UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.	:	**Civil Action 96-1285**
Plaintiffs	:	
	:	**Washington, D.C.**
V.	:	**Monday, June 9, 2008**
	:	
DIRK KEMPTHORNE, Secretary of the Interior, et al.	:	
	:	
Defendants	:	**MORNING SESSION**

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 1
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
DOUGLAS LAYCOCK				
By Mr. Gingold	40	--	93	--
By Mr. Gillett	--	69	--	--

E X H I B I T S

NUMBER	ADMITTED

(No Exhibits Moved into Evidence.)

P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action 96-1285, Elouise Pepion Cobell, et al. versus Dirk Kempthorne, et al. For the plaintiffs we have Dennis Gingold, Elliott Levitas, Keith Harper, and for the defendant we have John Stemplewicz, John Warshawsky, Robert Kirschman, and Michael Quinn.

THE COURT: The plaintiffs in this case -- plaintiffs usually go first. I'm wondering if given the nature of these proceedings, whether the defense would like to open first. If not, have you any agreement about who speaks first? I assume you're both going to make opening statements.

MR. KIRSCHMAN: Yes, Your Honor, we're both going to make opening statements.

I anticipate that at the start of the case, at least, we will be responding to plaintiffs' case, so I would cede to plaintiffs' counsel unless he has an objection to presenting.

THE COURT: I've never heard Mr. Gingold object to standing up to speak. So Mr. Gingold, proceed.

MR. GINGOLD: Good morning, Your Honor.

THE COURT: Good morning.

MR. GINGOLD: Just a note, Your Honor. I did have an objection to standing up after the end of our 59-day IT security trial. That was an exhausting period of time.

Your Honor, thank you very much for setting this date for trial. We hope to go to final judgment in this case, which

will reach its 12th anniversary tomorrow.

The history of this case is well-known to this Court. This Court has held that the government has a fiduciary duty to account, and has held that the government has breached its fiduciary duty to account. The United States Court of Appeals has affirmed this Court's decision.

This Court has also held that the United States government has failed to render the accounting that's been declared, and in fact has concluded that the accounting is now impossible.

Your Honor, the law that applies to this case is settled law. It is settled law in this district and it is settled law in this circuit and it is settled law in the Supreme Court. We have a situation where the government is acting as trustee; that situation involves the government failing to discharge its trust duties. We're looking at a judgment, if plaintiffs' request is granted, that is substantially into the billions of dollars. That's a lot of money, but it's been 121 years, and these have been our clients' funds for 121 years.

Justice Jackson in *Mosser vs. Darrow* in 1951 addressed an accounting case involving a fiduciary at the Supreme Court, and the appellant in that case specifically claimed that the amount of money was too much, based on the time that accrued and based on the original funds that had been collected.

Justice Jackson's reaction was basically, it's too bad. The duty to account imposes on fiduciaries the duty to provide a full accounting, and if in fact the fiduciary failed to do so, then whatever the just and proper amount is is what must be rendered, without regard to fault, without regard to malice, and Your Honor, even without regard to negligence.

In a recent case in this circuit involving *In Re: Medicare*, a similar issue was raised at the Court of Appeals by the government, which was defendant, because the government claimed if in fact these statutory obligations were affirmed by the Court of Appeals, that the cost to the government could be in excess of a billion dollars.

Justice Tatel, writing for a unanimous panel, said, once again, that's too bad. The Court doesn't determine justice based on the amount because of the statutory obligations that are in place, and those obligations cannot be vitiated in accordance with principles of equity. And that was a decision against the United States government, Your Honor.

In this Court's pretrial order, it established, at least what plaintiffs understand, is the procedures that will apply in this litigation. In this court in 1945, in *Cafritz vs. Corporation Audit Company*, there was a situation there where the fiduciary failed to render an accounting, and in fact, the District Court in that case held that under the circumstances, if in fact the specific items cannot be proved by the fiduciary

to reduce the amount that is claimed by the plaintiff, then in fact all inferences are against the fiduciary and the amount that is requested will be sustained.

At 632 of that opinion, specifically this court held, again in 1945, "When a fiduciary is under a duty to account and he fails to do so, the only inference to be drawn is that he could not satisfactorily explain the transaction without an admission of guilt."

In 1961, this circuit addressed a similar situation in *Rosenak (ph) vs. Pollard*. In that case the Court of Appeals, again in conformity with *Cafritz* - and *Cafritz* explicitly identified the need to provide checks, to provide securities, to provide the specific evidence that is necessary for the defendants to meet their burden - but in *Rosenak (ph) v. Pollard*, the Court said, "The burden of establishing the non-existence of money due to plaintiff rests on the defendant. Because of the very nature of the remedy, that burden cannot rest upon plaintiffs, but must shift to the defendant when facts giving rise to a duty to account have been alleged and admitted."

Your Honor, the duty to account has been alleged. It hasn't been admitted, but it's been found, and the duty to account has been breached, and, in fact, it's been rendered impossible.

So Your Honor, these are the decisions that are

directly relevant in our case. These are in conformity with decisions throughout the United States since the turn of the 20th century. Plaintiffs, as a result of the inability to get an accounting, are now unable to determine with any degree of precision the amount of injuries that have been sustained by the members of the class. We will never know now where the tens of millions of acres of land that were in this trust have gone, when there's no evidence that the land was ever sold or that fair market value was paid.

We will never know --

THE COURT: We're not talking about land in this proceeding. Right?

MR. GINGOLD: That's correct. But Your Honor, we asked for an accounting of the trust, and Court of Appeals in Cobell VI identified the accounting as all items of the trust. The government has stated --

THE COURT: But in this proceeding we're talking about cash in, cash out. Right?

MR. GINGOLD: That's correct. I did not suggest --

THE COURT: Let's just all be on the same page about that.

MR. GINGOLD: That's all we're talking about. And we're only talking about that in significant part, Your Honor, because there cannot be an accounting of those other assets.

So I am in full agreement, we are all in full agreement

with you with regard to the narrow scope of this proceeding. We're dealing with the funds that were collected, we're dealing with whether or not the funds were disbursed, we're dealing with whether or not interest is to be earned, or another form of recovery in the form of unjust enrichment is appropriate to be paid. We're dealing with whether or not the prejudgment interest rules that generally apply apply to this case. And Your Honor, they do not.

This is a trust case, this is a trust case where plaintiffs have charged unjust enrichment, and in 1926, the Supreme Court held that where there is unjust enrichment, all profits obtained in connection with the use of the trust funds must be disgorged, that it is outside the scope of the no-interest rule. That was the unanimous decision written by Justice Sutherland.

In addition, we have *Bowen vs. Massachusetts*, which everyone is familiar with, and *Bowen* deals with specific relief; as a matter of fact, a statutory obligation which was embedded in the statute as a promise to pay. The government breached that promise, the monies that were recovered were monetary relief, the Supreme Court held specifically that did not constitute damages, and, in fact, it was a recovery of the very thing that the plaintiff was entitled to receive.

Your Honor, we have two statutes that obligate the payment of interest. We have one which is the 1994 Act which

explicitly applies only to the individual Indians and the Individual Indian Trust, and not to the tribes, and applies retroactively with regard to any deposits or investments made of the Individual Indian Trust funds. It does specifically apply solely if the deposit was made, not if the investment was made with those funds, even though it was obligated by statute. And again, that is a retroactive statute.

We also have an 1841 Act, which was amended several times, including in 1880 and last in September of 1982. And it specifically states that all trust funds -- that trust funds held by the government shall be invested in government securities and shall pay an interest rate of not less than five percent.

That statute has been rarely invoked, but it had been utilized for a period of time through approximately 1880 for the payment of interest on the Tribal Trust funds. The ability to obtain the five percent was difficult, so the act was amended for the tribes, a new statute was created, and separate interest is provided.

Your Honor, the government's expert in trusts who testified in 2003 testified that this is a unique trust, the Individual Indian Trust, that the trust instrument consists of the statutes, and the trust law that governs the instrument primarily consists of what is embedded in the statutes. Your Honor, where we have statutes that explicitly obligate the

United States government to pay interest, that specifically takes any interest issue outside the standards set forth in *Library of Congress*.

But Your Honor, we're not asking for interest, we're just saying if in fact for some reason this court made a determination that our calculation of benefit conferred - which is the benefit to the government, not the injury to our clients - in some way constitutes a functional equivalent of interest, interest is authorized explicitly by statute in any event, so the no-interest rule doesn't apply. So Your Honor, we're looking at something that we looked at very carefully.

We also, as this court knows, and approximately two months ago provided to this court in our opening brief and in some clarification in our reply, how we plan to calculate the award that we believe is reasonable. We assumed for purposes of our economic model that the information contained in the government's CP&R database is information that could be relied on, and we assumed that the checks that were identified in that database for that, I believe, 14-year period was data that would eventually allow the government to prove that 70 percent of the funds were disbursed. Our calculations are for that 14-year period collections amounted to -- connections -- there were 30 percent of the total value in collections that were not accounted for.

Therefore, we were assuming, subject to the proofs that

the government is required to put on in particularity, and not with regard to general summary documents or information -- indeed, Your Honor, there is ample authority in various cases that are incorporated by reference, we believe, in the Court's pretrial order that suggest that general statements or conclusions with regard to deductions are not sufficient, and in fact, because of the obligation of the trustee, must be proved with particularity. So we're assuming the government is going to be able to prove the 70 percent.

We also are aware, and we don't know how it's going to be done, that the government has represented that from the beginning of the trust through 1991, virtually all the disbursement checks have been destroyed. Now, whether or not the disbursement checks were destroyed, there's a possibility that there are contemporaneous entries, not entries created years or decades or generations after the fact, that would reflect transactions that actually occurred.

But what Your Honor is going to hear in this proceeding is that the disbursement records of the government are wholly unreliable, that in fact the external auditors who audited the BIA and the trust for certain periods of time with regard to the Individual Indian Trust found significant concerns about the reliability of the disbursement records that conform to various reports that have been written for decades in that regard from 1915 to 1928, and otherwise this court is well aware of the

issues with regard to that.

So therefore, we believe, and we will listen very carefully to the specific proof that is introduced, that the government has the obligation to provide, that will reduce the amount that plaintiffs have requested. The amount that plaintiffs have requested, Your Honor, is principally based on the amounts that have been reported by the government. To the extent those amounts are incomplete - and Your Honor, we believe they are incomplete, but they are the best evidence available - we believe we're entitled to rely on that as a reasonable approximation of what we would otherwise be entitled to if an accounting had been rendered. That is provided for in a number of cases, including *SEC vs. First Financial*, in this circuit.

So we believe that's reasonable, we believe the information provided by the government is an admission against interest, at the very least, and we believe we can move forward in that regard.

This court will also hear testimony about the fact that not only are the older systems inadequate with regard to the checks and balances and availability of accurate and complete records, but throughout this litigation, the 12 years of this litigation, the data housed in the information technology systems cannot be relied on to make a determination as to how much money the government has actually paid out to any beneficiaries.

And Your Honor, in the 70 percent that we assumed in our model, that assumed all checks were good, that assumed all payments were made to trust beneficiaries, that assumed no fraud, and that assumed the beneficiaries received the monies in the correct amount. And that is notwithstanding the fact, Your Honor, that there's ample evidence, and it will be the subject of some testimony in this proceeding, of fraud and embezzlement by government employees. We are well aware of concerns with regard to that, and to the extent fraud and embezzlement is proven, obviously that's a damages issue that doesn't become part of this proceeding.

But nevertheless, I wanted this court to fully appreciate the fact that it is our understanding that that has occurred, but we are nevertheless assuming the 70 percent is 100 percent accurate.

So Your Honor, one other aspect of this which is very important to consider, the United States is acting as a trustee, and acting as a trustee, it is to be treated as a trustee and not as an administrator. It has been the Supreme Court's position since 1925 in *Standard Oil vs. The United States*, when the United States government is not acting as a sovereign but acts in another capacity, and in that case as an insurer, the United States is treated as an insurer, and it is obligated to pay interest as an insurer would pay interest for delayed payments.

