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

: Civil Action 96-1285
: Washington, D.C.
: Monday, April 28, 2008
: 10:00 a.m.

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

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1 P R O C E E D I N G S

2 COURTROOM DEPUTY: This is Civil Action Number 96-1285,
3 Cobell, et al. versus Gover, et al.
4 THE COURT: Counsel, as you stand to speak, state your
5 names for the court reporter. I won't enter appearances for
6 everybody at the beginning of this procedure. Some of you are
7 well-known to me, most of you are well-known to me.
8 We are here by prearrangement to talk about what might
9 be accomplished at another trial in this case, which I have set
10 for June 9th. And I have received something like 250 pages of
11 briefing from the parties, exclusive of appendices, attachments,
12 additions, reference materials, and so forth, which I and my
13 clerks have done our best to internalize.
14 And I understand that there are -- there is on the part
15 of the government enormous continued resistance to the very
16 idea, A, of having another trial, and B, of any remedy in this
17 case that has a dollar sign in front of it. And I understand on
18 the part of the plaintiffs that there are considerably more
19 zeros after the dollar sign than the government thinks is
20 possible, or frankly than I think is possible.
21 And the tent flap having been lifted by my order in
22 January, the plaintiffs are now asking me to -- I think they're
23 asking me to sweep into the remedy in this phase of the case all
24 kinds of things that I had thought were reserved to the
25 so-called management part of the case, which we haven't even

1 begun to hear or contemplate.
2 To my way of thinking -- well, here's where I am today:
3 I have accepted provisionally -- I mean, I don't doubt the
4 ability, nor deny the right, of the parties to give me 300 more
5 pages of briefs on this question. But I accept provisionally
6 the major premise of the plaintiffs' case that what cannot be
7 accounted for must be replaced.
8 But I have also accepted the government's modalities of
9 accounting, which I don't mean to get a cheap laugh out of this,
10 but it's sort of close-enough-for-government-work theory of
11 accounting that the government and the Court of Appeals, by the
12 way, have decreed.
13 But as I found in January, that accounting doesn't
14 account for everything. In my January ruling I was critical of
15 what I considered the lackluster attention of both sides to the
16 question of how much cannot be accounted for. I thought from
17 the evidence at the last proceeding that the number was in the
18 vicinity of 3.6 billion, or 3 billion dollars; now the
19 plaintiffs have ratcheted that up to four and a half billion
20 dollars, I think principally by adding the Osage headrights
21 money, an arguable but I think questionable proposition.
22 With respect to both sides, I really don't want to hear
23 argument today about sovereign immunity, about jurisdiction,
24 about supremacy clause, about lots of the frankly ancillary
25 arguments that were in the briefs of both sides.

1 What I am interested in, I think, are four basic
2 questions. The first is a question that I raised the last time
3 we were together that I don't think I have yet grasped the
4 answer to, and that is what I call the class certification
5 problem. Another way of putting that is to ask, if relief is
6 granted under a 23(b)(2) theory or a 23(b)(1) theory, what
7 further relief is precluded for class members who are bound by
8 that judgment? What is the claim-preclusive effect of a ruling,
9 and what is Eddie Jacobs and others like Eddie Jacobs going to
10 do?
11 The second major question which is raised in the
12 defendants' brief and really not responded to by the plaintiffs
13 is if there is an award with a dollar sign in front of it -- I
14 refuse to call it either damages or restitution or disgorgement.
15 Let's just call it an award with a dollar sign in front of it.
16 If there's an award with a dollar sign in front of it, who does
17 the money go to? How is it distributed?
18 There is sort of the suggestion in the plaintiffs'
19 brief that it would be just distributed pro rata, which makes
20 very little sense to me. But the complications of figuring out
21 who would get what share of what amount of money are quite
22 serious problems, it seems to me.
23 The third question relates to the time value of money,
24 which is either prejudgment interest or not. And if it is, I
25 have no jurisdiction; if it's not, it's something else. The

1 plaintiffs have unearthed a very interesting decision by
2 Judge Boggs sitting in the 9th Circuit, concluding that the time
3 value of money improperly forfeited or seized in forfeiture is
4 not interest -- I mean -- yeah, is not prejudgment interest.
5 And I haven't come down on one side or another of that
6 issue, but before I even begin to come down on that issue, I
7 need to think about and counsel need to advise me about some of
8 the complexities that Judge Boggs noted in his opinion. Exactly
9 how is it calculated? Exactly how is the money booked? Where
10 was it booked? As one of my law clerks has pointed out to me,
11 during many of the years in question in this case, the United
12 States didn't have any debt, so what's the debt-servicing idea
13 here for years in which the United States was not borrowing
14 money? And, of course, the methodology of just allocating some
15 of any reward per year is certainly simple, but I might add the
16 word "istic" after the word simple.
17 So the time value of money problem is a serious problem
18 and one that I would think needs to be addressed in considerable
19 detail.
20 And finally, of course, what numbers follow the dollar
21 sign? What is the amount of the award? I used numbers of three
22 million and 3.6 million -- billion, excuse me. Three billion
23 and 3.6 billion in the January findings, but was frankly quite
24 critical of those numbers. And the government, of course, is
25 critical of those numbers. The plaintiff is happy with those

1 numbers, or at least accepts those numbers, and wants to move on
2 from there by adding the time value of money to them.
3 But I do not consider that those numbers are -- I don't
4 think we're finished with that question, let's put it that way.
5 I don't think we're finished with that question at all.
6 Now, I have lots of other questions on my mind this
7 morning, but those are the major ones, class certification, how
8 is the money distributed, what about the time value of money,
9 and what is the amount of the award. And I would like to hear
10 from counsel on any of those four subjects, and if you have to
11 slip over into some other subject, okay, but frankly, I think
12 that's about all we have time to talk about in any serious
13 detail this morning.
14 Who goes first? Mr. Smith?
15 MR. SMITH: Good morning, Your Honor. David Smith
16 representing the plaintiffs.
17 You know, I'll focus on the first two issues that you
18 noted. Number one, the class certification problem if relief is
19 granted; what about the preclusive effect for any other actions
20 that may be brought, such as Mr. Jacobs. And number two, to
21 whom does the money go to.
22 Your Honor, addressing that first issue, a lot depends
23 on what the damage claim might be. There are certain damage
24 claims that certainly this Court, in various opinions, has
25 determined is not covered by this action. If the damage action

1 is a failure to collect, I believe you said that's not within
2 the scope of this particular proceeding at this time. Certainly
3 that claim could have been brought in the claims court. If
4 there are certain mismanagement issues, those claims would not
5 be precluded.
6 The fact of the matter is that any individual
7 beneficiary could at any point have brought a damage action in
8 the court of claims if they felt it was possible. To our
9 knowledge, that has not happened during the course of this
10 litigation. The defendants certainly would be more aware of
11 that than we would because they would be the ones being sued.
12 So to our knowledge, certainly Mr. Jacobs hasn't filed
13 such an action, and we're not aware at this point of anybody
14 else who has.
15 The practical matter is, Your Honor, that given the
16 failure of accounting, that would be an impossible task. If
17 you're sitting here with money that's been placed into a
18 commingled account, nobody knows what the beginning account
19 balances are, there's -- without that accounting, nobody can go
20 and determine what their individual loss may be.
21 So as a practical matter, that remedy is not even
22 available for any plaintiff. Nobody can go over into the court
23 of claims and say, you know, based on this accounting, I've lost
24 this amount of money. So that possibility is really not a
25 reality, in our opinion. Could at some point someone try to do

1 it, to go into the court of claims? Obviously that's a
2 possibility that a judge in that jurisdiction would have to
3 consider.
4 Your Honor, if this Court applied all the assumptions,
5 all the presumptions that a court of equity can in dealing with
6 a trust, giving every benefit of the doubt to the plaintiffs in
7 applying those trust principles, making the government go
8 through its proof of showing every disbursement, certainly I
9 could see the possibility that it would be precluded, any other
10 damage claim would be precluded. But as I understand from the
11 Court's ruling, that in fact is not what this Court is going to
12 do at this point.
13 Your Honor, the cases are not in agreement as to
14 whether a claim like this, dealing with equitable disgorgement,
15 what effect it may have on a damage claim, even if it was
16 possible. There are some cases that say you have to make an
17 election of remedies, there are some cases that say you give a
18 credit for anything you obtain in equity. Some cases you can
19 say you can do both. The cases certainly are not on agreement
20 on that point.
21 But it's our position that it really makes no
22 difference because it's not even possible. There's no
23 beneficiary of which we are aware who has had the advantage of
24 accounting to determine what individual losses may be. We don't
25 believe Mr. Jacobs or anybody else can do that. If the

1 government had done that accounting, certainly that would be a
2 possibility. But it's not here.
3 So I don't think that's a concern, that any individual
4 plaintiff will actually attempt to do that under these
5 circumstances.
6 Your Honor, looking at the --
7 THE COURT: Your argument triggers a subsidiary
8 question. If any plaintiff had accounting that is adequate
9 accounting back to the beginning, that plaintiff might have a
10 claim, you say. How are we to deal with judgement and per
11 capita accounts in this award? I'm using the word "award" as if
12 I had made one or as if I had promised to make one. I am not.
13 I'm using that word as shorthand.
14 MR. SMITH: Your Honor, presuming that there is an
15 award, the government raised the issue of judgement and per
16 capita accounts, and said certainly in this area we could show
17 an accounting and some damage claim could be made.
18 Your Honor, they had an opportunity to prove that at
19 the last trial, and as far as we could tell, they were
20 unsuccessful in showing that they could even produce an
21 accounting with respect to the very simple judgment or per
22 capita accounts. There were numerous issues that were
23 unanswered. There was no effort in those cases to, for example,
24 show the money was disbursed to the right people. Their
25 accountants looked at it but never looked at tribal rolls to

1 make sure if money was properly disbursed.
2 Even in those cases where -- there may be some remote
3 cases out there where an account was opened just for a
4 particular judgment, and then disbursed, but in most cases these
5 were put into accounts and commingled with every other account
6 holder out there. And you have the same issues; you don't know
7 what the beginning account balances are.
8 There were huge issues dealing with judgement and per
9 capita accounts regarding interest, the interest to be
10 calculated, and those issues have never been resolved, despite
11 this trial.
12 So certainly the government had the opportunity to come
13 in and bring an action -- or had the opportunity to come in and
14 prove to the Court that with respect to this small class of
15 cases, we can do an accounting. As far as I can tell from the
16 evidence that was presented in this Court's ruling, they were
17 not able to do that.
18 And so I would put those class of --
19 THE COURT: So you think they're precluded from doing
20 that in the hearing that we've got coming up in June?
21 MR. SMITH: Your Honor, I think that would be
22 ultimately your decision. They certainly had the opportunity to
23 do it and did not do it. I think that was the purpose of that
24 trial, was to show what the government could and could not do,
25 and they were unsuccessful in doing that.

1 You know, it's potential that a judgment or per capita
2 creditor could bring a damages action for money mismanagement
3 problems dealing with the management of those accounts, but
4 again, that's another issue that I don't believe is encompassed
5 within the scope of this particular proceeding.
6 THE COURT: Okay.
7 MR. SMITH: Your Honor, looking at the second issue you
8 mentioned regarding distribution, the government tends to sort
9 of conflate issues of calculation of a remedy and disbursement
10 of money together, talking about this fluid recovery concept.
11 And as I understand fluid recovery, and I think every court
12 tends to interpret it a little bit differently, but that's not
13 what we have here.
14 Looking at the 2nd Circuit cases, you're dealing with a
15 situation where you have so many plaintiffs, and you don't
16 really know what the damage is so you make estimates of what the
17 damage might be, and you go ahead and have a presumption of what
18 the class would be and what the remedy would be, and then you
19 have the folks come in later and make claims and you have a
20 bunch of money left over.
21 Certainly that's not what we contemplate in this case.
22 Your Honor, should this Court enter an award of restitution and
23 disgorgement, we enter, obviously, another stage. I'm not sure
24 the defendants have standing at that point to contest the
25 disbursement or the manner under which it's disbursed, but it

1 obviously is a key question for this Court.
2 We anticipate that it would be important for
3 appointment of a Special Master at that point to determine how
4 the money should be disbursed, to try to identify all the
5 beneficiaries, using the government's records and other sources,
6 and to get notice to all beneficiaries. And I think the Special
7 Master could make a best effort on determining how the money
8 should be disbursed.
9 Your Honor, based on what we've seen, and I know Your
10 Honor has reservations about this at this point, but it most
11 likely should be done on a per capita basis. We realize that
12 there are different beneficiaries in different parts of the
13 country whose resources are different, but as a practical
14 matter, all their money has been commingled in one account. And
15 given the failure of the accounting, we believe it's an
16 impossible task to determine how that money should be allocated
17 based on individual resources.
18 I think this Court has a great deal of discretion under
19 various Supreme Court cases to determine what the fair and
20 equitable manner of disbursing that money is. And certainly
21 there are cases that have allocated that, a fund of that sort,
22 on a per capita basis, where the actual loss to individual
23 account holders is difficult to determine.
24 There's a case out of this district, Segar vs. Smith -
25 it was a discrimination case, a promotion case - but in that

1 case you had a certain amount of money based on the failure to
2 promote, you had a lot of prospective employees, you don't know
3 which one would have gotten the job. It was impossible to break
4 that down by individual plaintiffs.
5 In that case, it was a 1982 case, the Court said
6 because of that difficult task of assigning different dollar
7 amounts to individual class members, we're going to do it on a
8 per capita basis. The Court felt that that was appropriate.
9 THE COURT: Segar is the most unfortunate precedent you
10 could possibly give me.
11 MR. SMITH: I apologize for that.
12 THE COURT: Because I know the Segar case.
13 MR. SMITH: I know you do.
14 THE COURT: I brought the Segar case in 1982, and it
15 took 26 years to get it resolved.
16 MR. SMITH: I recall that. We're getting close,
17 Your Honor.
18 THE COURT: That's the only unfortunate part of it.
19 26 years, that gives new meaning to the Bleak House idea.
20 So go on. I'm familiar with Segar.
21 MR. SMITH: Starting to make us look pretty good. I
22 appreciate that.
23 You know, there's other cases around the country. But
24 particularly when you're dealing here for relief, you're not
25 looking at individual losses, you're looking at the benefit

1 conferred on the government. And so your calculation isn't
2 based on the individual losses, you're not looking at how much
3 each person would have lost, even if that was possible.
4 Instead, under those circumstances, where allocation is
5 difficult, a fair and equitable manner may very well be to put
6 it on a per capita basis.
7 THE COURT: Mr. Smith, come on. You've got, what,
8 300,000 individual Indian money accounts?
9 MR. SMITH: Uh-huh.
10 THE COURT: Some of them are accounts to which payments
11 of a dollar and a quarter are made every few months, they're
12 fractionated down almost to the vanishing point. Right?
13 MR. SMITH: That's correct.
14 THE COURT: Some of them are very substantial accounts
15 that have been much less fractionated and are much more intact.
16 Right?
17 MR. SMITH: That's correct.
18 THE COURT: Some of them have to do with oil leasing
19 and some of them have to do with timber, some of them have to do
20 with cattle grazing and with markedly different receipts in each
21 of those accounts, and you would take an award of X billion
22 dollars and whack it up pro rata, per capita, so everybody gets
23 the same amount of money?
24 MR. SMITH: Your Honor, first --
25 THE COURT: You don't think I'm going to get some

1 opt-outs if I do that?
2 MR. SMITH: You may very well get some requests for
3 opt-out. You certainly could. But each individual beneficiary
4 has a history going back 100 years of money that has been
5 accumulated or that they should have been entitled to from
6 various sources over that 100 years. It hasn't always been a
7 single fractionated share. They have predecessors in interest
8 who had various shares that should have been distributed to them
9 over the past century.
10 So while it may be $1.25 today, accumulated over what
11 they should have been entitled to over years is obviously much
12 more.
13 Certainly a Special Master can look and try to come up
14 with some calculation for that, but I think that would be
15 difficult. And looking at principles of -- at equitable
16 principles per capita may be the best, fairest way in fact to do
17 that.
18 THE COURT: Well, the problem you put to me, the class
19 action problem you put to me, which is that no individual
20 plaintiff can really possibly bring an action, that's your
21 assertion here --
22 MR. SMITH: Uh-huh.
23 THE COURT: -- and therefore they're sort of stuck with
24 the class action remedy, raises in my mind the question of
25 whether there are due process rights of individuals who are

1 subjected to class treatment of their claims.
2 And a decision to divide the money up per capita is a
3 kind of -- from the standpoint of somebody who thinks and can
4 make a colorable showing that he's entitled to a larger share of
5 that, seems to me to deprive him of the right to at least make
6 some argument to somebody that he should get a higher share of
7 that money. Or she.
8 MR. SMITH: Your Honor, that brings up obviously the
9 circuit's decision in Eubanks and the implications of that.
10 Your Honor, the key in Eubanks was whether there were clear
11 disparities in the nature or the magnitude of the relief sought
12 by individual class members.
13 In Eubanks the Court classified the relief as
14 equitable. But it was back pay, and so every potential class
15 member had a potentially different amount of back pay. It was
16 classified as equitable; it really was more of a compensatory
17 type damage remedy.
18 Here, Your Honor, certainly there are no disparities in
19 the nature of the relief that is requested. The nature of the
20 relief is uniform with respect to all class members. And again,
21 unlike in Eubanks, we're not focusing on the loss to individual
22 members, we're focusing on the benefit conferred on the
23 government. We're not relegated to try to determine what each
24 individual account holder would have lost. Under Eubanks, if
25 any individual member can come in and show he is sufficiently

1 unique or distinct from other members of the class, I believe
2 under Eubanks this Court can consider an opt-out.
3 But I don't think we go there, where here the relief is
4 solely equitable, solely based on the defendants' own misconduct
5 and not on individual losses. I don't think we have those due
6 process concerns there.
7 THE COURT: I seem to remember being told, maybe on day
8 one of my involvement with this case, that plaintiffs had a much
9 more sophisticated model in mind for distributing the results of
10 this, a model that had something to do with timber sales and
11 geography and grazing and oil, and which tribes and which
12 individual members of which tribes might be expected to have
13 larger shares. What happened to that?
14 MR. SMITH: Your Honor, you heard a part of that model
15 from Mr. Fasold. And certainly not the entire model. And I
16 know you expressed some dissatisfaction with his presentation of
17 that model.
18 That model is still out there. You can look at
19 resources throughout history and determine certain amounts that
20 were allocated on certain amounts.
21 But I tell you, the best person to address that
22 particularly is probably Mr. Gingold, as he's just informed me.
23 That's something he has worked on for the past 12 years.
24 THE COURT: Okay. Well, I'll pass on Mr. Gingold now
25 because I'm sure he's going to be up on some other subject.

