UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
	:	
Plaintiffs	:	
	:	
v.	:	Washington, D.C.
	:	Monday, June 18, 2007
DEPARTMENT OF THE INTERIOR, et al.	:	
	:	
	:	
Defendants	:	3:00 p.m.

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

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P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action Number 96-1285, Cobell et al. versus Gover, Assistant Secretary of Interior, et al. If counsel who will be speaking please identify yourselves for the record.

MR. HOLT: May it please the Court, my name is Thaddeus Holt. The Court will have seen my name on the complaint and on the papers for the first four years of the case. I have not been active the last seven, but I'm still of counsel for the plaintiffs, and I thought I should come in and introduce myself.

THE COURT: Welcome back, Mr. Holt.

MR. HOLT: Thank you.

MR. HARPER: Good afternoon, Your Honor. Keith Harper for the plaintiffs.

THE COURT: Mr. Harper.

MR. DORRIS: Bill Dorris for the plaintiffs.

MR. SMITH: David Smith for the plaintiffs.

MR. LEVITAS: Elliott Levitas for the plaintiffs.

MR. GINGOLD: Dennis Gingold for the plaintiffs, Your Honor.

THE COURT: You're all going to be talking? Not at once, I hope. All right, let's hear from this side.

MR. KIRSCHMAN: Your Honor, for the government, Robert Kirschman.

MR. QUINN: Michael Quinn for the defendants, Your Honor.

MR. STEMPLEWICZ: John Stemplewicz for the defendants, Your Honor.

THE COURT: All right. I ran across a computer program the other day that I'm contemplating imposing on lawyers. It's called Rationale, and it's written by an Australian company called Austhink. You can look it up: Austhink.com. I notice everybody dutifully writing this down.

And what it does is to permit undergraduates to outline the arguments they are making in essays. But they are using it for -- they're beginning to use it in the legal establishment in Australia, and -- was that a fanfare for what I'm about to say? And I have suggested to the people writing the software that it would be very useful as a device for comparing the arguments of opposing sides in lawsuits.

If I could get your argument outlined, and then make the other side respond to it as outlined, and then have some facility to compare the two, I could actually force lawyers to do what they hate to do, which is to directly confront one another's arguments.

I must say, and I say this sincerely as a compliment to both parties, that in the last couple of submissions by the parties in this case, I'm beginning to see some actual confrontation of one another's arguments instead of ships

passing in the night. So I have a feeling that we're beginning to zero in on, at least in any mind, what this case is going to be all about, what it is going to be about.

We have a lot of things to talk about today; chiefly, I think, three things: The nature and scope of the historical accounting, which is a big, big issue that's been floating around in this case ever since the beginning and has never really been decided. Yes, I know the plaintiffs say it has been decided; and yes, the defense says no, it doesn't mean anything. But in my view, as a matter of law, there are a number of issues about the scope of the historical accounting that are still unresolved.

Second thing we have to talk about is the role that the Treasury Department should, must, or will play in the proceeding we all have in mind going forward in October.

And then, again, we need to talk about just what that trial is going to look like, what the parties can expect that it will actually be.

Now, I have some preliminary reactions to what you have all submitted to me on the nature and scope of the historical accounting that I want to lay out, not -- these are not rulings, holdings. As I say, this is a thought process that we're all involved in here, I hope. And I'm not going to be very elaborate about the reasons for all of this, but just in big kind of bold letters, here's the way I see the historical

accounting question:

First of all, on the status of Cobell X, I do not recognize that Judge Lamberth's rulings in Cobell X are, strictly speaking, the law of the case. But, that said, he has given more time and attention to it than anybody, he is a very distinguished, learned, experienced judge.

And where I depart from Judge Lamberth's views, and I do on a couple of points, it is with some trepidation and with the understanding that -- I'm beginning my analysis of this historical scope of accounting with Judge Lamberth's thought process as he recorded it in his Cobell X opinion.

Because although the Court of Appeals reversed the injunction in that case, they didn't reverse his thinking. And his thinking is very well developed, very profound, and very useful. I don't agree with all of it, but I respect all of it and I will treat it sort of as presumptively correct.

That said, my view of this historical accounting process is that it begins fundamentally and deals fundamentally with money. It deals with funds received in or handled by the trustee.

It does not deal -- the statutory accounting that we're involved with in this case does not deal with cadastral surveys, it does not deal with reconstructing all of the Indian lands that are in the Trust; it does not deal with direct pay accounts, it does not deal with compact/contract tribal

cooperation agreements; it does not deal with money that was never collected. It does deal with reversed escheatment payments if and to the extent they were redeposited in IIM accounts.

The timing, the time period covered by the historical accounting; this is, to my way of thinking, at least the beginning part of it, is the most difficult issue that is before me. Frankly, I have trouble reconciling all of what the Court of Appeals has said, I have trouble reconciling all of what Judge Lamberth has said.

Again, now, counsel, this is all open to further argument. If you want to stand up and make the arguments, I'm here to listen to them. I'm just telling you where I am today. I think the accounting goes back to the '38 Act and not before. I don't think the accounting stops at December 31st, 2000.

The government has -- in its latest plan has repeated what it's said in its earlier plans, has a number of exclusions, including accounts that were closed before October 25th, 1994. I think that's an improper exclusion. They've excluded accounts of deceased beneficiaries; I think that's an improper exclusion.

So just to summarize, from my point of view, this is about funds deposited or invested in the Act -- in the Trust from 1938 forward. It does not stop at December 31st, 2000. It includes funds that were in accounts closed before October 25th, 1994; it includes funds in accounts of beneficiaries who have

been deceased. It does not include going back and reconciling all of the lands by cadastral survey or any other way; it does not include direct pay or funds paid to tribes; it does not include money never collected.

It does include escheatments that were actually returned after the Supreme Court's decisions.

Now I would like to hear from counsel on those subjects, on subjects related to nature and scope of historical accounting. And you're welcome to disagree, rail against, or do whatever you want to about what I've just said. Who is first?

MR. STEMPLEWICZ: Good afternoon, Your Honor. John Stemplewicz for the defendants. And I'm going to keep this relatively brief, because I think you've addressed the key points in our brief, except for two. And that's the accounts closed before October 25th, 1994 and the decedents' accounts. So I'll address those this afternoon.

THE COURT: All right, good. Because those are difficult questions, both of them.

MR. STEMPLEWICZ: That's correct, Your Honor, they are. And they're not so difficult, however, if we retain the focus of this case. The jumping-off point for any of these analyses regarding the scope or nature of the accounting is the 1994 Act. And the Act in its terms is very clear. It talks about accounting for funds held in trust. Of course, funds is an issue we've already discussed; held in trust, which are

deposited or invested in accordance with the 1938 Act. That section of the Act, which is 102(A), by itself excludes accounts closed prior to 1994, in the government's view. It also excludes accounts that have been closed as a result of deceased account holders.

The historical accounting element of this case is tied to that provision. But that provision has to be viewed, not in isolation, but together with the other two sections that are key elements of the case: Section 101, which sets forth a laundry list of improvements that need to be instituted to make the accounting work -- the funds management work of Interior, going forward, work as it's supposed to work; and Section 102, which starts with the requirement to account, which I recited, and then goes into the Periodic Statement of Performance in 102(B), and then the annual audit, 102(C), clearly talk about a perspective or exactly what the Act is all about, which is reforming the management of the system.

Congress didn't have in mind, in reforming the system, to go back and change the past. But, as the Court of Appeals said in 2001, affirming what this Court said in 1999, it's necessary for those balances that we start with, as of October 25th of 1994, to be accurate. And that involves "reconciling those accounts, taking into account past withdrawals, deposits, and accruals," in the words of the Court of Appeals.

There is no independent obligation under the '94 Act to do a historical accounting. That obligation is tied to and within the same scope as the current accounting obligation that the '94 Act institutes. There's no provision in the Act itself, or no indication in the legislative history, either pre- or post-enactment, that Congress had in mind any sort of broad-based unlimited reconstruction of the accounts, of the funds disposition, let alone, as Your Honor pointed out earlier, of the complete history of the lands trust.

And recently in 2005, in Cobell XVII, the Court of Appeals once again anchored us to that particular section, 102(A), as being the most relevant provision, statutory provision, for delineating the responsibilities of the Department of Interior.

As this Court has held, what the plaintiffs seek is a statutory accounting, and the complaint recites the '94 Act. All of the decisions in this case cite to the '94 Act. To the extent that common law has any bearing, this Court dismissed the common law claims that were set forth in the complaint in 1999, and that was not appealed by the plaintiffs.

The plaintiffs' analysis of this issue is sort of turning it on its head. It seems like they've looked to the common law to find out what they're entitled to, then looked to see if there's a statute that comes close to validating what they would like, and saying: That's it. That statute must give

us what we're seeking under the common law.

And the analysis is just the opposite. It's, as the Court of Appeals said, you don't abstract from the statutory provision whatever common law benefits you feel you're entitled to, of course ignoring some of the responsibilities or the downside of common law of trusts that would hurt you.

In terms of the decedents, that's a complicated issue. We have tried, both in the briefs and the two appeals in the Court of Appeals, and in briefing it post the Phase 1.5 trial, and most recently last week, to try to articulate this in a way that gets to the heart of it. And I think there are really three categories of account holders that we need to look at here.

First would be decedents' accounts that were closed prior to the 1994 Act, which would be subject to the same limitation as accounts of living individuals whose accounts were closed pre-1994.

Secondly, we look to decedents' rights themselves. Now, if what this lawsuit is about, and it's agreed that it is, is an accounting under the 1994 Act, if the account holder died before October 25th, 1994, that right never accrued for a representative of a deceased individual. If those representatives are indeed before the Court to assert those rights in a representative capacity, they must be rights that the decedent had before death. And if death occurred before

October 25th, 1994, they could not have a right to an accounting under the 1994 Act.

Third is, what is the right of the living account holder to assert the claims of the decedent, or to assert a right to have a predecessor's account reconciled as part of his or her own accounting?

Well, there are a number of ways that money in an IIM account of a decedent can be distributed. One is outside the IIM system altogether; a check made out to someone who is a creditor or a relative who is not an Indian, or a friend who is not part of the IIM system, under a will of some kind. In that case, that money is outside the scope of the 1994 Act. It's not held in Trust by the United States, and it's not deposited or invested pursuant to the 1938 Act.

And let me take a simple example. There was $100 in a decedent's account, and it passes directly by inheritance to another individual who has an IIM account, or for whom an IIM account is opened. Then that deposit into that IIM account is just another transaction in that account that is not reviewed for its complete pedigree, any more than any other transaction in the account is reviewed.

The deposit would be verified as part of the accounting, to make sure that the right amount was deposited into the new IIM account. But there's no sort of chain of custody going back to day one that requires the Secretary, in

doing the accounting - which again, we must keep in mind is to reconcile the balances as of October 25th, 1994 - so that going forward the system will work the way Congress wanted it to work. There's no requirement to figure out what the balance was in a decedent's account many years ago on the date of death, or some earlier date in time.

So essentially, that's the argument on the decedent --

THE COURT: Let me stop you and ask you to explain something more of the mechanics of this. One of the things that we are learning, or think we're learning in my chambers about this whole subject, is that an individual Indian may have more than one account. Right?

MR. STEMPLEWICZ: Yes, that's correct. I believe there's an attempt being made --

THE COURT: The accounts run with allotments, but not with the individuals.

MR. STEMPLEWICZ: No, they run with the individual, Your Honor.