There is no doubt, Your Honor, that the circuit understands that the interest is owed, the income is owed for any delay. In Cobell XIII, when the Court of Appeals vacated the structural injunction entered by this court, Judge Williams, who was speaking for this court --

THE COURT: Mr. Gingold, excuse me for just a second. Could I see you and Mr. Kirschman at the bench for a moment, please?

(BENCH CONFERENCE ON THE RECORD.)

THE COURT: I don't want to cut you off in front of this huge audience, Mr. Gingold, but what you're giving me is a closing argument about law.

MR. GINGOLD: Okay.

THE COURT: I wanted an opening statement that tells me what the evidence is going to be in this proceeding. Can you shift gears and get to that, please?

MR. GINGOLD: Yeah, I will do that immediately. I was going to do that based on the explanation of why we were going there.

THE COURT: I know. But there's too much law, and I want to hear what the evidence is going to be. That's what an opening statement is.

MR. GINGOLD: Okay. That's fine.

(END BENCH CONFERENCE.)

MR. GINGOLD: So the parameters are set forth in

various cases that have been mentioned earlier, and we will introduce our evidence in accordance with our understanding of what this court set forth in the law.

We will open with Professor Laycock, who is a distinguished professor of law at the University of Michigan law school, who will testify with respect to restitution, unjust enrichment, and remedies. The law of restitution has been an arcane area of the law, and we believe just as Professor Langbein was helpful to this court in 2003, that we believe Professor Laycock will be similarly helpful to this court.

We are going to be introducing Mona Infield as a witness. Mona Infield is the branch chief for disaster recovery for the Bureau of Indian Affairs, and she has broad knowledge with regard to the reliability of the systems that house the data that the government at least has represented that it will be using in its response to plaintiffs' case-in-chief.

Ms. Infield as experience specifically with regard to IRMS and other systems that are directly pertinent, and her testimony is solely with respect to the reliability of the data, the trustworthiness of the systems, and it has nothing to do, Your Honor, with any issue regarding connectivity to the Internet.

Ray Ziler is going to be testifying. Ray Ziler is a certified public accountant in Albuquerque, New Mexico, he was

the partner in charge of various audits when he was with Arthur Andersen, audits of the BIA and in part IIM and Tribal Trust issues. He will be testifying with regard to his understanding of the reliability of the information, concerns about the inability to reconcile the Treasury and Interior accounts, the consequences of those concerns, and what they mean with respect to plaintiffs' claim.

Joan Tyler is another Interior employee. She is the Bureau of Indian Affairs' information technology specialist. She has broader information with regard to certain issues than Mona Infield does at the BIA. She went from the National Institute of Standards and Technology to the BIA; she, too, is not going to be testifying with regard to connectivity, she's testifying with regard to the trustworthiness of the systems that she is intimately familiar with, the reliability of data and data that we believe the government is using in response, and we believe that will be helpful and provide further evidence in support of plaintiffs' claim.

We also have Mr. Jim Miller. Mr. Jim Miller is the former director of the Office of Management and Budget, and former chairman of the Federal Trade Commission in the Reagan Administration. He will be testifying with respect to whether or not plaintiffs are correct that the funds held in the General Treasury Account are funds that would invariably be used by the government, and he would also be testifying that that benefit

conferred, as described by Commissioner Gregg in his testimony before this court in 2003, is correct, the government has benefitted from those funds, and in fact generally the calculations provided by plaintiffs' economic expert, Mr. Brad Cornell, are reliable, fair, and a reasonable approximation of what the benefits conferred are as a result of funds held in the Treasury.

So, Your Honor, we're only presenting seven witnesses to this court in our case-in-chief. We believe this case will go fairly quickly, we believe the information from each witness is material to our claim, we believe that Mr. Cornell and others will be able to explain in detail to the satisfaction of this court how we arrived at those calculations, and, Your Honor, we expect that this court will be satisfied that what we have done is reasonable and fair and represents an amount of money that is due our clients.

And again, Your Honor, we thank you very much for this trial. We've been waiting 12 years for it. We believe it's important to move on. Our clients have been waiting for this; as this court pointed out, class members have been born into this class and have died during the course of this action. It's time for relief, it's time for the trustee to understand what its obligations are, and we believe restitution is appropriate, we believe monetary recovery is appropriate, we believe our witnesses are sound and will be very informative to this court.

And Your Honor, we hope that we never have to see this situation again, because we hope that the remedy is sufficient to provide the incentive to discharge the trust duties prudently in the future.

THE COURT: Thank you, Mr. Gingold. Mr. Kirschman?

MR. KIRSCHMAN: During the course of the trial, you will certainly have this on the large screen, and I will be speaking generally to it today.

THE COURT: Speak to me. You can speak about that.

MR. KIRSCHMAN: I will be addressing -- Your Honor, I will be speaking to you and addressing that flow of funds chart for a brief time, but it will be explained in much more detail and be before you for a longer period of time during the trial.

THE COURT: All right.

MR. KIRSCHMAN: Your Honor, consistent with this Court's May 2nd order, we are here today to address money that was, one, received into the Department of Interior's IIM system; but two, was not shown at the October hearing to have been posted to IIM trust accounts; and three, was not explained by us, defendants, at that October hearing.

We will also address, as the Court indicated we should, whether plaintiffs can meet their burden of proving their allegation that the United States derived a benefit by wrongfully withholding these funds instead of disbursing them to IIM trust beneficiaries.

The defendants' witnesses and exhibits, Your Honor, will address each of these topics in detail. They will establish that there's no legal or factual basis to pay plaintiffs billions of dollars, or even anything close to $1 billion. The contemporaneous documents and the rational statistical analysis of those documents will demonstrate instead that approximately one percent of all collections and disbursements over the IIM system's 120-year history cannot be accounted for at this time. This amounts to millions, not billions of dollars still in question.

The reasons for that conclusion will be clearly set forth to you, Your Honor. In summary, the testimony and exhibits will demonstrate the following:

One, you will see that the money that was received into Interior's IIM system was not posted into IIM accounts for individuals was never supposed to be received by IIM beneficiaries. Instead, it was money that was rightfully supposed to go, for example, to tribes, to third parties, such as disappointed bidders, or to the government as administrative fees. And Your Honor, you will recall that in October you did hear testimony and see evidence to that extent.

The evidence we will present will demonstrate the process by which that money was correctly distributed to those parties. There is simply no reason plaintiffs should be paid money because of those proper distributions.

The Court earlier has focused upon two documents from the October hearing, DX-365 and AR-171. However, neither of those documents indicate in any way that money that actually should have been posted to IIM accounts was not posted to those IIM accounts. The evidence we present will demonstrate the proper flow of money within the IIM system, including the money to the IIM accountholders. Plaintiffs will not be able to demonstrate anything to the contrary.

Your Honor, you have noted that the flow of some money collected was not explained by the government's accounting efforts presented at the October trial, and there are good reasons for that, Your Honor. First, the history and purpose of the IIM system was to provide decentralized beneficiary services for individual Indians, and those services were spread among a large geographic area. The IIM system was never devised to manage individual accounts on an aggregate basis, or to report on operations in a consolidated manner. There has been no historic need for an aggregate analysis with respect to the entire IIM system.

Nevertheless, some limited aggregate data does exist from the 120-year period we're addressing, and those records do cover a relatively high percentage of the collections and disbursements throughout the system.

Second, Your Honor, throughout this litigation the courts have required a historical accounting be performed of the

funds held in Individual Indian Money accounts, and that is where Interior has focused its resources and its time since at least 2001. At no point until this past year was Interior charged with analyzing the aggregate amount of money that passed through the entire IIM system, but that was then correctly disbursed to parties other than the individual Indians. This money was not posted or intended to be posted to IIM beneficiaries.

Even at the October hearing, we, defendants, did not understand that we were being charged with explaining the disbursement of all the funds that entered the IIM system. Certainly DX-365 and AR-171 were never intended to address that broad topic. DX-365, you may recall, was developed solely for the October hearing, and its purpose was to show how much throughput could be covered by Interior's 2007 accounting plan given various assumptions concerning the characteristics of the IIM accounts. DX-365 has no bearing on any liability to any member of the plaintiff class.

In similar fashion, Your Honor, AR-171 was merely included in the October record as part of the administrative record, because that information, the information contained in AR-171, was considered by the Department of Interior when it was considering how to prepare its 2007 accounting plan.

It was presented at trial to demonstrate the amount of money that was collected into the entire IIM system based on the

Court's request for throughput information. It was not intended to address all of the disbursements, and you recall it did not address all the disbursements made in the IIM system throughout the 120-year period of the IIM system.

But Your Honor, we certainly recognize that these matters are now in the past, and we are prepared to answer the questions raised in the Court's May 2nd order. Since January 2008, the Department of Interior, its contractors, and the Department of the Treasury have dedicated many resources and much time to provide the Court with the information that you have deemed to be relevant to this trial. Given more time, the Department of Interior could continue to uncover more relevant documents, could continue to analyze those documents, and as a result it would refine its numbers.

There are still gaps within the historical records that research has not yet been able to fill; however, every indication is that as more documents would be collected and more data would be analyzed, it would serve to only further demonstrate that the IIM systems were properly used and that money was disbursed to the proper party.

As it is, Your Honor, the evidence and the analysis of those records that we do have demonstrate that nearly 100 percent of all the funds that were posted into the IIM trust fund were disbursed to individual Indian beneficiaries. This will be explained to you in detail by our witnesses. These are

witnesses who have been working with this information for years, and from some of whom you have heard testimony previously back in October. These include Michelle Herman, Dr. Fritz Scheuren, and Dr. Ed Angel, our historian.

Your Honor, plaintiffs will not be able to meet their burden of producing contrary evidence that shows that the government has failed to disburse any significant amounts of IIM funds to the IIM beneficiaries. Plaintiffs have claimed previously that they're owed approximately $58 billion. They bear the burden of proving this at trial. That claim will not withstand scrutiny during the course of the trial.

To the extent that they present at trial a case consistent with what we had seen from their earlier briefings, Your Honor, plaintiffs' arguments and calculations are dubious at best, because they have selectively used data and documents, while at the same time ignoring other actual data that would undermine their position. And this will be a focus of the evidence and the testimony we will present to you.

In contrast to the evidence and testimony we will present, we anticipate that plaintiffs will continue to misstate the amount of funds that should have been in the IIM trust fund by including amounts that clearly do not belong there. They will apparently rely upon also, Your Honor, the testimony of professional witnesses who have no real substantive understanding of the relevant documents or the data or the

processes within the IIM system. And these witnesses, Your Honor, will be used to buttress plaintiffs' incorrect premise, one of which is the unreliability of the data.

Plaintiffs, Your Honor, will not establish that 4.5 billion was not disbursed to IIM accountholders that should have been disbursed to them. This is a figure that plaintiffs have represented earlier to the Court and to us, defendants, in their filings, and to the extent they're going to act consistent with that here, they will not be able to demonstrate that amount has not been disbursed.

Plaintiffs, as we understand it, will begin their analysis with information from last October's AR-171. If again they proceed consistent with their filings to you earlier this year in April, they will deviate from that data and ignore the information contained in portions of AR-171. For that reason, their contention that $4.5 million was posted to IIM accounts but not disbursed will be shown to be patently incorrect.

Plaintiffs' manipulation of the data led to, one, you will see, inflated receipt amounts; two, disproportionately low disbursement amounts; and, in turn, three, an erroneously low disbursement rate.

For example, you heard this morning, Your Honor, about a 70 percent disbursement rate, but we will present testimony and evidence that shows that that does not include, as it should, disbursements made to Tribal Trusts.

Plaintiffs also incorrectly treat all Osage headright revenues as being IIM, being Individual Indian Monies. That will be shown to be incorrect.

Plaintiffs will apparently also seek to include over $1.5 billion in Tribal IIM money as receipts, despite the fact that this court has already recognized that Tribal IIM is not properly to be included in individual IIM accounts.

As a final example, Your Honor, we anticipate that plaintiffs' disbursement rate will not account for electronic fund transfers. During this trial we will demonstrate the significance of that omission.

