

Respectfully submitted,

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June 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 2007 the foregoing *Defendants' Responding Brief Regarding the Scope of the October 10, 2007 Hearing* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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