THE COURT: They run with the individual. So individual A, Indian individual A, married to a member of the same tribe, has three children as a member of the same tribe; has an account, what, he and his wife jointly? Or is the account only in his name? Or does she have one, too?

MR. STEMPLEWICZ: I believe the accounts are by individual and not jointly held, Your Honor. And in many cases

there would be no need to have an IIM account, especially if it's a one-time distribution. The IIM accounts really only exist as a holding point for individuals who, due to age or incapacity, are not able to have accounts of their own and have money distributed directly to them. So the money is held by the government as sort of safekeeping for the individual until the individual is of age.

Another large category of IIM accounts is money that's of such a small amount that they don't distribute it until it adds up to $15. But the basic idea of the IIM accounts is to work as an auto-pay system; as money comes in, it gets into the hands of the right individual as quickly as possible.

THE COURT: You're telling me that if it's a one-time payment, the money comes through, is gone, is paid, and there's no account, so you're not going to account for that either?

MR. STEMPLEWICZ: I don't believe, Your Honor, there would be any reason in a case like that to have that.

Now, in many cases, and it may even be the majority of cases, there are estates that take years and years and years to wind up, not only to identify who the heirs are, but what the percentage share of each heir is in an amount that may be in an IIM account. That amount might be zero.

So pending that determination, there may be a period of time where money remains in an account, pending distribution to heirs. But if all of that is done and the probate system goes

through its course, the money then would not have to pass through the IIM system, as I understand it - and we can check on that to be sure - but there wouldn't really be any reason for it to go through the IIM system unless one of the distributees or heirs was a minor or in one of these other categories where it was necessary for safekeeping purposes to protect the individual, to hold that money in the government accounts.

THE COURT: Okay.

MR. STEMPLEWICZ: The IIM system does not -- there's no direct correspondence between IIM accounts and land allotments. There's a relationship between land-based accounts and IIM accounts, naturally, because revenue comes from the land, but there isn't always a direct correspondence between an IIM account and an allotment.

The most obvious example is a judgment account. There's no land necessarily -- there may be tribal land or a per capita account. But then again, people who get judgment account distributions might have land-based IIM accounts. There could be all sorts of combinations like that.

But it is not a system where there's a direct correspondence between the land and the IIM account. They really are addressed at different interests.

Finally, Your Honor, I was just going to address the pre-'94 closed accounts and the decedents. But I would like to also mention one of the areas that you raised earlier, which is

the cutoff date of December 31st, 2000.

Now, we address this in our brief as to the rationale for having that date, which is essentially the beginning point for the Trust Fund Accounting System, the TFAS system. That is really the going-forward element of the '94 Act. And Interior could have picked October 25th, 1994, because really that's what the Court of Appeals said: You need to get -- reconcile the accounts as of that date. But it chose that later date because there would be sort of a transition period between the existing system as of October '94 and the system as contemplated under the '94 Act. And that was considered to have been instituted or implemented by the adoption of TFAS, the transition to TFAS.

So that was the rationale for having a different ending point than the date of the 1994 Act.

THE COURT: Well, I understand that. But, I mean, if TFAS is as good and smooth and quick and slick as you say it is, it should be just a matter of pushing a button to account for anything after December 31st, 2000, shouldn't it?

MR. STEMPLEWICZ: I believe it is, Your Honor. I think that's the point.

THE COURT: So there's no significant burden on the government to ask you to push that button?

MR. STEMPLEWICZ: Well, the burden is not going forward but looking back. Now, I don't know if it would be a significant burden, frankly, if there was an account opened, say

as of June 15th, 2001. That obviously would not be a problem, because we would have TFAS and it would be easy to reconcile that account.

But if there were an account that opened post -- well, actually, most of the examples I'm thinking of would take us some time into that post-December 31st, 2000 period. So it really is TFAS.

If TFAS can do the job, and it should be able to, that should not -- it's all a matter of, what's your population of your sample? And if we start going into a later date than the sample that Interior has planned, it could involve considerably more costs or delays in doing that. At this point, standing here today, I couldn't tell you if that's the case.

THE COURT: All right. Thank you, sir.

MR. STEMPLEWICZ: Thank you, Your Honor.

THE COURT: Mr. Harper?

MR. HARPER: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. HARPER: I would like to start with the two areas which the defendants discussed, Your Honor. Now -- the first being the accounts closed prior to 1994.

This really is an issue that has been decided by Cobell VI. In Cobell VI the Court held, as this Court knows, that the 1994 Act did not create, alter, or limit the duty to account. So it can't possibly be that a beneficiary who had a duty to

account - who, say, had an account closed on October 1st, 1990 - somehow lost that duty to account by the enactment of the 1994 Act.

Second important point, the government sort of argues that these issues were not determined in Cobell VI, these issues were not argued in Cobell VI. Well, the issue they presented in Cobell VI was, and this is from their brief, issue number two, "whether the District Court erred in concluding that the 1994 Act provided a right for the IM beneficiaries to obtain the judicially conducted historical accounting of their IM accounts, rather than requiring determination by the Department of Interior to the nature and scope of any historical reconciliation necessary to meet the obligations regarding the IM balances."

So they brought in this notion that they can determine the nature and scope of the duties. They talk throughout their brief about the prospective nature -- on pages 62, 55, 53, and 54, about the prospective nature of the language in the 1994 Act; they have raised all these issues, and the Court of Appeals rejected them. And to the extent they now argue that, "oh, yes, we didn't exactly raise this precise issue," well, then I would argue that they waived that right. They should have raised it then. So either they raised it and they lost it, which we contend did in fact occur, or if they didn't raise it, they should have raised it, and they still lost.

Because what the District Court held is that they had to provide an accounting of all funds in the IM Trust, going back all the way back to the beginning of the Trust. And that's been reconfirmed time and again. So we think on that issue Cobell VI is dispositive.

With respect to the decedents' accounts, let me address first the notion of their regulations, because -- or excuse me, their probate process. They tend to argue, they have argued that these issues are essentially determined conclusively through the probate process.

I would refer the Court's attention to 2001 Westlaw 254024, an IBIA decision. In that decision, the individual beneficiary, there an IM account holder, in an action called Estate of Irvin Lyle Waites (ph), argued that they could get an accounting. They wanted their accounting prior to disposition of the probate.

And what the Court said is that -- about this requested relief goes far beyond the scope of the probate proceedings. And it goes on to describe why they cannot provide the accounting based on the powers given to the Court, given in the IBIA's jurisdiction.

So it can't possibly be that when the beneficiary goes before the probate -- goes through the probate process, they cannot get an accounting there, but somehow that extinguishes their right to an accounting here. It just can't possibly be

the case.

And further, what they do not -- what the government does not tell you in their brief is that the vast majority of regulations that they cite to regarding the probate process are of recent vintage. They're of the last few years. And such self-serving new regulations, promulgated specifically for litigation purposes, have been -- in the DC Circuit been disregarded time and again. And they certainly do not provide a mechanism for making any arguments as they are making here. So we agree with you on the notion that those can't possibly be reasons for saying that this is dispositive.

One final note on the notion of deceased account holders and closed accounts. As Your Honor knows, the class was certified in 1997, February of 1997, for all present and former beneficiaries of the IIM Trust, and that obviously includes people who had closed accounts. So they had a right to an accounting that was not altered or limited by the '94 Act, these are members of the class, and the Cobell V and Cobell VI both hold that plaintiffs, that is, all former and -- present and former beneficiaries, have a right to the accounting. So on these issues we think the courts have been dispositive.

Turning then to how far back the accounting should go, whether it should go pre-1938. And again, I think the touchstone is the holding in Cobell VI. Cobell VI said that the duty to account was a preexisting duty; that it not only was

preexisting, but it arose as an incident of the Trust relationship; that the creation of the Trust relationship created the duty to account; that those statutes that created the trust relationship, along with the United States taking comprehensive control of the assets belonging to the Individual Indian Trust beneficiaries, means that there is a duty to account.

Now, that duty to account well preexisted 1938. In fact, as we cited in our brief, there is an 1899 Act, and this is certainly not the only act, that said that Indian funds -- that the government shall account for Indian funds.

THE COURT: Tell me, is there anything in that '38 Act that refers to the 1899 Act?

MR. HARPER: No, Your Honor. But the 1938 Act is not -- is merely an act that discusses mechanisms for deposits and things of that nature.

The point is here --

THE COURT: What do you think the Court of Appeals meant with that parenthetical?

MR. HARPER: I think what it was saying is, they were not deciding that issue at this juncture, that they had not determined this issue at that juncture. And that later in Cobell X the Court did decide the question, and it said funds held in accordance with the 1938 Act is what the Act says -- is what the 1994 Act says.

One -- again, the '94 Act is not the metes and bounds of the duty to account; and two, just because it is deposited pursuant to the 1938 Act doesn't mean it didn't preexist the 1938 Act. For example, there could very well be a series of funds collected, deposited pursuant to the 1938 Act once enacted, and had to be accounted for.

And so we think that it goes all the way back to the Indian Trust, and we think that the analysis that Judge Lamberth painstakingly goes through in Cobell X demonstrates why.

The duty to account, and the most important language in Cobell VI on this point and many of these points, is the language, when the Court talks about: What are the nature and scope of the duties involved here? And this is critically important, because the government likes to say it's a statutory accounting, it's a statutory account. Well, you know what? We agree with that. It's the accounting required by statutes.

But which statutes? And if it preexisted the 1994 Act, it couldn't possibly be the 1994 Act as the only statute involved. And here's what the Court of Appeals said there: "This does not mean that the failure to specify the precise nature of the fiduciary obligations, or to enumerate the trustees' duties, absolves the government of its responsibilities.

So it had these duties. It wasn't determined with specificity in any statute, but it is implied by the creation of

the Trust relationship. And that's the import of Cobell VI, and that's why that duty to account arose as an incident to the Trust well before 1938. The 1994 Act does have language about the 1994 (sic) Act, but in no way does that preclude or diminish, nor could it possibly limit, the accounting duty because Cobell VI says it doesn't. So we would argue it would go all the way back to the beginning of the Trust.

Your Honor, with respect to what the government calls the land accountings, I think really what we're talking about here is an issue of: How do you determine the accuracy of accounts without looking at the ownership?

For example, there was a gentleman, Mr. Kennerly (ph), who was recently present at a committee hearing in the Senate. And what he has testified and what the government's own documents demonstrate - this is from their studies - is that he was dispossessed wrongfully of lands. Now, he shouldn't have been -- it was basically just a mistake on the records, and instead of his ownership it was provided to somebody else. There's something awry with the ownership records, something wrong with the land records. Because of that error, he hasn't received a dime from the Trust ever, that -- the proceeds from leasing on his land.

And that's all across Indian country. If you go out to Indian country, there's a lot of people out there that have oil wells pumping on their land; they're not getting a dime for it

because the ownership records are incorrect, or other records are incorrect. It's going to the wrong beneficiary.

There is no possible way, no possible way that each beneficiary can get an accounting of their own assets, their funds, not their underlying resource, without a necessary hard look and review of the ownership records and other records related to the underlying assets.

Now, let me make one distinction here, because I think this is important, and sometimes these issues get conflated. That does not mean, for example, that there is a distinction with another part of the land accounting, another part of the trustee's duties.

The trustee obviously has a duty to exercise care in the management of the trust. And that includes, for example, pursuant to The United States vs. Mason, 1973 Supreme Court case, that includes necessarily a duty to only -- to lease out for fair market value of the resource. If the United States fails to do that, then you could seek an accounting of that. And that may be a claim that could be brought. But we are distinguishing that from the ownership records, and necessity to correct those ownership records for purposes of providing the full funds accounting involved in this matter.