Your Honor, there has been no wrongful withholding of IIM trust funds, and plaintiffs will not meet their burden of demonstrating that in the coming days. For them to collect the $58 billion that they seek, they must prove not only that the government failed to disburse IIM funds, but also that it improperly withheld billions of IIM for long periods of time. They cannot meet that evidentiary burden. There's no evidence that the United States has wrongfully withheld any significant amount of funds over the past 120 years. We know of no such evidence, and we anticipate that plaintiff will not be able to offer such evidence supporting any specific scenario under which money was wrongfully withheld.

Your Honor, then beyond the issue of whether money was wrongfully withheld, there's also not going to be any evidence

that withheld funds were used to benefit the United States. Even assuming, Your Honor, that not every dollar collected into the IIM system can be mapped to a precise disbursement, there is no evidence that the United States gained a benefit by withholding that money.

The United States can only benefit from IIM money -- someday I'm not going to miss not saying that acronym.

THE COURT: You've had a lot of practice, Mr. Kirschman.

MR. KIRSCHMAN: I have. IIM money that it actually had the use of and that was not dedicated to any beneficiary's use or benefit.

Therefore, for example, Your Honor, money held in commercial banks did not benefit the government; money that was invested on behalf of the IIM beneficiaries and then was subsequently paid to the beneficiaries did not benefit the government; funds that were properly classified as IIM trust funds and held in the account of an IIM beneficiary did not benefit the government.

Even money that might have been lost somewhere - for example, Your Honor, it was paid to the wrong party - was not money from which the government could benefit, because the United States did not have use of that money.

Now, the testimony and evidence we will present, Your Honor, will disprove plaintiffs' theories. Our case is based on

actual documents, the testimony of witnesses who have worked with these documents for many, many years, and who are familiar with the IIM system. And we will demonstrate through these documents and reasonably widely accepted statistical analysis that plaintiffs are not entitled to large sums of money as a result of this trial.

You've already made note of the flow of funds chart we have here, Your Honor, and throughout the trial, especially in regard to the testimony of Ms. Herman, we will explain that flow of funds within the IIM system.

True IIM dollars, money that should be posted to the IIM accounts of beneficiaries, are and have always been only a part of the total collections into the IIM system. That is what this chart depicts, Your Honor. It demonstrates -- if you look at the far left-hand side, there's a green box. It depicts in that box the money that flows in into both individual accounts and non-individual accounts, as then is depicted in the middle in the blue box.

You'll see the top half of the blue box, Your Honor, depicts non-individual accounts, and beneath it there are the individual accounts which concern us here in this case, and which always have, as we talk about historical accounting. Within the IIM system, Your Honor, different types of transfers may occur, as is demonstrated in the blue box with the circular arrows.

Finally, then, Your Honor, as we move to the right of the chart, disbursements are then made from the money collected, and these disbursements are made to many parties, including but certainly not limited to IIM beneficiaries. And these are shown in the brown boxes on the far right of the chart.

Our continuing research has demonstrated that a significant percentage of money entering this IIM system, the total system, over the years was not IIM trust account money. For example, Your Honor, it was tribal money, and I have an example I would like to briefly show you as to the type of evidence you'll see on that front.

This document -- is it on your screen, Your Honor?

THE COURT: Yes.

MR. KIRSCHMAN: This document is a BIA intrabureau cash transaction authorization, and it demonstrates how Tribal IIM - again, that's depicted in the top half of the blue box in the flowchart - is disbursed into a Tribal Trust account.

The account number at the top left corner of the document, starting with 145 T, tells us that this is Tribal IIM being disbursed, and this document shows that the money was disbursed to the Warm Springs Tribe's proceeds of labor account, you can see in the collection box, which is depicted on the large flowchart in the middle brown box.

The document demonstrates that almost $9 million, Your Honor, including interest, was disbursed in this one

transaction. It also establishes why the money was disbursed to the Tribal Trust, and this was an issue you heard some testimony on back in October.

The reason it was moved was to remove Tribal IIM out of the IIM system, pursuant to the OTFM - and that's the Office of Trust Management - pursuant to the OTFM policy to, quote, "prohibit the establishment of tribal accounts in the IIM system."

Another example of money that was never intended to be received by IIM beneficiaries, Your Honor, was, as Mr. Cason told you back in October, bid deposit money. This document, Your Honor, is a 1910 report of the Commissioner of Indian Affairs. It is an excerpt at pages 68 and 69, and it is an example that demonstrates that disbursements have been made to disappointed bidders as early as 1910.

This image, Your Honor, is a blowup of the bottom of page 68 and 69. It makes it easier to see that in the 1910 fiscal year, of the approximately $7,657,000 disbursed from the IIM system, approximately $2,720,000 was returned to unsuccessful bidders. If you do the math, Your Honor, that comes to approximately 35 percent of the disbursements for that fiscal year. That return of the bid deposit money is reflected in the top orange arrow on this flow of funds chart, and the brown box to third parties.

Your Honor, you will recall that I earlier stated also

that money held in commercial banks should not benefit the government or could not benefit the government. This page of the 1910 commissioner's report is also relevant to that point. It shows that as of July 1st, 1909, approximately 4.7 million was located in bonded banks to the credit of individual Indians, and that was of a total 6.6 million in the IIM system.

Significantly, it shows that in the following year, if you look at the lower part of this image, individual Indians drew over 2.5 million in checks from their bank accounts. Finally, this page demonstrates that by the end of fiscal year 1910, there was then almost 6.9 million in bonded banks to the credit of individual Indians, of the total balance of $9.6 million in the IIM system.

These are the documents, these are the type of documents our witnesses have reviewed, have been reviewing for years, and will discuss with the Court in the coming days.

One final example, Your Honor, shows how IIM money has over the years been correctly separated from other money that was never supposed to go into any IIM beneficiary's account, where both the individuals and tribes were, for example, on a lease.

This example relates to -- consists of two documents. The first document is another BIA intrabureau cash transaction authorization form. This form, Your Honor, shows forestry income, nearly four and a half million dollars, being disbursed

from a Special Deposit Account - or an SDA, as we all know them - to several Tribal accounts. You can see, Your Honor, that the money is being disbursed from 14X-6039 to three Tribal Trust accounts which are indicated by the 14X-7 at the beginning of the account numbers.

On our flow of funds chart to my left, this transaction is shown by funds moving from an SDA in the blue box to the brown Tribal Trust box to the far right.

Before we leave this document, you can see that it is based on a journal voucher, and it's at the bottom right-hand corner, journal voucher number 3P11T018. Turning to that journal voucher, you will see that a credit entry appears in the amount of approximately $564,000. That amount represents a 10 percent forest management fee transferred to the government. That is what the FMF indicates on the first line of this entry.

Turning back to our flow of funds chart, Your Honor, that is depicted within the blue box as an administrative-to-administrative transfer. The funds were moved from an SDA to an administrative account.

Turning to the second page of the journal voucher, Your Honor, you will see the transfer of the funds to the three tribes; you will also see the funds that were disbursed to them -- and these funds are the same figures that were then two days later disbursed by the disbursing agent.

Finally, Your Honor, if we look at the bottom portion

of this second page, we see a transfer of funds from the SDA to the Individual Indian Money accounts. This entire transfer totaled approximately $5,640,000, and of that total, the IIM accounts made up roughly 11 percent of that amount. In our blue box, in the IIM system, that was a transfer that went from the top box, non-individual accounts, to the individual accounts.

And finally, regarding this document, Your Honor, it's significant that it was prepared and signed by the forest manager in charge, as well as being approved by the superintendent and the designated disbursing agent, just as the previous document had been executed by the deputy disbursing agent.

These examples and the others that will also be presented to you at trial by Ms. Herman will establish that because large amounts of money are not IIM trust money, they are not part of the historical accounting question that is central in this case, that has been central now for almost 12 years, and therefore should not count in calculating any remedy.

In this light, it should be clear that DX-365 did not suggest a discrepancy in the amounts that should have been paid to IIM beneficiaries, or provide a basis for any liability against the United States. It only demonstrated a reality of the IIM system, and that is that large amounts of the dollar flows are simply not beneficiary dollars.

To the extent, Your Honor, there are IIM trust dollars

not readily reconciled by the research and the statistical analysis performed to date, the average estimated amount of those IIM trust dollars is, based upon the data that is now available, calculated to be approximately $158 million. And even that amount undoubtedly continues to contain a significant amount of Tribal monies, Your Honor, because of the fact of this IIM system and what is included within it.

Research and analysis to update the throughput estimates that were contained in AR-171 show that taking into account the actual current balance of dollars held in the IIM system, the difference between the reported trust balances and the estimated average sum of all IIM systems transactions is approximately that $158 million. This figure reflects just a little more than one percent of total collections into the IIM system over its entire history.

These results are consistent with a statistical analysis performed by NORC, led by Dr. Fritz Scheuren. NORC has constructed a comprehensive model that uses available data to estimate a reasonable range within which the IIM system balance should lie with a high level of confidence. The $158 million calculated figure falls comfortably within that range.

NORC has undertaken a statistical analysis using a series of methods preferred by statisticians for addressing missing data. As Dr. Scheuren will explain to you in detail, Your Honor, NORC's model uses available data to measure the

uncertainty within the model. The point estimate, the point estimate developed by NORC's model for the IIM system balance, and that represents a mean, is consistent with what the calculated updates to AR-171 demonstrates that, there is an approximately $158 million difference between the reported IIM system balance and the balance that could be explained using available data.

And by the way, Your Honor, as we show the revised AR-171, it will now be referred to I believe as DX-371, because, of course, in this trial there is no administrative record.

Further, Your Honor, statistically, at a 95 percent level of confidence, the evidence we present will demonstrate that this difference could be at worst no more than $365.7 million.

Now, beyond the statistical analysis by NORC and the very detailed work provided by FTI and Ms. Herman, the work performed during Interior's historical accounting efforts, the paragraph 19 analysis, and the settlement packages that have been prepared by Treasury and GAO over the years from 1890 to 1951, will also demonstrate that the documents used in this exercise are reliable. They will discredit any argument that billions of dollars could have been hidden by the government.

You heard argument this morning that the unreliability of the documents used will be raised by plaintiffs' witnesses. However, Your Honor, if you look at the work that was done by

Interior and its contractors in the historical accounting efforts, such as the Litigation Support Accounting, you will recall that that work was based on actual documents, and refute any claims of unreliability. The government's documents and calculations during this work demonstrated regularity of process and good faith in practice that rebut any presumption that any undocumented disbursement equals an amount not paid to an IIM beneficiary.

The remedy in this case must flow from the alleged injury, and that alleged injury here is a failure to provide historical accounting. Plaintiffs will not be able to demonstrate any causal connection between the remedy they seek and the breach which has led us to this trial.

Finally, Your Honor, we will also present evidence that demonstrates that plaintiffs' allegation that the United States wrongfully withheld funds within the Treasury general account for the benefit of the government is factually defective. Thus, for example, the testimony and evidence will explain the Department of the Treasury's cash concentration system and the funds accounting system, which Treasury employs to track the flow of cash and the movement of funds. This evidence will establish, contrary to plaintiffs' allegations, that large sums of cash could not and have not accumulated to the benefit of the government.

In summary, Your Honor, at the end of this trial it

will be clear that plaintiffs could not carry their burdens of proof, they cannot get over the hurdle of proving their allegations that $4.5 billion was owed to individual beneficiaries and was then not disbursed to them, and they will be unable to establish that the United States wrongfully withheld billions of dollars from IIM beneficiaries and then benefitted from the use of that money.

This court should, based on the actual documents that do exist and will be presented and addressed by our witnesses, reject plaintiffs' flawed premise that the records relevant to this inquiry are unreliable.

Given more time, Your Honor, defendants could perform more work that would reduce the amount of unexplained monies even further. However, even at this point in time, with the limited amount of time and resources defendants have had to address the Court's inquiries, the evidence and testimony will demonstrate that the difference between the current reported ending balance of the IIM system and the average statistical estimate of the ending balance, is approximately $158 million.

Further, employing a confidence level of 95 percent, the evidence will establish that at worst, no more than $365.7 million cannot be explained within the IIM system. And again, Your Honor, I cannot stress enough that even that amount includes far more than only Individual Indian Money accounts, for the reasons I've discussed earlier.