1 Maybe we can talk about it when it's his turn.
2 MR. SMITH: Okay.
3 THE COURT: Anything more to tell me about class
4 certification or manner of distribution?
5 MR. SMITH: Not those particular issues, no,
6 Your Honor.
7 THE COURT: Mr. Smith, before you go, I asked the
8 question when I was talking about the class about claim
9 preclusion, and I'm not sure if you answered that. I'm not sure
10 I caught it when it was going by. What is precluded by an
11 award, of the award that you contemplate?
12 MR. SMITH: Your Honor, it's our position that as we
13 understand this trial going forward, that nothing has precluded
14 an individual beneficiary from pursuing a damage claim, and
15 nothing will preclude an individual beneficiary from presenting
16 a damage claim to the court of claims if they feel it's
17 possible. We don't think it is, based on the failure of the
18 accounting. But I don't think anything would preclude any of
19 the class members from attempting to assert a damage claim.
20 THE COURT: And a damage claim would comprehend what,
21 mismanagement, failure to collect, selling land too cheap?
22 MR. SMITH: Failure to collect, those things that at
23 least at this point this Court has determined is not within the
24 scope of this. But I think any damage claim, if they feel they
25 can show losses to their account, they have always had the

1 opportunity to present that damage claim to the court of claims.
2 I don't think at this point anything precludes that.
3 THE COURT: All right. Thank you, Mr. Smith. Let me
4 hear from the government on those two first points.
5 MR. QUINN: Good morning, Your Honor. Michael Quinn
6 for the United States defendants.
7 THE COURT: Good morning, sir.
8 MR. QUINN: I will attempt to address Your Honor's
9 questions and Mr. Smith's arguments with respect to the two
10 issues you mentioned first this morning regarding
11 claim-preclusive effects and distribution. Mr. Stemplewicz may
12 have something to add on the distribution issue, but I can
13 address it somewhat from the class action perspective,
14 Your Honor.
15 I think your questions touch on a key concern that the
16 United States has with plaintiffs' proposal here for a trial in
17 June. First off, plaintiffs make no case that any damages could
18 be awarded under the first provision in which this case was
19 originally certified under 23(b)(1)(a). They argue that it
20 should go forward under 23(b)(2). However, in order to accept
21 plaintiffs' position and proceed on that basis, you essentially
22 would have to ignore three controlling decisions of the
23 DC Circuit, none of which plaintiffs even address in their
24 briefing.
25 The first is Thomas v. Albright, which holds, and in

1 that case vacated and remanded a class certification decision in
2 a settlement circumstance because it failed to consider the
3 Eubanks v. Billington factors and analysis for whether a case
4 can be appropriately certified under 23(b)(2).
5 In the case of Thomas, as in the certification decision
6 here, the original certification order was issued prior to the
7 DC Circuit's decision in Eubanks. So this Court has never
8 considered this case with respect to the Eubanks v. Billington
9 factors and analysis.
10 Thomas holds that it's an abuse to discretion to go
11 forward with 23(b)(2) cases, particularly when you're going to
12 discuss or address opt-outs or notice to the class, without
13 going back and re-examining the propriety of certification under
14 23(b)(2). Thomas v. Albright is 139 F.3d at 525, and that's
15 addressed in our briefing.
16 The second case that plaintiffs fail to address in
17 their briefing, and which the Court would have to ignore in
18 order to proceed under 23(b)(2), is In Re: Veneman. That's at
19 309 F.3d 789. In that case the Court was concerned -- I believe
20 the Court has already referred to it this morning, and I would
21 like to just briefly quote from a particularly appropriate
22 section of that case at 795 and 796.
23 The Court mentions that there are two concerns
24 surrounding Rule 23 class actions; first, how class
25 certification affects the due process rights of absent class

1 members to have their own day in court, and second, whether the
2 parties are bound by the judgment. Your Honor, those are
3 precisely the issues you were attempting to get at this morning.
4 But the Court in Veneman goes on to say: "As to the
5 first point - that is, how it affects the due process rights -
6 the Supreme Court established in Phillips Petroleum vs. Shutts
7 that, one, before a court can bind absent class members," and
8 quoting from Shutts, "concerning claims wholly or predominantly
9 for money damages," unquote, "due process requires that they
10 receive adequate notice and an opportunity to opt out of the
11 action."
12 The Court went on to say: "The defendant in such an
13 action has a right" - that is, the government here would have a
14 right - "standing, in effect, to demand that adequate notice be
15 given to the class members so as to avoid a situation where the
16 defendant would be bound by a loss, yet class members would not
17 be bound by its win." And that's the risk and one of the
18 concerns that we have in going forward under 23(b)(2).
19 To go on in Veneman, the Court also said: "To
20 complicate matters further, the Supreme Court has expressly left
21 open the question of whether a judgment in a no opt-out class
22 action," such as we have here, "like the one that the District
23 Court certified in Veneman, can ever preclude absent class
24 members from bringing their own individual lawsuits for monetary
25 damages," citing Ticor Title Company vs. Brown,

1 511 U.S. 117.

2 The Court then mentioned second: "The constitutional
3 concern in Shutts and the Supreme Court's case Ticor may also
4 implicate concerns underlying Rule 23, and these constitutional
5 questions are not avoided simply because the party elects," as
6 they claim here, "to pursue it as an equitable remedy."

7 I think if you go and look at the Eubanks decision,
8 Your Honor, you see that in Eubanks the Court clearly said that
9 it doesn't matter whether you've styled this as a claim for
10 money damages or as one for injunctive relief. Eubanks involved
11 a question of the propriety of awarding back pay as incident to
12 a Title VII type of claim.

13 The Court said in Eubanks that, "Back pay, that it's
14 considered as a form of equitable relief, does not undercut the
15 fact that variations in individual class members' monetary
16 claims may lead to divergence of interests that beg unitary
17 representation of a class problematic." That's Eubanks, 110
18 F.3d at 95.

19 Your Honor, that's the situation we are presented with
20 here, is we have an equitable theory that's been advanced by the
21 plaintiffs that is not an award to the whole. It is not a claim
22 of a whole. It's like you take a rubber -- you have one of
23 these rubber band balls, they bounce and it looks like one big
24 ball, but when you start looking at it, there are different
25 strands. Some are long, some are short, some are thin, others

1 fatter. They all come apart. They're individualized, different
2 colors.
3 And I think that's what Your Honor was concerned
4 about --
5 THE COURT: Wonderful extended metaphor.
6 MR. QUINN: I'm sorry, Your Honor. I tried to come up
7 with something that could be concrete about the significance of
8 the abstract problem that exists here.
9 It is true, we know right off the bat, that as a whole,
10 plaintiffs have serious problems with the theory that they're
11 proposing. For one, Your Honor in your January 30 decision came
12 to the conclusion that certain members of the class, at least
13 putatively, are not proper plaintiffs in this class action; that
14 is, people who died before the act took effect in 1994.
15 THE COURT: That's a problem.
16 MR. QUINN: There's no approach here to carve out or
17 identify monies that belong to those people that are not part of
18 this case. Why should --
19 THE COURT: Mark that down on your June 9th calendar.
20 MR. QUINN: Well, Your Honor, second, the class
21 definition excludes people who have brought claims prior to the
22 class being certified here. And there have been some claims,
23 cases brought by individual Indians that might exempt, take them
24 out from class consideration.
25 THE COURT: How many cases are there?

1 MR. QUINN: Offhand I can't say, Your Honor.
2 THE COURT: Half a dozen?
3 MR. QUINN: That's probably a fair assessment.
4 THE COURT: Okay.
5 MR. QUINN: The other is we know also, and I think it
6 was touched on here this morning, that those who have had
7 accountings under per capita or settlement judgment accounts,
8 those types of accounts, several thousand claimants, several
9 thousand accounts, the Department of Interior is at 95 percent
10 complete with those accountings.
11 Those accountings we believe do not run into some of
12 the problems in terms of the administration, performance of the
13 accounting. Most of those do not involve probated estates, they
14 don't have that question about going back in time and looking at
15 prior predecessor interest. They don't have those things.
16 They're limited in time. There's no explanation offered by
17 plaintiffs, and I heard none this morning, why those class
18 members should participate in any award here. Their money is
19 not at stake, based on their theory.
20 In a sense, and we've presented this in our briefing,
21 Your Honor, the plaintiffs have essentially put forward what is
22 referred to in the 2nd Circuit as an argument for a fluid
23 recovery. The recent case of the 2nd Circuit Court of Appeals
24 in McLaughlin vs. American Tobacco touches on the problems that
25 are inherent with that approach.

1 In the McLaughlin case, cigarette smokers as a class
2 tried to sue the tobacco company over light cigarettes. They
3 couldn't prove -- they had problems of proof trying to show
4 individual injury. I think that's what Mr. Smith is trying to
5 argue here this morning, that some of these people wouldn't be
6 able to show individual harm with the particulars of their
7 account because they wouldn't have enough information.
8 That was the essentially the problem the plaintiffs
9 were trying to get around in the McLaughlin case. They proposed
10 a different approach. It was essentially a disgorgement; in an
11 economic analysis, the price difference, the profits, the excess
12 profits that the American Tobacco Company earned by hiding the
13 fact that the light cigarettes were not as safe as people were
14 led to believe, so that you would have a price differential
15 between the price actually paid and the price that would have
16 been commanded in the market had people known the truth.
17 The Court of Appeals rejected that approach as a class
18 action claim, and I think it's worth considering the reasons
19 that they did so. And I'm quoting here from what is on the
20 Westlaw version page start 11 of that opinion: "We reject
21 plaintiffs' proposed distribution of any recovery they might
22 receive because it offends both the Rules Enabling Act and the
23 due process clause. The distribution method at issue would
24 involve an initial estimate of the percentage of class members
25 who were defrauded and therefore have valid claims. The total

1 amount of damages suffered would then be calculated based on
2 this estimate, and presumably on an estimate of an average loss
3 for each plaintiff. Essentially a per capita type of award."
4 "But such an aggregate determination is likely to
5 result in an astronomical damages figure that does not
6 accurately reflect the number of plaintiffs actually injured by
7 defendants, and that bears little or no relationship to the
8 amount of economic harm actually caused by the defendants. This
9 kind of disconnect offends the Rules Enabling Act, which
10 provides that federal rules of procedure such as Rule 23 cannot
11 be used to bridge, enlarge, or modify any substantive right.
12 The Court further explained that, quote, "Roughly
13 estimating the gross damages to the class as a whole, and only
14 subsequently allowing for the processing of individual claims,
15 would inevitably alter defendants' substantive right to pay
16 damages reflective of their actual liability."
17 THE COURT: Well, Mr. Quinn, the problem with that,
18 with the McLaughlin decision, is that apparently, as I
19 understand what you've read to me, the Court used a few data
20 points about injury and then figured out what the damage was.
21 But here we're starting with a big number and deciding how to
22 distribute it.
23 I mean, I hear you, but suppose, for example -- I'm
24 just thinking out loud a little bit here, but suppose -- let's
25 take an award of X, just take an award of X dollars, and it

1 represents, after we sort out whether dead people are entitled
2 to it, after we sort out whether per capita and judgment
3 accounts are entitled to a piece of it, whether we decide
4 whether Osage headrights, it represents individual Indian money
5 account receipts that have never been properly accounted for.
6 Okay? Let's call it that.
7 MR. QUINN: For sake of argument, I'll assume that,
8 Your Honor.
9 THE COURT: For sake of argument. And then let's say
10 there are 300,000 Native Americans who are entitled to a piece
11 of that. Somebody is appointed to sort this out; remains to be
12 seen. I mean, the United States is the trustee, and I suppose
13 the United States would want to say, well, we would like to be
14 the trustee for that. Plaintiffs would say, no, no, it's got to
15 be somebody else. But let's sort that out later. Somebody is
16 going to sort this out.
17 Notice is given to the entire class that this is the
18 award. The class is told that there are going to be two phases
19 in distributing this award; the first phase will consider
20 individual claims brought by individuals who want to make a
21 claim, a specific claim. Those individual claims would be heard
22 and decided, monies disbursed, and then what's left over will be
23 distributed -- the class will be told, what's left over will be
24 distributed per capita. And the class will also be told, if you
25 don't like any of this, you can opt out and try to do it

1 yourself.
2 Now, what are the constitutional, practical McLaughlin
3 or other problems you see in approaching it that way?
4 MR. QUINN: Well, for one, Your Honor, I think it
5 violates the Veneman decision of the DC Circuit, which the
6 primary concern there, they were faced with a petition
7 interlocutory from a certification decision, where the Court had
8 been faced with a question of whether we have a hybrid
9 certification of a class; that is, under 23(b)(2) go forward on
10 the substantive injunctive relief, and reserve for later whether
11 we have a damages issue that's going to need to be resolved and
12 be addressed, perhaps to qualify for class treatment under
13 23(b)(3). But we'll leave that to another day.
14 That petition went up to the Court of Appeals. The
15 Court of Appeals addressed great reservations about that,
16 ultimately remanded the case without deciding it, because it was
17 concerned that the issues that they were most concerned about
18 hadn't been really briefed by the parties. And that goes to
19 this issue about the notice to the class and the decision, when
20 the decision is made.
21 Rule 23 urges the Court to make a class certification
22 decision at the earliest practical time. And there are serious
23 constitutional questions to keep a case open with half of a
24 case -- with a case going to trial on an issue without having
25 already made the determination about who is in the class and

1 who's out, and giving that notice in advance of the trial.
2 I don't see how you could go forward, if you were going
3 to allow opt-outs and give notice to class, with a trial in
4 June, just as a matter of practicality. Because all that would
5 have to transpire in advance of the trial, or you put the
6 outcome of the trial at risk later in terms of those who want to
7 opt out or argue that they should have been given notice prior
8 to the trial.
9 In terms of the distribution and those who have claims,
10 I think plaintiffs have a burden of establishing, as part of
11 their claim for unjust enrichment, that the money that they're
12 claiming for is inured to the benefit, taken from those class
13 members. And that may be ultimately a question of proof at a
14 trial. But in terms of -- you can't just throw a number up
15 there and say, well, it belongs to everybody in the class, when
16 it doesn't.
17 This case started out as a 23(b)(2) case or a
18 23(b)(1)(a) case where it made sense to proceed under those
19 provisions as a class, because regardless of the fact that
20 everybody had different accounts -- and we're talking about
21 hundreds of thousands of separate accounts, not a pooled fund,
22 not a single fund in which everybody shares a similar interest.
23 We have land in Montana, leases for range, timber leases, oil
24 leases, commercial leases in California, all those have inherent
25 different questions.

1 Plaintiffs' land claim that is really kind of way, way,
2 way beyond the pale that they've tried to bring in, they've
3 tried to argue that that's all part of the common relief here,
4 but we know, just sitting here today, that none of the four
5 representative class plaintiffs has a legal interest in all
6 those parcels of land.
7 But the point is, it made sense originally to proceed
8 under 23(b)(2) and (b)(1)(a) because we were talking about a
9 singular duty to account that was same across all these
10 different interests. What's happened now is we've changed the
11 entire case. We turned it around to a case involving numerous
12 tens of thousands of different interests seeking claims against
13 the government for money allegedly improperly withheld.
14 Those are all -- if money was withheld, there's no
15 proof that it was withheld in common from everybody across the
16 class. If there was money withheld from an oil well royalty in
17 Texas, that doesn't give someone who is a land holder in Montana
18 a claim for unjust enrichment. You have to tie it -- even in
19 the trust cases that allow tracing into commingled funds, the
20 burden is still on the plaintiff to show entitlement to the
21 money that's been commingled. They just say, because it's
22 commingled, we get a pass on having to prove it. That's not the
23 law, Your Honor.
24 So I would say that ultimately, as they've framed the
25 relief remedy, they cannot be awarded as a class mechanism. You

1 could have four individual, five individual plaintiffs make
2 claims of unjust enrichment as individuals, but it couldn't be
3 conducted as a class remedy, even if you got to 23(b)(3) and
4 tried to do this as a hybrid.
5 But if you were to proceed at all, I think you would
6 have to give the notice and the right of opt-out in advance of
7 the trial to the class to give them -- and they would have to
8 know, what's the theory of the recovery, what's the distribution
9 going to be, before they go blindly allowing the case to go into
10 the merits of the remedy.
11 THE COURT: Well, seems to me the notice that you're
12 talking about might be a better informed, more informative
13 notice after evidence is taken on the -- further evidence is
14 taken on the amount of any award, and the contemplated method
15 for its distribution.
16 MR. QUINN: Well, I mean, certainly as a plaintiff I
17 would like to know I could hold back my bet and keep it in my
18 pocket and decide what the outcome is until the cards are laid
19 up on the table, and then decide whether I want to participate
20 or not. I mean, I don't think that's the appropriate approach
21 to take in terms of what the informed approach in terms of an
22 opt-out is.
23 THE COURT: Okay. At any rate, your answer to my
24 question is, read Veneman?
25 MR. QUINN: That's one, Your Honor. I would also urge

1 you --
2 THE COURT: I will do that. I've read it once, I'll
3 read it again.
4 MR. QUINN: I would also suggest one other. When
5 plaintiffs came back in their reply brief and had affirmatively
6 said, we're not going to even talk about distribution now, and
7 tried to distinguish McLaughlin as a distribution case when
8 they're talking about fluid recovery, looking for some guidance
9 on distribution, I came across this other case I think is
10 instructive by Judge Pollack out of the Southern District of New
11 York. It's Schaffner vs. Chemical Bank, 339 F.Supp 329, 1972.
12 In that case, a beneficiary of a trust managed by
13 Chemical Bank tried to bring a class action on behalf of her
14 trust for certain overcharge practices by Chemical Bank as
15 trustee. And the class she sought to have certified was a class
16 that involved her trust as well as several thousand trusts also
17 managed by Chemical Bank.
18 Judge Pollack refused to certify the class as such, and
19 said: "While strictly not the same, the attempt of the
20 plaintiff to include in her class not only beneficiaries of her
21 own trust but beneficiaries of separate and distinct trusts is
22 akin to attempts by shareholders of one corporation to sue on
23 behalf of shareholders of all other like corporations. Several
24 attempts have been made to join as a class shareholders of
25 different mutual funds on federal claims bearing a similarity to