And that is a distinction that -- the government sort of conflates the two together and tries to say, anything that has to do with underlying assets is off base. Well, they can't

possibly do a funds analysis without that. You can't possibly know whether the funds were properly collected, properly deposited, properly disbursed to the right beneficiary, without going and determining if those records are accurate. So we think that that kind of thing is necessary.

We would also argue in similar fashion that things like cadastral surveys are critical to that, as well. If the cadastral survey is in error, and it shows that production from a beneficiary's oil well was on X person's land instead of Y person's land, it was on BLM land as opposed to a beneficiary's land because of a cadastral survey error, then obviously the proceeds from that are not going to go to the correct beneficiary, even though they were collected by the United States.

And that's oftentimes the case. You go out to, say the Navaho reservation, and everything is checker-boarded so that there's BLM land right next to non-Indian land right next to Individual Beneficiary land. And if you're off a few feet, you could get an oil well being produced, with extensive production, and not a cent going to the true owner because the cadastral surveys are off. Here, they're off up to 20 percent in certain instances.

THE COURT: Well, what's your response to the government's argument that, if this accounting goes to that extent, it's going to increase the cost of it, I think they said

at one point 20-fold? Do you care?

MR. HARPER: We believe that the important point here is that they have this obligation to determine what the obligation is. And the obligation here involved, Your Honor, is to do a full accounting, an adequate accounting, one that demonstrates how they've conducted themselves in the management of their duties.

THE COURT: Let me ask you -- let me put to you, maybe not quite as provocatively as the government did in their brief, but let me put it to you straight. Do you want this done, or do you want to prove that it can't be done?

MR. HARPER: We believe what's clear is that, to the extent that the accounting is determined to be what the law requires, they cannot complete the accounting.

And let's just get to that point. They cannot complete the accounting required by law, and that's the -- and if they could do it, we would want that accounting. But they can't possibly do it.

And that's why additional equitable remedies should be available in this circumstance.

THE COURT: That's the next chapter.

MR. HARPER: That is the next chapter, and that's a different colleague.

But Your Honor, let me say one thing about the cost of the accounting, because I think this is also a dispute between

the parties. And you raised the issue of the cost of the accounting. The government basically --

THE COURT: I didn't raise it. The Court of Appeals raised it.

MR. HARPER: Well, the Court of Appeals did raise it. But what the Court of Appeals didn't have before it is a record. Because there's been no analysis in the District Court on this point, where the trustee causes the increased cost in the accounting, then all of the accounting cost goes to the trustee. They have to pay for it. That's black-letter trust law, and there's ample support in the case law for that: Restatement talks about it, Scotts, Bogart as well.

We think that's the circumstance here. This accounting -- had they been doing cadastral surveys, as is their responsibility, it wouldn't cost as much as they say it would. Had they been doing an accounting, as is their responsibility, as was made clear in 1899, they wouldn't have the costs associated with the accounting today. Had they retained documents as they should have, there wouldn't be those costs associated there.

In a normal trust, a trust beneficiary asks for an accounting, and they go back and they get their records and they show them their records. Here, we've asked in our request for production - again, a separate issue, I understand - but the response of the government to that request for production is

pertinent to this issue. Because they said it's going to take millions of man hours and millions of dollars just to produce the necessary documents for a handful of beneficiaries.

Well, how can that be if they've been maintaining the documents in regular fashion? How can that be if they have all that they need in their cave in Kansas? If it was all so easy and they hadn't breached their responsibilities, then they would just go back there, pull those documents out, and provide them to us, as a normal trustee would. But that's not what's happening here.

So all the cost associated with the accounting is created because of their malfeasance, created because of not their unreasonable delay, but their unconscionable delay, and their intransigence. And that's what the Court of Appeals -- those are the terms the Court of Appeals has used.

And it's because of that that trust law does provide directly the answer as to whether or not they should provide the accounting required by law, or some lesser accounting, and it is the one required by law. Once that factual predicate basis is established, then trust law says the accounting is borne by the trustee because of their breaches of trust.

And we think that's the circumstance here, and we would welcome the opportunity to make that factual establishment in this litigation, because we think it's clear on the record.

THE COURT: All right.

MR. HARPER: I will just touch upon management by tribes. We think that 25 U.S.C. is pretty clear on what happens when a function is compacted or contracted pursuant to self-governance. And it says that it shall not diminish the trust responsibility owed to individual Indians and tribes.

So it can't possibly be that they compact and contract, without any consent of the individual beneficiaries, and somehow they discharged their duty or eliminated their duty that they had prior thereto.

Because the statute itself says they cannot diminish their trust responsibility by compacting and contracting. The trust duty involved here, the accounting duty is one of their fundamental trust responsibilities. So it can't probably be that they compact and contract, and somehow by doing so eliminate their duty to account.

So we believe that whether or not the assets or funds are held by tribes pursuant to compact or contract, collected, or whatever the function the tribes are involved in, they still are funds that the government has a responsibility to account for, just like any other funds.

THE COURT: Does this argument in any way put individual Indians at odds with tribes? Does it create any adversary relationship between individuals and tribes?

MR. HARPER: Your Honor, we don't think necessarily it does, but there may be an issue of whether or not a tribe's --

we're not saying the tribes are the ones that should be held accountable for this. It is the government who has oversight responsibility of the management.

In this circumstance --

THE COURT: Well, in the direct pay situation, you take the position that the government -- that if some oil company hasn't made the payments that it should have made directly to an individual Indian, you take the position that the government ought to go after the individual oil company and recoup the money and pay it over to the Indian. Right?

MR. HARPER: We think that could be one of the options that --

THE COURT: Same issue for tribes? You're on both sides of some of these cases, if that's the case, Mr. Harper.

MR. HARPER: We do represent some tribes on these matters. And the tribes that we do represent, except for one, does not have functions, compact or contracting functions, over Individual Indian Trusts. In fact, two of the tribes don't have responsibilities -- do not have allottees at all.

So in those two, there's one tribe that does have some compacting and contracting functions, but we believe that those have been addressed by the parties involved, and explained to them.

Your Honor, if I could just touch upon the issue with respect to direct pays and the oil companies. What we're saying

in that circumstance, as we would say in this circumstance, is that once the accounting is provided, then that allows the beneficiaries to make choices as to how further to proceed: Seek further equitable remedies in this court, perhaps seeking other remedy in other courts.

The important point, though, is that -- and that may still be the circumstance vis-a-vis tribes, as well. There may be some compelling of the United States to bring an action against the tribe, or it could be some other remedy involved. And, you know, all that has to be borne in mind with the notion that tribes have sovereign immunity to a certain extent.

So there are issues that may arise, but the point being, that does not in any way displace the United States' obligation to, in the first instance, account for those transactions. Whether or not -- what remedies may be available, that's a separate question.

THE COURT: Can you describe what that accounting would look like? I mean, the money never passes through the government's hands.

MR. HARPER: The government has responsibility to retain -- as trustee, the tribes being their trustee delegates in this circumstance, has responsibility to oversight their trustee delegates and ensure that all payments are made, timely made to the right beneficiary; to the extent that they're collected, all collections are made. All those issues that a

trustee would normally have, to the extent that the tribes have taken over those functions, they need to carry those out, and the United States has a responsibility to ensure that they carry those out.

That means the United States has to go and get documents from those tribes. If they're within their possession, then the United States has to do that to do the accounting. In many of these circumstances, the BIA and the tribes are working hand in hand to the management of these individual beneficiary assets.

Understand out there, for each tribe, what they do with respect to compacting and contracting may be slightly different. One tribe may take over a realty function, the other tribe may take over the IM function, another tribe may take over some other related function. All of these have to work in conjunction, and those not taken by the tribe are kept with the Bureau of Indian Affairs or other Department of Interior agencies.

And so, it is not in any way unreasonable, and indeed the statute requires that the United States not diminish their trust responsibility owed to individual Indians when there's compacting and contracting.

Your Honor, two other items. The un-posted collections, which I think were --

THE COURT: That gets us into Treasury, doesn't it?

MR. HARPER: Yes. And a colleague of mine will talk about Treasury issues.

THE COURT: Okay.

MR. HARPER: And the other item is of should-have-been-collected monies, monies that the government had an obligation to collect, but failed to collect.

Again, these are funds that are -- the United States had an obligation -- all we're talking about is proceeds from trust land; obligation, clear obligation to collect those funds, invest them while they held them, and disburse them. If they failed to collect them, then they at least have to tell us what they did and why they did what they did, explain from lease to disbursement what happened with all the lease payments.

We're not saying they have to go behind the lease. We're not saying they have to discuss, for example, whether or not the lease should have been for $100 an acre as opposed to $50 an acre. What we're saying is, that $50, did they collect those funds? That is clearly a fund management issue. It's not an underlying resource management issue, because we're talking about a collection --

THE COURT: It could sort of go either way, it seems to me, whether it's a trust fund management issue or an asset management issue. In my mind, it falls on the other side.

MR. HARPER: Well, Your Honor, in that circumstance, there is clearly a payment due. And the problem -- and the

reason why we think it is included is, from our complaint and every time since then, we have always talked about the lack of an accounts receivable system. The United States doesn't have an accounts receivable system, so they don't know when a payment is due, so they don't know to go out and collect those funds.

And the reason we talk about that in the complaint, and the reason we've harped on that issue ever since, is because the failure to collect means it never gets deposited in the right systems, in what they're calling their IM system.

So that piece, that going out and collecting those funds, is part of our case, because we've talked about it in the complaint and because we've sought redress because of it. And there's in no conceivable way, if you're talking about an accounting of funds, that you can exclude funds that were not collected, that's obviously still part of the proceeds of the trust.

Trust funds are trust funds, not because the United States denotes them as trust funds. They're trust funds because they're proceeds from trust lands. They get their character as trust funds because they're proceeds of trust land. And that's plain in, among other places, Mitchell 2.

So we think, too, Your Honor, that the uncollected funds are part of this -- should be part of the accounting.

On any of these issues, we would welcome the opportunity, since the government raised a lot of these

questions --

THE COURT: Do you have a view, Mr. Harper, just kind of a mechanical view as to exactly how that might be done? You're the government; you have the obligation to, in your view, account for what was collected and paid and what wasn't collected and paid.

MR. HARPER: Yes, Your Honor.

THE COURT: How do you do the latter part of that?

MR. HARPER: What you would do is, you would get the lease, and you would collect the lease, all the leases from a particular plot of land.

THE COURT: From every plot of land, wouldn't you?

MR. HARPER: Yes. Their obligation is to account for each beneficiary, that's correct. And, Your Honor, as Cobell V makes clear, and ordered the defendants to go out and get third party documents that were relevant to these proceedings. They've never done so. But they could have done that, they should have done that, they were ordered to do that. Had they done that, they would have much more than they presently have.

They would go and they would take the leases, and they would take whatever information that they have regarding that land, and say, "You follow that all the way to the front." You have to go both ways. You have to go from the ledger entries all the way to the leases, and from the leases all the way to the ledger entries. Because if you just go one way, if there's

transactions missing, there's no way you're ever going to get to the errors by failure to collect. And many other errors, as a matter of fact, but you certainly won't get those errors.

So you would look and you would say, "Okay, what are the lease payments owed on this lease?" And then you would go and you would follow the system and see if those hit the system. And then, were they disbursed properly to the correct beneficiary?

Then you would go and look at those leases and ask the question, "Are they registered to the right owner of the right allotment," and those kinds of issues, as well. That's what a full accounting would do, one that would lay bare the trust and allow the beneficiary to make determinations as to how to proceed.