Your Honor, we thank you for your consideration of our evidence and our witnesses, and we appreciate you handling this case in the manner you have. Thank you.

THE COURT: All right. Who's going to call the first witness? I guess everybody now has a seat. Proceed, sir.

MR. GINGOLD: Thank you, Your Honor.

Professor Laycock.

(Oath administered by Courtroom Deputy.)

MR. GINGOLD: Your Honor, are we going to handle the witnesses the way we did in the last trial, without a voir dire, and we're supposed to give you a summary of who they are?

THE COURT: Oh, yeah, we don't need a big voir dire. This man has already testified, has he not?

MR. GINGOLD: No, he has not, Your Honor.

THE COURT: All right. Well, what are you offering him to testify about and what objection is there to his expertise?

MR. GINGOLD: Your Honor, we're offering Professor Laycock to testify about restitution, unjust enrichment, and remedies.

MR. KIRSCHMAN: Your Honor, we had previously made our objections regarding this line of testimony, and you had addressed that pretrial.

THE COURT: Right. But now the question is, what about the qualifications of this witness to give testimony on this subject? Any objection?

MR. KIRSCHMAN: We do not challenge Professor Laycock's qualifications.

THE COURT: Just give me a CV and give us the barest outline of his credentials, and we'll get on with the substance.

MR. GINGOLD: Your Honor, we could put his CV on the screen if you like. Let me see if I have the hard copy.

I do have one yellow highlight on it, Your Honor.

THE COURT: That's all right. Thank you.

MR. GINGOLD: Your Honor, just briefly, Professor Laycock is a Yale Kamisar Collegiate professor of law at the University of Michigan law school. Professor Laycock is a graduate of the University of Chicago, with honors; he clerked for a 7th Circuit United States Court of Appeals judge, Judge Water Cummings; he is a fellow of the American Academy of Arts and Sciences; he teaches remedies, restitutions, and religious liberty; he is second vice president of the American Law Institute, he has been since this year; he's a member of the council of the American Law Institute, and has been since 2001; he's involved in the restatement third as an advisor and a member of the council. That's a restatement of third restitution, Your Honor. He has been a lecturer at many law schools and universities.

Prior to his position at the University of Michigan, he spent 25 years teaching at the University of Texas law school; he had several chairs at the University of Texas law school.

Prior to the University of Texas, he was a professor at the University of Chicago; at the University of Chicago, Your Honor, he taught equity restitution. Your Honor, at Texas he taught remedies.

He has written books and articles; one of his books is "Modern American Remedies, Cases and Materials." He's also written articles on how remedies became a field, the scope and significance of restitution in the "Texas Law Review."

He's written a preliminary report on a restatement third of restitution, report to the director of the American Law Institute, 1987, and, Your Honor, he has been involved as an advisor on the restatement second of restitution back in 1984 and 1985, and he has been involved as an advisor on the restatement third restitution and unjust enrichment since 1997.

THE COURT: Professor Laycock is obviously a distinguished academic scholar. We're happy to have him here. Proceed with the testimony.

MR. GINGOLD: Thank you very much, Your Honor.

(**DOUGLAS LAYCOCK, PLAINTIFF WITNESS, having been duly sworn, testified as follows:)**

DIRECT EXAMINATION

BY MR. GINGOLD:

Q. Professor Laycock, can you describe damages and restitution?

A. Damages and restitution are two of the fundamental categories of the law of remedies. These categories are used in

substantially every remedies book, the treatises and the case books; in many of those books they're part of the title. The title will be "The law of remedies, damages, equity, restitution." And the modern remedies course was created by combining previously separate courses in damages, in equity, and in restitution.

So there are two different kinds of remedies, and they're fundamentally different from each other.

Q. Are they fundamentally different in substance?

A. They're different -- well, they're different in many ways. They're different in the purpose that they're trying to achieve, they're different in the measure of recovery, they're also different historically.

The only reason I hesitate on substance is some people wonder whether remedies are substantive or procedural. I think remedies are substantive, and so yes, they're different in substance.

Q. Have you, in the course of your research and your writings and your teachings, come across Dobbs?

A. Yes.

Q. And Dobbs, what has Dobbs written?

A. Dan Dobbs at the University of Arizona has written the leading treatise on the law of remedies. The first edition is 1973, second edition is 1993. I've used it my whole career. Everyone in the field uses it. It's often cited by the Supreme

Court.

MR. GINGOLD: Plaintiffs would like to mark for identification, Your Honor, Plaintiffs' Exhibit 2, which is Dobbs "Law of Remedies, Damages, Equity Restitution," second edition, Volume I.

BY MR. GINGOLD:

Q. I would like to turn your attention, Professor, to page three.

THE COURT: So this is Laycock on Dobbs on remedies?

MR. GINGOLD: I believe Professor Laycock --

THE COURT: Professor Laycock probably has his own views.

BY MR. GINGOLD:

Q. Do you agree with the highlighted section that is identified on page three of Dobbs?

A. I do. That's what I testified to just a minute ago, that these are fundamentally different and basic categories of remedies.

Q. And with regard to damages, if you can turn to page three just for clarification -- sorry, page four. Page four is a statement with regard to what damages constitutes. Do you agree with that, Professor Laycock?

A. I do agree. And the point is that damages are aimed at compensating the losses to the plaintiff, and they're measured by plaintiffs' loss. They're measured on the plaintiffs' side

of the transaction.
Q. And I would like you to turn your attention to page six. You see the highlighted section on page six, and it discusses restitution. Correct?
A. Yes.
Q. Have you read that before?
A. I have.
Q. Are you familiar with what it means?
A. I am.
Q. What does it mean?
A. Well, it means that the purpose of unjust enrichment is very different -- or of restitution is very different from what I just described as the purpose of damages. The purpose of restitution is to deprive the defendant of any unjust enrichment in the transaction, so the restitutionary recovery is measured on the defendant's side of the transaction. Damages are designed to compensate the plaintiff's losses, restitution is designed to take away the defendant's gains.

Sometimes they're called profits and sometimes they're called benefits, but what the defendant got out of the transaction is the measure of recovery and restitution.
Q. Now are there variations in the measurement of damages or restitution?
A. There are.
Q. What are they?

A. Well, I doubt the judge wants to hear much about variations in damages. We have different measures for tort and for contract, and for intentional tort and negligence and so forth.

On the restitution side, we have -- there are a variety of different restitutionary remedies with somewhat different histories. We're going to mostly be discussing the accounting for profits, which is a measure of recovery against fiduciaries or against conscious wrongdoers other than fiduciaries, and it includes all the profits that the defendant received in any way from the transaction.

MR. GINGOLD: I would like to mark for identification Plaintiffs' Exhibit 4. If we can highlight or identify, separate the top section.

BY MR. GINGOLD:

Q. This exhibit has identified four different distinctions. Did you prepare this exhibit, Professor?

A. I did.

Q. Okay. What do you intend to convey with this exhibit?

A. Well, the part that is currently highlighted is designed to illustrate the differences between damages and restitution with respect to the claims that are now being made in this case, or that were being made earlier could have been made in this case. So it repeats the basic definition that damages are measured by the plaintiff's loss and restitution is measured by the defendant's gain.

So a damage claim in this case would be very different from the restitution claim that's actually being asserted. The damage claim would include -- and I don't know if these things exist, but these are the allegations that have been made or could have been made.

It would include income that should have been collected but never was collected by the government, it would include assets that were sold or leased at prices below the market price, assets that were mismanaged, improvements that were allowed to deteriorate, money that was lost or stolen, money that wasn't collected because leases weren't enforced or direct pay contracts weren't collected or weren't paid on.

All of those would be examples of money that were losses to the plaintiffs, but that money never came into the hands of the government so it wouldn't be a benefit to the government. And so none of those are at issue in this case, but they illustrate the extent to which a damage claim would be very different from the restitution claim.

The restitution claim includes only funds that were collected by the government and retained by the government, and then income earned on those funds or interest saved on those funds. So the restitution claim is practically quite different from the damage claim, as well as conceptually.

Q. You just said both interest earned and interest saved. Correct?

A. I did say that.
Q. Is that a traditional understanding of what profits are?
A. Yes, that's part of the traditional understanding of what profits are. The new restatement takes the position that savings of expense to the defendant are the same as income earned, and there's a whole section, Section 7 is about cases in which the unjust enrichment to the defendant is that someone paid off part of his indebtedness.

So reduction of debt is a form of unjust enrichment. There are lots of cases about that. That's very well settled.
Q. And as applied to this case, is it your understanding that that is the form of restitution that plaintiffs are seeking?
A. It's been explained to me that the economist's model that's going to be presented is based on the assumption that the government was able to pay off debt and pay less interest.

My own view from the law side is that it really doesn't matter whether the government invested in banks or its own securities and earned interest, or whether it redeemed securities and saved interest, that those are equivalent forms of unjust enrichment.
Q. Now, the view you're stating is not a controversial view, is it?

THE COURT: Repeat that.

BY MR. GINGOLD:
Q. It's not a controversial view, the fact that cost savings or

benefits in that context are equally considered to be profits for point of view --

THE COURT: Leading question, unobjected to, I'll allow the answer.

A. I don't believe it's controversial with respect to the reduction of debt or reduction of interest. I think there has been some controversy with respect to savings of expense that are more remote or more consequential, but I don't think there's any controversy about reduction of debt and the accompanying reduction of interest.

BY MR. GINGOLD:

Q. Do you have any understanding as to whether or not there's a relationship to trust law -- relationship of restitution to trust law?

A. Restitution is a familiar remedy in trust law. It's one of the oldest and most basic applications, and indeed much of the rest of the law of equitable restitution was developed by analogy to the duty of the trustee to give up any profits he earned from the trust.

So we talk about constructive trusts and we talk about accounting for profits by infringers of intellectual property and the like; all that law developed by analogy to this core application of restitution to express trustees.

Q. Now, with regard to the application, is there a unique vocabulary associated with restitution?

A. There is some very odd and old fashioned vocabulary associated with restitution.

Q. Could you please explain?

A. Well, restitution and unjust enrichment are global terms for this whole body of remedies, and restitution was popularized as the label for the field with the restatement of restitution in 1937. There are some older uses, but it wasn't that commonly used before then.

Under that heading of restitution of unjust enrichment, there are a number of more specific remedies, some of them legal with names out of the root system, and some of them equitable. And the kind of equitable restitution we're talking about here is called accounting for profits, most commonly, that the trustee has to account for any profits he made from the trust. Some of the courts call it disgorgement of profits; my sense is that disgorgement is a more recent term, but you see it quite commonly.

Sometimes the courts say gain or benefit instead of profits. Profits gain and benefit are all equivalent; accounting for and disgorgement of are pretty much equivalent; and sometimes you see other vocabulary, he has to surrender his profits or give up his profits.

But accounting for profits is the oldest label, and I think still probably the most common label.

Q. Is that traditionally in equity or at law?

A. It's plainly in equity.
Q. Do you have an understanding of how federal law treats restitution?
A. Federal law treats restitution pretty much the same way state law does, and there are a lot of federal cases, including Supreme Court cases, in many contexts, go back a long ways.
Q. Are you familiar with ERISA cases that have been recently decided by the Supreme Court?
A. I'm familiar with a recent line of ERISA remedies cases. I'm not an expert on the substantive law of ERISA in any way.
Q. Is there any relevance, in our view, of the ERISA decisions to issues in this case?
A. The recent ERISA remedies cases have been the occasion for the Supreme Court to explain and summarize the law of restitution, and especially the law of equitable restitution.
Q. Now, in those cases, is there anything that -- or let me ask you specifically, are you familiar with *Mertens vs. Hewitt*?
A. I am.
Q. What is your understanding of that case? What does it deal with?
A. *Mertens vs. Hewitt* was a suit against the actuary of an ERISA retirement plan, essentially for actuarial malpractice. It was basically for damages caused to the plan by the actuary's mistakes.
And the holding in the case is that's a legal remedy,

not an equitable remedy, and so the plaintiff couldn't get it under ERISA. And it's been criticized on that ground, that all remedies about trust enforcement should have been treated as equitable, but that's the holding, that's not the reason the case is relevant here.

The reason the case is relevant here is in the course of reaching that holding, the Court explained the difference between damages and restitution.