1 those here asserted. These attempts have been turned back
2 uniformly. Thus far, courts have limited the equitable remedies
3 of the individual plaintiff only to actions involving the
4 economic union with which he has been associated," citing a
5 series of cases. That's -- I'm trying to find the exact page
6 where that quote appears, Your Honor. That's at 337, 38 of that
7 decision. So I would urge Your Honor to take a look at that as
8 well.
9 This is a remedy that involves individual rights. The
10 income streams are individual, the timing of when money may have
11 been withheld from any particular person is individual, the
12 amounts are individual, the issues are individual, and we would
13 submit it's not amenable to a class action treatment under any
14 provision.
15 Under 23(b)(3), for Your Honor to consider the
16 amenability of that, plaintiffs have an obligation to bring
17 forth a motion and bring forth proof that they're entitled to
18 treatment under 23(b)(3). They haven't asked that.
19 THE COURT: No, they have not.
20 MR. QUINN: So you're kind of stuck with 23(b)(2). And
21 23(b)(2), if you go back -- and I'm sure Your Honor has already
22 looked at Eubanks several times. But when you look at that
23 decision, the limitation of 23(b)(2) in terms of granting
24 opt-out and notice to class is designed for specific situations
25 where you have a particular plaintiff party who is in the class

1 as a special circumstance and needs to be excused from the
2 class.
3 That's not meant to be an exemption that allows you to
4 take what is normally a 23(b)(3) type of class action for
5 damages. And that's really what we're here about. Plaintiffs
6 talk about this as injunctive relief, equitable relief, but that
7 is essentially a fiction. If this Court's jurisdiction weren't
8 limited to awarding equitable relief, we would be talking
9 essentially about a damages claim. That's really essentially,
10 at bottom, what they're seeking.
11 And I would ask Your Honor to look at one other case,
12 finally, that's in our brief, a case from last year decided by
13 the DC Circuit, Richards vs. Delta Airlines, 453 F.3d 525,
14 DC Circuit 2007. And we've discussed that in our brief, but I
15 wanted to highlight the point there.
16 The Court said, quote, "Plaintiff cannot transform a
17 claim for damages into an equitable action by asking for an
18 injunction that orders the payment of money." In that case they
19 brought a claim for a declaratory judgment action against the
20 airline, asking for an order requiring them to pay for lost
21 baggage.
22 And essentially that's what we have here in our case,
23 is plaintiffs can know that they can't bring a damages claim,
24 they know that the damages elements of their complaint were
25 stricken from this case with their blessing back in 1998, and so

1 they're stuck choosing this Court, choosing these claims,
2 they're stuck with the one remedy that this Court has recognized
3 all along that they're limited to, and that is the accounting.
4 To get beyond talking about monetary remedy in this
5 context, I think it runs into the problems that the DC Circuit
6 found in Richards v. Delta Airlines as well.
7 THE COURT: Well, just let me comment on that last line
8 of argument about Richards vs. Delta Airlines. It is certainly
9 true that the plaintiffs have been hard pressed throughout this
10 case to describe what they wanted without using the term
11 "money." And they have been -- as you pointed out in your
12 brief, they expressly disavowed seeking an order for the payment
13 of money early on in this case.
14 And watching the plaintiffs try to navigate around that
15 rock, that big rock, is a subject of some -- strike that. I was
16 about to say amusement, but strike that. It's interesting to
17 watch the plaintiffs try to deal with that problem, which is a
18 serious problem for them.
19 But one thing -- and I have to tell you that I am not
20 at this point sure that an actual dollar award can be made, or,
21 if made, would be sustained on appeal. But I'm certainly going
22 to figure out what the dollar award should be, and there's no
23 question that I have declaratory judgment jurisdiction, and so
24 one result of this procedure may be a declaratory judgment that
25 the defendant is unable to account for X dollars that have been

1 received in IIM accounts, and under the law of equity should pay
2 it.
3 Whether the government ever responds to declaratory
4 judgment actions unaccompanied by injunctions is an interesting
5 question, and one that I've always -- you know, the government's
6 response to that may be, how many divisions has the Pope. I
7 don't know.
8 And then there's another piece of the order that might
9 say, pay it, if I decide that I have, and then the whole thing
10 goes to the Court of Appeals and the Court of Appeals decides
11 whether only the payment -- whether the payment order is
12 sustained or whether the declaratory judgment is sustained.
13 But I assure you that one way or another, the result of
14 this process is going to be a dollar figure. Because I have
15 believed from the time I took this case on that what this case
16 needs more than anything else is a dollar figure, so that
17 somebody up in the other branch of government can focus on this
18 and decide what to do about it.
19 So I hear you on the jurisdictional question, and I
20 agree that it is a dicey and complicated one, and I agree that
21 the plaintiffs have had a very difficult time with it throughout
22 this case, but my stewardship of this case is going to end with
23 something preceded by a dollar sign.
24 MR. QUINN: And I appreciate that, Your Honor. I
25 understand what you're saying here. However, the number that

1 they're claiming, that we get up to somewhere in the
2 neighborhood of $58 billion, I think even by your own standard
3 in the Garcia case, is not incidental. I don't think it
4 qualifies by any test as incidental under 23(b)(2).
5 So there's more than just a jurisdictional problem,
6 there is a procedural problem that Your Honor faces, because
7 plaintiffs have basically limited your consideration here of the
8 class treatment of remedy. Your Honor could come up to a
9 number, I would say, in terms of the actual plaintiffs who are
10 named in the case, but as far as a class remedy, Your Honor has
11 to be comfortable, in effect, that 23(b)(2) allows this kind of
12 a relief.
13 And I think your own prior decisions where you've
14 considered this before, $20 billion I think at stake in Garcia,
15 you said it predominated over the injunctive relief in any sense
16 of the word.
17 And what we have here is monetary relief that is not
18 seeking to be incidental. It's not back pay as part of an
19 injunctive relief order and restatement or something of that
20 order, which is the traditional Title VII racial discrimination
21 kind of claim that's supposed to be addressed under 23(b)(2).
22 This doesn't come close to that configuration.
23 What we have here is a remedy that seeks to supplant
24 the injunctive relief that was supposed to be ordered. So in
25 effect, I don't know how you get past --

1 THE COURT: My own decision in Garcia?
2 MR. QUINN: Well, or the rule limiting 23(b)(2) to
3 predominant issue. Particularly with the question you started
4 out with, Your Honor, about the finality concerns and preclusive
5 effect, particularly in view of plaintiffs' remarks in their
6 reply brief. Reply at 78, note 88, plaintiffs say, "Class
7 members would not be precluded for seeking damages claims in
8 U.S. Court of Claims once these proceedings are concluded." The
9 United States has no assurance, you put a number up there, what
10 that would terminate in terms of finality down the road after a
11 judgment were rendered. And even if the United States
12 ultimately paid a sum of money, where that would leave us in
13 terms of continuing exposure.
14 A reply at page 97 offers another problem to
15 plaintiffs' allegations here for a remedy. At 97 of the reply
16 brief, plaintiffs say, quote, "The relief that plaintiffs
17 request," and they cite their own brief, original brief at 19
18 and 20, "is all equitable in nature, and alternative available
19 remedies in light of the inability to account, and is
20 independent of any monetary recovery adjudged by this Court."
21 In essence, I think they're acknowledging there that
22 their proposal for a remedy here --
23 THE COURT: What page of their reply?
24 MR. QUINN: Page 97 of their reply, Your Honor, they
25 say, "The relief that plaintiffs request," citing their opening

1 brief --
2 THE COURT: By the way, from now on, anybody who wants
3 to file a brief longer than 35 pages has to accompany it by a
4 motion for leave to exceed the page limitation, which I usually
5 grant by saying, you can file any length you want to, I'll read
6 the first 35 pages.
7 Page what?
8 MR. QUINN: 97 of the reply brief, Your Honor.
9 THE COURT: 97, all right.
10 MR. QUINN: I believe the quote is -- and I don't have
11 the page in front of me, I just have the extract. It says, "The
12 relief the plaintiffs request," citing plaintiffs' brief at 19
13 and 20, "is all equitable in nature, and alternative available
14 remedies in light of the inability to account, and is
15 independent of any monetary recovery" -- it's at page -- oh,
16 there's another reference to that, yeah. "Adjudged by this
17 Court."
18 And also at page 66 of their brief they make a similar
19 statement, Your Honor. Page 66 of their brief, the first full
20 paragraph, at the very end of the paragraph they say in the last
21 clause, "Plaintiffs now seek the equitable remedies of
22 restitution and disgorgement independent of their previous
23 accounting claim."
24 So I think we have another preceding question about
25 what the nature of this remedy is that they're actually seeking.

1 Because if it does more than anything to address the accounting
2 claim, which we understood coming in is the only thing the Court
3 wanted to address, those claims should be carved out, or those
4 remedies, to the extent they try to remedy some other wrong,
5 need to be pared back.
6 And those are all things that I submit would need to be
7 addressed before we go into any trial.
8 THE COURT: Well, I'm interested in hearing -- that's
9 an interesting sentence, that sentence on page 66, and I don't
10 know what it means either.
11 MR. QUINN: But you take that together with plaintiffs'
12 other representations about there not being really -- they're
13 not having any assurance of any kind of finality about what an
14 award in this case would foreclose in terms of finality, I think
15 that runs into one of the legs that concerned the Court in
16 Veneman that they expressly addressed about the defendant having
17 standing to make sure that when the case comes to conclusion,
18 there are certain claims that are going to be foreclosed, and we
19 know what those are. And if you can't know what those are, I
20 think you have problems in terms of the remedy that you're
21 trying to confer on the parties.
22 THE COURT: Okay, Mr. Quinn. Anything further?
23 MR. QUINN: Mr. Stemplewicz has something on
24 distribution.
25 THE COURT: Mr. Stemplewicz?

1 MR. STEMPLEWICZ: Good morning, Your Honor. I had been
2 prepared to address the jurisdictional and sovereign immunity
3 issues. I'm not going to belabor those points after Your
4 Honor's introductory comments.
5 However, I think that the problem Your Honor identified
6 as far as distribution is concerned highlights one of the key --
7 the fundamental jurisdictional problem here, the sort of
8 jurisdictional runaway train that this proposed remedy would get
9 us on in light of where Bowen went, and later with the Blue Fox
10 decision.
11 And that is, no matter how large a sum of money we come
12 up with, or how small, and no matter how we divide it up,
13 whether it's pro rata or we come up with some way of identifying
14 categories, subcategories of class, however it's done, not one
15 single member of the plaintiff class is going to learn one
16 single scrap of information about the transactional activity in
17 his or her IIM account.
18 And that is what they came here for, ostensibly. That
19 is what the 1994 Act is intended to provide, to sort of open
20 this curtain of disinformation or lack of information that was
21 out there. And the point is, that is clearly substitutionary
22 relief.
23 Judge Lamberth said that the very thing to which
24 plaintiffs are entitled under the Bowen analysis is an
25 accounting. We've been on that path all this time, and now,

1 suddenly, the very thing, as they point out now in their brief,
2 is a refund of monies wrongfully withheld and the disgorgement
3 of profits. Those are very different very things.
4 And when you look at the direction the Supreme Court
5 signaled in 1999 in the Blue Fox case, that is exactly the wrong
6 direction that the Court should proceed with.
7 Thank you, Your Honor.
8 THE COURT: I hear you. Fine. I got it. There are
9 certain forms of words that both sides have latched on to like
10 grim death in this case. One of them is "substitutionary
11 relief," one of them is "repudiation," which appears about 45
12 times in the plaintiffs' brief, I have no idea why. Maybe
13 they'll tell me why "repudiation" is such a magic word and why
14 "substitutionary relief" is such a magic word.
15 But the problem with both sides' arguments here is that
16 these magic words that come from 200 years of equity
17 jurisprudence just don't fit here. And I've got to find some
18 way to get this case over with, and getting it over with by
19 dismissing it because it's impossible, because an accounting is
20 impossible, makes no sense to me, and getting rid of it by
21 remanding it to the government to do what is impossible makes no
22 sense to me. So you can call it substitutionary relief if you
23 want to. I don't, at this point.
24 MR. STEMPLEWICZ: With all due respect, Your Honor,
25 that's not our term. That's right out of Blue Fox.

1 THE COURT: I understand. I understand.
2 MR. STEMPLEWICZ: And at least remanding --
3 THE COURT: But you have latched on to it.
4 MR. STEMPLEWICZ: Well, certainly. That's what the
5 standard is. Unfortunately, there's no different standard for a
6 12-year old case.
7 And, you know, however questionable it may be in the
8 Court's view to remand this to Interior to do the best
9 accounting that can be done, the fact is, at least doing so will
10 provide answers to questions or at least information that the
11 IIM account holders have about their accounts that are not going
12 to be answered by a check. That check is nice, everybody likes
13 money, but it is not going to solve the problem, it's going to
14 raise more problems. Why isn't my check larger? Why did my
15 cousin get $50 more than I did? What does this have to do with
16 the transactional activity?
17 THE COURT: Or why did my cousin get the same amount
18 that I got? That rotten cousin of mine got the same amount per
19 capita. What sense does that make? That's more likely what
20 you're going to get.
21 MR. STEMPLEWICZ: But the money is not going to answer
22 those questions, Your Honor.
23 THE COURT: All right. Thank you very much.
24 Let's move on to the time value of money. Who's going
25 to talk about that for the plaintiffs? And then on to the

1 merits, or the merits, if that's the right word, the content of
2 the trial.
3 Mr. Gingold?
4 MR. GINGOLD: Thank you, Your Honor. Mr. Stemplewicz
5 is right, to a certain extent; terms do have significant
6 importance with respect to whether or not this is a damages
7 action, as the government says it is, or whether or not it is
8 what plaintiffs say it is, which is an action in equity, Your
9 Honor, to enforce the trust. And Your Honor, we sought to
10 enforce the accounting duty for some years, and that accounting
11 duty has been rendered impossible.
12 Many judges have looked at that very issue, from
13 Learned Hand to Justice Alito when he sat on the 3rd Circuit, to
14 Judge Posner in the 2nd Circuit, to Judge LaValle in the
15 2nd Circuit. And they have all come down the same way. There
16 is no disagreement, there is no ambiguity. Equity and
17 restitution is the opposite of damages. It's a substantive
18 issue, it's not a form over substantive issue. It never has
19 been, Your Honor. And it particularly applies in a situation
20 like this where we have an express trust.
21 When we're looking at the time value of money, that's
22 one of the standards, as a matter of fact, Your Honor, and it's
23 a term of art that is used and has been used even in this
24 circuit, but clearly with respect to the 3rd Circuit, with Judge
25 Alito, when he was sitting in the 3rd.

1 And it has been discussed in detail by all the
2 authorities, whether you're dealing with a restatement of
3 restitution, whether you're dealing with restatement third or
4 restatement second or you're dealing with the various drafts
5 that go through March 12th of this year. That is expressly
6 identified as one of the measurements available to plaintiffs
7 when they are seeking equitable restitution as opposed to
8 damages.
9 Plaintiffs were well aware of the jurisdictional issues
10 between the claims court and the District Court when this action
11 was filed on June 10th, 1996, and plaintiffs were also well
12 aware of the preclusive issues that could arise, and also
13 evaluated whether or not it was appropriate to file
14 contemporaneously in the claims court with regard to the damages
15 issues, and in the District Court with regard to the pure
16 traditional equitable relief.
17 The decision was made to file in this court solely, for
18 several reasons, one of which, Your Honor, is the fact it would
19 be rank speculation to determine the nature and scope of
20 damages, if any, until an accurate and complete accounting is
21 rendered.
22 The accurate and complete accounting was related to the
23 fact, notwithstanding counsel for the government's opposition,
24 that this is now and always has been a commingled trust. The
25 funds are collected in common, they're deposited in common,

1 they're invested in common, they're allocated in common, and
2 from that common fund the distributions are made.
3 Whether you're looking at common law, which explains
4 what a common trust fund is, or commingled trust, or the federal
5 government's own regulations under 12 CFR 9.18 dealing with
6 bank-administered common trust funds, it's all the same thing
7 and these criteria are met. As a matter of fact, 12 CFR 9.18
8 tracked common law, and that's the reason that regulation was
9 imposed not only on national banks but also on all member banks,
10 and ultimately on thrifts, because the Federal Home Loan Bank
11 Board adopted that same regulation vis-a-vis the trust
12 departments.
13 So Your Honor, we're not dealing with ambiguities here,
14 we're dealing with facts. We're dealing with record evidence of
15 admission that this is a common trust fund.
16 As this Court knows, equity, equitable restitution, is
17 in fact the mirror image of damages. And that is, Your Honor,
18 it's not a cute phrase or anything else; you look in the mirror
19 and you're seeing the opposite of what you are. It is
20 substantive. It has been that way for 700 years in restitution,
21 and it's preceded the first 100 years of trust law development.
22 And it moved for the most part in accordance with each other as
23 the development evolved, including in this country, Your Honor.
24 The confusion started in this country in 1937, when
25 equity and law were merged, and because equity and law were

1 merged, the issues with regard to the specifics and precision in
2 pleadings were no longer necessary because there was no
3 consequence. That didn't eliminate the fact that the
4 substantive distinctions exist, and in fact, this Court
5 correctly pointed out in its January 30th decision that this
6 area of the law is murky.
7 If you read the authorities, whether you're looking at
8 Dobbs or you're looking at Scott or you're looking at Bogart, or
9 you're looking at the comments from the draftsmen of the
10 restatement, they all say the same thing. There has been casual
11 use of the terms because it was unnecessary to be more specific.
12 We, however, are in a different situation. The
13 uniqueness of law in equity exists and has existed since this
14 government consented to its waiver -- or waived its sovereign
15 immunity. Actions for damages at a certain level are brought in
16 the United States Court of Federal Claims, actions with regard
17 to equitable issues have always been, since the Constitution and
18 since the Judiciary Act of 1789, the province of this Court.
19 That's what we invoked. We were not trying to be cute
20 to get around issues that exist. These issues were stated quite
21 clearly. We never sought damages. What was stricken from the
22 complaint were common law claims, and what the Court of Appeals
23 in Cobell VI stated was, the statutory duties are informed by
24 common law. It was absolutely unnecessary to have common law
25 claims.

