

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT
3

4
5 ELOUISE PEPION COBELL, et al.,

6 Plaintiffs-Appellees,

7 v.

No. 05-5068

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

10 Defendants-Appellants.
11

12 Friday, September 16, 2005

13 Washington, D.C.

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

16 BEFORE:

17 CIRCUIT JUDGES GARLAND AND SENIOR CIRCUIT
18 JUDGES WILLIAMS AND SILBERMAN

19 APPEARANCES:

20 ON BEHALF OF THE APPELLANTS:

21 MARK B. STERN, ESQ.

22 ON BEHALF OF THE APPELLEE:

23 G. WILLIAM AUSTIN, III, ESQ.
24
25

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P R O C E E D I N G S

THE CLERK: Case number 05-5068, Elouise Pepion Cobell, et al. V Gale A. Norton, secretary of the Interior, et al., Appellants (indiscernible).

ORAL ARGUMENT OF MARK B. STERN, ESQ.

ON BEHALF OF THE APPELLANT

MR. STERN: May it please the Court. District court has reissued the accounting portions of the structural injunction that this Court vacated in December of last year and the question now is whether the Court should vacate those provisions again. Structural injunction runs afoul of two fundamental principles, both of which were reemphasized by this court in its last opinion, both of which are strongly contested by the plaintiffs.

First, imposing billions of dollars of requirements, a Court must consider whether, in fact, congress mandated or even authorized those requirements and second the limitations on the judicial (indiscernible) emphasized by the Supreme Court in Southern Utah and by this Court in its December 2004 decision really do have application to this case. A court can direct an agency to take action. It cannot properly formulate a plan, require the agency to undertake it in the form of an injunction and then superintend its compliance in an action under 7061.

THE COURT: Do you agree that Southern Utah and

1 Lujan are not directly applicable to this case?

2 MR. STERN: No, Your Honor, we think that they are
3 directly applicable.

4 THE COURT: So this case is no different, in your
5 view, than any APA case?

6 MR. STERN: I don't know that it's no different. I
7 think that the Court in its 2004 decision, I think that the
8 language that it used was the nature of this case as an Indian
9 Trust case, not fully neutralize the applicability.

10 THE COURT: Right, we said that the application of
11 Lujan and Southern Utah is complicated by the availability of
12 common law trust precepts to flesh out the statutory mandates
13 and we said in Cobell VI, I'm still quoting from the same
14 opinion, at least partially limits the deference that we would
15 normally owe the defendants in administering the statutes with
16 which they are charged.

17 MR. STERN: Yes, we accept that, Your Honor.

18 THE COURT: And then at the same time, just two or
19 three days before that, this Court also held in the IT case,
20 that contrary to the secretary's view, while the Government's
21 obligation are rooted in and outlined by the relevant
22 statutes, they're largely defined in traditional, equitable
23 terms and the narrower judicial power's appropriate under the
24 APA do not apply. We said that too, right?

25 MR. STERN: You did, Your Honor.

1 THE COURT: So we can't, I take it you agree, that
2 we don't look at this case just like any other APA case. The
3 fact that the secretary has trust (indiscernible)
4 responsibilities, makes a difference with respect to the
5 Court's remedial authority.

6 MR. STERN: It makes a difference. The question is
7 what difference?

8 THE COURT: How much of a difference?

9 MR. STERN: Yes.

10 THE COURT: Okay.

11 MR. STERN: Now, I mean, you know, we take as, you
12 know, a given --

13 THE COURT: You either have to take a little bit
14 louder or --

15 MR. STERN: -- all those points.

16 THE COURT: -- my hearing --

17 MR. STERN: I'm sorry, Your Honor.

18 THE COURT: I wonder why I'm having a difficulty
19 hearing.

20 THE COURT: I thought it was the power of the center
21 chair.

22 THE COURT: I can't hear anything.

23 THE COURT: Is that mic on?

24 MR. STERN: Is this better?

25 THE COURT: It's up. Thank you.

1 THE COURT: Yes.

2 MR. STERN: I'll try to speak up.

3 THE COURT: Maybe you should pull it closer to you.

4 THE COURT: It looks like it's falling off the edge.

5 It doesn't move?

6 THE COURT: It doesn't move.

7 MR. STERN: This isn't going. This one doesn't go

8 up or down either.

9 THE COURT: Your neck has to go up and down.

10 MR. STERN: That I can do. The question is what
11 kind of a difference does it make and we do think that the
12 December 2004 opinion, which is consistent, we think, with the
13 2001 opinion, does identify what limitations on the judicial
14 role and it also states that while the duties that may be
15 imposed, they have got to be rooted in a statute, that the
16 Court can look to common law duties to fill that out. We
17 don't necessarily expect Congress to be as --

18 THE COURT: Counsel, I wonder if I could ask you,
19 one of my colleagues could agree, if you could focus, start
20 specifically focusing on the points in the injunction you
21 think are erroneous?

22 MR. STERN: Yes, Your Honor.

23 THE COURT: Instead of going to the general
24 philosophy. If we understand clearly what your alleged errors
25 are then we can talk about the general law.

1 MR. STERN: Yes, Your Honor.

2 THE COURT: And I wasn't so clear reading your
3 briefs whether you clearly identified what the errors are.
4 For instance, I didn't understand why we have before us the
5 questions of the statute of limitations. I don't understand
6 that at all. Is that really before us?