MR. GINGOLD: Plaintiffs would like to mark for identification Plaintiffs' 8, which is the *Mertens vs. Hewitt* decision.

BY MR. GINGOLD:

Q. And I would like you to turn your attention to page three. This is a highlighted section.

MR. GILLETT: Your Honor, if we could be provided with hard copies of these.

THE COURT: I was just about to say, if you're going to cite a Supreme Court case, you don't have to put it in evidence, you can just cite it. Everybody can get it on their computers.

MR. GILLETT: With regard to the previous documents that were shown that were created with the highlighting, we don't have that in hard copy.

THE COURT: Yes, you should get hard copies.

MR. GINGOLD: Your Honor, they haven't provided us with anything that they used in the opening.

THE COURT: If you're introducing it at trial, you need to give him a copy of it.

MR. GINGOLD: Okay. We won't use -- we don't have hard copies right now.

THE COURT: But you can get them later, can't you?

MR. GINGOLD: Yes, we will. I thought you wanted them contemporaneously right now. We don't have them right now.

THE COURT: We live in an electronic age.

MR. GINGOLD: Your Honor, may I proceed?

THE COURT: Yes, proceed.

MR. GINGOLD: Thank you.

BY MR. GINGOLD:

Q. Do you see the highlighted section of *Mertens*?

A. I do.

Q. Have you read this before?

A. I have.

Q. What does that mean to you?

A. This is the opinion of the Court, and it's explaining the difference between damages and restitution in the same way that I explained it earlier; the fiduciary is personally liable for damages, for restitution.

And then the quotations in parentheses are quotations from the statute that provide what the remedy is, and the Court is characterizing those remedies as damages and restitution respectively.

So to make good to the plan any losses to the plan, the Court says is damages; to restore the plan any profits of such fiduciary made through the use of the assets, the Court describes as restitution.

Q. So the use of the term damages and restitution does not concern you, does it?

A. Well, it's an example of the Supreme Court explaining these terms exactly the way I tried to explain them a few minutes ago.

Q. Now, are you familiar with another ERISA case which is *Great West Life vs. Knudson*?

A. Yes, I am.

Q. What is your understanding of what that case involved and what it held?

A. Well, that was a follow-up case to *Mertens*. The relevant ERISA provision here draws a different distinction, actually, from the one we're talking about. It says that if you're suing a nonfiduciary under ERISA, the plaintiff is entitled to any equitable relief but not to legal relief. So it's not a damages/restitution distinction as such, it's legal/equitable.

And in *Great West*, the plaintiff formulated her claim -- it was an insurance company. I'm sorry. The plaintiff formulated its claim in terms of restitution, but the Court said the kind of restitution they were seeking was legal, not equitable, so they couldn't get it.

And in the course of that holding, they explained the

difference between legal and equitable restitution, and they explained the accounting for profits.

THE COURT: Mr. Gingold, I get the distinction between damages and restitution. That's not a problem. The problem is who the defendant is in this case, and what the jurisdictional limitations are on what the government can pay out.

Now, just to call it damages and restitution in an ERISA context or in some ancient context is helpful, but it doesn't get me to what I think we all understand to be the real legal nut of this restitution problem, or the gain problem, which is what can the government be required to pay, if anything.

So if you could direct the professor to cases involving the government as a defendant, it would be most helpful to my problem.

BY MR. GINGOLD:

Q. Professor, do you have any understanding as to whether or not there are Supreme Court or other cases that exist where the government is a defendant and the government has been held accountable in restitution or unjust enrichment?

A. To some extent, yes.

Q. And what is your understanding?

A. Well, the one clean example that I'm familiar with is a case called *Henkels vs. Sutherland*.

MR. GINGOLD: Plaintiffs would like to mark for

identification Exhibit 10.

BY MR. GINGOLD:

Q. Professor Laycock, is this the case that you were referring to?

A. Yes, it is.

Q. I would like to turn your attention to the page three. And by the way, can you describe this case and state whether or not the government was the defendant?

A. An officer of the United States was the defendant. The custodian of alien property during wartime, the government was seizing the property of enemy aliens, and what happened in this case was they mistakenly seized the property of a citizen and held it through the course of the war. And the citizen is suing to recover his property and to recover interest on the property.

Q. I would like you to turn your attention to the highlighted section on page three of this opinion. Have you read this before?

A. I have.

Q. Let me read this to you, and maybe you could explain whether or not you believe the government is treated the same way as private parties with respect to restitution.

Quote, "We cannot bring ourselves to agree that a direction to invest such money in securities of the United States, rather than in other securities, may be utilized to enable the government unjustly to enrich itself at the expense

of its citizens, by appropriating income actually earned and received, which morally and equitably belongs to them as plainly as though they had themselves made the investment."

What is your understanding of that statement?

THE COURT: That speaks for itself, doesn't it, counsel?

A. It mostly speaks for itself. I think the beginning of the sentence is a little odd, and that reflects the government's argument that -- the government conceded it had to make restitution of income earned on the original shares of stock that they had seized from the plaintiff, but they said once we sold the shares of stock and invested in government securities, we're no longer accountable, we don't have to make restitution of the interest. And the Court is rejecting that defense, and rejecting it on unjust enrichment grounds.

Q. Do you have any recollection as to why the Court expressed concern of the need to ensure that the government did not unjustly enrich itself?

A. Well, what you have highlighted here is a straightforward statement of basic unjust enrichment doctrine.

Q. I would like to go back to this page and there's a highlighted section at the top of the page. If we can focus in on the highlighted section, have you read that before, Professor Laycock?

A. Yes, I have.

Q. What does that mean to you?
A. Well, it says that restitution of profits to the government, even when it's in the form of interest, is not subject to the no-interest rule, and apparently does not require any waiver of sovereign immunity. Because the government -- the unjust enrichment I think is treated as a citizen's own property, and at the end of that highlighted passage the Court suggests that otherwise there would be constitutional problems with the taking of the property.

So they're treating the original property and the interest earned from the property as the plaintiff's own property.

Q. Do you know whether or not the funds involved in *Henkels* were held in trust by the government?
A. I believe the property held under the Alien Property Act was treated as held in trust, but in any event, what's clear is it was always treated as property of the citizen being held by the government, it was not the government's own property.
Q. Now, are you familiar with *Bowen vs. Massachusetts*?
A. Yes, I am.
Q. What is your understanding of that case? What does it involve and what did it hold?
A. Well, it's about a provision in the Administrative Procedure Act, Section 702, and I gather it's been the subject of a lot of discussion here.

702 waives sovereign immunity for any remedy other than money damages, and *Bowen vs. Massachusetts* says money damages is a very familiar term in the law, it has a settled meaning in the law, and that's what it means in the statute. And *Bowen* itself involved specific relief rather than damages, but it's equally true that restitution is not money damages.

So if money damages in 702 means what the Court says it meant, the meaning it's always had in the law, then restitution is also a remedy other than money damages, and 702 waives sovereign immunity with respect to restitution claims.

Q. Do you have any understanding as to what the basis for that holding is? Why did the Court conclude as it did?

A. I think it was a straightforward reading of the text of the statute.

Q. And was it a statutory obligation to pay?

A. Well, I'm sorry, we're talking about two different steps in the Court's reasoning.

The term "money damages" they treated as a term of art. It has a settled meaning; that meaning excludes restitution. That meaning also excludes specific relief.

And what the holding was in *Bowen* is that the specific enforcement of a statutory entitlement was specific relief, and it was not money damages even though it resulted in an award of money.

So they were focused on specific relief as the

alternative to money damages. I've so far been focused on restitution as the alternative to money damages, but they're both clearly distinct from the historic meaning of money damages.

Q. And again, it was the United States that was the defendant. Correct?

A. Well, it was Bowen, who was secretary of a cabinet department in his official capacity, so functionally, yes, the United States was the defendant.

Q. Are you aware of any statutes, have you read any statutes relevant to *Cobell* that provide a statutory obligation to pay interest to the trust beneficiaries?

A. Yes.

Q. Do you recall what they are?

A. Well, there's an 1841 statute and a 1994 statute. I don't have the section numbers memorized.

MR. GINGOLD: Plaintiffs would like to mark for identification Plaintiffs' 11. Your Honor, this is part of the Trust Reform Act.

BY MR. GINGOLD:

Q. Have you read this before, Professor Laycock?

A. Yes, I have.

Q. What is your understanding from reading this statute?

A. Well, I'm not an expert on these statutes, and the judge can read them at least as well as I can, but I can testify to the

nature of the remedy that would be involved in enforcing these statutes. The statute on its face appears to require the payment of interest on funds held for individual Indians.

Q. Do you know whether it's prospective or retroactive in fact?

A. In, let's see, the fourth line of that first paragraph, it says retroactive to the date that the Secretary began investing Individual Indian Monies on a regular basis.

Q. Is this the sort of statutory obligation that existed in *Bowen*?

A. Well, it's a statutory obligation to pay money. The obligation in *Bowen* was a very different statute, but it was also a statutory obligation to pay money.

So the remedy of specifically enforcing that statutory obligation would be the same remedy; it wouldn't be money damages, it would be specific relief to enforce the statutory obligation.

MR. GINGOLD: I would also like to mark for identification Plaintiffs' Exhibit 12, the second paragraph, or the second half of this, if we could focus. A little bit more. The entire part of chapter 25 that's identified, can we focus? Yes, thank you.

BY MR. GINGOLD:

Q. Professor Laycock, have you reviewed this statute before?

A. Yes, I have.

Q. Is this the 1841 statute you were referring to?

A. Yes, it is.
Q. What is your understanding of what it provides?
A. Well, again, the substance of the statute is not really my expertise. But if you go down through Section One to the last sentence, it says, "The Secretary of the Treasury shall -- " and it's talking about the fund that was donated to create the Smithsonian Institution, I think. It says, "The Secretary shall invest at accruing interest any stock of the United States bearing a rate of interest not less than five percent per annum."

And then in Section Two it applies that same standard to all other funds held in trust by the United States, and the annual interest accruing thereon to be in like manner invested bearing a like rate of interest.

So it seems to say that any money held in trust must be invested at at least five percent, and the annual interest accruing thereon must also then be invested at five percent.
Q. I would like to mark for identification Plaintiffs' 13. This is a current codification of the 1841 statute. Have you read this before, Professor Laycock?
A. Yes, I have.
Q. What does this codification mean to you?
A. Well, the language has been simplified, but it appears to say the same thing, that amounts held in trust by the United States government, including the annual interest earned on the

amounts, shall be invested in government obligations and shall earn interest at an annual rate of at least five percent.

Q. With respect to the "shall earn interest at an annual rate of at least five percent," how would you interpret that?

A. Well, I think that speaks for itself. I mean, again, I'm more comfortable speaking to the remedy that would be used to enforce it, but it seems to be a mandatory obligation to earn at least five percent on all monies held in trust, and on a compound basis, including the annual interest that has previously accrued.

Q. Now, is compound interest consistent with your understanding of restitution or unjust enrichment with respect to remedies?

A. Absolutely.

Q. And why is that?

A. Well, because the -- in the absence of a statute, the judge-made equity rule for restitution would be all the profits that inured to the defendant. If the defendant is holding money, compound interest is routinely readily available in our economy, so of course those profits would include compound interest. And anything less than compound interest would allow the defendant to keep part of its profits from the breach of trust, and if a long period of time has elapsed, anything less than compound interest would enable the defendant to keep most of his profits.

Q. So is this statutory obligation, as you understand it,

consistent with the type of obligation that was interpreted in *Bowen* as an obligation that may be recovered as that which the plaintiff had the right to obtain?

A. Well, again, this is a statutory obligation to pay money, it creates a specific entitlement on the part of the plaintiff, and an injunction or other court order to specifically enforce this entitlement, the specific relief within the meaning of *Bowen*, it's not money damages.

Q. Now, are you familiar with the testimony of Professor Langbein in trial 1.5 in 2003?

A. I've read that testimony. I'm in general familiar with it, and I'm familiar with certain parts of it in some detail.

Q. Are you familiar with the parts of that testimony where Professor Langbein referred to the relationship of statute to the trust instrument in this case?