1 Cobell VI also determined that unless there is a clear
2 statement by Congress to the contrary, all traditional trust
3 duties apply to the government. With respect to the management
4 of the Individual Indian Trust, it's one trust with many
5 designated accounts, like every other commingled trust in the
6 history of this country exists, Your Honor.
7 So we are dealing with a situation that there was no
8 cuteness, there was no attempt at semantical games. As a matter
9 of fact, on November 23rd, 1998, in the beginning of a two-day
10 hearing before Judge Lamberth, that very issue was argued again
11 by defendants --
12 THE COURT: Mr. Gingold, with respect, I imagine you
13 are responding to what I said a few minutes ago about watching
14 the plaintiffs try to dance around this rock that was in their
15 way. But to use another metaphor, you are kind of kicking in an
16 open door here. I have accepted the proposition that what
17 you're seeking is equitable relief and not damages. That's why
18 we're still here.
19 What I want to know is why you think you are also
20 entitled to something that most people would consider interest,
21 and what I've carefully not called interest but have called the
22 time value of money.
23 I understand, too -- well, I've read Judge Boggs and
24 $277,000 of U.S. Currency, and I'm generally familiar with the
25 rulings in that and a couple of other currency forfeiture cases,

1 but you must know that the general thrust of case law considers
2 what you're talking about prejudgment interest, as to which
3 there are serious jurisdictional issues. That's what I want to
4 hear about.
5 And if you want to bring yourself within the ruling
6 that Judge Boggs made, how do you expect to pin down the
7 particulars that he required in the remand in that case?
8 MR. GINGOLD: Well, Your Honor, first of all, we are
9 not asking for the time value of money. That's why we were
10 asking for the costs saved by the government.
11 But with respect to the time value of money - and Your
12 Honor, it's an important distinction - several measurements are
13 established throughout case law and throughout the various
14 authorities as to the measure of the unjust enrichment, one of
15 which, which is probably more frequently used than any of the
16 others, is referred to, as you note, as the time value of money.
17 That necessarily implicates, Your Honor, the interest
18 that was earned by the trustee on the assets of the trust
19 beneficiary. It wasn't interest earned that was to be payable
20 to the trust beneficiaries if they sought that, it was the
21 actual benefit that was obtained as a result of the breach of
22 trust.
23 Your Honor, but the cases go further in that regard.
24 Again, we're not asking for time value of money, but I would
25 just like to explain the distinction.

1 THE COURT: Actually, well, I think I understand the
2 distinction. But since you insist on the distinction, it seems
3 to me the proof that the government actually benefitted is a lot
4 harder than just taking T-bill rates or Treasury bond rates over
5 the number of years. You've got to prove something more than
6 that, I think.
7 MR. GINGOLD: Your Honor, with all due respect, I am
8 assuming a couple of items here. Number one, this is a trust,
9 number one, that the trust duties that apply to ordinary
10 trustees in this country apply to the government as trustee for
11 the Individual Indian Trust, unless Congress unambiguously
12 states to the contrary. And I'm assuming, Your Honor, this is a
13 commingled trust, and I'm assuming, Your Honor, that the duty to
14 account has been breached.
15 And I'm assuming, Your Honor, what funds have been
16 withheld improperly, and therefore we're looking at another
17 breach based on what every authority that I've looked at agrees
18 is a breach, and that's the failure to disburse funds to the
19 trust beneficiaries that are obligated to be disbursed.
20 But maybe I can start off more easily with Cobell XVIII
21 and Judge Williams' statement on December 10th, 2004.
22 Judge Williams stated, "As trust income beneficiaries are
23 typically entitled to income from trust assets for the entire
24 period of their entitlement, to income and for imputed yields
25 for any period of delay in paying over income or principal, we

1 do not see and plaintiffs make no effort to explain how the
2 accounting delay could deprive them of interest or any
3 comparable returns." Your Honor, Judge Williams also cited
4 Bogart at Section 814, 321 to 325.
5 Your Honor, prejudgment interest would reflect
6 something that would be -- that is an entitlement simply based
7 on the delay of payment as opposed to the interest earned and
8 has been credited. One of the distinctions this Court has
9 correctly made, when it identified the collection issue as
10 distinguished from funds that should have been collected and
11 that weren't, we aren't looking in this litigation -- which is
12 one of the reasons Mr. Smith was correct on his statement of
13 preclusion and what's available. We never were looking at what
14 should have been collected and isn't, whether or not it was $5 a
15 barrel as opposed to $105 a barrel. That's not part of this
16 case. The accounting would have revealed that.
17 We're not looking at whether our clients were paid
18 three percent, when the prevailing rate, let's say in the
19 1980's, was 20 percent. That's not part of our case.
20 What we're looking at, Your Honor, is what has been
21 collected, what has been deposited, what has been invested in
22 common, and what in this case has been withheld.
23 So Your Honor, we are not looking at what this Court
24 has accurately characterized as a damages claim, and therefore,
25 Your Honor, the prejudgment interest would fit in that same

1 category. To the extent we are asking for interest that should
2 have been paid to our clients, and as a result, an injury is
3 sustained, we would agree that would be prejudgment interest so
4 long as that met within the standard set forth by
5 Judge Williams.
6 But that's not what we're asking for, Your Honor. When
7 we point out, as we have with regard to cost savings, it's what
8 the government benefitted from the withholding. There are a
9 line of cases -- and again, I'm saying as opposed to the time
10 value of money, which is the principal way plaintiffs have
11 established the amount for restitution, we chose not to do
12 that --
13 THE COURT: All right. Let's just -- let's get rid of
14 the term "time value of money," since it upsets you so much.
15 MR. GINGOLD: I'm not upset, Your Honor.
16 THE COURT: Let's talk about actual gains to the
17 defendant from using the benefits. Okay?
18 MR. GINGOLD: Yes, Your Honor.
19 THE COURT: How are you going to prove actual gains to
20 the defendant from use of the benefits?
21 MR. GINGOLD: Well, first of all, Your Honor,
22 Commissioner Gregg in his testimony in 1999 specifically
23 testified, as we've cited in our briefs, that the money that is
24 not disbursed to the trust beneficiaries is in the Treasury
25 general account, and that that money is used either to reduce

1 the amount of debt that exists or allows the government not to
2 borrow based on the funds that are held in the Treasury general
3 account, which, Your Honor, is also a commingled account.
4 There is admission that that benefit accrues to the
5 government. The commissioner at that time specifically said
6 that. He was examined several times on that issue, and each
7 time the conclusion was consistent with what I just stated. So
8 there is an admission with regard to the benefit conferred, Your
9 Honor.
10 Calculating that raises interesting issues as well,
11 because there are separate and special rules when trust funds
12 are commingled, whether they're just commingled with other
13 members who are trust beneficiaries of the same trust, whether
14 they're commingled with third parties, or they're commingled
15 with the government. In our case they've been commingled with
16 everybody, including tribes.
17 Therefore, the proofs after the admission that there's
18 a benefit conferred would be shifted to the government. That's
19 an important factor, because it's the government that has all
20 the records, it's the government that determines what's
21 invested, it's the government that has the records to determine
22 where the funds are allocated within the entire Treasury
23 Department at any point in time.
24 So we would have hoped, Your Honor, that an accounting
25 would have revealed all of this so we wouldn't have to rely on

1 presumptions. But because the accounting hasn't been revealed,
2 we're left with alternative remedies.
3 Now, let me point out, the reason we said in our brief
4 that these remedies are independent, equitable remedies are
5 independent whether or not you ask for an accounting, Your
6 Honor. The fact that an accounting has been deemed to be
7 impossible only means that our choices become more limited on
8 what we would have wanted to do if the accounting was rendered.
9 Once the accounting was rendered, choice could have been a
10 variety of things, as we've stated ad nauseam in our briefs, so
11 I'm not going to repeat that.
12 But nevertheless, those remedies existed because of the
13 nature of the trust itself, just as the duty to account inheres
14 in the nature of the trust itself.
15 Going further, with regard to -- I think you pointed
16 out there are periods of time that the government may not have
17 borrowed and there are periods of time when the government
18 borrowed quite a bit. And we can take the Depression, where the
19 borrowing was thin except from JP Morgan, because there was no
20 money available for the government to borrow.
21 The key question that is raised in each one of those
22 cases is in fact not what the breaching trustee actually
23 benefitted, it's what he could have benefitted if he used those
24 funds properly.
25 In the example that's given in one of the cases, Your

1 Honor, that we've cited, an individual who took control of an
2 apartment building, the question --
3 THE COURT: Wait a minute. You've cited all these
4 cases that say actual gains, not theoretical gains or what the
5 gains might have been.
6 MR. GINGOLD: No, we've also cited cases -- I know our
7 briefing is voluminous. We've also cited cases that identify --
8 as a matter of fact, I think it's in one of our footnotes that
9 identified cases which establish the measurement by what either
10 the breaching party would have had to pay if the property wasn't
11 misappropriated, and that involved egg-washing machines and the
12 theft or conversion of accounting papers.
13 There was another case, Your Honor, that was referenced
14 with regard to a party that took over an apartment building,
15 only leased out certain of the apartments, but the
16 restitutionary award was based on the amount that the party
17 could have rented those apartments for during the time it had
18 unlawful possession.
19 So Your Honor, we cited -- most cases deal with the
20 actual; many cases deal with the position that the breaching
21 party was in during the period of time that party had
22 possession. All those cases are cited. And they also reference
23 provisions of the restatement of restitution in that regard, and
24 I believe Dobbs as well.
25 So this is an area of law that is complicated and it's

1 materially different from damages. Every time the case is
2 identified as an example or not an example of whether or not it
3 should be an opt-out or not an opt-out case, those cases, Your
4 Honor, in fact are damages cases, and there's a different theory
5 and different policy with regard to that.
6 I would like to turn this Court's attention, for
7 example, to footnote 11 of page 14 of plaintiffs' reply brief,
8 which deals explicitly with two cases dealing with the issues I
9 was referencing. Dobbs is identified as well in that footnote
10 at 5.8(3), at 933, note eight, when there's a negative unjust
11 enrichment issue raised.
12 Your Honor, one of the key factors, whether we're
13 dealing with Dobbs or we're dealing with any other authority,
14 and that's Bogart or Scott or the restatement, which
15 Professor Langbein says is the premier authority on trust law in
16 this country, and I presume he also means restitution, since he
17 has contributed to it, we're dealing with the same thing. We're
18 dealing with a measurement solely of whatever is determined to
19 be a reasonable benefit -- or a benefit that can be calculated
20 reasonably to be obtained through either a violation of law or a
21 breach of trust, or some other interference with a plaintiffs'
22 rights.
23 In our case, Your Honor, we have all of those here. So
24 therefore, when plaintiffs need to make the determination
25 because of the absence of the accounting that has been an

1 obligation of the government since the beginning of this trust -
2 and Your Honor, as Cobell VI pointed out in noting Mitchell 2,
3 it's a duty that inheres in the nature of the trust relationship
4 itself - so without that, we're left to something that is
5 extremely rare in the law, a trustee that has been found and
6 noted by the Court of Appeals to have mismanaged this trust as
7 long as this trust has been in existence, and now the failure to
8 render the accounting that has been an obligation that is
9 inherent in the nature of the relationship.
10 The fact that that accounting duty has been deemed to
11 be rejected -- I will not use the term "repudiation," but
12 rejecting the rendering of the accounting duty and making the
13 accounting impossible leads plaintiffs as a class with one
14 remedy, and that is restitution.
15 And as a matter of fact, Your Honor, all the
16 authorities say the same thing as well. One of the reasons that
17 plaintiffs seek restitution as opposed to damages is because of
18 the difficulty, or in some cases impossibility, of quantifying
19 what the damages would be, whether it's because trust records
20 have been destroyed or whether or not there's another factor
21 that makes that impossible.
22 So Your Honor, the remedy that we're talking about
23 exists independently of the duty to account in the context of an
24 express trust. And, Your Honor, it also exists as one of the
25 remedies that are available once the accounting is completed,

1 and once this Court determined it was acceptable, and once the
2 individuals had the ability to make an informed judgment as to
3 what next should be done. That has been taken away from them,
4 Your Honor, after 12 years in this litigation.
5 Your Honor, from the very beginning we've had these
6 same arguments. And again on November 23rd, 1998, Mr. Holt, in
7 response to questions from Judge Lamberth, responded, Your
8 Honor, we want the return of our money that has been wrongfully
9 withheld, and we believe that -- as a matter of fact, we
10 explained that funds have been collected into the Treasury that
11 are revenues from the Individual Indian Trust corpus, but they
12 weren't designated properly. Therefore, if 10 items were
13 collected, six of them could conceivably be identified as not
14 trust money, although it was deposited and held by the
15 government, and for it could be held. We wanted the six that
16 was collected and deposited, and then -- we wanted recovery of
17 that, and then we wanted the accounts restated to reflect
18 accurately what had occurred. Your Honor, this was from the
19 very beginning. We didn't dance around anything.
20 Now, another important point in that regard. When it
21 is determined, and the government has acknowledged through its
22 own various uses of throughput and other documents that have
23 been provided to this Court that money has been withheld, or it
24 cannot account for the funds that it acknowledges are collected
25 but are not distributed, those funds, Your Honor, are

1 presumptively determined, or should be presumptively determined
2 to be withheld, unless, as every single authority states,
3 whether you're dealing with a trustee generally or a commingled
4 trust in particular, the trustee identifies why those are not
5 the funds of the beneficiary, why that particular number is in
6 error, and it's able to prove that.
7 That is in every single authority, Your Honor. It's
8 not just plaintiffs' --
9 THE COURT: Mr. Gingold, with respect, you're kind of
10 starting to repeat yourself. I mean, we've all been over this
11 many, many times.
12 Let me ask you a hypothetical question. Suppose, just
13 suppose that the funds that cannot be accounted for were not in
14 fact withheld, that everybody knows that they were actually
15 paid, it's just that we can't account for them.
16 Now, one might conclude in responding to that, if that
17 were the fact, too bad, government, pay it again because you
18 can't account for it. That's what a trustee has to do. You
19 can't account for it; you say you paid it, we're not going to
20 assume you withheld, you just blew it way back 50 years ago.
21 Somebody wasn't keeping records or you lost those records in a
22 barn, and they were eaten by rats or whatever else you assert
23 actually happened. Yeah, the money was probably paid, yeah,
24 most of it was probably paid; you can't account for it, pay it
25 again. Okay? That's the hypothetical.

1 Why should the plaintiffs be entitled to any more than
2 just the money, if that were the fact? Why should they be
3 entitled to money that the government did not in fact withhold
4 and use and keep in some other way? Why should I make the
5 presumption that the money was withheld and kept?
6 MR. GINGOLD: Well, I'll answer your last question
7 first, if I may, Your Honor. Because that's what the law is.
8 Where the trustee is maintaining the books, where the trustee is
9 maintaining the funds, where the trustee is making the
10 distributions, and in many cases the checks are sent through the
11 trustee's own superintendents, the law says the obligation is
12 the trustee's. And particularly, Your Honor, where it's a
13 commingled trust, where it's even more complicated. That's what
14 the law says.
15 THE COURT: I mean, the government points out correctly
16 that in my findings and conclusions back in January, a major
17 element of the finding that the shortfall may be between 3 and
18 3.6 billion dollars is the fact that for a whole long period of
19 time, there are no records of what disbursements were made. And
20 I said from the bench, come on, everybody knows these
21 disbursements were made, or some of them or most of them; you
22 just can't prove it.
23 Now, what benefit did the government, actual benefit do
24 you think the government retained from the use of monies that it
25 in fact paid but just can't account for?

1 MR. GINGOLD: If in fact it paid for it and can't
2 account for it, Your Honor, I don't know how you can make the
3 assumption they were paid.
4 Your Honor, we assumed in our model that we presented
5 in our opening brief and I discussed during the hearing we had
6 previously, we assumed every check that was cut and identified
7 in the CP&R, the Treasury database from Interior information, we
8 assumed every one of those payments were made to the
9 beneficiaries.
10 And actually, Your Honor, whether it's 3 or 3.6 or
11 4 billion dollars, or a little more than that, that has nothing
12 to do with the checks they say were cut. We're looking at their
13 data. Their data doesn't support that assumption, Your Honor.
14 The assumption we made is an assumption that's not
15 required for any beneficiary in a case such as this, with regard
16 to an express trust or with regard to an express trust that's
17 commingled independently.
18 The assumptions are that the funds were not spent
19 unless the trustee can prove they were. That is the presumption
20 in the law, and it's been that way forever. Judge Lamberth in
21 one of his summary judgment decisions, I believe it was in March
22 of 2003, explicitly identified what needed to be done for
23 proof --
24 THE COURT: Yeah, I understand that. My question is,
25 does the presumption extend the next phase to the amount of

1 money that you are calling the actual benefit to the government?
2 MR. GINGOLD: Yes, it does, Your Honor. And it's very
3 explicit in that regard for all the reasons that we've mentioned
4 in our briefs. It is the duty of the trustee to maintain
5 adequate records, it is the duty of the trustee to maintain
6 adequate systems, and it is the duty of the trustee to maintain
7 adequate staffing. Cobell VI explicitly stated those are
8 subsidiary duties of the duty to account, and the duty to
9 account cannot be discharged unless that is done. And that is
10 precisely the situation we're into today.
11 As a result, Your Honor, the amount that has been
12 identified that the government cannot prove -- and as a matter
13 of fact, Your Honor, in reality the government should have to
14 prove every single disbursement out of the trust, because
15 otherwise it's presumably, based on the law, not to be a
16 disbursement of the plaintiffs' money; rather where it's
17 commingled in a case like this, it would be a disbursement of
18 the trustee's own funds.
19 So Your Honor, that is the problem when you breach the
20 trust duty. That is the problem when you don't maintain
21 adequate records. The Court of Appeals didn't say there's an
22 exception in this case for Indians, Mitchell 2 didn't say
23 there's an exception for Indians, and you'll never see anything
24 in a restatement of trust that says that either, Your Honor.
25 A trustee is a trustee is a trustee. That's been the

1 foundation of the law in this country since the time it was
2 founded. The government has provided no statutory authority
3 where Congress has explicitly and by necessary implication
4 changed those trust duties, notwithstanding all the action that
5 has occurred in the 12 years of this litigation with regard to
6 issues on the Hill.
7 So Your Honor, that is precisely why those presumptions
8 are in play, because of the recognition that there's no way the
9 trust beneficiaries would be able to have that sort of
10 documentation. The government has had years to make those
11 proofs in this case, and hasn't done so, and, by its own
12 admission, as a matter of fact, destroyed, if not all, nearly
13 all of the checks prior to 1992.
14 And Your Honor, this is an important factor. Equitable
15 restitution and disgorgement is two components. One is to
16 divest what has been characterized as unjust enrichment by the
17 courts and by all the authorities, and that which the trustee
18 profited as a result of its breach of trust.
19 THE COURT: But in my hypothetical they haven't
20 profited.
21 MR. GINGOLD: By your hypothetical, Your Honor, they
22 haven't proved it, so as a result, they lose. That's what the
23 law is.
24 THE COURT: But the question is, does the burden shift
25 on that issue?