THE COURT: Well, you may be right about that, but the question we keep stumbling on is whether the full accounting that you're talking about is the accounting that was mandated by Congress. That's the issue.

MR. HARPER: Yes, Your Honor. We think that the Cobell VI, in stating that it is a preexisting accounting, means that -- and that it is described in, quote, "Traditional, equitable terms," means that the nature and scope of the accounting is determined by this Court as the same accounting duty as any beneficiary would have in any other circumstance.

And that's perfectly consistent with the recent Supreme

Court guidance in White Mountain Apache. White Mountain Apache, the duty there involved was not expressed in statute, that there was no duty to preserve the trust assets. But the Supreme Court held that, because it created a trust as an incident to the creation of the trust, you have that duty. If you have that duty there, then you have this duty here.

And finally, of course, the '94 Act has language that is necessarily inclusive. It says, "including but not limited to." In Cobell VI, the Court went to great lengths to explain why that provision meant that there were many unstated duties there involved.

Two other points, if I could. One, with respect to -- there is a provision that we did not include in our brief because we did not see the government's filing prior to filing it. They have now excluded from their accounting any review of interest. In their 2003 plan, January 6th, 2003, they don't describe any specifics. But what they say is that they're going to do a, quote, "interest test, an analysis of the IM trust funds rate of return and the calculation of interest factors as planned" as part of their accounting.

They've now excluded that, and that's an additional exclusion from this, and, I guess we would argue, an impermissible exclusion.

THE COURT: Okay.

MR. HARPER: Finally, one other matter. We -- it is

not clear from the government's, quote/unquote, "plan" whether or not they intend to exclude Osage or not, the beneficiaries of the Osage headright trust. They are IM beneficiaries, we believe they're included. The government argues -- has argued in the past that they're not, and we're not clear what their present position is.

To the extent that their present position is that they should be excluded, we would say that that's again another impermissible exclusion.

THE COURT: Well, you have to explain that one to me. I'm not sure I'm up to speed on Osage.

MR. HARPER: Sure. Your Honor, in Osage, the trust is owned by individual Osage members, and each is provided -- initially, back in the turn of the century from the 18th -- I'm sorry, 19th to 20th century, they discovered oil in Osage. And so they divided -- it's held in common, so to speak, but with each individual holding a headright ownership. It's a vested interest in the larger pool. And so, say X amount of money comes in; it's divided equally among all the headrights.

The funds are distributed through the Individual Indian Trust system and given to each of the beneficiaries, and sometimes people get direct pay of that. But the ownership of the original is held in common and is owned by those individuals, and so therefore it is individual Indian assets that are involved there, and we think necessarily included in

this case, which is an accounting of all funds belonging to individual Indians.

Whether or not they decide to put it in an X account or Y account is immaterial. The government does not, again, determine the nature of the duties based on which account they put it in, and we think that it therefore belongs in the litigation.

THE COURT: Okay. I'm sure I'll hear from the government about that.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you, Mr. Harper.

MR. STEMPLEWICZ: Your Honor, if I may briefly respond.

THE COURT: Yes.

MR. STEMPLEWICZ: And then address the Treasury issue as well.

Where this case on the merits tends to get somewhat complicated is when --

THE COURT: From my point of view, from day one.

MR. STEMPLEWICZ: Well, the solution, I think, Your Honor, is to adhere to what Congress put forth, and that is in the 1994 Act, the language in there that does not in any way suggest the kind of all-encompassing, broad-based accounting that the plaintiffs argue is required.

With all due respect to Judge Lamberth, and yes, he did put a lot of work into Cobell X, but in regard to the closed

accounts prior to -- accounts closed pre-'94 Act, the Cobell X opinion changed the language of the Act and said, "All funds which were deposited or invested pursuant to the 1994 Act." The Act says, "All funds which are deposited or invested pursuant to the '94 Act."

THE COURT: Well, Judge Lamberth also said he can't remember ever seeing a case in which so much emphasis was placed on the tense of a verb, as I remember.

MR. STEMPLEWICZ: I think the tense of that verb, of course, it is what Congress said, but it also fits in naturally to the scheme of the '94 Act. When 101 and 102 are read together, and along with all the legislative history both pre-Act and post-Act that is discussed by the Court of Appeals, it's very clear that what Congress had in mind was something of much narrower scope than the plaintiffs have argued.

Cobell V never said that the government had to account for all funds going back to the beginning of the Trust. What the Court held there was that the '94 Act imposed the duty on Interior to perform an adequate accounting of all funds, irrespective of when they were deposited. It didn't say all funds ever deposited or invested throughout all time.

And the Court of Appeals language in Cobell VI, which seems to be creating the confusion about preexisting rights, is really addressed at the fundamental issue of whether any historical accounting at all was required, not what the scope of

that requirement was.

The Court of Appeals much later, getting into the Cobell XVII, was very clear that it was deferring ruling on issues such as that which were presented to it in the appeal of the structural injunction, with the one exception of the statistical sampling.

The class definition is of no more consequence to who's entitled to an accounting than if it said: All present and former IIM account holders, and everybody who has driven the Beltway around Washington, D.C. I mean, it's what the statute says, not how the plaintiffs have postured themselves coming before the court in terms of the definition of the class.

The preexisting right that the plaintiffs keep coming back to, yes, there was a preexisting duty to account, which is why the government could not complain in 2001 that there was a historical component to the accounting that was required under the '94 Act. That preexisting obligation to account was the general obligation of any agent of the government to account for funds, a disbursing agent in military or wherever else, to account for funds in his or her possession.

But also there was an on-request right, where any IIM account holder at any time could request a statement of account of the agency superintendent, and Interior's regulations required that the superintendent provide a statement of account on request.

Do we have a record of how many requests such as that were made? No, we don't know. We do know that a lot of IIM account holders pursued their rights in various ways prior to the '94 Act. The Mitchell case is one example. Those were 1,400 or so IIM account holders with timber rights who were suing the United States. Of course, it was a Tucker Act claim, but they were still pursuing their rights.

So the individual beneficiaries pre-1994 Act did have that opportunity to obtain information about their accounts.

So to the extent that there is this concern that those individuals -- it's somehow unfair to carve them out of here, the bottom line is, Congress enacted what Congress enacted, and it did not include those individuals whose accounts were closed prior to October '94.

Now, what remedies they are left with, remedies is another issue. There's the right and there's the remedy, which was a question before 1994. What remedies those folks may still have is open to question, but they're not in this case.

THE COURT: Have any of the published opinions in this case by any court -- or have any published opinions in any case, to your knowledge, given support to your assertion that this statute is intended for prospective relief?

MR. STEMPLEWICZ: Yes, Your Honor. I believe that that's what this court said in Cobell V. And I believe that the same phrase --

THE COURT: That's after he had certified a class of present and former beneficiaries?

MR. STEMPLEWICZ: It is possible that the former beneficiaries could be seeking accounting. They could be in that window between '94 and '96. He didn't certify the class until 1997, so it was inclusive of those who were eligible to --

THE COURT: And you think Judge Lamberth understood this to be prospective only?

MR. STEMPLEWICZ: Well, he certainly did --

THE COURT: Show me where he said that.

MR. STEMPLEWICZ: I don't have chapter and verse at hand right now, Your Honor, but we can get that, where there was discussion of the '94 Act being prospective in its language. And I believe Cobell VI said that, as well.

THE COURT: That, and the place where he said he didn't remember ever seeing a case that put so much emphasis on verb tense?

MR. STEMPLEWICZ: It was not in Cobell X.

THE COURT: Is that 10? All right.

MR. STEMPLEWICZ: In addressing the issue of cost, as Mr. Harper was arguing, that it's correct that the cost should be borne by the government; well, it is being borne by the government, and Cobell XVII was very clear when addressing that argument about a court of equity. Sort of shifting the burden of costs to a trustee, the Court said there's no indication in

the '94 Act that Congress intended the best imaginable accounting, and there's no evidence in the '94 Act that Congress intended to impose on the taxpayers any such burden that might derive from the common law or from the order of a chancellor in equity.

What the Court did say was, if the structural injunction of Cobell X, if it is revisited, would have to be drastically changed.

The "including but not limited to" language that plaintiffs cite is not the historical accounting provision in 102(A). It is the obligations of the trustee set forth in 101, which, by the way, modifies 25 U.S.C. 162(A), which is where the 1938 Act resides.

As far as the one last point, Your Honor, we did address in our brief the argument about excluding any transactions that were not picked up, collections not made. The plan and the provision of the plan that's relevant to that is cited. It's the land-to-dollars test, one of the system tests that the Historical Trust Accounting Office has incorporated into the plan to pick up that kind of transaction to assure, to the greatest extent possible, the accuracy of the information that's provided to the account holder.

With that, I'll address the Department of the Treasury.

THE COURT: You want to talk about the interest test and the Osage issues that Mr. Harper raised?

MR. STEMPLEWICZ: Well, Your Honor, there's no difference, to my knowledge, between the 2007 plan and the 2003 plan on the interest test.

THE COURT: So it has not been dropped, excluded, omitted?

MR. STEMPLEWICZ: It's not excluded. The throughput - that's been described in various places as $13 billion over the life of the Trust - does include interest. And that is described in one of the tables in the July 2002 report to Congress on the historical accounting. That was the plan that preceded the 2003 --

THE COURT: What, by the way, was the throughput -- that's a great word. That's a word of another generation. What was the throughput before 1938?

MR. STEMPLEWICZ: I don't know, standing here today, Your Honor. I believe there is some indication in that table of what it was.

At that time, in that era, all I could say at this point was, there were somewhere in the neighborhood of 20,000 IIM accounts. It was still in the relative early stages of leasing that was going on. It was well before inflation, the later years. There was development of oil and gas, and there could have been some large numbers in there, but standing here today, I can't -- without looking at that table...

THE COURT: Okay. And what about the Osage?

MR. STEMPLEWICZ: The Osage, all I could say on that, Your Honor, is again, there's no difference between the 2003 and 2007 plans. I don't know -- I'm not aware of any express exclusion of Osage. My understanding, as long as there was an IIM account and it was open as of October 25th, 1994, it will be included in the historical accounting.

THE COURT: All right, sir.

MR. STEMPLEWICZ: Now, Your Honor, as far as Treasury is concerned, notwithstanding the lengthy analysis in the plaintiffs' brief, it's really a very simple issue. And it goes back to Cobell V, following the Phase I trial.

And the Cobell V opinion, 91 F.Supp 2d, 1 at pages 49 and 50, describes the declaratory judgment regarding the Secretary of the Treasury. The judgment is that the Secretary of the Treasury's duty to retain IIM-related trust documents that are necessary for the rendition of an accounting is the Secretary's duties. It's a limited involvement in the case.

The Court of Appeals in Cobell VI, in explaining the rationale for the historical accounting, said it's necessary, in order to perform the accounting required in section 102(A) of the '94 Act, "to reconcile the accounts in existence, taking into account past deposits, withdrawals, and accruals."

Those transactions, which are the heart of the historical accounting, are in the books and records of the Department of Interior. They are maintained -- those

transactions are administered, the accounts are administered on an individual-by-individual basis, and they are what they are.

The books and records of the Department of the Treasury are not based on an individual deposit, withdrawal, or accrual. All of those necessary elements of the historical accounting are included in the books and records of Interior. And in fact, the very provision of the statute that's at issue here, Section 102(A), starts with the words, "The Secretary of the Interior shall..." The Secretary of the Treasury is not mentioned in regard to the historical accounting provision in the 1994 Act.