A. In general, yes.

Q. What is your understanding?

A. That the statute -- that because Congress created this trust, that the statutes are the trust instrument. And I believe his position was that each new statute acted as an amendment, but that there is no other trust instrument except for the statutes themselves.

Q. So we're dealing with -- what is your understanding of the effect of the statutes that specifically mandate the payment of interest based on Professor Langbein's testimony?

A. Well, I understand the effect of his testimony to be that the statutory obligation to pay interest, of course it's a statutory obligation on the face of the statute, and I take it he would say it's also a trust obligation, that that is the trust instrument.

Q. I would like to return to Plaintiffs' Exhibit 4, and I would like to look at the categories, the last three items in each column, if we can.

Professor, you testified that you prepared this. Could you explain the categories that are on this exhibit and the importance of them?

A. Well, the point of this is to try to define as succinctly as possible the difference in these various categories of remedies that we've talked about. Actually, we didn't get to the last one yet.

But you recall the one at the top, and the place we started, was the difference between restitution and damages, and that's the distinction that explains why the restitution claim here is within the waiver of immunity in 702.

The distinction between substitutionary remedies and specific remedies was a distinction specifically at issue in *Bowen*, and I think the Court is familiar with it. But it's the difference between money as a substitute for some non-monetary entitlement or money as either the very thing that plaintiff lost or the very thing that defendant gained. And so that's a

different distinction.

But in either case the specific remedies are not money damages, and getting the recovery in either the specific statutory entitlement to pay interest or recovering specifically the money that the defendant earned from the trust, either of those would be a form of specific relief and would not be money damages.

The difference between legal and equitable remedies is the distinction in the ERISA cases, and that's pretty familiar, I think, to the Court, and that has to do with where did the remedy originate, in the courts of law or in the courts of equity before the merger. And again, that's a little different. There were restitutionary remedies on both sides of that divide, there were specific relief remedies on both sides of that divide.

And then the last one here we haven't talked about yet.

Q. Let's talk about it.

A. Well, that's the difference between a simple judgment for money and tracing identifiable assets, and that, again, is different from any of the other three.

If the plaintiff gets a judgment for money, even if he's a trust beneficiary, he gets equal status with all the defendant's other creditors. And if the defendant is going bankrupt, he may not be able to collect his judgment.

If the plaintiff traces identifiable assets and shows

this very bank account or this very fund of money or this very piece of land is identifiable as what was taken from me, then he's treated as the owner of the property, not just a creditor, and he gets priority over all the other creditors.

So tracing into identifiable assets is really not relevant when you're only worried about the plaintiff and the defendant. It's relevant when there are third party creditors out there who may go unpaid, and that's not an issue with the United States as the defendant.

So the difference between judgment for money and tracing identifiable assets is not the same as substitutionary remedies and specific remedies. The accounting for profits, which is the remedy we're talking about here, is a restitutionary remedy, it's an equitable remedy, it ends in a simple money judgment that gives no priority over other creditors, but does not require tracing into identifiable assets. I think on these facts it's also a specific remedy, because the very thing the government benefitted from is money, and it's only that money that the plaintiff is trying to recover.

But as in *Bowen*, the plaintiff doesn't have to identify the specific dollars. There's no talk about erase or identifiable funds in *Bowen*. If the defendant takes $1,000 and the plaintiff seeks to recover that $1,000, that's specific relief, whether or not it's the same one-thousand-dollar bill or

whether or not it comes out of the same checking account. The $1,000 is so directly equivalent to the original $1,000, we treat that as specific. And that's how *Bowen* treated it.

Q. So as a specific remedy, it's not substitutionary relief. Is that correct?

A. If the very thing the defendant benefitted from is money, then getting that money back or disgorging that money is specific relief.

Q. So based on your understanding of the cases where the federal government is either the trustee, in *Henkels*, or in *Bowen*, where it's dealing with specific relief in the context of a statutory obligation, do you see any issues, any negative issues, with respect to the legitimacy of plaintiffs' restitutionary claim in this court?

A. Well, I don't know whether you can prove it, and I haven't reviewed the evidence. But the economic model that you intend to present has been explained to me by the economist, it's a restitution model, and if the evidence supports it, it's a perfectly valid model of a restitution claim, it's not a damages claim.

Q. Is it reasonable to use restitution when an accounting has not been rendered, in your view?

A. Absolutely. One of the common reasons for seeking restitution is precisely when the restitutionary recovery is provable and quantifiable in a way that the damage recovery is

not.

Q. And why is it easier to prove, or is it easier to prove a restitutionary remedy based on the benefit conferred than it would be to prove damages to the members of the class, do you know?

A. Well, again, without getting into the evidence that I'm not familiar with, the basic difference here is, as we said at the very beginning, restitution is measured on the defendant's side of the transaction by the amount of the defendant's gain. I mean, there's only one defendant, so it's much simpler to figure out how much that defendant gained.

Damages are based on the plaintiffs' side of the transaction. They're measured by the plaintiffs' loss. And the class has hundreds of thousands of plaintiffs, and if it's impossible to do an individualized accounting, then it may well be impossible to prove or quantify the loss to individual members of the class, but it may remain entirely possible to quantify the gain to the defendant because you don't have to do that disaggregation on the defendant's side.

Q. Based on your vast knowledge of restitution, is it commonly used? Is it an area of law which is commonly understood in this country?

A. It is certainly commonly used; I'm not sure it's commonly understood. But there are -- you know --

THE COURT: You would be out of a job if it were.

THE WITNESS: I would be out of a job if it were. I get asked to explain restitution much more often than I'm asked to explain damages.

A. But restitution is a very common remedy, especially in certain fields of law, including the law of fiduciaries, who have to give up all their profits, including the law of intellectual property, where infringers have to give up all their profits, including the law of fraud, where the plaintiff always has the option of asking for the defendant's profits instead of the plaintiff's gain.

So it is commonly used, and the judges usually figure it out when it's presented to them. And some judges are familiar with it, but I think it's not taught in many law schools anymore, and the vocabulary of the first restatement and of Palmer's Treatise is kind of quaint and inaccessible to modern lawyers. So it's commonly used, but it's not as well understood, certainly, as damages or injunctions.

Q. One last question. In how many law schools is restitution a course studied, do you know?

A. I don't know for sure, but I'm only aware of two where there's a separate course in restitution, the University of Michigan and Boston University.

Now, many law schools have a remedies course that includes a substantial unit on restitutionary remedies. That's where it's still taught. But it's not taught as a separate

course in many places at all, and there's no case book in print. I had to use the draft restatement for my course.

MR. GINGOLD: Thank you, Professor. No further questions.

THE COURT: Any cross for Professor Laycock?

MR. GILLETT: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. GILLETT:

Q. Good morning, Professor Laycock.

A. Good morning.

Q. This takes me back to my law school days. I'm not certain those were pleasant days.

A. But you get to turn the tables.

Q. I always tried not to get called on by the law school professor who liked to use the Harvard method. Unfortunately, sometimes I did.

When were you first hired to work on the *Cobell* case?

A. Sometime in late May. I don't remember the exact date.

Q. May of this year?

A. It was before the meetings of the ALI, so it would have been the week of the 9th. So it was early May.

Q. Of 2008?

A. Of 2008, yes.

Q. And prior to that contact, Professor, what was your knowledge or understanding of the case of *Cobell* vs. *Kempthorne*,

or otherwise sometimes known as versus Babbitt or Norton.
A. Right. I actually didn't know about the case.
Q. And how many hours did you spend reviewing materials prior to your testimony today?
A. I've got a running log I haven't totaled. I don't have it with me. I have not reviewed many of the materials in the case. I reviewed some. What I mostly reviewed was to confirm my own recollections, the leading treatises in trust and in restitution and remedies, and the relevant restatements and the key Supreme Court cases.

And I've probably spent in the neighborhood of 30 or 40 hours all together, but that's an estimate. I haven't added it up.
Q. Okay. And so you've looked at, for instance, the restatement of trusts third?
A. I think the restatement of trusts is second. The restatement of restitution is now third. They're doing this in generations.
Q. And they're doing the restatement of trusts third as well, aren't they?
A. Oh, I'm sorry, yes. They're doing a restatement of trusts third, but I don't think the published drafts have yet gotten to these remedies issues.
Q. And what information was there provided to you directly by the plaintiffs in this case for your review?

A. Well, they sent me their briefs and your briefs on -- pretrial briefs for this trial. Because the first thing I asked them is, you've got to tell me what you're arguing. I've got to know if your theory is the same as my theory.

So they sent me all the briefs, they sent me the judge's most recent opinion, I think it's called Cobell XX. I did not read I through XIX. I've looked at a few passages in those earlier opinions that they pointed out to me, but I do not -- I told them from the beginning, in the time available, I cannot master the facts of this case. What I can testify to is how settled principles of law apply to the claims you're making.

I've also seen a presentation of their economist's model, so I have some familiarity with that.

Q. And what is the -- when you looked at that model, what sort of assumptions were made in that model concerning the funds that were or were not paid?

A. Well, you'll probably do better to ask that question of the economist, but I can tell you what I understood.

Q. What did you understand that model to contain?

A. I understood it to contain an estimate of revenues into the trust based on government data, an estimate of disbursements of the trust based on what was called the CP&R data. I think that's Check Processing and Reconciliation. So that was based on checks that were written and checks that were cashed. And from the years for which that data was available, they derived

an average disbursement rate of about 70 percent, and they used that disbursement rate. They had more data, more years of data, available for collections.

And then they assumed the 10-year government bond rate as the government's average internal rate of return for money that was deposited in the Treasury.

Q. And that 10-year rate, that was the profits that were attributable to the funds that were identified as not having been paid?

A. Well, the profits would include the principal, the money that was collected but not disbursed, and then also the interest saved by having that model -- having that money in the Treasury. And they used the 10-year rate as the average rate for estimating that.

Q. Other than that information, the three briefs, your review of treatises on the area of both whether it would be restatement of restitution, unjust enrichment, or trusts, and that, any other material that you used in preparing for your testimony today?

A. Did you mention cases?

Q. Cases, excuse me.

A. Yes. You know, there might have been some stray document here or there, but that pretty much sums it up.

Q. Are you familiar with the term "Treasury general account"?

A. I've heard that term. I have some notion what it means, but

I don't have any precise notion what it means.
Q. And did you examine in your preparation whether there was any commingling of funds, as that term is used in the restatement of restitution and unjust enrichment, or in the restatement of trusts?
A. I did not examine that. As I said, I did not examine the facts. What I tried to testify to was, is the claim the plaintiffs are making a restitution claim within these various waivers of immunity. I did not try to verify the claim.
Q. But is commingling, whether a fund is commingled or not commingled, important with regard to the manner in which the plaintiff meets its burden of proving unjust enrichment by the defendant?
A. Well, normally, commingling trust funds with the trustee's own funds would be a very serious breach of trust. Someone over the last few days explained to me that the government is entitled to commingle. It still has to account for interest on the trust funds, but it doesn't have to keep them separate. So I didn't inquire into commingling.
Q. So have you looked at the statements in the restatement of trusts that seem to allow a trustee to commingle trust accounts? If that happens to be, in effect, to the benefit of the claimant, the beneficiary takes 1,000 small trusts, puts all of the money into one large cash account, and then invests it in that manner, would that be improper commingling, in your

opinion?
A. I think what you just described is commingling of the funds of multiple beneficiaries --
Q. Right.
A. -- which may save money. I think that's rather different from commingling beneficiary money with trustee money. So yeah, I don't have any problem with running a joint account that commingles the funds of many beneficiaries.
Q. So that would not be improper commingling?
A. This isn't what I came to testify in regard to the violation, but my understanding of trust law is no, that would not be improper.
Q. What you're trying to suggest would be commingling, if the United States received $10 million from an IRS payment, someone paying their taxes, and they put that $10 million in the same account as $10 million of Individual Indian Trust.
A. That's my understanding of commingling by a trustee, the kind of commingling that's generally improper.
Q. Are you aware of any statements in the restatement of trusts that would deal with that that is allowed in sort of a cash collection account so long as the trustee can properly identify the ownership of those funds?
A. I'm not aware that those provisions exist or that they don't exist, because I didn't investigate the law with respect to the alleged breach. I was only reviewing my recollection of the law