1 MR. GINGOLD: Well, every single authority that I've
2 read for 700 years says so, Your Honor.
3 THE COURT: You've been reading for 700 years?
4 MR. GINGOLD: Your Honor, I went back to the
5 original -- as a matter of fact, the original restitutionary
6 cases - yes, I did - to look at those cases, and Your Honor, the
7 only thing that's happened is it's actually become worse for the
8 trustee. And the original cases were principally cases dealing
9 with the claims between the beneficiary and creditors of the
10 trustee. That's the reason the concept of the res and
11 subrogation and constructive trusts were established. So yes, I
12 did go back that far, and yes, Your Honor, this is what the law
13 is.
14 But this is an important point. Restitution involves
15 deterrence as importantly as it involves divestment of unjust
16 enrichment. What is necessary to encourage the trustee --
17 THE COURT: You're losing me on your deterrence point.
18 I'm sorry, deterrence -- I have tried very hard in what I have
19 written on this case so far not to start allocating blame. I'm
20 not doing that.
21 MR. GINGOLD: It's not a question of -- Your Honor,
22 this can be on a neutral basis. Let me explain. We're not
23 trying to allocate blame either. Let's take a simple issue.
24 There's a duty to account, and there are subsidiary duties
25 that have been --

1 THE COURT: How about incentive instead of deterrence?
2 I'll accept that.
3 MR. GINGOLD: Your Honor, however Your Honor --
4 THE COURT: More positive thinking, Mr. Gingold.
5 MR. GINGOLD: Encouragement.
6 THE COURT: All right. Good.
7 MR. GINGOLD: So Your Honor, one of the important
8 points of restitution is encouragement, to encourage the trustee
9 to discharge the trust duties prudently.
10 And Your Honor has pointed out that it's necessary to
11 make sure that the trustee understands how much he is encouraged
12 to do his job as well as he can, prudently, under the
13 circumstances. It's a reasonable, prudent man standard, Your
14 Honor, it's not an absolute standard. But as this circuit
15 pointed out, and this Court itself has pointed out numerous
16 times, one of those duties is to maintain adequate records. You
17 don't do so, you're going to be encouraged.
18 THE COURT: I think we've flogged this moribund animal
19 long enough. But let me say in the nature of fair warning to
20 the plaintiffs, don't assume that the actual gains to the
21 defendant from using the benefits are proven by the inability of
22 the government to account for disbursements. I want to think
23 about this a little bit more, and this has been a useful
24 discussion, but I think the presumptions go in opposite
25 directions and I think the burdens go in opposite directions.

1 And I think the plaintiff will have the burden of proving that
2 actual gain proposition that supports something like 55 million
3 of your 58 --
4 MR. GINGOLD: Billion.
5 THE COURT: -- billion dollar ad damnum.
6 MR. GINGOLD: Your Honor, we understand that. We would
7 like to note that a fiduciary who does not maintain adequate
8 records is not permitted to take advantage of that circumstance.
9 That is another rule of law with regard to management of the
10 trust and the fiduciary duties that have existed in this
11 country.
12 So to the extent the government doesn't have the
13 records, that trustee would be taking advantage of exactly what
14 the Court of Appeals identified in Cobell VI as a breach of a
15 subsidiary duty, and as a matter of law, the trustee is not
16 permitted to take advantage of that.
17 So the position that trust beneficiaries would be
18 placed in is exactly what every major, every decision that I'm
19 aware of in this country and elsewhere under these circumstances
20 has said, this is the burden that's shifted to the trustee.
21 Once plaintiffs are able to establish a reasonable
22 approximation of what the award should be - and Your Honor, the
23 reasonable approximation is based solely on the government's
24 production and the government's data, it is not based on
25 anything that has been manufactured by plaintiffs - is it a

1 large amount of money, Your Honor? Yes, it is. But billions of
2 dollars have come into this trust; from the very beginning there
3 have been serious issues with regard to how the trust has been
4 managed. It doesn't make any difference which administration it
5 is, Your Honor. And as a result, we are dealing with an
6 accumulation of problems that is unfortunate, but it is reality.
7 To place that burden on the trust beneficiaries, where
8 the trustee has not discharged the trust duty that is inherent
9 in a trust relationship itself, Your Honor, would be
10 unprecedented based on my understanding of the law.
11 THE COURT: Okay. Well, you've said what you have to
12 say, I've said what I have to say, and we have to move forward
13 toward our June 9th trial. And I'm just telling you what I
14 think you better consider trying to prove.
15 MR. GINGOLD: Your Honor, one last thing in that regard
16 and I won't say anything further.
17 As I mentioned, plaintiffs are assuming that every
18 check that the government says were cut to trust beneficiaries
19 were actually paid to them, without any proof of that. We are
20 assuming that 100 percent. That is a burden that we have lifted
21 from the government that is not necessary with regard to any of
22 the cases that I've ever seen. Your Honor, we're using the
23 government's data to do that. We're using the CP&R data, and we
24 explained that both in our opening and our reply brief.
25 So we are not suggesting that even a check that went to

1 a superintendent in care of a beneficiary, and where there's no
2 endorsement, even if a check exists, we're not talking about the
3 fact that -- we're not presuming the check that was identified
4 to the beneficiary hasn't been paid.
5 The government itself, whether you're looking at I
6 think -- and by the way, you'll find that on page 48 of our
7 reply brief. Whether you're looking at any of the major
8 documents that we've cited, whether it's AR-171, AR-176, or
9 DX 356, this is the government's data, and we didn't create it,
10 we didn't segregate it. It wasn't identified to us, it just
11 wasn't presented to you, Your Honor.
12 The issue that did remain that we excluded, Your Honor,
13 was the issue of the ACH or electronic funds transactions, where
14 there's absolutely no evidence that has been presented in that
15 regard. And Your Honor, I think that accounts, for the limited
16 period of time that that was available, upwards of one and a
17 half percent of the transactions. So at least on its face it
18 may not be material.
19 I would also like to point out, Your Honor, electronic
20 funds transactions didn't really exist in substantial form until
21 the mid '80s, and there weren't too many EFT or ATM terminals on
22 Indian reservations. So the reality is, that's the one area we
23 did not give the government full credit.
24 We also did not give the government full credit when it
25 arbitrarily established a 15 percent amount of money in the

1 so-called Tribal IIM Trusts. Your Honor, there is absolutely no
2 evidence to support that whatsoever, and in fact, to combine
3 tribal money in an Individual Indian Trust was in violation of
4 the government's own regulations.
5 So we tried to accommodate what we thought the Court
6 wanted, and that is to use concrete information that has been
7 provided by the government so we could avoid some of the issues
8 as to whether our data is better than the government's data, and
9 so we can streamline the proceeding. We used that and presumed
10 100 percent disbursement for checks the government was able to
11 identify, or at least where a beneficiary was the payee. So we
12 did that, Your Honor.
13 But the government admits in its various documents and
14 even in testimony that distributions from the trust went to
15 third parties, whether you're dealing with corporations that
16 were lessees or whether you're dealing with tribes or you're
17 dealing with something else, including the government, with
18 regard to the payment of administrative fees.
19 So Your Honor, it's not every disbursement from the
20 trust that is a disbursement to the trust beneficiary, and the
21 government's owned admissions and documents demonstrate that.
22 So we tried to do what this Court asked for. That's
23 the reason we have this 70 percent disbursement rate. That
24 reflects the checks the government identified for the period of
25 time that it was available that were paid out, and it compares

1 the amount of money the government acknowledges was collected.
2 That is the shortfall.
3 THE COURT: Look, Mr. Gingold, if we're talking about
4 the 69 or 70 percent factor and the way you've calculated it, if
5 you're going to stick with that, then that's something we're
6 going to have to sort out on June 9th. I can't sort all of that
7 out today. In fact, I didn't quite follow it in your briefs.
8 And it is a method of proof that is -- you know, when I
9 was in law school, there used to be a whole stack of books in
10 the library called Proof of Facts. I don't think they do Proof
11 of Facts anymore. I'm not sure that would have made it into
12 Proof of Facts.
13 But --
14 MR. GINGOLD: Your Honor, it may have in the trust.
15 THE COURT: -- we'll see. If that's your proof, we'll
16 see.
17 MR. GINGOLD: Your Honor, that's the proof that the
18 government acknowledged with regard to the difference between
19 the amount it acknowledged it collected and the amount that's
20 reflected in the checks distributed.
21 Further, Your Honor, we applied that proof all the way
22 back from 1991 back to the beginning of the trust, even though
23 there's not an element of proof --
24 THE COURT: You will forgive me, Mr. Gingold, if I tell
25 you that on this issue I have reached some sort of plateau, and

1 I expect to hear testimony about it in June. Because arguing it
2 at this point isn't getting either one of us anywhere.
3 MR. GINGOLD: No, I understand that, Your Honor. I was
4 just pointing out, we were relying on what we understood this
5 Court wanted to give some certainty to a number as opposed to
6 every number in dispute, and we made assumptions in that regard.
7 THE COURT: All right.
8 MR. GINGOLD: Further, Your Honor, we were also relying
9 on what the law is with regard to presumptions in the trust
10 situation.
11 THE COURT: Now, what's your view of what needs to be
12 proven and -- proven, and by whom, at the June 9th trial,
13 Mr. Gingold?
14 MR. GINGOLD: The view that we expressed in our brief,
15 Your Honor, as tempered by the consideration, at least as we
16 understand your comments today, we understand that there's been
17 approximately, based on, again, using solely the government's
18 production, something over $15 billion that's been collected in
19 the trust; based on the government's production, something over
20 $10 billion has been paid out of the trust by check.
21 THE COURT: Does that include the Osage headrights
22 dollars?
23 MR. GINGOLD: Yes, it does, Your Honor. It includes
24 that --
25 THE COURT: Let me ask you this.

1 MR. GINGOLD: Sure.
2 THE COURT: If a billion dollars of the asserted
3 shortfall is related to the Osage headrights, how are you going
4 to support per capita distribution of that to all Native
5 Americans, no matter what their tribes are?
6 MR. GINGOLD: Your Honor, that's precisely why we
7 explained that this restitutionary award, historically and
8 today, is irrelevant to the injuries sustained by any individual
9 plaintiff. The class as a whole is entitled to it.
10 To the extent -- Your Honor, the cases, as Mr. Smith
11 pointed out correctly, are the following: There are cases that
12 say plaintiffs can elect an award, and if that award is
13 restitution - and generally, Your Honor, if you look at those
14 cases, it's where the restitutionary award is actually more than
15 the damage sustained by the beneficiaries, because there's no
16 correlation between the two - then they would be precluded from
17 seeking damages claims either in that same court or in another
18 court.
19 There is also a case that specifically says that
20 damages claims in the same court can be tried by a jury, where
21 the equitable restitution claims must be determined by the
22 judge, and then the judge fashions that out. They've always
23 been recognized as different.
24 There's also a situation where if in fact they can't
25 prove the damages because the evidence isn't there, the trust

1 beneficiaries are generally left to a particular restitutionary
2 amount because the damages can't be proven. All of this is the
3 reason that restitution has evolved to where it is.
4 We have a unique situation in that regard because this
5 Court has certain jurisdiction and the claims court has certain
6 jurisdiction. We did not, when we filed this case, and do not
7 now, attempt to recover damages for any member of the class. We
8 hoped that the accounting would reveal, with adequate
9 information, what the issue is, whether or not the beneficiary
10 chose to go after an oil company, for example, because of an
11 underpayment that would be disclosed in the accounting. Not
12 that this Court should do anything about that, but if an
13 underpayment in royalties existed vis-a-vis Exxon, why shouldn't
14 the beneficiary be able to go, if that beneficiary chose, into
15 in U.S. District Court to recover that in damages?
16 If in fact it was determined that the money was
17 collected but not paid out, that isn't damages, Your Honor. If
18 it wasn't collected pursuant to a lease term, then that would be
19 damages. And if it would be identified in the accounting, then
20 they could do so.
21 What Mr. Smith was identifying was there is a pragmatic
22 consequence to not having an accounting, and that's to being put
23 in a position to make an informed decision about what remedies
24 to seek in the trust. That's the reason the accounting is
25 always the starting point, Your Honor, and the documents are

1 always a starting point. Once the information is rendered, then
2 the decisions are made.
3 Here, there is no choice, from the class point of
4 view --
5 THE COURT: Now hold it. I'm still waiting for an
6 answer to my question. I'm not sure that I've got it. My
7 question was, if a billion dollars of this amount that you're
8 starting with is the corpus from which you add all of the, what
9 we've both decided we will not call the time value of money, if
10 a billion dollars of that is attributable directly to the Osage
11 headright claim, why shouldn't a billion dollars of it go back
12 to the Osage? You've got it in this undifferentiated cloud
13 somehow.
14 MR. GINGOLD: Well, Your Honor, if we're dealing with a
15 benefit conferred on the government --
16 THE COURT: Yeah, okay.
17 MR. GINGOLD: -- so without any injury to the
18 individual -- and that's what the concept of the benefit
19 conferred is. It distinguishes the two. Your Honor, there's an
20 argument that can be made that inasmuch as there is no
21 correlation between the award and the injury to any member of
22 the class, that the award should be per capita.
23 On the other hand, Your Honor, if this Court determined
24 that that is unfair, pursuant to a fairness hearing, this Court
25 could determine whatever it wants to do.

1 All we were pointing out is this reinforces strongly
2 the distinction between an allegation that we have a damages
3 claim that's characterized or cast as a restitutionary award.
4 It isn't, Your Honor. Restitutionary award is based solely on
5 what benefit has accrued to the trustee. It has nothing to do
6 with any injury to a single beneficiary.
7 Under those circumstances, it would seem to me, Your
8 Honor, that allocation based on amount of interest or
9 speculative recoveries or collections is irrelevant to what is
10 involved in a restitution. On the other hand, if this Court
11 wanted to make that allocation under those circumstances, we
12 wouldn't object.
13 We want to do a couple of things, Your Honor. We want
14 it to stay as far from the line, wherever that is, between
15 damages and restitution as possible. And there are issues.
16 THE COURT: I got that part. That's loud and clear.
17 MR. GINGOLD: But once you start making an assessment
18 on an individual basis, then the argument can be made with
19 regard to whether or not you're dealing with an element of
20 compensation or substitutionary relief to the beneficiary, or
21 are you truly dealing with a restitutionary award that is
22 independent of the injuries sustained.
23 We wanted to stay on the right side of the line. We
24 didn't want to have obfuscation or confusion above. This area
25 of the law, as Dobbs says, is one of the most confused areas of

1 the laws that exists, and we wanted to keep it simple. But Your
2 Honor, we wouldn't have an objection if you chose to allocate
3 differently.
4 THE COURT: Well, and of course that begs the question
5 of whether the Osage headrights belong in this corpus at all --
6 MR. GINGOLD: That's correct.
7 THE COURT: -- since the money never came into the IIM.
8 MR. GINGOLD: And Your Honor, the money came into the
9 government or was held in the Treasury, and the fact it didn't
10 go into the system is irrelevant to the fact that it wasn't
11 deposited in the Treasury. It was deposited and held in the
12 Treasury, Your Honor. It wasn't held in a third party, it
13 wasn't held in the Osage tribe.
14 That is a distinction we were making, and we were
15 trying to identify this in conformity with how this Court
16 distinguished direct pay and compacting and contracting issues.
17 With the compacting and contracting issues, at least as we
18 understood it, one of the reasons -- and with direct pay as
19 well, one of the reasons this Court excluded those monies is
20 because the funds were not held at the Treasury, or an
21 unauthorized representative of the Treasury, whatever that might
22 be.
23 In this case the funds are held in the Treasury,
24 Treasury checks are written to disburse the funds.
25 THE COURT: Did I say anything about Osage headrights

1 in the January 30th opinion? I don't remember that I did.
2 MR. GINGOLD: I don't believe you did, Your Honor,
3 except for the fact that the $13 billion total that was
4 reflected by the government's throughput analysis is a total
5 that incorporates part of the headright revenues, Your Honor.
6 So we were dealing with the statutory authority
7 regarding those headrights, the fact that the funds were always
8 held in the Treasury, the fact that disbursements were made with
9 Treasury checks. Whether a system is a good or bad system or
10 inaccurate or complete system doesn't determine the nature and
11 scope of the trust responsibility.
12 As Mitchell 2 says, it would be an anomalous situation
13 where the trustee discharges his duty and he's accountable, but
14 when he does not, he is not accountable.
15 That's what we have here, Your Honor, with regard to
16 the Osage. The fact that the government does not issue checks
17 on the 4844 ALC, but it does issue checks with a different
18 agency locator code, doesn't exclude Individual Indian Trust
19 funds that are generated from trust lands and deposited in the
20 Treasury and held in the Treasury, and then disbursed with
21 Treasury checks to be other than Individual Indian Trust funds
22 outside this litigation. That's not what is reflected either in
23 the class certification order or in what we understand this
24 Court decided on January 30th.
25 THE COURT: Okay. Let's see. The government has

1 suggested that although they mightily resist the notion of any
2 award that has a dollar sign in front of it, that such an award
3 in any event would have to be adjusted from the numbers we've
4 been talking about earlier to encompass the accounts for
5 individuals who are dead and have no representatives in the
6 plaintiff class, they would have to net out previous judgments
7 and settlements; they want to argue with you, I'm sure, about
8 the Osage headrights, and they probably want to review much of
9 the material that was covered in the January 30th findings of
10 fact about what the actual unaccounted for amount of money is.
11 Now, what do you think we're going to be doing in June?
12 MR. GINGOLD: Your Honor, to the extent -- what we
13 understood, and in the briefing that we provided to this Court,
14 was the government would be able to reduce the award or the
15 amount that plaintiffs request based on what it could prove
16 should be outside the scope of this case or what it could prove
17 has been paid out.
18 Let's take an example, Your Honor, the one that was
19 just raised by Mr. Quinn, the previous judgments and
20 settlements. Your Honor, it was suggested there might be a
21 handful, six. I can tell you we're not aware of any that deals
22 with equitable restitution with regard to the benefit conferred
23 on the government for the use of funds. Perhaps the government
24 would be able to provide some insight in that regard so we can
25 look at those cases.