There is this sort of theory that the plaintiffs have about the ebb and flow of money in the Treasury general account somehow impacting the interests of each individual IIM account holder. However, if that's the case -- well, it may, but if -- there's no way to tell from changes in the TGA whether that's a result of a correct transaction or incorrect transaction, or any transaction at all. It may just be an adjustment.

It seems like the only purpose served by dragging Treasury further into the case beyond the point in Cobell V, where the duty was spelled out, would be to provide a pretext for a money judgment account. And that of course is outside the scope of this lawsuit.

THE COURT: All right. Thank you. Mr. Harper?

MR. HARPER: Your Honor, I would just want to respond

to a couple of items raised by government counsel, and then on the Treasury issue, I'll turn it over to my colleague Mr. Gingold, if I could.

Very briefly, the one issue -- the government argues, in their brief and here today, that these notions of the preexisting duty is irrelevant, in essence, to any of the issues before you now. It boggles the mind that one can make an argument that, even though the Court of Appeals has held that the 1994 Act did not limit or alter an accounting duty, that somehow it completely eliminated that duty for the vast majority of beneficiaries involved. Just unbelievable. And not by implication on a verb tense, is how the United States Congress intended to eliminate the duty to account for all these beneficiaries.

Moreover, with respect to these very issues, whether or not there is prospective language in the 1994 Act and the meaning of it, again, let me read from their brief. "Where these provisions imposed a number of specific accounting requirements, they are all prospective in nature and do not govern the historical reconciliation of the IM accounts."

This exact question, they're saying, pointing to the exact same language, was brought forward to the Court of Appeals. And the Court of Appeals said no, that language does not limit, does not alter, does not diminish the trust duties here. So we think that issue has been plainly decided.

They talked a little bit about the law of the case, obviously about Cobell X. Just for the record, our argument is not that it's law of the case. Our argument is that that decision is persuasive pursuant to decisions of the D.C. Circuit, that decisions where those findings are not specifically addressed are still persuasive.

One other item with respect to -- the government again is arguing a number of times, said here today and sort of conflates two questions, whether or not -- and they do this in the context of those pre-'94 accounts. And they say, well, they had a right to statement of accounts. A statement of account is not an accounting. A statement of account you can get in all kinds of different ways. There's a bank statement of account.

But a Trust beneficiary has a right to its trustee telling them what they've done with their property since the last time they've provided an accounting; here, since there's never been an accounting, to the beginning of the Trust.

That's the right we're talking about. Not simply some statement, but sufficient information so the beneficiary can ascertain whether or not the Trust has been faithfully carried out. And that will necessarily include the land management piece for, among other reasons, that there have been numerous land sales, some 40 million acres, in which there has been no accounting, ever.

And how are we going to determine what happened with

those 40 million acres of land, what happened to the proceeds, unless we go back and trace it from the initial allotment to what happened to those funds and whether they were disbursed to the correct beneficiary?

THE COURT: I think the question is whether it's possible, and I think the answer you want me to find is that it's not.

MR. HARPER: Well, Your Honor, we believe two things. We believe, one, that it is the province of this court to determine the nature and scope of the duty. In fact, the government argued just precisely the opposite in Cobell VI, that it is not the province of this court to -- their headnote reads, "The District Court's declaration of the scope of such an accounting, and its determination to hold a trial on accounting issues, should be reversed." Again, rejected.

So they've made that argument, whether you should do it or they should do it. And Court of Appeals said you should do it. So we think that that's initially what should happen, is what is the nature and scope of the duty? Then furthermore, once that duty is determined, can the government bring itself into compliance, and can they discharge the duty. And if they cannot discharge the duty, then we argue that that opens the door to -- and really justifies other equitable remedies clearly within the province of this court.

THE COURT: I hear that.

MR. HARPER: Thank you, Your Honor. I turn it over to my colleague, Mr. Gingold.

MR. GINGOLD: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

MR. GINGOLD: With respect to Treasury, Your Honor, Treasury is an indispensable party in these proceedings. Several times the government has attempted to dismiss the Treasury from these proceedings, and it has failed to do so.

The October 10th, 2007 trial is one of the most important proceedings in this 11 years. We have now reached the 11th anniversary. And Your Honor, to dismiss Treasury at this point in time would not allow this court to resolve this issue with finality.

Most importantly, the government itself, in testimony before this court and in exhibits submitted that have been introduced into evidence, among them Defendant's Exhibits 108 and 110 in Trial 1.5, describe in some detail the Treasury's role in the Individual Indian Trust since the turn of the 19th and 20th centuries.

The Treasury has had active participation in all aspects of this Trust from the very beginning: From a trustee delegate that has held the money; from a trustee delegate that has invested the money; from a trustee delegate that has transferred the funds to various accounts; from a trustee delegate that has held securities that have been pledged to

secure the deposits in local commercial banks of funds that are pooled funds for Individual Indian Trust beneficiaries.

Much of the investment portfolio of the Individual Indian Trust, for a good part of the more than 100 years of the Trust, has been U.S. government securities: Treasury bonds and Treasury bills. We have been through this particular situation at length in this court. Treasury does indicate, in what has been filed recently, the extent to which it has participated in one aspect of this.

What is abundantly clear is, Treasury has held the money, it is Plaintiffs' view that the money is for the most part still at the Treasury. The government's own experts have testified from 1906 through various other portions of the Trust, and by statute, by letter of the Secretary of the Treasury, by actions taken by the Secretary of the Treasury, funds have been held and actions have been taken with regard to both interest earned on the funds, compound accretions referred to in the bonds that are held in the name of the trust beneficiaries.

The Court of Appeals in Cobell VI specifically stated, as Mr. Harper has informed you, that the accounting is to include all deposits, withdrawals, and accruals. And it's to include, and is not limited to.

Let me explain, Your Honor, how the typical transaction would occur. And again, I think it's very important, just as an example, for the length and breadth of the Treasury activities,

that Defendant's Exhibits 108 and 110 be reviewed because it's a discussion of the role, including the auditing role, of Treasury with regard to funds that are held elsewhere.

For example, Your Honor, funds are commonly collected and pooled in various accounts at Treasury. On December 18th, 2002, Burt Edwards, who is the executive director of the Interior Department's Office of Historical Accounting, testified that virtually all the funds are pooled and invested, and that all the funds that are pooled or invested, none of them, Your Honor, are held in the names of Individual Indian Trust beneficiaries.

These are accounts, and as Mr. Edwards said, up to thousands of accounts held at Treasury for funds that are deposited. If MMS, for example, Your Honor, in June of 2007, was receiving funds from oil companies, let's say Exxon Mobil and let's say Shell Oil, that has been leasing individual lands, tribal lands, government offshore lands, government onshore lands, the funds come in in aggregate, Your Honor. They're not separated into Individual Indian Trust funds, or by any individual name.

One would have to go into the leases themselves, which are communitized. One would have to look at the ownership interests in the land, many of which are undivided interests, Your Honor. The government itself told this court and Congress, on July 2nd, 2002, that they estimated there were four million

beneficial interests in 10 million acres of land.

The income is generated and pooled, and held in common, and invested in common. You will not find a security, whether it's the United States bond or note, or whether you're dealing with a savings bond that is held in the name of an Individual Indian Trust beneficiary.

That's why it's so important, and that the government has recognized in that same July 2nd, 2002 plan, you have to look at all the funds whenever they've been deposited in order to come up with accurate balances.

Now, Your Honor has raised issues with Mr. Harper with regard to the costs. The government estimated that the costs of the accounting of all funds would cost approximately two and a half billion dollars in its July 2, 2002 plan. And then in the Court of Appeals, it informed the Court of Appeals in Cobell XIII that in fact it would cost $13 billion to do the accounting.

THE COURT: Well, I'm sorry --

MR. GINGOLD: That would include --

THE COURT: So the funds are held in an undifferentiated pool. What do you want them to do? Sort out each deposit and track it through an undifferentiated pool, find out which dollar was paid to which Indian account? Is that what you're looking for?

MR. GINGOLD: Your Honor, what the Treasury has said,

and they repeated in the recent affidavit, is it's not that they can't provide the documentation; it's that they are dependent upon the predicate information provided by Interior in order to provide that information.

For example, when the funds are deposited in MMS as a result of the -- in the MMS account at Treasury, as a result of the collections for a particular month, BIA then provides information and does a manual segregation of what they consider to be the individual funds, the tribal funds. And those are deposited in respective accounts. Treasury has reported to this court that individual funds are in fact deposited in tribal accounts.

If the fund information, if the accuracy of the information isn't complete, then you could have Individual Indian Trust funds remaining in MMS accounts, or remaining elsewhere at Treasury. But funds are collected from the Individual Indian Trust lands and deposited in the Treasury in that regard.

Then again, it's BIA that has the information, and either manually separates the individual Indian funds from the rest of the aggregate funds, or provides that information to another part of Interior that does that.

But Your Honor, that is done, and it's done every time there is a deposit made at the Treasury, and has been made. That is also done with regard to the commercial banks. In fact,

Your Honor, the Treasury had been the depository and custodian of the securities that were pledged by the local banks in order to hold the Individual Indian Trust funds. There are statutes, at least since 1906, that specifically dealt with that particular issue. And the compromise was that Treasury would hold the bonds in the event the bank failed.

Prior to 1933, banks didn't have FDIC insurance. As a result, there was risk both with regard to holding government funds and with regard to holding Individual Indian Trust funds. And the solution to that risk was that the deposits had to be secured, and the deposits were secured with individual securities that were held by the Treasury.

That information should be in the possession of the Treasury. It is important information, because to the extent the government has not collected the third party information from the local banks who received the deposits from BIA superintendents that were funds generated from the Indian Trust lands, those securities would help identify the amount of money that was held, and whether the securities have ever been redeemed.

When there's a withdrawal from the 14X-6039 account, Your Honor, there can be a withdrawal for several different reasons. Again, that is a pooled account. It can be withdrawn because a Treasury check is cut, and immediately at the time the check is cut, the credits are transferred to the Treasury

general account. They're not removed from the Treasury, they're just removed from the 14X-6039 account.

Another significant withdrawal from that account is when the funds are invested in securities. These are the funds, again, just for purposes of this illustration, June of 2007, from MMS, $100 million comes in in funds from the various sources that I mentioned: Offshore, onshore federal lands, Tribal Trust revenue, and Individual Trust revenue.

Let's say $20 million of that is identified by BIA. And from the leases, individual -- Individual Indian Trust leases that on the face of the leases refers specifically to the land that the revenue was generated from. That is the purpose of those leases, and they're both in the form of short-term and long-term leases. And those are critical, because that is the principal ability to segregate the income at the Treasury level when it reaches the MMS account at Treasury.

So Your Honor, when you withdraw the funds -- and as a matter of fact, Burt Edwards basically testified that most of the money is immediately withdrawn and invested in government securities. This again was his December 18th, 2002 testimony, in a deposition.

When you withdraw the funds, and let's say it's $20 million that's withdrawn from 14X-6039, it could be invested in a variety of Treasury securities. But in order to determine which securities -- what the yield is; and we're dealing with

Treasury securities -- and I'm going to try and be simple, because this could be awfully complicated. You're dealing with discount rates, not interest. You're dealing with accretion, you're not dealing with accruals.

As a result, you have -- the government buys a bond with a face value of $100; depending on the discount rate, it would pay $95 today, depending on the maturity of the particular bond. When it's redeemed, a certain amount would be liquidated, and, whether or not the money ever goes back to 14X-6309, would again be information held by Treasury; whether or not it goes into the general Treasury account, that again would be information held by Treasury.