with respect to the remedy.
Q. And commingling, whether there was commingling or not commingling, would not affect the appropriateness of any particular remedy in this case?
A. I think the remedy here, the remedy that is sought, is based on the government's imputed use of the trust funds, and that remedy doesn't really depend on whether they were commingled. I think the theory of the alleged remedy is they were in the Treasury account, they enabled the government to borrow us money; whether they were identified as a separate sub account in Treasury or commingled in Treasury, I don't think affects the remedies issues.
Q. So you were not told to assume for the purposes of your testimony that it was a commingled fund?
A. I was not told to assume it was commingled, and I did not assume it was commingled.
Q. But you did assume for the purpose of the remedies that there was unjust enrichment, that there was some sum of money that the United States received on behalf of Indian beneficiaries that was not paid to them?
A. Actually, I didn't even assume that. The basis of my testimony is that's what the plaintiffs are claiming, and if that's what they're claiming, it's a down-the-middle-of-the-plate restitution claim.
But whether or not what they're claiming really

happened was not within the scope of my testimony.
Q. Are you familiar with the term "specific restitution"?
A. Yes.
Q. And what is specific restitution?
A. Specific restitution is restitution of specific property that represents the very thing that the defendant gained.
Q. So if I was the trustee and had received $1,000 on account of my claimant beneficiary, and that was put into a large cash account, cash collection account, would specific restitution still reach the $1,000, assuming there was still $1,000 in that cash collection account?
A. Yes, it would. I think the question is ambiguous about which of two sets of distinctions you're asking about, but the answer to either is yes. Getting back that $1,000 is going to be specific relief.
Q. So there could be specific restitution for the $1,000, but the claimant could also bring a civil money damage claim for $1,000 and recover that from the trustee as well. Is that correct?
A. I think that question draws a mistaken distinction. Civil money judgment is the alternative to recovering from an identifiable fund, and the point of recovering from an identifiable fund is to gain priority over other creditors. And we also use specific relief in a different sense, simply meaning to recover the same thing that you lost, and it has nothing to

do with priority over other creditors. So a specific performance decree is specific relief, and it's not about priority over other creditors in most cases.

I think the general understanding in the field is if the very thing the trustee gained was $1,000, then returning $1,000 is specific relief, whether or not it comes out of the same fund.

And the reason I began, I think, is this: Except for *Bowen*, this distinction is a descriptive category that doesn't have any doctrinal consequences. It doesn't matter really -- usually it doesn't matter whether we describe the relief as substitutionary or specific. It helps lawyers and law students understand what's going on, but it typically doesn't have doctrinal consequences.

Bowen gives that distinction doctrinal consequences, and Bowen seems to treat money as fungible. So if what you're entitled to is money and you recover money, they treat that as specific relief. I think that is consistent with how lawyers have used the terms. But it's not a term that has been litigated or interpreted much, because apart from *Bowen*, it's only descriptive and not result driving.

Q. You seem to resist using the term "specific restitution" in favor of the term "specific relief." Is there a reason that you use that, specific relief, as opposed to specific restitution?

A. I wasn't meaning to resist. In this case I'm perfectly

comfortable with specific restitution. But *Bowen* was specific relief more generally, it wasn't restitution.

Q. That involved an APA case in which the plaintiffs sought to require the Secretary to perform certain obligations that were imposed by statute?

A. That's right.

Q. And that's not the sort of thing that you would have where a trustee simply receives money and fails to -- and either dissipates it or whatever. There's not a statute and an APA action at all?

A. Well, it's not the sort of thing you would have with the usual trustee, but with the United States as trustee of a trust created by statute, with specific duties imposed by statute like those duties to pay interest we were looking at on direct, it is a specific statutory obligation. And at least if the statute interpreted mean what it appears to say, then an order enforcing it would be exactly analogous to *Bowen*. It would be specific enforcement of a statutory duty.

Q. But it also would be a trustee has the duty of a prudent investor, so that if he receives money on account of a claimant, the prudent investor rule requires him to invest that in a prudent manner. And if he fails to do so, isn't it true that the claimant is then entitled to recover the sum that was invested, plus the sums that would have been earned if invested in a prudent manner?

A. That's true. But that would be a damage claim and not a restitution claim. Because the sums that -- if the plaintiff asked for the sums that would have been earned if the money had been invested, that's money that should have been earned but never was. That's a loss to the beneficiaries, and that would be a damage claim that's not included in the restitution claims that we're talking about here.

Q. So in a restitution claim, under those same fact patterns, we would have to switch the interest that should have been earned to the interest that was in fact earned?

A. The interest that was in fact earned or the interest that was in fact saved if the government is that borrower through this whole period.

Q. I hadn't gotten to that hypothetical yet. But just where the trustee takes the $1,000 and does not invest it prudently, the claimant is still entitled to the $1,000 and the interest that was actually earned, and you're saying that would be a restitutionary remedy?

A. That's correct. And if we take your two questions together, they're entitled to one or the other but not both. They can't get interest on the same money twice, but they can get the interest that should have been earned as a damages claim, or they get the interest that actually accrued to the trustee as a restitution claim.

Q. And even though these are both breaches of trust, and the

remedies for breaches of trust are almost uniquely equitable. Isn't that true?

A. Well, it was true until the Supreme Court got into the act and declared all these damage remedies to be legal, not equitable. I think that's historically mistaken, and I think Professor Langbein has been very vocal about that, but it's not an issue here.

Historically, all the remedies for the enforcement of a trust were equitable if the plaintiff chose to sue in equity, and there were some very limited exceptions where you also had the option to sue in the law courts.

Q. So in addition to the -- you would say that for the $1,000 that the trustee got and did not pay, you could get the $1,000 back as specific restitution, clearly?

A. Yes.

Q. You could get the interest that was actually earned; that would be specific restitution?

A. Yes.

Q. You could then get interest that should have been earned in the alternative; that would be legal?

A. Yes.

Q. That would be damages?

A. That would be legal in the Supreme Court's new categorization of these things, yes. That would be damages. I think I'm more comfortable saying it would be damages than

saying it would be legal.

THE COURT: Can plaintiff get both?

THE WITNESS: He cannot get both.

THE COURT: Or do they have to elect?

THE WITNESS: He has to elect to the extent that they're two measures of the same economic substance. There are cases where part of the recovery is in restitution and part of the recovery is damages, and they don't overlap. But when we're talking about interest, he has to choose. Because interest that should have been earned is damages, and interest that actually was earned on the same money are two measures of the same thing. We might use a different interest -- we would use a different interest rate, but he can't get both. He would have to elect.

BY MR. GILLETT:

Q. Let's look at -- I mean, when we're talking about damages, you look to the loss by the claimant, the beneficiary here?

A. Yes.

Q. So there, the $1,000, whether you look at it from the claimant's point of view or the government's point of view, the $1,000 is the same on both sides of the ledger. Right?

A. If it's only $1,000, it's the same on both sides of the ledger.

Q. The claimant has lost $1,000 --

A. Yes.

Q. -- the trustee has gained $1,000?

A. Yes.
Q. Looking at it from the claimant's point of view, he has lost a certain amount of interest that was not paid to him, and that would still be a damage claim.

On the other side, you would say if the trustee had invested the $1,000 in government securities, the benefit, the unjust enrichment, looking at it from the trustee's point of view, is the $1,000 plus the money that was actually earned by investing that $1,000 in government securities?
A. Yes.
Q. Now let's assume that the trustee had the obligation to, under statute or regulation, to invest in government obligations. When you look at the two from the point of view of the claimant, he had the right to receive interest that was paid on government instruments that were invested in, and he gets the $1,000. And on the other side, the quantum of damages is exactly the same. Is that correct?
A. I'm sorry --
Q. Invested --
A. I got lost. It was exactly the same before we started putting the interest in. I think once we put in the interest, it may become somewhat different.
Q. Let me start over. From the beneficiary's point of view, it was $1,000 that he's entitled to?
A. Yes.

Q. And because, let's say, a statute requires the United States to invest it in government securities, he is entitled to the interest that would be obtained from that investment, even if the United States didn't do that. Is that correct?

A. I think that's correct.

Q. Now, on the other side, looking at it from the trustee's point of view, he gained $1,000, and in this case he actually invested it in those government obligations and received interest on those government obligations.

A. Yes.

Q. Now we have the quantum on both sides; whether it be restitution disgorgement or it be damages, we have exactly the same thing, same quantum.

A. Not necessarily. Because, for example, the statute we looked at a few minutes ago, the statutory obligation was to invest at a rate of at least five percent. The interest rate that the government actually earned or saved in many years was less than five percent.

So the unjust enrichment, based on what the government actually gained, will be a lower interest rate and therefore a smaller number than the specific statutory entitlement of five percent. And it would probably also be a lower number than if we just measured it by the general measure of common law damages, which would be the market rate of interest available to the plaintiffs, which is probably higher than the 10-year bond

rate.
Q. But a trustee who as a prudent investor has to comply with the restrictions on the trust, if the trust requires that it be invested in government obligations, then he must fulfill that obligation, is that correct, even if he could find greater return somewhere else?
A. That's correct.
Q. But leaving aside the five percent statute that Mr. Gingold showed you, I don't want that in my hypothetical.
A. Okay.
Q. They both -- from the damage point of view, look at from the claimant's side, the beneficiary's, he lost interest that would have been earned on government securities that his trustee was required to invest his funds in, and that would be his damages, non-restitutionary, just money damages.

On the other side, the unjust enrichment side would be the $1,000 would have to be paid back as restitution, specific restitution, and the interest that was actually earned by investing it in the same government securities or instruments, he would have to -- that he actually earned, he would have to pay that back. That would be disgorgement.
A. Yes.
Q. And if the investment, the interest rates, because they were the same instruments, are the same, why would one remedy be more appropriate than the other, or does the law favor one over the

other?
A. Well, the numbers are only going to be the same if you stipulate that the trust instrument tightly restricts what the trustee can invest in for the benefit of the beneficiaries, and that is exactly what the trustee then invested in for the benefit of himself.

And if we assume those facts, then the amount of the loss to the beneficiaries and the amount of the enrichment to the defendant should be the same. Whether it's the same or different, the usual rule is the plaintiff has a choice of remedies here. He can choose to pursue the damage remedy or he can choose to pursue the restitution remedy, and he has to obviously satisfy the requirements of the one he chooses, but if he can satisfy those requirements, he's entitled to elect.
Q. But when the damages equal the gain, there's very little reason to go to restitution. Isn't that true?
A. Well, in a wide range of cases there's very little reason, but sometimes either judge-made doctrine or statute creates a reason. And most obviously here, if you have a waiver of sovereign immunity for any remedy except money damages, then you've got a waiver that covers the restitution claim and that doesn't cover the damages claim. And that may be an odd choice for Congress to make, but we've got similar distinctions in the law of a lot of states.

So that's a distinction that's fairly familiar to the

law, that the waiver of immunity covers one remedy but not the other.

Q. Well, would you agree with this statement: That when the underlying wrong is the same and the remedy is the same, important collateral issues should not be left to the option of the clever pleader?

A. As a matter of policy, I would agree with that because I wrote that. But if you look at the context in which I wrote it, the immediately preceding or preceding plus two sentences says, but that's what the law is, that you get different rules of statute of limitations, different rules of sovereign immunity, and I think there are a couple of other examples there of things you get different rules of in what the law actually is if the plaintiffs' lawyer knows to choose the restitution remedy rather than the damage remedy, or vice versa.

Q. As a matter of policy, you don't think that's a good idea, however?

A. As a matter of policy, I don't think that's a good idea, but I don't have a majority of the votes in the Congress. I didn't get to write the statute.

Q. Now, are you aware of a statute that actually requires the investment of Individual Indian Money trusts in government securities?

A. Yes, I've seen that statute.

Q. And in fact, in this case, in the hypothetical that the

plaintiffs have asked you where the avoidance of a cost by the United States, which is the benefit that they've asserted and you've testified about, is the avoidance of a cost that the government would bear if it had, say, taken $1 million of the Indians' money and not had to borrow it, it would have had to pay some Treasury rate to borrow that million dollars; now, if the statute requires that the million dollars of the Indian funds be invested in government securities, it's possible that the measure of the two there, the government actually hasn't benefitted at all, it would have paid the government instrument rate of interest on the million dollars to the Indians just as it would have avoided that cost?