1 And Your Honor, to the extent that an individual did
2 recover previously a damages award that would be in excess of
3 what he may be awarded by this Court, arguably there should
4 be -- it may be appropriate for an adjustment if in fact a
5 correlation is established between the two. And I'm not sure,
6 Your Honor, there is a correlation between damages under any
7 circumstances and unjust enrichment, based on my understanding
8 of the law.
9 With regard to Osage headrights, to the extent, in my
10 view, Your Honor, that the government can demonstrate that what
11 we've said with regard to the law and practically how the funds
12 have been held are incorrect, that can also be reduced from the
13 amount.
14 With regard to the deceased beneficiaries, as this
15 Court noted, whatever funds should have been inherited by the
16 successors in interest would continue, or at least as we
17 understood what this Court said. So to the extent the
18 government can demonstrate that the successors in interest who
19 are part of the class, and living beneficiaries, either had been
20 paid that money or that the deceased beneficiaries had paid that
21 money so it never was inherited through probate or otherwise,
22 the award should be reduced by that as well.
23 Your Honor, as the government itself pointed out in
24 this court - not in this courtroom, but in this court - with
25 regard to Philip Morris, whatever in that case the government

1 said Philip Morris could prove to reduce the, in that case,
2 $280 billion restitutionary amount that it was seeking under
3 RICO, the government can do that and the award would be reduced
4 accordingly.
5 Your Honor, this is a proceeding in equity and it's a
6 court of law; therefore, whatever proof is provided satisfactory
7 to this Court, plaintiffs concede should be used to reduce the
8 award. Plaintiffs also suggest, Your Honor, that there is more
9 latitude provided in the District Court in an action in equity
10 than there is in a matter of law.
11 Therefore, fairness, as this Court has pointed out, I
12 think with regard to if we know someone has been paid but there
13 isn't any proof - Your Honor, if we know someone is paid, there
14 isn't any proof, I don't know how we get there - but if we know
15 someone is paid and the proof is lousy, Your Honor, fairness
16 would suggest that that not be credited to plaintiffs, it should
17 be deducted from the amount as well.
18 But Your Honor, part of what occurs in a court of
19 equity involves fairness, involves encouragement, involves
20 dealing with unjust enrichment in this case, and Your Honor, it
21 involves making sure that this case is resolved fairly. And we
22 are in favor of that. That's the reason we adopted the
23 presumptions we did, notwithstanding the fact that in our
24 reading of the law, it wasn't necessary. But we did that to try
25 and reach that fair result.

1 So Your Honor, we believe this Court does have
2 substantial latitude to fashion a remedy that renders a fair
3 judgment, and does not -- it is not considered Draconian from
4 the point of view of paying beneficiaries this Court knows were
5 paid. We're not interested in that, because we're not
6 interested in what they were paid; we're interested in what the
7 government obtained as a result of its breaches of trust.
8 And Your Honor, this Court found the breaches, the
9 Court of Appeals affirmed them on numerous occasions. So it's
10 not a pejorative term, it's just a statement of fact, and I
11 don't intend it to impugn anyone's integrity.
12 But Your Honor, we believe that the government has an
13 obligation to demonstrate why the information that has been
14 provided to the plaintiffs and this Court for 12 years is
15 incorrect. And they've provided it, there's been testimony with
16 regard to the benefit, there is a throughput analysis that has
17 been started in 1996, Your Honor, so for 12 years they've been
18 working on this very issue, and they haven't presented that to
19 plaintiffs.
20 We believe, Your Honor, to the extent that information
21 is available that is suggested in defendant's brief, that that
22 information be presented either in the form of an identified
23 potential exhibit or otherwise, so plaintiffs aren't surprised
24 at the proceeding.
25 We believe in that regard --

1 THE COURT: Wait a minute. There are a couple of
2 places in your brief where you suggest you want production.
3 We're finished with that, counsel. We are finished with that.
4 There is not going to be any more discovery of any kind. If
5 they present stuff at this hearing in June that you are
6 surprised by, that's why it's a bench conference (sic); we can
7 have a recess and you can explore it.
8 MR. GINGOLD: So Your Honor, we thought it would be
9 done not in the context of discovery, in the context of at a
10 point in time this Court determines the parties' exhibits should
11 be identified and explained. We're not asking for discovery.
12 That's all.
13 So Your Honor, we did not use discovery --
14 THE COURT: I'm running out of time here, and the
15 government hasn't even begun to talk about what they want to
16 call interest and what they want to call the proceedings in
17 June. So I think we ought to let --
18 MR. QUINN: Your Honor, if I may beg your indulgence,
19 just one thing Mr. Gingold addressed, just going back to the
20 class issue for a moment and the claims -- the class definition,
21 Mr. Gingold made a reference that it's related to this
22 disgorgement claim. The definition actually is much broader
23 than that. It relates to anyone in effect who -- a class is
24 exclusive of those who prior to the filing of the complaint in
25 this case had filed actions on their own behalf alleging claims

1 included within the complaint.

2 So it's not necessarily limited to anybody who sought

3 disgorgement or restitution or unjust enrichment. It can be a

4 broader category than.

5 THE COURT: The court reporter needs a break. We will

6 take a short break. I mean short break. We'll reconvene in

7 15 minutes.

8 (Recess taken at 12:27 p.m.).

9 THE COURT: All right. Let's continue.

10 MR. WARSHAWSKY: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. WARSHAWSKY: John Warshawsky for the United States.

13 Mr. Gingold, as we understand it, pretty much addressed the last

14 two questions that the Court presented. I'm going to be

15 addressing more what I believe was the Court's question four;

16 Mr. Kirschman can address Judge Boggs and the interest issue.

17 THE COURT: Okay.

18 MR. WARSHAWSKY: Your Honor, both parties agreed, at

19 least in their briefs, that in a restitution case, the plaintiff

20 bears the burden of initially establishing a reasonable

21 approximation of the amount to be disgorged. We both cited the

22 same case law on that.

23 Where the parties I think diverged is that the

24 plaintiffs seek to transform that into a very, very light

25 burden. In essence, they seek to discharge their burden with

1 this document here, Attachment A, which is their adaptation from
2 Administrative Record 171, and this document here, Defendant's
3 Exhibit 365, which was the government's -- one of the
4 government's preliminary draft documents provided at the October
5 hearing.
6 The Court, I would submit, should bear in mind that
7 under the law cited by both parties, in a restitution case the
8 plaintiff starts at zero. Now, the fact that there are trust
9 overtones to the case doesn't change that. And the Court said
10 something this morning which I thought was particularly on
11 point, if I may. You said, "Magic words from 200 years of
12 equity jurisprudence don't fit here."
13 And that's important, Your Honor. Because it's true
14 that if one looks at a basic trust case and asks a trustee to
15 justify a transaction that occurred in a couple of years, and
16 you have a discrete number of transactions, you may, in a common
17 law setting, apply one set of standards.
18 It's quite different for a beneficiary to come back
19 decades later in any setting, but particularly in a government
20 setting, and to seek to impose upon a trustee a duty to prove
21 every single transaction going back a century, or to suffer a
22 presumption that in fact the transaction was not handled
23 properly.
24 The record in this case, which I would like to spend a
25 couple of minutes discussing, does anything but establish a

1 basis for concluding that the trustee in this case should be
2 presumed not to have properly made disbursements to the
3 beneficiaries, that they have unlawfully withheld funds, which
4 is at the heart of a disgorgement action.
5 Now, if I can talk very briefly -- and I respect the
6 Court's time. I know we're moving on. In Attachment A, which
7 is the plaintiffs' adaptation of AR-171, the Court will bear in
8 mind AR-171 was a document prepared for the October 2007
9 hearing. It was denominated a draft document for the purpose of
10 providing some analysis of collections and disbursements within
11 the IIM system. As the Court noted, for example, in Cobell XX,
12 AR-171 had no disbursements data prior to 1972. This was a
13 preliminary analysis.
14 The plaintiffs' analysis of AR-171, however, contains a
15 number of obvious issues. The Court this morning focused on one
16 that we've obviously noted, the Osage headrights issue. In
17 fact, a great, great predominance of the money, the Osage
18 headright money, never flows through the IIM system. It goes
19 straight from the Osage tribe to beneficiaries. A small
20 percentage, or a minority, at least, a small percentage does go
21 into the IIM system; that's, for example, money paid to
22 incompetents, as to whom the government does serve as a trustee.
23 What Attachment A does is to include all of the Osage
24 headright money, regardless of whether it is money that actually
25 goes into the IIM system.

1 Attachment A includes Tribal IIM money, about one and a
2 half billion dollars of Tribal IIM money. The Court observed in
3 the Cobell XX case, again, Tribal IIM money is a misnomer. This
4 is tribal money that was used where the IIM system had been used
5 as kind of a checking account for tribes, but it was not part of
6 the Individual Indian Money Trust.
7 Now, as we go to trial on this, obviously the Court
8 will hear more evidence about the receipts figures. I would
9 like to point out a couple of problems with the disbursements
10 analysis in Attachment A. I concede that Attachment A does have
11 disbursement data going back to 1880s; certainly the analysis
12 that plaintiffs, in their opening brief on page 29, where they
13 actually did take the 13 billion minus 10 billion -- or I'm
14 sorry, the 13 billion minus the figure shown on AR-171, they
15 said that gives you 3.6 billion. That doesn't have
16 disbursements before '72.
17 But there is an analysis in Attachment A where they
18 have used a plug disbursement figure, one calculated based on
19 their analysis of the CP&R data for 1988 through 2002.
20 Curiously enough - and it was this 69.82 percent figure that
21 Mr. Gingold referred to - of the 15 or so years in that data, if
22 you look at them individually, nine of the 15 years had a
23 disbursement rate higher than 69.82 percent.
24 If in fact they would have utilized data for other
25 years, pre-'88 years, where they actually had disbursements

1 data - you'll recall from Attachment B they had some years
2 identified where they found data - they would have had a much
3 higher disbursements rate as well.
4 The decision not to utilize -- not to give the
5 government credit for electronic transfers, again that seems to
6 be an obvious flaw with the Attachment A analysis. It's an
7 overly simplistic analysis, which if the burden is shifted to
8 the government, obviously we will be addressing in June.
9 But I would like to get back to this question about
10 what does the record actually show, and is there any real reason
11 to presume unlawful withholding of funds in the first place.
12 That's important.
13 Plaintiffs do have a burden to show some causal
14 relationship between the harm here, the failure to provide
15 accounting statements required by the '94 Act and the amount
16 that they claim they're entitled to for restitution.
17 Early on, Your Honor, I remember this when you met with
18 the parties after you had taken over the case, you sat down with
19 us and asked, do we have any advice. I'm sure you asked the
20 plaintiffs the same question. And I told you my advice, if I
21 may. I said, forget about the lore of the case; look at the
22 facts. Because the facts are important.
23 The facts in the record of this case show, for example,
24 the paragraph 19 analysis, a $20 million effort conducted with
25 respect to the five named plaintiffs then, and agreed upon

1 predecessors. Contrary to expectations, over 160,000 documents
2 were located to support transactions going back to 1914, and in
3 fact the analysis showed that when Ernst & Young, who conducted
4 the analysis, when they looked at their -- when they projected
5 what transactions should be found in the ledgers based on
6 available leases and other records, they were able to trace
7 99.99 percent to the transactions ledgers. There wasn't a
8 great, great hemorrhaging of data between receipts and
9 disbursements.
10 The Court will recall, for $20 million dollars, one
11 transaction, a $60.94 transaction that should have been posted
12 to a named plaintiff, in fact was posted to a member of the
13 class with a similar account number.
14 I won't spend a great deal of time talking about it,
15 but the Court, of course, listened carefully and patiently to
16 the testimony about the LSA project last fall. You'll recall
17 that Dr. Scheuren described how when Interior originally
18 designed the 2003 plan, there was an expectation that a great
19 number of transactions wouldn't be able to be vouched because of
20 the inability to find documents.
21 In fact, they vouched virtually every transaction that
22 was sampled. They reconciled 100 percent of the transactions
23 over $100,000, but of the sampled transactions, only a handful
24 couldn't be vouched, and Dr. Scheuren, in his analysis, presumed
25 those transactions were incorrectly recorded.

1 And the Court will recall what Dr. Scheuren's
2 conclusions were about that. After looking at all the analysis
3 for the LSA, he told the Court with a 99 percent level of
4 confidence, on the credit side, no more than $84 million error;
5 on the debit side, $4 million error. Utilizing more standard
6 95 percent level of confidence, he told you credits, $42 million
7 off; debits $2 million off.
8 That's important, Your Honor. Because these are facts,
9 and it belies the notion that there's been a massive unlawful
10 withholding of funds. To the contrary, it suggests, as would be
11 expected from a business records system, a great deal of
12 integrity in terms of recording money coming in and money going
13 out, because that's what business systems do. That's what the
14 IIM trust is, it's a business system.
15 Other evidence that the Court has heard, of course, the
16 results of the judgment and per capita analysis, that 86 percent
17 of the accounts have been reconciled, with, as the Court noted
18 in Cobell XX, minimal number of errors noted.
19 The Court heard about things like the data completeness
20 validation, the DCV analysis, the land to dollars pilot, the
21 meta-analysis. All of this is consistent with the notion that
22 the Court should not presume unlawful withholding of funds.
23 Plaintiffs' anecdotal evidence at the hearing last
24 fall, several witnesses talked about incidents; they were
25 investigated, and it didn't result -- and the investigations did

1 not result in findings of wrongdoing. Nothing wrong.
2 Back in 2005, for your benefit, of course, prior to
3 your involvement, when we were having a four-month hearing about
4 a preliminary injunction on IT security, one of plaintiffs'
5 witnesses was an auditor with 20 plus years of experience. We
6 asked her, Ms. Sandy, in all this time, are you aware of any
7 incident where somebody hacked into the system to take money
8 from an IIM account? She had never heard of an incident like
9 that.
10 The evidence in the record is not limited to the
11 electronic records ledger. At trial in June, I anticipate the
12 Court will hear about the efforts conducted by the GAO and the
13 Treasury departments over the period of the 1890's to 1951,
14 where Indian disbursing agent accounts were regularly reviewed
15 by these two agencies and the accounts checked and reconciled to
16 the penny. Again, that type of analysis can't be squared with a
17 presumption of a substantial amount of dollars being unlawfully
18 withheld.
19 So with that in mind, Your Honor, I simply wanted to
20 present the Court the notion that there is a burden of proof in
21 this case, and it is the plaintiffs' burden to start with zero
22 and to prove up. These documents, I would submit to the Court,
23 can't be sufficient to shift the burden.
24 THE COURT: Let me ask you this, Mr. Warshawsky: You
25 suggested that AR-171 was a draft when it was submitted. Does

1 the government have an updated version of AR-171?
2 MR. WARSHAWSKY: We are in the process -- yes, Your
3 Honor, we are --
4 THE COURT: Would you have such a document available
5 for the trial in June?
6 MR. WARSHAWSKY: We will certainly have one, yes.
7 THE COURT: I thought so.
8 MR. WARSHAWSKY: We have obviously --
9 THE COURT: Let me interrupt you. Let me interrupt
10 this program to note that for many of us, it's lunchtime. And I
11 really don't -- I would -- one part of me says let's continue
12 this until it's done, but frankly I think that would wind up
13 kind of shortchanging some of the arguments that are yet to be
14 made here. And the cafeteria would love to have all your
15 business.
16 And so what I'm going to do is to recess now for lunch,
17 just for an hour, until 1:45. Can we reconvene here at 1:45 and
18 we'll continue? I've got a criminal matter at 2:30, which I
19 think we can be done by 2:30. But if we run past that 2:30 hour
20 a little bit, we will. But I don't want to shortchange anybody
21 on the time they want to spend.
22 And by the way, you mentioned the computer issue. That
23 is an outstanding motion, and if both parties are disposed to
24 give me a few minutes of argument on that after lunch before we
25 quit, I would like to hear that. All right?