When it goes into another of what Mr. Edwards testified could be upwards of more than a thousand accounts at Treasury that could hold Individual Indian Trust money just with regard to Interior accounts, Your Honor, that would be information that can be provided by Treasury if the predicate information is produced to the Treasury Department.

Treasury has been candid about that for years. As a matter of fact, Treasury raises the issue of the paragraph 19. Treasury went through a significant exercise, wasn't able to finally resolve that issue because it was unable to get the predicate information from Interior.

But does have Treasury have summary level documents? Yes, it does, Your Honor. Does Treasury have specific

documentation? Yes, it does, Your Honor. Are many of the securities purchased in the name of the Secretary of the Interior? Yes, they are. Not the individual Indian. Are many of the securities purchased in the name of Bureau superintendents? The answer is yes. Not the individual Indian.

Are deposits held and securities pledged to insure those deposits in the name of disbursing officers, the Secretary, and BIA superintendents? Yes, they are. And that information, Your Honor, is held by the departments of the Treasury.

Your Honor, we acknowledge this is a complex problem. We have tried to work with, and we had a very good working relationship, Your Honor, with the Treasury, as distinguished from Interior. If the Treasury gets adequate predicate information, we are confident that Treasury could produce the type of information that could provide answers with regard to the income generated from the Trust.

If the Treasury gets --

THE COURT: What is your hypothesis, Mr. Gingold? What hypothesis do you think you're going to prove if you get everything you want?

MR. GINGOLD: Well, it 's the accounting of all deposits, withdrawals, and accruals, as stated by Cobell VI and affirming in this court in Cobell 5.

THE COURT: But, I mean, what do you think you are

going to find at the end of the day?

MR. GINGOLD: I think we're going to find that very little of the money was disbursed to the Individual Indian Trust beneficiaries, Your Honor.

THE COURT: So the money that was disbursed was the wrong money. Is that your point?

MR. GINGOLD: Your Honor, we're not sure that the money was ever disbursed from the Trust. These are commingled accounts, not only 14X, but when it goes to the general Treasury account or other accounts --

THE COURT: Money isn't fungible?

MR. GINGOLD: Money is very fungible. But if in fact money was paid -- you're not dealing with a check, with an agency code or identifier, to the Trust. The identifier is to the Interior Department. So...

THE COURT: Let me try out my hypothesis on you. Okay? My hypothesis is that over the years there's been a throughput of $13 billion, and that the standards that you want to impose on Treasury will only -- and that indeed $13 billion have been paid out to Indians, but that Treasury can only track specific amounts to specific Indian accounts of two or three billion.

What do you want?

MR. GINGOLD: Well, first of all, Your Honor, I would be surprised if they can track two or three billion.

THE COURT: Okay. But that's my hypothesis.

MR. GINGOLD: Right. Then we would want --

THE COURT: You want equitable disgorgement of the other 10 to be paid again to Indians?

MR. GINGOLD: Well, if your hypothesis is they've been paid, and there's evidence that they have been paid, Your Honor, we wouldn't want to be paid again.

THE COURT: Well, I'm saying that money has been paid to Indians. Okay?

MR. GINGOLD: So your hypothesis is, the money actually has been paid to Individual Indian Trust --

THE COURT: Yes.

MR. GINGOLD: If the money has been paid to Individual Indian Trust beneficiaries, and the disbursement records, including the checks, prove that, Your Honor, we're not entitled to anything in that regard.

THE COURT: Well, then, let's go back to what your hypothesis is.

MR. GINGOLD: My hypothesis, Your Honor --

THE COURT: You think nobody has ever received any of this money?

MR. GINGOLD: No. As a matter of fact, there has been some receipt of some money, Your Honor. But let me give you an example. In 1997, the Treasury did a check disbursement study with regard to the 14X-6039 account, and that study has been provided to this Court. Slightly more than 50 percent of the

funds from the account were identified for a 12-month period of time as actually being disbursed from the account by Treasury, whereas -- and I think that was about $170 million, Your Honor. Or 166 million, to be a little more precise. Whereas, I think something more than 160 million was not identified, but was nevertheless reported by Interior as going out of that account.

There have always been problems between the reconciliation of the Treasury accounts and the reconciliation of the Interior accounts. That has been a problem that results from different record-keeping at both of the departments.

But from the one 12-month period of time that Treasury did its own study, there was approximately a 50 percent, let's say, if not error, divergence between what Treasury found and what Interior found.

Now, Interior doesn't hold the Trust money. Interior doesn't hold any account for an individual. Those are -- by the government's own acknowledgment in its briefs, and also in the exhibits that it filed, those are administrative procedures with respect to systems to identify beneficiaries who have an interest in the Trust funds. That's all they are. The Treasury is the only one, other than the local banks or brokerage firms or anyone else who has invested in the securities as fiscal agent or as agent otherwise, for the money. Interior doesn't hold any of the money. They never did. They weren't supposed to. They didn't have the ability to do so.

So what we're looking at, Your Honor, is significant evidence that's been introduced in this litigation, where the books and records of Interior don't agree with the books and records in Treasury. But one particular time, which is in the modern era, when everything is supposed to be running relatively well, showed approximately a 50 percent difference in what was taken from the account, and what was at least believed by Treasury to be disbursed out of the account.

THE COURT: Where is this information that's in the record before me?

MR. GINGOLD: Your Honor, the check study is dated May 31st, 2000. It's called, "Study of Check Negotiation Practices For Office of Trust Fund Management-Issued Checks, Financial Management Service." It is Attachment K -- Your Honor, would you care to have a copy of this?

THE COURT: No. Just tell me, Attachment K to what?

MR. GINGOLD: It's Attachment K to -- Your Honor, I'll have that information for you in a moment.

THE COURT: Okay.

MR. GINGOLD: But it has been provided to this court as just an illustration for a 12-month period of activity in the 14X-6039 account. It doesn't purport to be comprehensive activity at Treasury. Treasury has acknowledged to this court, and we can provide that other information to you, that Individual Indian Trust deposits have been placed in other

accounts, including the Tribal Trust account.

Let me explain why that occurs. And Your Honor, the fact that Treasury was able to identify it speaks volumes as to the type of information it has available for purposes of the accounting.

Frequently, when an oil company leases land, it leases land over Individual Indian Trust and Tribal Trust properties. Many of the trust lands for individuals are undivided interests, and frequently the Individual Indian Trust lands are the bulk of the oil and gas lease. Those leases are considered to be either unitized or communitized.

So one payment is made to avoid administrative problems for the oil company for that particular lease, and that payment is made either to BLM or MMS. Or BLM does an audit of that, depending on the circumstances. But it's a communitized lease.

Frequently those deposits, when they reach MMS at Treasury and they are allocated as pursuant to the data provided or utilized by BIA, those deposits are then deposited in the Tribal Trust account.

Your Honor, one of the exclusions, of course, is the government is not looking for Individual Indian Trust deposits that were collected in various accounts at Treasury, other than the 14X-6. But 14X-6 was identified, at least in the modern era, as the principal account to hold the Individual Indian Trust funds.

So Your Honor, we're dealing with a situation where the money is held. There are no doubt withdrawals made from the account on a regular basis. And as Treasury has testified, and has been very candid, the fact that the money was drawn from 14X doesn't mean a single individual received the funds.

Because unlike your checking account, Your Honor, when you write a check, your funds are not withdrawn until the check is paid. When an individual Indian check is drawn, because it's a Treasury check, immediately the funds are transferred to the general Treasury account from the 14X-6039, and they're still held by Treasury. They are not withdrawn. In addition, you have the funds that are immediately withdrawn to invest in various securities.

So the fact that $13 billion could have gone out of the Trust after it was collected doesn't mean it even went out of the Treasury Department, Your Honor. And the only party that would have that information is the Treasury Department. It's not the Interior Department. They couldn't possibly have it. They don't book the transactions, they don't book the transfers, they don't hold the securities, they don't -- and frequently, Your Honor, securities are bare securities, they're not registered securities. So it couldn't possibly be the Interior Department that holds the money.

And Your Honor, if in fact the money went out to the Trust beneficiaries, then you would see, at Treasury, canceled

checks. Now, the problem, and we will acknowledge that, and this is an issue that was discussed widely in these 11 years, is the Treasury destroyed nearly all of the canceled checks through, I believe 1992. So there's a real interesting question about the evidence. Does that mean that nothing was paid out prior to 1992, Your Honor? No, we're not saying that.

On the other hand, Judge Lamberth did make a ruling in one of three summary judgment decisions in 2003, I believe it was an April 28th, 2003, specifically identifying, because of the issues involved in Treasury and how the payments and withdrawals were made from various accounts at Treasury, that it was required by the defendants to prove that the money was paid to the Trust beneficiaries. Otherwise, nobody knows if the money ever left the Treasury Department, Your Honor.

That is a -- is this a nightmare and a serious problem? Yes, it is, Your Honor. Is it a problem because of the historic record-keeping problems? Yes, it is. And that's one of the reason, Your Honor, that Cobell VI pointed out that a subsidiary duty of the duty to account is the duty to maintain adequate systems, the duty to create and maintain adequate records, the duty to have adequate staffing. That was all part of what was identified by this court and affirmed by Cobell VI.

So Your Honor, indeed, if in fact the Interior Department alone was required to deal with the issues on October 10th, we would be losing a party that is clearly

indispensable to whatever this court finally decides is an adequate accounting.

Simply put, Your Honor, if Cobell VI, and the Court of Appeals, and trust law, has any relevance at all, the duty to account for deposits, the duty to account for withdrawals, and the duty to account for accruals cannot even start without the Department of the Interior -- I mean, without the Department of the Treasury.

Let me also point out that, prior to 1909, which is the starting date that the government uses for its $13 billion, at least from what the government reports - and again, it's discussed briefly in Defendant's Exhibits 108 and 110 in Trial 1.5 - from 1896 to 1906 there was significant oil and gas and significant revenue collected by the government in that regard.

In other -- and as a matter of fact, that's -- the Osage is involved in that, that Mr. Harper referred to. Millions of dollars, Your Honor, in collections, millions of dollars in rents and bonuses. In fact, one document that was introduced into evidence in the case identified, I believe for that period of time, 18 bonuses paid of a million dollars or more during that period of time. This is Individual Indian Trust money; it was collected, it was paid, and it has been held. Whether it was ever paid out, Your Honor, we don't know.

There was one brief period of time in this litigation,

there was a production of checks, Treasury checks. And it was, I believe, on either November 23rd, 1998, or November 24th, 1999, during a hearing before this court, the government produced I believe 32 or 36 checks that identified as -- the five named plaintiffs as the payees.

Of those checks, I think one-third were actually identified as paid to a party other than the Individual Indian Trust beneficiaries, when you look at the endorsement on the checks. And many of those were identified as not even being originally paid to the Individual Indian Trust beneficiaries, although they were produced as that. That was what Treasury produced during that particular hearing.

Without Treasury's active involvement, those checks never would have been produced, Your Honor. These are Treasury checks. Today, the checks are Treasury checks. I mean, as a matter of fact, but for the deposits that were placed in local banks, and that's commercial banks, and at a point in time savings and loans, all of which, Your Honor, had to be secured with bonds or surety, either U.S. government bonds or surety bonds, all of which were held by the Treasury.

All the other money was deposited into Treasury, and then other reinvested in Treasury securities, other government securities, transferred to a fiscal agent. Or, Your Honor, the Treasury's own fiscal agent, the Federal Reserve, used those funds in overnight transactions made to banks. And those

transactions were based on the discount rate of the Federal Reserve banks in the district in which they were located.