A. I'm not sure I follow the question.

Q. If you assume that the United States invested the money for the Indians, they would have paid the interest also on whatever a million dollars of government obligations were.

A. If you assume they invested the money for the Indians, and they accounted for the interest and eventually disbursed that interest to the Indians, then yes, there's no benefit to the government. I don't think that's the assumption of the model based on the disbursement evidence that's actually available, but again, I'm not testifying to what the evidence is.

Q. Now, you've testified that you believe that in the Administrative Procedure Act, when they use the term "money damages," that they were using that as a term of art.

Now, isn't it true that in the federal system, equity in law was used with the federal rules, there were no separate legal and equitable causes of action, per se?

A. There's one form of action known as the civil action, but distinction between legal and equitable persists for various purposes, including jury trial and including ERISA and so forth.

Q. But in terms of you believe that under the APA, that if the same measure of damages and the same amount, and you simply put the label "restitution" on it, that you automatically, then, by pleading, have avoided the sovereign immunity issue of the APA?

A. I didn't say that. It's not enough to simply put the label on it. The facts have to support it. It has to actually be a gain to the defendant and not merely a loss to the plaintiff.

If it is both, you can focus on the gain to the plaintiff -- I'm sorry, you can focus on the gain to the defendant. Because if it's both, the plaintiff has a choice of remedy. And so yes, if the facts will support it, then the plaintiff can make a restitution claim and be within the waiver.

But it's not merely a matter of labeling. They have to actually prove a different set of facts for restitution than for damages. And there will be cases where the facts overlap or turn out to be pretty much the same, but you can't assume that. When they're filing their complaint, they have to make out a case for restitution.

Q. Now, are you aware of the cases that I guess would be

denominated as -- the lead case was *United States vs. $277,000*, a civil forfeiture case where the United States comes into possession of $277,000, let's say, from a civil forfeiture along with a criminal action; after the criminal charges are dropped and the United States decides that there's no reason to forfeit the money, the claimant says, I want my $277,000 back and I want the use value of that money.

A. I don't know those cases.

Q. Could that be a restitution issue? Could you claim restitution of that $277,000?

A. Well, unless there is some statute that precludes the restitutionary remedy, yes. Is it common law or in equity, that would be a pretty straightforward restitution claim.

Q. And along with that you could make a claim for the disgorgement of profits or interest earned by the United States while it was holding the money, if they actually earned it?

A. Well, not necessarily. These rules that we've been discussing, the accounting for profits rules -- well, let me answer that in two parts. Okay?

The rule that the defendant has to account for all his profits of whatever kind is a rule that applies to conscious wrongdoers and to fiduciaries. So there are other forms of restitution claims that have more limited remedies, and I think your question was about all profits, or words to that effect.

But even with respect to the more limited remedies in

other forms of restitution, I think restitution normally includes interest, unless -- because the question you're asking is with the government as a defendant, and I'm not familiar, except in the most general terms, with the general forfeiture statutes. Unless there's some statutory provision that prevents it.

But that kind of claim for restitution of money that a defendant wound up in possession of at common law or in equity would normally include interest.

Q. Now, are we talking about interest actually earned or interest that should have been earned in a non-fiduciary situation?

A. In a non-fiduciary situation but a restitution claim, not a damages claim, it would be interest actually earned or interest actually saved by the defendant.

Q. So let's assume the government did not invest that 277 in an interest-bearing account, so there's no actual interest earned. But the United States put it in the General Treasury Account, where money usually goes when the government gets in possession of it. We'll assume that. Okay?

A. (Witness nods.)

Q. Now, under your -- under what you've testified today, would it be correct to say that if the government used that $277,000 to avoid borrowing $277,000, there should be a disgorgement remedy available for the savings, the interest-avoidant costs

that the United States obtained?
A. Yes.
Q. And we're ignoring sovereign immunity issues here.
A. We're ignoring sovereign immunity issues, because I don't know what the immunity rules are with respect to civil forfeiture recoveries.
Q. But if there were a bar against obtaining prejudgment interest against the United States, a sovereign immunity type issue, on the damage side they wouldn't be able to get interest, but on the disgorgement restitution remedy side, it's possible they could?
A. I think that's right. I think that's what *Henkels* says.
Q. Do you know whether the statute that you referred to requiring five percent interest paid on accounts, do you know, did you do any research as to whether that's still actually effective today with regard to individual Indian accounts?
A. Well, I saw that it's still in the current codification, but I did not personally do any research beyond that.
Q. Now, are you familiar with the *Blue Fox* case that followed the *Bowen* case with regard to equitable -- certain equitable liens or constructive trusts against the United States?
A. Yes, I am.
Q. Does that in some way limit the availability of some of these equitable remedies against the United States?
A. No.

Q. No. What was the import of the *Blue Fox* case with regard to the *Bowen* case?

A. Well, *Blue Fox* was not an ERISA case, it was a case of a government subcontractor who didn't get paid because the general contractor went broke. So the claim was squarely based on losses to the subcontractor. There was no unjust enrichment in the case, because the government lost money, too, when the general contractor went broke.

And so what the plaintiff did was he sued for the money he was due that had been unpaid on his contract, and sought an equitable lien on certain funds that had once been in possession of the government to secure the payment of his losses. And what the Court said, and I think it's right, and it excited me in the course of saying it, is the claim here is essentially for losses suffered as a consequence of the government's failure to require a performance bond from the general contractor. And the equitable lien, which would be equitable and would be restitutionary, that's just an attempt to secure the underlying judgment, and the underlying judgment is for damages, not restitution.

Q. And so even though they were a clever pleader in that case, they didn't succeed?

A. Well, they weren't as clever as they thought they were, because they couldn't disguise the fact that what they were really seeking was losses they had suffered.

MR. GILLETT: I have no further questions, Your Honor. Thank you, Professor Laycock.

THE WITNESS: Thank you.

MR. GINGOLD: Just a couple of questions, Your Honor, on redirect.

REDIRECT EXAMINATION

BY MR. GINGOLD:

Q. If I understand Mr. Gillett's questions, I think he asked you if interest was obligated and wasn't paid, would that be damages or would that be restitution, or words to that effect. Do you recall that?

A. I recall the question. I think it was a little different from the way you just asked it. Because I think you left out of his question anything about the possibility of specific enforcement of the statute, and I understood him to be asking about common law remedies, interest that should have been earned but wasn't would normally be a loss to the plaintiff, and in the absence of a specific statutory entitlement, would normally be treated as damages.

Q. Where there is a specific statutory entitlement or obligation, what is it?

A. Well, it doesn't convert it into restitution if you're looking at the money the plaintiffs lost, but a specific statutory obligation may well bring it within the specific relief category of *Bowen*. I think you could specifically

enforce that statutory obligation.
Q. And that would not be damages?
A. That would be specific relief, it would not be damages.
Q. I would like to identify Plaintiffs' Exhibit 18.
MR. GINGOLD: Your Honor, this is Cobell XIII.
THE COURT: It's what again?
MR. GINGOLD: Cobell XIII.
BY MR. GINGOLD:
Q. I would like to turn your attention to page six. Professor Laycock, have you read this before?
MR. GILLETT: Your Honor, this is beyond the scope.
MR. GINGOLD: We're dealing with payment of interest that Mr. Gillett went into great questioning --
THE COURT: I'll allow it. I'll allow it.
A. I have read this before.
BY MR. GINGOLD:
Q. What is your understanding of this statement?
A. This is the Court of Appeals saying that a delay in the accounting would be harmless, because the income beneficiaries are going to be entitled to interest for the entire period anyway, or for imputed yields over the period of the delay.
MR. GINGOLD: No further questions, Your Honor.
THE COURT: Professor, in Mr. Kirschman's opening statement he repeated one of the basic challenges that the government has laid down to the plaintiffs' recovery throughout

this case. He said, and I expect I'll hear this more and more, that the remedy, the remedy in this case must flow from the alleged injury, which is failure to provide a historical accounting.

So far what's been established in this case is that the government has failed to provide a historical accounting -- and I'm oversimplifying this for the sake of the question. The government has failed to provide a historical accounting, and indeed cannot do so.

And then there was some desultory discussion last time we were here about what the gap is between what the government has collected and what they have disbursed, but we're going to sort all that out.

The question is, can there be restitution for a failure to account?

THE WITNESS: I don't think I would put it quite that way, although the failure to account is certainly relevant. I think -- as I said, I have not tried to master the 20 opinions in this case, but my understanding of the attempt at the historical accounting was that it was to determine, in as much detail as possible, what had happened over the years so that the plaintiffs would then know what claims were available to them. And further requests for relief would have followed in the wake of the accounting.

The accounting, having been found to be impossible, the

plaintiffs are left only with those claims that they can prove without the benefit of the full accounting. And the claim that they have focused on and think they can prove without the benefit of the full accounting is not based on the failure to account, except as an evidentiary matter, it's based on the evidence they think they have that much more money was collected than was ever disbursed.

THE COURT: Actually, the plaintiffs' theory is a little bit more the flip side of that. The plaintiffs' theory is, it's your duty to account --

THE WITNESS: Well, that's right.

THE COURT -- and that which you can not account for, you must restore.

THE WITNESS: I think that's right, Your Honor. I think they're saying both. I think they're saying it's the government's duty to account, but the best evidence the government has offered so far also shows this gap between income and disbursements.

And I think the restitution claim is now focused on that violation. Not on the failure to account as such, but the inability to account continues to be relevant as an evidentiary matter to the attempt to determine the difference between income and disbursements.

So restitution here, or specific relief, is not intended to be directly the remedy for failure to account,

except insofar as the failure to account has evidentiary value on the amount of disbursements. The accounting having been found impossible, they have focused on the violations that they think they can still prove even in the absence of an accounting. And if you recall the list of potential damage claims, a lot of claims have gone by the wayside after the accounting turned out to be impossible.

THE COURT: In the taxonomy of relief that you used to lead off your discussion, you mentioned damages, restitution, injunctive or injunctive relief, declaratory relief.

THE WITNESS: Yes.

THE COURT: Does each of those forms of relief stand alone? Or I'm interested particularly in declaratory relief. Does declaratory relief have to be tied to something else or can it just stand all by itself?

THE WITNESS: Sometimes it stands all by itself; often it is tied to something else. So you declare what the defendant's duty is under a body of law, and usually the defendant will comply, but sometimes you have to follow up with an injunction to make sure that that happens.

But declaratory relief stand by itself, and often the parties are both happy to have their dispute resolved and they both comply with whatever the Court declares.

THE COURT: So just hypothetically, if a court were uncertain about its power to award restitutionary relief, and

were, as a consequence, to award declaratory and restitutionary relief, belt and suspenders, would those two merge or could the plaintiff -- if the restitutionary relief were not allowed by another court, could the plaintiff take the declaratory relief to another court that could award -- that could require it to be satisfied?

THE WITNESS: That's a very interesting question. You know, the Declaratory Judgment Act expressly provides for such further appropriate relief as may be necessary to enforce the declaratory judgment. I think that the usual presumption is that that further relief to enforce the declaratory judgment is going to come from the court that issued the declaratory judgment.

But if some higher court were to say the money has to come from the claims court --

THE COURT: We don't want to get too specific.

THE WITNESS: We don't want to get too specific. The money has to come from somewhere else, it would also be part of the usual rules that the declaratory judgment is a final judgment, it's res judicata. And I would think that ought to be honored in the other court, and I think we're in relatively unexplored territory here, but I would think that ought to be honored.

THE COURT: Thank you, Professor. There was some dispute about whether I should hear expert testimony from law

professors, and of course, as you say, I'm presumed to be able to read the cases myself, but you have a gift for making things simple and straightforward, and I appreciate your testimony.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're excused. Thank you very much. It's lunchtime. We'll be in recess until 1:35.

(Recess taken at 12:34 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

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

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SIGNATURE OF COURT REPORTER **DATE**

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