1 MR. WARSHAWSKY: Very good, Your Honor. Thanks.
2 (Recess taken at.12:45 p.m.)
3 THE COURT: Okay. Mr. Warshawsky, where did we leave
4 off?
5 MR. WARSHAWSKY: Your Honor, I just have a couple of
6 points to cover real briefly. We talked before the break about
7 Attachment A and plaintiffs' analysis of AR-171. We didn't
8 spend any time talking about Defendant's Exhibit 365. I'm going
9 to say just a couple of points about this.
10 This is the basis for the $3 billion number. And
11 again, as the Court will recall, this was also a document
12 prepared in conjunction with the October 2007 hearing. It was
13 denominated by -- it's captioned "proven coverage," and the
14 purpose of it was to come up with an estimate, to prepare an
15 estimate of how much coverage was being accomplished through the
16 historical accounting efforts. It was not designed to provide
17 any measure of amounts that should have been posted to the IIM
18 accounts.
19 And the bottom line is, Your Honor, there's always
20 going to be a difference between amounts coming in, collections,
21 and amounts getting posted to the IIM accounts. Because there
22 are a number of types of collections that simply don't hit the
23 IIM system. We've talked about some of them already today.
24 So I would ask the Court not to draw an inference from
25 the $3 billion delta shown on Plaintiffs' Exhibit 365. It

1 simply wasn't intended to suggest that $3 billion in collections
2 should have been posted to the IIM accounts. In fact, as I
3 indicated, there's always going to be a difference between
4 collections and postings.
5 Mr. Gingold referred to a throughput analysis that he
6 said the government has been working on since 1996. And this is
7 a reference, I assume, to a 1996 document prepared by Dr. David
8 Lasater which was referenced in the plaintiffs' reply brief. It
9 will suffice to say, I've spoken to Dr. Lasater; it was by no
10 stretch of the imagination a throughput analysis. This was an
11 initial effort to try to come up with some sort of resolution of
12 the matter way back, thankfully, before even I was involved in
13 the case, but it certainly was not a throughput analysis and has
14 not been developed into a throughput analysis.
15 Finally, this morning the Court asked about the
16 plaintiffs' model, the one that incorporates things such as
17 estimates of oil and gas revenue, timber revenues, and the like.
18 The thing about that model is, Your Honor, it was a revenue
19 model. It simply generated an estimate of revenues in the
20 system. There's nothing in that model having to do with
21 disbursements.
22 And this is indeed the same model like we first
23 encountered in the 2003 hearing, the Phase 1.5 trial.
24 Plaintiffs -- Mr. Fasold basically has a plug formula to get to
25 the $13 billion he estimates oil and gas revenues and the

1 various like, and then, when it's said and done, whatever he
2 can't estimate, there's an "other" category which is defined as
3 the difference between the 13 billion reported in the July 2002
4 report to Congress by the Interior Department, the difference
5 between 13 billion and whatever other estimates he came up with.
6 And when we got to the question of how do you
7 distribute the 13 billion, the answer was, it's not part of this
8 model. And Judge Lamberth noted that as well.
9 So Your Honor, with that, if there are no questions, I
10 would --
11 THE COURT: Go ahead. What?
12 MR. WARSHAWSKY: At this point I was going to leave the
13 podium and Mr. Kirschman was going to address your interest
14 question.
15 THE COURT: Okay. And Mr. Kirschman can talk to me
16 about this 70 percent disbursal rate? Because that's part of
17 the interest calculation, as I understand.
18 MR. WARSHAWSKY: The 70 percent, actually, Your Honor,
19 maybe I can address that.
20 THE COURT: Go ahead. Talk about it.
21 MR. WARSHAWSKY: Are you talking about the disbursal
22 rate in plaintiffs' Attachment A?
23 THE COURT: Well, it was my understanding that
24 plaintiff used that in sort of estimating -- in spreading out
25 the amount of non-disbursements that form the basis of their

1 interest -- strike interest. Their...
2 MR. WARSHAWSKY: What they've done --
3 THE COURT: Whatever we decided to call that number.
4 Not interest, not the time value of money, whatever we decided
5 to call it.
6 MR. WARSHAWSKY: Well, what plaintiffs have done, Your
7 Honor, is they took the data from 1988 to 2002, took their
8 receipts calculation, took their disbursements calculation based
9 upon CP&R data, principally, and averaged it over the period of
10 '88 to 2002 to come up with this 69.82 percent rate, which they
11 then apply for each year going back to 1887. The assumption is
12 every year 70 percent gets disbursed, and then the rest of it
13 just continues to accumulate. And that accumulated benefit, as
14 they call it, in turn becomes the subject of their interest
15 calculation.
16 So there's always an assumption in their model that
17 you're never going to disburse 100 percent of the receipts.
18 THE COURT: But does the government have some
19 explanation of that 69 point whatever it is, 8-2 percent rate?
20 MR. WARSHAWSKY: Well, the explanation would be, Your
21 Honor, that it's going to vary from year to year, first of all.
22 There are going to be years where you have a much higher
23 percentage than 70 percent; there will be some years where you
24 have a lower percent. And over the history of the trust, Your
25 Honor, there were times that the policy was to encourage

1 retention of cash, other times it was to encourage disbursement.
2 There are a number of individual reasons why that number isn't a
3 flat number.
4 But fundamentally, you also have to start with the
5 notion that the way it's been calculated builds in a number of
6 revenue sources that simply have nothing to do with the
7 IIM Trust, that are things like, as we've talked about earlier
8 today, the Osage headrights, things like IIM Tribal money.
9 So, you know, I think, as I indicated, we are
10 continuing our analysis of this, but ultimately I don't believe
11 you're ever going to get to a point where everything coming in
12 ends up being posted to an IIM account. We know that's not
13 going to be the case, because there are a number of revenue
14 sources that simply have nothing to do with IIM beneficiaries.
15 But that's how they've used the 70 percent. They've
16 simply calculated an average based on roughly a 15-year period,
17 and then applied it all the way back to 1887.
18 THE COURT: And in that 15-year period, what's the
19 explanation for it, failed bitters, disbursements made but no
20 documentation? I mean, what is it?
21 MR. WARSHAWSKY: Oh, well, again, I think that's an
22 analysis that we're continuing to do. You know, some of the
23 explanation is that -- a big part of the explanation, I would
24 submit, is that included within that calculation are revenues or
25 receipts that simply are never going to go to IIM accounts.

1 They're not to be posted to the IIM accounts.
2 But, you know, beyond that, I'm not comfortable giving
3 you specificity at this time. We certainly will address that in
4 June.
5 THE COURT: All right. Who goes first on June 9th?
6 MR. WARSHAWSKY: Your Honor, as I've indicated, the
7 plaintiffs have the burden of demonstrating, presenting a
8 reasonable approximation of the amount that they claim should
9 be -- that they should receive for restitution or disgorgement.
10 THE COURT: Well, I know. But remember the last time
11 we had this same discussion and there was a perfectly rational
12 argument that the plaintiffs had some burden of proof, but since
13 it seemed to be the government's job to show that they had made
14 an accounting, the government led with their testimony, and the
15 theory was that the plaintiffs would shoot at it and see if they
16 could discredit it.
17 MR. WARSHAWSKY: What the government was attempting to
18 do, Your Honor, in 2007 was to demonstrate that the 2007 plan --
19 the Court wanted to conduct a review to determine if the 2007
20 plan was going down the right track, if you will. You know, it
21 made sense, I would submit, to have the government putting on
22 the 2007 plan at the outset.
23 THE COURT: But you're going to have a new version of
24 AR-171 --
25 MR. WARSHAWSKY: But --

1 THE COURT: -- by June 9th.
2 MR. WARSHAWSKY: But as I've indicated, Your Honor, I
3 know we're not going to be able to tie down every dollar.
4 Because simply, that's not the way the system works, in that not
5 every dollar collected belongs in an IIM account. We're
6 certainly not going to be in a position, I would say, to tie
7 down dollars all the way back to the inception of the trust,
8 because there was no reason to aggregate that kind of data.
9 But the problem is, Your Honor, that by making the
10 government go first, the Court in essence presumes that there's
11 been unlawful withholding of money. And the plaintiff has to
12 show that before --
13 THE COURT: I tried to make it clear before lunch, and
14 maybe I'm the only person in this room who thinks that there's a
15 distinction, but there's a distinction between unlawful
16 withholding of money, which is the language the plaintiffs keep
17 trying to use, and disbursing money and not being able to
18 account for it. Those are different ideas, it seems to me.
19 And Mr. Gingold tells me I have to presume it as a
20 matter of law, and maybe I do. I'll have to study up on that.
21 But if I'm not so constrained by the cases, it is not logically
22 necessary for me to assume that money you can't account for has
23 been, quote, "unlawfully withheld," closed quote. It's just as
24 logical to assume that the payments were made and you just can't
25 account for them.

1 MR. WARSHAWSKY: Okay. Well, Your Honor, if I may, I
2 was going to have Mr. Kirschman come up and take the interest
3 issue. But since we're really getting into questions about how
4 the trial is going to be presented, Mr. Kirschman is counsel of
5 record, and I would feel -- I do think he would probably feel
6 more comfortable.
7 THE COURT: All right, Mr. Kirschman, your turn.
8 MR. KIRSCHMAN: Good afternoon, Your Honor. Before I
9 address the interest issue and the case you noted from the
10 9th Circuit, I would like to offer a one-case cite regarding one
11 of the three options you mentioned at the outset of the hearing.
12 You mentioned that there was a possibility that you
13 could issue a declaratory judgment. Defendants would just like
14 to refer the Court, or remind the Court of Christopher Village
15 v. United States. In that case the Federal Circuit held that
16 the 5th Circuit lacked jurisdiction to issue a declaratory
17 judgment as to the government's liability on a contract, even as
18 a predicate for a damages action in the Court of Federal Claims,
19 because the APA did not waive the government's immunity from
20 such a claim.
21 We've cited that at our brief at pages 21 and 22, but I
22 think it's one of two or three we cited and it's just a
23 parenthetical. So we just wanted to highlight that to the
24 Court's attention.
25 THE COURT: All right. Thank you.

1 MR. KIRSCHMAN: Now turning to the issue of the
2 interest or time value of money. The Court this morning said
3 you were interested in Judge Boggs' decision in United States v.
4 $277,000 U.S. Currency.
5 Plaintiffs cite that for the first and only time on
6 page 73 of their reply brief, in footnote 82. What plaintiffs
7 don't address is the fact that that decision constitutes a
8 minority view, and that the majority of the courts do not
9 follow, or did not follow at the time, that decision of
10 Judge Boggs.
11 In fact, Your Honor, the majority view is different.
12 And I would like to cite to the Court a case, United States v.
13 $30,006.25. And I apologize, I misplaced the cite right now.
14 I'll have it for you shortly.
15 But in that decision, the 10th Circuit specifically
16 considered Judge Boggs' case and declined to follow it. The
17 Court in the 10th Circuit in this decision - again that was in
18 the year 2000 - stated, "We cannot agree that the 9th and
19 6th circuits have found a legitimate exception to the
20 no-interest rule. Regardless of what they call it, they are
21 allowing an award of interest against the United States without
22 a waiver of sovereign immunity, but, quote, 'the force of the
23 no-interest rule cannot be avoided simply by devising a new name
24 for an old institution,' closed quote." And they're citing the
25 Shaw case there.

1 "To the extent" -- and I'm quoting again the
2 10th Circuit decision. "To the extent their holdings stem from
3 the fact that the government may be unjustly enriched if it is
4 not forced to disgorge its profits from the seized property, and
5 that a contrary holding is unfair, they do not cite, nor are we
6 aware, of any general waiver of sovereign immunity for unjust
7 enrichment claims."
8 "Moreover," the 10th Circuit explained, "fairness or
9 policy reasons cannot by themselves waive sovereign immunity."
10 And they again cite Shaw for that proposition, Your Honor.
11 So that, as I stated, is the majority view. This
12 matter -- the issue took on a different stance later in 2000
13 when Congress amended the law related to the civil asset
14 forfeiture provisions. So Congress saw the need to specifically
15 change the law, and the 6th Circuit and the 9th Circuit's
16 positions are to the contrary.
17 Judge Boggs' decision is also distinguishable from this
18 case, Your Honor, in several important aspects. Again, of
19 course, this involved the seizure in a forfeiture action, and
20 that's certainly not what we have here. In those cases you have
21 a strict statutory framework and a seized asset deposit account
22 which was specifically at issue.
23 The case I cited from the 10th Circuit made also
24 perhaps the most important distinction. Both in Judge Boggs'
25 case and in another case cited by Judge Boggs, he had

1 specifically issued an order shortly after the seizure took
2 place requiring the government to place the seized funds into an
3 interest-bearing account, and all parties, including the
4 government, thought that's what was going to happen.
5 Through different circumstances, that did not happen in
6 Judge Boggs' case. And he found that that would be very unfair,
7 after he had specifically ordered the government to put the
8 funds in an interest-bearing account, and didn't think - in my
9 words, not his - that the government should get away with that.
10 That is not the case here, Your Honor. The government
11 in this case has paid interest when it was statutorily required
12 to do so, and we cite in our brief 25 U.S.C., Section 161(a)(b).
13 So there has been interest paid in this case consistent with
14 statute.
15 Also, too, another distinction in Judge Boggs' case is
16 he looked at the long practice in the California district he was
17 in and took judicial notice of the fact that interest had been
18 ordered to be paid in those cases.
19 This case, obviously the Cobell case, is so unique. We
20 have no such long history here that would even suggest interest
21 or the time value of money could be paid, and there should be no
22 exceptions made, consistent with the Shaw case, as cited by the
23 majority view.
24 Your Honor, too, Judge Boggs reviewed the history in
25 seizure cases between the GAO and the Justice Department, and

1 found that that interest was relevant. Obviously, such a
2 history is not relevant here.
3 And the final distinction, and this goes back to the
4 first main one, is that Judge Boggs found that this was simply,
5 in his case, an order to maintain funds shortly after the
6 seizure had occurred and litigation ensued, and he found that he
7 had the inherent power to issue an order related to the
8 maintenance of assets. Here we're not obviously in a position
9 where Your Honor has issued such an order. We're in a much
10 different case with a very long history.
11 For those reasons, Judge Boggs' decision and the
12 9th Circuit case you mentioned earlier today is of no assistance
13 to plaintiffs. I would say, though, that because this was in
14 the reply brief, and I don't know your exact words, but you said
15 it should be explored in depth, if you would find further
16 briefing helpful, we could brief it on an expedited basis, no
17 more than 10, 15 pages, probably by the end of the week, if you
18 feel this is an issue critical to proceeding.
19 But speaking strictly about that case cited in
20 plaintiffs' reply brief, that is the basis for the distinction,
21 and it was not controlling law at the time, except, of course,
22 in that circuit.
23 THE COURT: Well, I don't want any more briefs on the
24 question. I think what I said had to be explored in depth was
25 the factual basis of the plaintiffs' claim. And I'm not quite

1 sure what the result of today's proceeding is going to be, but I
2 suspect it's going to be some form of a pretrial order that will
3 be issued in a few days that will try to capture what has been
4 discussed here and express my expectations of what's going to
5 happen here beginning on June 9th. And then I suppose we'll
6 have to have another conference to talk about that.
7 But I don't need any more briefing on Judge Boggs. I
8 take your point about the split or the non-unanimity of the
9 Courts of Appeals on this subject. Another case we had found is
10 called Larson vs. United States, which is at 274 F.3d, 643,
11 which also declines to follow Judge Boggs' ruling on that
12 question.
13 MR. KIRSCHMAN: Your Honor, could I give you the cite
14 now for the case that I discussed with you? I didn't have it
15 available when I first raised it. The 10th circuit case.
16 THE COURT: Yeah, what is it?
17 MR. KIRSCHMAN: It's 236 F.3d, 618, 10th Circuit, and
18 that's December 28th, 2000. I'm sorry, I misplaced the cite
19 originally.
20 THE COURT: Okay.
21 MR. KIRSCHMAN: Your Honor, we have not yet addressed
22 lands. Mr. Siemietkowski is available to address the land
23 issues if you feel going forward that could possibly be a part
24 of the trial.
25 THE COURT: The land issues?

1 MR. KIRSCHMAN: Yes. Related to the fair market value
2 claims and the like. Not the claim --
3 THE COURT: First of all, let me ask the plaintiffs
4 whether they seriously think the land issue has anything to do
5 with the trial we're going to hear in June.
6 MR. GINGOLD: We weren't sure, Your Honor. And the
7 reason for it is, without an accounting and without the ability
8 to determine the income generated from each interest and the
9 itemization of the trust assets, that's part of the consequence
10 of not being able to do an accounting.
11 We understand the Court wants to focus on the funds
12 issue itself, but the absence of the accounting as a consequence
13 with respect to identifying the items of the trust -- and Your
14 Honor, what the corpus of the trust is has been an issue in this
15 case from the beginning, because in order to determine the
16 income, you have to know which assets were generating that
17 particular income and then what was invested thereafter.
18 So we thought -- we didn't have a fair market value
19 claims issue, I think is the short form. What we said was, to
20 the extent that there was in evidence that corpus was
21 transferred out of the trust for fair market value, that we
22 wanted the assets restored.
23 We also pointed out that there are reasonableness
24 issues involved, to the extent the Court wants to address it,
25 and those reasonable interests involved reflect the use and

1 occupation by the government, and perhaps third parties that are
2 in trespass. So that is a consequence of not rendering an
3 accounting of all items of the trust, Your Honor.
4 So we understand from what this Court was saying today
5 that the land issues were not going to be part of the trial, so
6 we wouldn't be surprised if that's what the Court decided, for
7 appropriate reasons.
8 But I just wanted to explain, when you don't have an
9 accounting, the plaintiffs are left with unanswered questions in
10 every respect, including the corpus. And that was supposed to
11 be resolved, as the Court of Appeals identified its
12 understanding of what the scope of the accounting included.
13 So we don't have it, Your Honor, and we believe that
14 was part of the case. We weren't asking for the recovery of
15 whatever the value was in what was sold, we weren't seeking
16 constructive trusts or subrogation rights; we were focusing on
17 as narrow an issue as possible, understanding what we thought
18 this Court was saying and what the consequences naturally are
19 once the accounting is not going to be done.
20 THE COURT: All right.
21 MR. GINGOLD: But Your Honor, I have a point regarding
22 the interest issues. Can I respond to what's been said?
23 THE COURT: Go ahead.
24 MR. GINGOLD: Your Honor, again, as we discussed
25 earlier, plaintiffs aren't looking for the interest that should

1 have been paid to them. Interest that should have been paid and
2 hasn't been credited is damages. We're not looking for that.
3 THE COURT: I got that part.
4 MR. GINGOLD: And Your Honor, what we're looking for is
5 strictly from the restitutionary point of view, the benefit
6 conferred on the government, however that is measured; whether
7 it's measured in the context of the value of funds, time value
8 of funds, or whether it's the cost benefit to the government, or
9 in any other way. And there are many ways it can be done, Your
10 Honor.
11 And let me point out as a practical matter, the only
12 reason any interest was earned on the beneficiaries' funds is
13 because the commingled funds were invested in U.S. government
14 securities, for the most part. So if you bought a discounted
15 bond, it really -- interest is a euphemism, because you bought a
16 discounted bond for $95 and at maturity it's redeemed at $100.
17 So interest is almost a red herring in that regard.
18 And again, we're dealing with accretion, we're dealing
19 with accruals, we're dealing with imputed income. Assistant
20 Secretary Hammond testified in Trial 1.5 that they did not
21 aggregate interest or income, Treasury didn't, when it was
22 evaluating the return on investment to the trust. All they
23 could do is identify the particular securities that were
24 purchased. And Your Honor, there's no identification of
25 securities, no identification of redemption, no identification