Who has that information? The Treasury and its fiscal agent, Your Honor, not the Interior Department.

Your Honor, when you're dealing with overnight transactions, those are electronic funds. Historically, the electronic funds would have no paper trail at the Department of Interior. Solely that kind of information would be at Treasury and its fiscal agent, and its fiscal agent is the Fed.

THE COURT: Maybe I better hear from the defendants on this whole Treasury business.

MR. KIRSCHMAN: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KIRSCHMAN: I think plaintiffs' counsel's discourse on Treasury points out a significant divide. I don't know if I would equate it with two ships passing in the night, but the discussion about Treasury focused on essentially their damages claim and their argument regarding who bears the burden of proving the distribution of funds.

In this court's April 20th order, the Court explained its intention to hold a hearing that addressed four principal issues, and they were: The methodology and results of the accounting project up to the time of the hearing; whether defendants are curing the breach previously found by the courts, or have unreasonably further delayed their obligations; whether

the historical statements of account would satisfy defendants' fiduciary duties; and what further relief, if any, should be ordered.

Consistent with that, we have pointed out to this court what the Court of Appeals said in Cobell VI regarding what was left to be resolved by this District Court. And you've seen it and heard it before, that this court should look towards the steps taken by the Department of the Interior since 2001, to see if they constitute steps so defective that they would necessarily delay rather than accelerate the ultimate provision of the accounting.

We believe that standard is consistent with the Court's April 20th order, where you asked to see the status of the accounting and the elements of that accounting, what it entailed. We are prepared to provide that information, and we have, beginning with Interior's submission of its historical accounting project documents on May 31st.

The hearing on October 10th should not be about plaintiffs' money claims, plaintiffs' claims for equitable restitution, or any other type of equitable monetary relief. We've explained that in the briefs.

Also too, we believe those requests constitute a request for money damages. We believe this is not the hearing that the Court proposed. We have provided a framework for proceeding ahead on that, but there's a huge disconnect that was

just, I think, revealed.

Plaintiffs intend, or would like the Court to pursue an impossibility trial. And there's no grounds for that based on the case law, and it's inconsistent with the Court's April 20th order.

Now an issue, by the way, in our brief was not the dismissal of Treasury from the case, it was whether Treasury had a role for the October 10 hearing. And the Department of the Treasury does not play a role with the issues as described by the Court, or described by us in our briefing. Nor should it. The Department of the Interior has prepared the historical statements of account that you've seen today. They have prepared the adaptations to the plan, and it's the Department of the Interior that is moving forward.

With that in mind, we believe that the recommended course should follow the issues that the Court addressed in its April 20th order, and that the Court of Appeals touched upon in Cobell VI. We've already filed, as I said, the historical accounting project documents. And Interior will, in the next couple of weeks, be filing the administrative record that supports and explains further that plan.

Also too, as we've told the Court, Interior is working towards producing historical statements of account regarding land-based accounts. All this information, with any testimony that may be needed to fill gaps or to clarify the elements of

the accounting for the Court, would promote this case and move this case forward consistent with the case law.

Also, too, the Court had before in its orders expressed interest in the repository of Indian records in Lenexa. A tour of that facility would promote the Court's understanding, and we think is also appropriate.

But what we need here is a clear direction as to what is being tried in October. There's no basis to try a damages trial. The Court of Appeals, and this court earlier, have made it clear that the relief here contemplated by the 1994 Act, and contemplated by the courts as a result, was the accounting that is requested in the complaint. That is what this case is about. The 1994 Act doesn't suggest otherwise.

So at this juncture, much rather now than on the eve of the proceeding that's set to commence on October 10th, the parties should address, and the Court should address with the parties, what is actually going to be considered here.

To the extent plaintiffs seek monetary relief, there's no basis for it under the Act, either as equitable restitution or disgorgement. To the extent they believe they are otherwise entitled to money, it's money damages.

So we recommend strongly that the Court follow our course, and we would work with plaintiffs to accomplish a time line regarding what we need to do to prepare for the proceeding commencing on October 10th.

Once the administrative record is prepared, plaintiffs should, for example, review that and address with defendants the need to supplement it. They need to point out any gaps in the record that they believe exist, and we should move forward on that front.

Also, to the extent plaintiffs are going to identify any witnesses that they believe will require witness testimony, they should identify those witnesses and any expert reports they intend to use, and the government in turn then will identify at a later date any witnesses they believe they need, to address issues plaintiffs may have raised.

That's how this case moves forward. And I'm not saying there aren't more steps, but there are several, and October 10th now is less than four months away.

To the extent that plaintiffs are suggesting a damages trial, again, that is not contemplated, and perhaps that should be fully addressed before we go further. We're in the situation where plaintiffs essentially seem to request that this court find an accounting that they really don't want.

I should add a step. The Court stated today that -- you've given us your initial thoughts on the scope of the accounting, and I think you said they were open to further argument. I don't know if, at the end of the day --

THE COURT: That's all I've been hearing all afternoon.

MR. KIRSCHMAN: What's that?

THE COURT: I think I've been in that "further argument" all afternoon.

MR. KIRSCHMAN: That's right. So --

THE COURT: Further briefing? No, not any time soon.

MR. KIRSCHMAN: What I was going to say, Your Honor, I don't know if it's coming at the end of this hearing or if it's coming in a written order later --

THE COURT: I don't either.

MR. KIRSCHMAN: -- but to the extent it comes, I think also, too, the Department of Interior will then have to consider the Court's ruling. Because one of the issues to be addressed is the amount of time the accounting will take and what it will cost. And to the extent the Court makes specific rulings on certain elements of the scope of the accounting, that will affect the cost of the accounting and the time it takes to perform.

Now, the Court of Appeals, in Cobell XVII, stated that the Department of Interior's consideration of these elements was due substantial deference because of the application of scarce resources and their expertise in the area of accounting.

But what also too would have to happen, I think, for purposes of the October 10th hearing, would be that the Department of the Interior would have to address any rulings you make before then on these scope issues, consistent with this discussion.

THE COURT: Why don't you speak more plainly, counsel?

MR. KIRSCHMAN: Well, for example, Judge Lamberth issued a structural injunction, and the Department of Interior then looked at what work would be required based on the rulings of Judge Lamberth, and provided estimated costs of that structural injunction effort.

As I said --

THE COURT: I'm not issuing a structural injunction. I'm trying to plan a trial.

MR. KIRSCHMAN: Oh, I know. But to the extent that you intend to on October 10th review the results of the accounting project up to date, to see whether -- you know, what the progress is up to the date of the hearing, obviously the progress made will be measured by what the scope of the accounting is that you have found.

So I think that information regarding the cost may be relevant to the Court's decision. The Court of Appeals, in Cobell XVII, stated that Judge Lamberth should have considered the cost of his structural injunction once he was provided with that information.

So to the extent that Interior can, and I'm not representing that they can, but I believe they will certainly have to make that effort, I think that would be something else that should be brought to the Court's attention.

I mean, let's put it this way: The Department of the

Interior is moving forward based on the historical accounting plan that was submitted May 31st. If there are modifications to that, or the Court is ordering those, I think that order will have to be considered.

THE COURT: And? Will have to be considered? Of course it will have to be considered. What you're trying to say and not trying to say is, "Judge, if you're going to make us do all of that before October, we're going to go to the Court of Appeals."

MR. KIRSCHMAN: No, no. I'm not trying -- because --

THE COURT: Okay. Because nobody is going to the Court of Appeals from here, until we're through with this trial.

MR. KIRSCHMAN: No, Your Honor. I'm sorry, I wasn't suggesting that. What I was saying, that any cost estimation that Interior can develop based on your ruling should be provided to you.

THE COURT: All right. All right. Your plan is your plan. What you're going to do is what you're going to do.

MR. KIRSCHMAN: Okay.

THE COURT: What this October trial is all about is going to be -- let me see if I can block this out for you, and I'll try to write this out for you.

First, it's going to be about what you're doing and what you're not doing. All right? I mean, you're doing what you're doing; they think you should be doing a lot more. It's

going to be about both of those things.

Second, what would it cost to do the things that they say that you should be doing and you're not doing?

Third, taking into account the cost, because that, I think, I'm required to do by the Court of Appeals, is what you're doing adequate? Is it an adequate accounting?

And fourth -- and this is what you don't want to hear, but I think Mr. Gingold is entitled to at least a record on this point, fourth, what does it all add up to? Throughput versus what you can prove, what are the big numbers?

MR. KIRSCHMAN: Okay. Respectfully, Your Honor, what I was trying to convey were the second and third points you raised --

THE COURT: Okay.

MR. KIRSCHMAN: -- on the cost.

THE COURT: Well, what I'm saying is, that that's what we're going to sort out in this trial.

MR. KIRSCHMAN: I understand that.

THE COURT: Now, how we can do that exactly remains to be seen. I have kind of a big-picture view here. It seems to me that if you apply my initial ideas about what you need to do and what you don't need to do, as I tried to articulate at the very beginning of this proceeding this afternoon, it has something to do with burdens of proof.

The plaintiff has to show me that it would be

reasonable, in keeping with the balancing process that the Court of Appeals wants me to do, that it would be reasonable for you to -- or for the government to be required to do -- to survey the checkerboards; that it would be reasonable to require the government to account for direct pays; that it would be reasonable to require the government to account for compacting, contracting tribal cooperation agreements; that it would be reasonable for the government to account for money that was never collected.

I may not strictly be talking about burdens of proof here, but I would be looking to the plaintiffs to show me why the exclusion from that is -- of those things from your plan is unreasonable. Okay?

I would looking to the government to persuade me that it is unreasonable to include accounts that were closed before October 25th, 1994, or to include the accounts of deceased beneficiaries, or to include any of the retrospective look back to 1938.

I would expect the plaintiffs to have to prove to me that it would not be unreasonable to require the government to go back before 1938 and -- are you getting my drift here?

MR. KIRSCHMAN: Yes, sir.

THE COURT: Now, as to the Treasury issue that Mr. Gingold raises, I confess that I'm not quite sure how those issues are interwoven with the BIA issues that would be resolved

with this trial. But I suspect that we're actually talking about two trials. Maybe it's 1.6 and 1.7, I don't know. But the Treasury issues, Mr. Gingold has a gift for explaining them in great detail, but the detail boggles the mind.

And the way I see it, the way the actual money is handled in Treasury accounts is probably a different subject.

MR. KIRSCHMAN: I agree.

THE COURT: Maybe not an off-the-table subject, but a different subject. And that's not what I want to hear on October 10th, beginning on October the 10th.

So, what does your plan provide, and what does it not provide?

Question number two. Question number two: What would it cost to do what it does not provide, to produce the complete accounting, since the beginning of the world, that the plaintiffs want here?

And third, taking into account the cost and complexity and expected benefit, by the way, because cost means nothing if you don't lay it alongside -- if it's a dollar chasing a nickel, it doesn't make much sense.

MR. KIRSCHMAN: Yes, Your Honor.

THE COURT: Is what you're planning to do adequate? And then, as I said, this final kind of balloon issue, because the plaintiffs have been strumming this chord since the first day I heard from them, and I think the world wants to know this,

and maybe Congress ought to know it, and whether it results in equitable relief or not is another subject even down the road from 1.7: What is the total throughput? How much money has passed through these accounts since whenever, since 1938? And how much of it is properly accounted for? We need to know that.

MR. KIRSCHMAN: Your Honor, on that point, that is a damages issue.

THE COURT: No, it's not. It's an information issue. It bears on the adequacy of the accounting. If the accounting -- I mean, it could be -- it could result in a damages issue, but I'm not there yet.

I mean, if you're doing an accounting that accounts for 12 percent of the money that's passed through these accounts, well, you know, we put it to a panel of disinterested people to ask whether that is what anybody would refer to as an accounting.

Plaintiffs are entitled to that number. They may or may not be entitled to relief on that number, but they're entitled to the number.

MR. KIRSCHMAN: Your Honor, respectfully, the accounting does not account for the $13 billion in throughput. One of the -- I mean, the scope of the accounting is what's at issue here, and it will not include the entire $13 billion.

THE COURT: That will all be explained, I'm sure. I'm sure it will all be explained.

Now, how do we try these? How do we do this? Well, the government's position always has been: We'll give you an administrative record, and then you can file administrative briefs and talk to us about whether it's arbitrary and capricious, and run the APA tests against it.

But as I think I've tried to make clear, it is far too late in the day for us to have a pure APA review of your plan.

MR. KIRSCHMAN: And we appreciate that, Your Honor.

THE COURT: It's got to be a review that answers these questions. And who is going to testify is a big question. Or what kind of evidence you will put on to demonstrate the adequacy of any of the accounting you're doing is a big question.

But the way I approach it is this: If your position is, here's the administrative record, go figure it out, Judge, you can do that. But then the plaintiffs get to call a lot of your witnesses as adverse witnesses. And there are probably Touhy problems, and there are probably subpoena problems, and we'll have to sort all of that out. But the plaintiffs will be permitted to cross-examine your people, the people who are espousing this, on the adequacy of what they're doing.

Better, I should think, for you to bring them on yourself and let the plaintiffs cross-examine what you put on as direct.

MR. KIRSCHMAN: Your Honor, may I ask for clarification

on that?

THE COURT: Yes, sir.

MR. KIRSCHMAN: In your initial order you mentioned written direct testimony.

THE COURT: I did mention that.

MR. KIRSCHMAN: Are you suggesting, and we wouldn't be opposed to this, that we put on our witnesses live, and then be subject to cross-examination, or --

THE COURT: Well, I'm going to let you work that out. I mean, written direct is a lot more efficient, but you may want to put some people on on direct just so that you don't have them immediately subjected to adverse cross-examination, hoping that I've read their direct before you even start the cross.

MR. KIRSCHMAN: There's a certain logic to that, Your Honor, yes.

THE COURT: So I think you can have that either way, really. But I'm suggesting that you may put your witnesses on by written direct if you prefer to do it that way.

MR. KIRSCHMAN: We'll address that, Your Honor. But I think there's a logic to what you said about us presenting our witnesses before you hear them for the first time on cross-examination.

THE COURT: I'm going to leave that up to you. We have plenty of time.

MR. KIRSCHMAN: Also too, in our brief we did mention a

visit to Lenexa as assisting the Court and providing information that directly relates to these issues. In our brief we stated that that trip could occur before the hearing. I think at least it should occur at the beginning of the hearing, so that the Court has a visual image, and also sees the processes that actually take place.

Seeing that, and hearing from the people who do the work there, I think may be the start of the story. And there's a certain I think logic to that, if the Court is interested in seeing Lenexa.

So October 10th, I believe is a Wednesday. Again, this is certainly up to Your Honor, but as far as presenting what the Department of the Interior is doing, Lenexa would demonstrate that both visually and also with either explanation at the site or explanation immediately after, back in court, explaining what you saw.

So I raise that with the Court's attention, because to the extent Interior will be demonstrating what it's doing, that would be a notable part of the process.

THE COURT: Do the plaintiffs have a view on this proposed Lenexa trip? That was my idea. I still like it.

MR. GINGOLD: We do, Your Honor.

THE COURT: You do?

MR. GINGOLD: We do have a view.

THE COURT: What's your view?

MR. GINGOLD: We believe that the government's response to our request for production is evidence of the lack of utility of Lenexa. If the government can't produce documents without paying tens of millions of dollars for a handful of Trust beneficiaries, all you have is a facility that's storing documents without indexes or inventory, and you would be more likely to find the lost Ark than you would be anything useful.

MR. KIRSCHMAN: Your Honor, that's argument, and Mr. Gingold --

THE COURT: Of course it's argument.

MR. KIRSCHMAN: -- can certainly raise that. But that doesn't strike against the utility of seeing Lenexa and seeing how the process works.

And their premise is that the accounting that is being done will be a transaction-by-transaction -- include a transaction-by-transaction reconciliation, and that is not the accounting that's taking place.

So I think there's no basis there that would discourage the Court from going.

THE COURT: I think it would be useful for me to see what's being done, and to hear about it. My only issue is time. And it takes, what, all day to get there and all day to get back?

MR. KIRSCHMAN: I would assume practically, yes. Yes.

THE COURT: Well, I don't think frankly I'm going to

have time to do it before this trial begins, and I don't -- I'm not sure that I want to do it on day one, before opening statements. But let me consult my calendar and think about it a little bit, and maybe the second week we could all go out there, or some of us could go out there and take a look.

MR. KIRSCHMAN: Regarding the throughput issue. And I understand the Court's ruling that this is information that plaintiffs are entitled to. I want to point out again and reiterate that what plaintiffs have sought here is an accounting under the 1994 Act.

And to the extent that -- and you noted that it may be a subject that is the basis for a second trial, but I want to note the fact that plaintiffs have not sought monetary relief in their complaint, and we believe they should be judicially estopped, now that they're affirmatively actually stating that.

Just as important, if not more important, though, is what the 1994 Act provides as relief in this case, and what the claim is before this court. We have briefed these issues, but I think they will continue to play a role, to the extent that plaintiffs in essence don't want the accounting that Interior is moving forward with.

THE COURT: I think that's quite clear.

MR. KIRSCHMAN: And because of that, it leads, you know, to the issue. The Department of the Interior has an obligation, under the 1994 Act, to provide an accounting, and

that obligation remains. But if that's not the relief plaintiffs want, then we should address what they think they want -- or I'm sorry, not think; what they've now asserted they want, and we should address whether they're entitled to that in this court or under the 1994 Act.

It serves no one's purpose to have a second trial, or even elements of this trial that relate to damages that plaintiffs are not entitled to.

THE COURT: Look, I've tried to make it very clear that I do not anticipate that the direct result of this trial that we're going to have in October is going to be damages, equitable disgorgement, or a huge pile of money for anybody. That's not to say that that won't happen at some point.

But, just as the BIA and the Department of the Interior are required to make an accounting, I'm accountable, too. And the accounting that I'm trying to make here is an accounting to the public, to Congress, to Indian country, of what is being done and what's not being done, and what it all amounts to. There's got to be a bottom line to this somewhere.

And I see part of the bottom line being a finding, if you will, as to how much of all this money that's passed through these accounts over the last 70 years - and that's 1938 - how much of this money can be accounted for in terms that accountants would normally consider accounting, and how much can't.

Congress needs to know that, the plaintiff class needs to know that, and the public needs to know it. That's not -- but you're trying to translate that immediately into a damages award. We're not there yet. But that information is going to be part of the outcome of this trial. Okay?

Anybody have any more questions this afternoon?

MR. KIRSCHMAN: No, Your Honor.

THE COURT: Well, you should. Somebody ought to be saying, "Wait a minute, when are we going to exchange witness lists, what are the mechanics here, how are we going to get started?"

MR. KIRSCHMAN: I'm sorry. I propose that we work with plaintiffs on a schedule.

THE COURT: You propose to work with the plaintiffs? Now, that --

MR. KIRSCHMAN: I'm sorry, let me --

(Simultaneous discussion.)

THE COURT: -- Shakespeare here. That is a consummation devoutly to be wished, counsel.

MR. KIRSCHMAN: I'll step back from that, Your Honor. I think we should talk to plaintiffs about a schedule, and how we move forward, and try to develop something to present to the Court. If I didn't say that, I was certainly thinking that.

THE COURT: That was a perfectly lovely idea. I would be happy to have you do that.

And I'll tell you what. I can't get my calendar up here because I can't get my computer to work. But you're right, October 10th isn't very far away now. If you can submit some sort of an agreed scheduling order to me in the next couple of weeks, do it. If you can't, we need to get together again.

MR. KIRSCHMAN: What we may do, Your Honor, is we'll set forth matters we agree upon, and to the extent there's any disagreement --

THE COURT: That's fine.

MR. KIRSCHMAN: -- we'll raise those with the Court.

Mr. Gingold is laughing.

THE COURT: It's always refreshing to see Mr. Gingold laugh.

MR. GINGOLD: No, I was smiling, Your Honor.

MR. KIRSCHMAN: We will endeavor to come up with that. And if we can't, we will tell the Court that once we reach an impasse. We'll also inform the Court of that.

THE COURT: Just submit whatever you can, no later than two weeks from today.

Now Al, what day is two weeks from today?

COURTROOM DEPUTY: July 2nd, sir, a Monday.

THE COURT: And what's -- and give me the date a week after that, Monday July what, 9th?

COURTROOM DEPUTY: It would be the 9th.

MR. KIRSCHMAN: Your Honor, one of the issues we have

to discuss is discovery, or supplementation of the administrative record. And the parties have briefed that. But that is also an unresolved issue.

So part of plaintiffs' bemusement may be the fact that we still have unresolved what discovery, if any, will be permitted by the Court. And I think I might have --

THE COURT: That's easy. The answer is none, except on good cause shown. These people know more about you than you do. I don't think they need any discovery. Right?

MR. KIRSCHMAN: I certainly agree with that.

MR. DORRIS: Your Honor, if I might -- good afternoon, by the way.

THE COURT: Good afternoon.

MR. DORRIS: I know it's late in the hour. I would suggest that any discovery that we have asked for, there is some that we do still want that we will discuss with them over these next two weeks, and report to you on that.

But as to how you've set out the framework for the hearing on October 10th, we would like to discuss, with them, them providing information, for example, about the throughput. Because there is information we've never been provided on that.

So I would suggest, if it's acceptable to the Court, that that be one of the topics for us to discuss with the defendants during these next two weeks.

THE COURT: I'm not going to put any restrictions on

topics you discuss with each other.

MR. DORRIS: Okay. Also, would it be permissible for me to file in the morning a notice with the two citations to the record one document for what Mr. Gingold was referring to earlier, where one document shows Treasury saying --

THE COURT: Sure.

MR. DORRIS: Thank you, Your Honor. That's all.

MR. STEMPLEWICZ: Excuse me, Your Honor. Just one quick thing. In our discussions earlier about prospective aspects of the '94 Act, we talked about where that language appears in any of Judge Lamberth's opinions or the Court of Appeals. And I apologize for my fuzzy memory on that. I assume from the discussion we can await briefing later on that, rather than have some special filing.

THE COURT: Yeah.

MR. STEMPLEWICZ: Thank you.

THE COURT: All right. I'll hear from you whatever I hear from you two weeks from today. And if it's not perfect agreement -- why set this hypothetically? We're going to convene again on July th 9th.

Al, what have I got that day? Can I do it at the same time in the afternoon, 3:00 o'clock?

COURTROOM DEPUTY: Yes, sir. We only have morning matters.

THE COURT: 3:00 o'clock in the afternoon on July the

9th, to go over what you submit to me. And now we're talking mechanics, okay? Not concepts any more. We're talking mechanics three weeks from today.

MR. KIRSCHMAN: With the proposed schedule. Correct?

THE COURT: Yes. Yes. All right. Thank you.

(Proceedings adjourned at 5:33 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.

_____ _____

SIGNATURE OF COURT REPORTER DATE