1 of the reinvestment of those funds.
2 So interest is really not an issue. That's why the
3 issue was footnoted in the section that we footnoted it in.
4 We're not looking for the interest even earned by the
5 government, whether or not we could, Your Honor. We're not
6 looking for the interest that was credited, because, Your Honor,
7 in our calculation we actually backed that out. We are not
8 looking for interest. If we were looking for anything, we would
9 have been looking at the yield, and the yield is strictly
10 related to what was actually acquired using our clients' funds.
11 It is nothing else, and there's no other purpose for it.
12 So interest isn't truly relevant. That's the reason
13 again, Your Honor, we moved further back so we wouldn't see any
14 conflation of issues regarding interest and benefit conferred.
15 We thought it was too dangerous with regard to how it could be
16 construed.
17 And that's the reason we followed a line of cases that
18 dealt with how benefit conferred is to be calculated and
19 measured, what is generally considered to be reasonable, and how
20 judges like Pierre LaValle and Posner and Learned Hand and
21 others used that. And we followed that model, Your Honor. If
22 we're wrong, we followed a series of cases that are unrefuted,
23 and from judges that are considered to have sound and honorable
24 reputations in the profession.
25 But it isn't interest, and we're not looking for

1 interest. We're not looking for interest that should have been
2 paid. That is not part of the $58 billion calculation. It's
3 strictly what the government -- how the government benefitted
4 from what it -- from how it used plaintiffs' funds or didn't use
5 them, because those funds were not distributed. And how this
6 Court wants to determine presumptions obviously is a key to all
7 of this. We believe there's a line of cases that very clearly
8 in a trust situation, express trust situation, establish the
9 foundation that plaintiffs used in its calculations.
10 THE COURT: You talk about encouragement and
11 incentives. You're enticing me into the company of Learned
12 Hand, Pierre LaValle, and Judge Posner. Where in your briefs am
13 I going to find those exalted judges?
14 MR. GINGOLD: They're throughout the reply brief --
15 THE COURT: The ones who have an honorable reputation,
16 as distinct from the rest of us?
17 MR. GINGOLD: -- 28, to start, Your Honor.
18 What I was pointing out is there are great judges and
19 there are great judges, and Learned Hand is regarded generally
20 as one of the great judges in this country.
21 THE COURT: Granted.
22 MR. GINGOLD: Whether you're a right-winger or a
23 left-winger, Judge Posner in many respects is considered to be a
24 very, very sound, judicious judge. Judge Alito, he's now
25 Justice Alito --

1 THE COURT: Oh, I forgot, you added Alito, too.
2 MR. GINGOLD: Yes, yes. The 3rd Circuit case,
3 Your Honor.
4 THE COURT: All right.
5 MR. GINGOLD: Thank you, Your Honor.
6 Your Honor, further, in our reply brief we addressed
7 every one of the issues that Mr. Warshawsky discussed earlier.
8 Unless this Court wants us to go into those issues, we will rely
9 on what we state in our reply brief.
10 THE COURT: All right.
11 MR. GINGOLD: Thank you.
12 THE COURT: This discussion is getting a little -- do
13 you want to be heard?
14 MR. KIRSCHMAN: If I may, Your Honor, on that last
15 point.
16 I raise it both as a legal argument because I think it
17 goes to the question of how the trial should proceed and who
18 goes first.
19 I believe Mr. Gingold, if I understand him correctly,
20 made it clear that plaintiffs are again seeking the benefit
21 conferred upon the government, and it's for that reason that
22 they have relied on a predicate of unlawful withholding, which
23 they haven't presented here. But the mere fact that there
24 wasn't an accounting for the dollars doesn't demonstrate a
25 benefit to the government.

1 So you had set out the hypothetical, what if the money
2 was paid but just not accounted for. In that case there would
3 be no benefit. And because plaintiffs have again reiterated
4 that their claim going into June 9th is based upon not interest
5 but benefit to the government, that's a significant flaw in the
6 argument, because they haven't showed any unlawful withholding.
7 And your hypothetical wouldn't reach the point where it would be
8 a benefit to the government if in fact the money was paid out;
9 it was paid out to a tribe, it was paid out to a disappointed
10 bidder, or it was eventually paid out through a Special Deposit
11 Account to an IIM account holder.
12 And that then begs the question of why plaintiffs in
13 this instance should go first, because we, defendants, need to
14 know clearly what we're responding to once they have presented
15 such a case on the issue of benefit or entitlement to interest.
16 Thank you.
17 MR. GINGOLD: Your Honor, we presented exactly how we
18 intend to proceed, as we thought this Court wanted us to do, in
19 the briefing. We included documents attached to our opening
20 brief which identified what we're going to be using and how we
21 were going to be doing it. The benefit conferred is outlined
22 explicitly on how we're doing it.
23 Your Honor, if our understanding of law is correct with
24 regard to presumptions, not only -- and this Court may view our
25 discussion of the commingled trust issues and the presumptions

1 that are associated with the trustee in a commingled trust
2 vis-a-vis both disbursements from the trust and with regard to
3 deposits into the trust. And under the restatement and related
4 cases, restatement of restitution, it is very clear that the
5 presumptions with regard to expenditures by the trust presumably
6 are not expenditures of the trust beneficiaries' money if the
7 funds are combined with the trustee's.
8 Presumably if they are expenditures of the trust
9 beneficiaries' money - and this is where Learned Hand comes into
10 play, Your Honor - that it is presumed that if there is a
11 disbursement from the trust and there's an investment in
12 something valuable, then the presumption would be up to the
13 beneficiary to determine if he wants the benefit of that
14 investment. And Learned Hand was quite specific in that regard.
15 In addition, Your Honor, with a commingled trust, the
16 presumption is -- if the funds were expended and they should not
17 have gone to anyone but the beneficiaries, then the presumption
18 is all deposits subsequent to that improper disbursement would
19 be considered to be intended to restore the trust fund itself.
20 And these are identified specifically, they are related
21 to, among other things, Section 54 of the restatement of
22 restitution, and the explanation for those presumptions are
23 stated in our brief, Your Honor.
24 THE COURT: Okay. Thank you.
25 As I said, I think what I better do is to try to sort

1 this out and issue some sort of pretrial order, and I'll try to
2 do it later this week.
3 Oh, another man is on his feet.
4 MR. SIEMIETKOWSKI: I was going to try to convince you,
5 Your Honor, to take the lands issue off the table today.
6 THE COURT: Well, sit down and hear me out.
7 MR. SIEMIETKOWSKI: Yes, sir.
8 THE COURT: You'll like what I'm about to say.
9 It sounds to me, first of all, as if although
10 technically the government is correct that the plaintiff has the
11 burden of proof on whatever shortfall it claims it needs to
12 recover, the plaintiffs can shift the burden back to the
13 government by filing AR-171 and Exhibit 365, and essentially
14 saying they amount to something like an admission.
15 And then the government is going to come back and say,
16 wait a minute, we've amended AR-171 and here's the amendment;
17 they're going to say, the Osage Indian headrights don't belong
18 here; they're going to say, you've got to net out the people who
19 have died and are not members of the plaintiff class; they're
20 going to say, you've got to net out judgment and per capita
21 accounts, if they're not already netted out. They're going to
22 say whatever else they're going to say about the dollar amount.
23 Then I think on the question of what the benefit to the
24 government has been from the failure to account, I don't see any
25 way that the plaintiff does not bear the burden of proof on that

1 one. And exactly how that works out and exactly what they have
2 to show, I don't know. But I am not willing, absent some more
3 research, which I pledge to do, to assume that the failure to
4 account is the same thing as unlawful withholding. And so I
5 will expect the plaintiffs to assume the burden on that issue.
6 Now, what this means in terms of witnesses, in terms of
7 how long it's going to take to work these issues through at the
8 trial that's to begin on June 9th, I don't have a very clear
9 idea in my head. It could be that we're only talking about a
10 few days of testimony, and that testimony will be -- and some of
11 it may be filigree on what we already heard about the dollar
12 amounts back the last time, what was it, October of last year?
13 Some of it may be repetitious, some of it may be amendments. I
14 don't expect that I'm going to want to hear a lot of legal
15 argument at that point.
16 Now, I don't think the lands question has anything to
17 do with what we're going to discuss beginning on June 9th,
18 period. This is about dollars into the IIM, dollars in and
19 dollars out. And I'm assuming that if we get out something like
20 a pretrial order later this week and we have more details to
21 discuss, we can schedule another meeting in a couple of weeks to
22 go over what I get out this week. But I'm not scheduling that
23 meeting now.
24 What I would like to do now is to hear briefly from the
25 parties on the subject of reconnecting the Internet of the IT

1 systems of the Bureau of Indian Affairs.
2 Mr. Warshawsky, you're up. You filed the motion.
3 MR. WARSHAWSKY: Yes, Your Honor. We filed two
4 motions. And as the Court will recall, initially we filed a
5 motion to reconnect the Solicitor's system, and more recently
6 filed a motion to reconnect Bureau of Indian Affairs, the Office
7 of Hearing and Appeals, Office of Special Trustee, to allow the
8 connection of the Office of Historical Trust Accounting, and to
9 vacate the consent order. This has been well briefed, and I
10 will be brief in oral argument.
11 Your Honor, a lot has changed since entry of the
12 consent order in December 2001. At that time Interior certainly
13 did not have an inventory of all of its systems. The types of
14 security controls that we think of as commonplace today often
15 weren't in existence, things like firewalls, intrusion detection
16 devices, systems.
17 And Interior wasn't alone in that respect. I mean, it
18 was a very different IT security world back then, some seven
19 plus years ago. Or six plus years ago. Is that right?
20 Whatever. Anyway, since December 2001.
21 As we've explained in our briefs, there have been
22 indeed substantial changes in both -- substantial changes of
23 both law and fact since that time. The law changes;
24 principally, Congress' enactment of FISMA, the enhancement of
25 NIST, which has promulgated numerous guidelines, both mandatory

1 and recommendations regarding security controls, which federal
2 agencies now are either required to follow or at least consider.
3 And, of course, the Court of Appeals decision in Cobell XVIII.
4 Factually, all of the systems discussed in our two
5 motions have gone through Interior's connection approval
6 process, the so-called CAP process. Consistent with federal
7 law, the Court has been provided with statements from the
8 authorizing official, designated representative for each bureau
9 or agency involved -- bureau or office involved, I'm sorry,
10 indicating that after considering information provided by that
11 bureau or office's Chief Information Officer, including
12 assessments of security controls, that the person designated
13 responsible -- I should say the person that Congress designated
14 as being responsible for making risk management decisions has
15 concluded that the security controls and plans in place for the
16 network provide adequate security, commensurate with risks and
17 magnitude of harm potentially resulting from unauthorized
18 access, to protect the information associated with that network.
19 Because of the nature of this litigation, Interior
20 added an additional level of review by the associate deputy
21 secretary, Mr. Cason, not required by federal law, but that has
22 been followed in this case.
23 So the Court is presented with now the kinds of
24 determinations that Congress described in FISMA, and under the
25 guidance of Cobell XVIII, this, of course -- this case, of

1 course, is not a FISMA compliance case as Cobell XVIII
2 recognized. The Court of Appeals also observed -- assuming such
3 an animal exists.
4 The Court of Appeals noted that in going through the
5 extensive type of federal review involved now in IT security,
6 there was a role for just about everybody, but, with due
7 respect, the federal judiciary.
8 And so we respectfully ask the Court, having now been
9 presented with the types of risk management decisions required
10 by Congress, and the showing that indeed there is now security
11 in place and security deemed adequate by the responsible
12 officials, the Court should go ahead and allow either
13 reconnection or connection of the OHTA system.
14 THE COURT: Is it your assumption, Mr. Warshawsky, that
15 the consent order is invalid or that it needs to be amended? I
16 mean, the consent order does talk about a Special Master, and
17 there isn't one anymore.
18 MR. WARSHAWSKY: No. Your Honor, at this point --
19 THE COURT: Well, then, what do you say to the
20 plaintiffs' argument that you basically are not attempting to
21 abide by the terms of the consent order?
22 MR. WARSHAWSKY: I would say, Your Honor, the consent
23 order has largely been overcome by events. Because of change in
24 both facts and law, it's no longer a meaningful order to begin
25 with.

1 You know, Your Honor, I actually did work a great deal
2 with the Special Master back in 2002. As we went through the
3 process of getting systems reconnected under the consent order,
4 and into early 2003, it did provide a meaningful process at the
5 time. That was before a great deal of law had developed.
6 But simply put, right now the systems are no longer --
7 the systems that existed back then aren't the systems existing
8 now. And, you know, if we were presented with a similar
9 situation today, I'm not sure that the consent order -- I'm
10 fairly certain, I would suggest, the consent order would not be
11 an appropriate vehicle.
12 THE COURT: Which is why you've moved to vacate it?
13 MR. WARSHAWSKY: We've moved to vacate it because it
14 doesn't make sense, given the state of where we are now, and
15 frankly it doesn't make sense because there are no systems that
16 should remain disconnected under the consent order.
17 THE COURT: Who wants to give me five minutes from the
18 plaintiffs' side of this?
19 MR. DORRIS: I would, Your Honor. Bill Dorris for the
20 plaintiffs. The consent order is still valid, it's in place.
21 Admittedly the Special Master is no longer involved in the case,
22 but when you look at the function that the Special Master was
23 doing, that function can still be done in this case.
24 Now, where we stand is this: We're starting with a
25 consent order where the government -- which the government

1 drafted and presented to the Court, where the government comes
2 in and says, we acknowledge significant deficiencies in our IT
3 systems.
4 Back in May of last year, Your Honor, you said to them,
5 look, go ahead, get ready to reconnect. When you're ready to
6 reconnect, come in, show me that there's security - and I'm
7 paraphrasing, obviously - and I'm inclined to let you do it.
8 But right now all you're doing is saying that you've got
9 security.
10 That's where we are now. There's not a single report
11 from an independent qualified contractor that indicates that
12 there's adequate security in these systems, if they're
13 reconnected to the Internet, over the plaintiffs' Individual
14 Indian Trust data.
15 THE COURT: Did I say they had to have an independent
16 qualified contractor?
17 MR. DORRIS: You did not, Your Honor. You said, You're
18 saying that there's adequate security; you need to show that to
19 me. That's my paraphrase for what you said.
20 But I submit to you that they have not shown it to you.
21 The consent order refers to having a qualified independent
22 contractor do a system-by-system analysis. They have not filed
23 those reports with you. What they say is, well, those would
24 contain confidential information. They can be filed under seal,
25 like all the many IT security documents in this case have been

1 done with the redactions.
2 So where we're standing is they are saying, we say we
3 have adequate security and that ought to be enough. We would
4 submit to you with the evidence that has been presented
5 previously in this case, that there were systemic deficiencies
6 in their security - and we're talking about BIA, is where the
7 wealth of the IITD is - that we need for them, before they
8 reconnect that and put that out on the public Internet, we need
9 to ensure that there is adequate security there. They say there
10 is; let them show that there is.
11 Your Honor, this is a situation where the Court of
12 Appeals has made clear that where this is a material dispute
13 about something like this, there needs to be both discovery and
14 an evidentiary hearing.
15 THE COURT: Well, that's what Judge Rogers said in that
16 decision, but, you know, in the first place, she didn't read or
17 hasn't read the local rule that says you never hear evidence in
18 preliminary injunction matters in our court. That's a local
19 civil rule of our court.
20 Also, wasn't she talking about if you're going to make
21 credibility decisions the way Judge Lamberth did, if you're
22 going to make credibility determinations, you've got to hear the
23 witnesses? Isn't that what she's saying?
24 MR. DORRIS: Your Honor, I did not read it that way,
25 and I still don't read it that way, that it goes solely to where

1 there's a credibility determination. It's where there are
2 disputed material facts, that there needs to be that kind of
3 hearing. That's the way I read what she said.
4 THE COURT: If that's the new rule, Court of Appeals
5 imposed rule for preliminary injunctions in our court, it's
6 going to stand the practice of this court on its head. Because
7 for years all district judges have been saying, no, no, no, you
8 can't bring your witnesses, no, no, no.
9 MR. DORRIS: Well, Your Honor, we really are in a
10 little bit different procedural spot than that now. We have a
11 consent order that is in place, and they're moving to vacate
12 that consent order. And what they basically have said to this
13 court is, trust us, we've got the security.
14 Now, that's the same thing that they were saying all
15 the way up until 2001, when the Special Master filed a report in
16 November of 2001 that said, hold on a second, they don't have
17 adequate security.
18 So that's the position that the plaintiffs are in at
19 this point right now, is that when they say, trust us, we have
20 trouble trusting them on that. And we would ask the Court to
21 hold them to a higher standard than that, and permit us to at
22 least have them file the reports that they're basing these
23 declarations that they filed with the court so that we can see
24 and question what support they have for the statements they're
25 making.

1 THE COURT: All right. Well, my -- no, I don't need to
2 hear anything more, Mr. Warshawsky.
3 My tentative view of this -- and I'll take this under
4 submission, and it's time for me to rule on this question. It
5 is time for me to rule. My tentative reaction to it is, this is
6 a collateral issue and it's time we took it off the table and
7 let the government reconnect its computers. But I will consider
8 that and rule on it later on.
9 If there's nothing further, counsel, I thank you for
10 your attention and your helpful arguments today. We have a
11 criminal matter right behind you, so good-bye.
12 (Proceedings adjourned at 2:47 p.m.)
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1 CERTIFICATE OF OFFICIAL COURT REPORTER
2
3 I, Rebecca Stonestreet, certify that the foregoing is a
4 correct transcript from the record of proceedings in the
5 above-entitled matter.
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9 ________________________________ __________
10 SIGNATURE OF COURT REPORTER DATE
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