7 MR. STERN: Well, it's there, Your Honor, because --

8 THE COURT: It's there. Is it before us?

9 MR. STERN: Well, we think it is before you because
10 it's part of an opinion that's before this Court, and that
11 ruling has potentially significant ramifications and we think
12 it's clearly wrong as a matter of law. We don't think that
13 the question before this Court is whether, we're not asking
14 this Court --

15 THE COURT: Wait a minute. Has any judge, has the
16 district judge made any decision on the statute of
17 limitations?

18 MR. STERN: The District Court has ruled essentially
19 that there is no statute of limitations.

20 THE COURT: Essentially.

21 MR. STERN: Well, there's no, I mean, I think that
22 is what the Court ruled. The Court said that until the trust
23 is repudiated that the statute of limitations cannot run and
24 so right now --

25 THE COURT: That is a statement he made but is there

1 anything in his order that relates to that?

2 MR. STERN: It's certainly possible that in the
3 district court's view of how that order would then operate and
4 how it would be --

5 THE COURT: Wait. Wait. Wait. But counsel you
6 understand what I'm trying to do. I'm trying to figure out
7 what specific part of the injunction is in front of us now.
8 What error was made? Not general discussion of law but what
9 specific errors are before us?

10 MR. STERN: I think our major concern with that is
11 simply that that is a ruling that is now in the case and that
12 if we do not bring it to this Court's attention then there
13 will be arguments at a later point that the Government did not
14 appeal in order at the proper time --

15 THE COURT: And the defendants would be subject to
16 contempt if they cut off the accounting with respect to issues
17 on which the statute had run.

18 MR. STERN: That's exactly right.

19 THE COURT: You think he has made a specific
20 decision on that which is (indiscernible)?

21 MR. STERN: I think that it's absolutely clear.

22 THE COURT: I wasn't sure about that. What are the
23 other points?

24 MR. STERN: Well, the other, I mean, there are about
25 five primary items that we identify in --

1 THE COURT: If you would, tick them off?

2 MR. STERN: -- the brief on substance. One of them
3 involves the sort of two questions of do you go back to do an
4 accounting for all accounts to back to the beginning of the
5 trust relationship in 1887 or do you --

6 THE COURT: I think that is fairly before us. I
7 agree with you.

8 MR. STERN: Yes. And then the --

9 THE COURT: And your view is that is inconsistent
10 with prior opinions of this Court?

11 MR. STERN: And the statute.

12 THE COURT: Yes, well, I'll stick with prior
13 opinions of the Court because they interpret the statute.

14 MR. STERN: Right.

15 THE COURT: Right? Right.

16 MR. STERN: And related to that issue, or do you go
17 back and do an accounting for closed accounts, in other words,
18 an account that could have been closed 30 years ago.

19 THE COURT: I think that's fair --

20 MR. STERN: -- and --

21 THE COURT: That's fairly before us too.

22 MR. STERN: Right and those are two key items.

23 THE COURT: Yes.

24 MR. STERN: Another item is do you do a recreation
25 of all the land transactions since 1887? That's another

1 fundamental.

2 THE COURT: Wherever the money went. Wherever the
3 revenue went.

4 MR. STERN: Well, those are related.

5 THE COURT: Yes.

6 MR. STERN: This is --

7 THE COURT: I understand. That's legitimately
8 before us too. I understand that.

9 MR. STERN: Right.

10 THE COURT: Okay, what else?

11 MR. STERN: There's the related to that is the
12 question of what you have to do in terms of verification. By
13 verification, in other words, what the Department of the
14 Interior has proposed to do and we've been saying consistently
15 for years is plan to go back and recreate on the basis of
16 electronic and paper records a full statement of all the ins
17 and outs, you know, deposits and withdrawals for all those
18 open accounts going back to 1938 and in addition --

19 THE COURT: Correct me if I'm wrong, my
20 understanding was for transactions, I think it is, \$5000 or
21 more, you would go back and look at the underlying land
22 transaction which produced the addition to the account?

23 MR. STERN: Exactly, Your Honor, then there's a
24 second step that Your Honor refers to which is to do something
25 more than the recreation of the records. And remember at the

1 time that Congress passed this statute and at the time this
2 Court's 2001 decision the picture the people had was, you
3 know, the records might not even be there. We couldn't
4 recreate, you know, these ledgers and today, though there's
5 been a very different view, partly because we've spent over
6 100 million dollars in the meantime but now there's a very
7 different view, like, you know, lots of stuff has been
8 assembled. You know the project, it went back for all the
9 named plaintiffs and their predecessor accounts, turned out
10 that in fact the available records were a whole lot better
11 than anybody believed they were. But in addition to do that,
12 just getting those records together, then the next level is to
13 see, to get a sense of well, how well, you know, was the
14 system actually functioning in terms of what was, you know,
15 when you had a specific land transaction, so when the money
16 came in, did the right amounts then actually get credited to
17 everybody? So it's not only can I give you your records, can
18 I go back and see how the entire thing worked to be accurate.
19 And there, for that, it would be for high amounts in the land
20 based transactions, Interior would look at them, you know, for
21 each transaction separately.

22 THE COURT: Any other issues?

23 MR. STERN: Well, related to that, just let me
24 finish on that, is that for the smaller amounts, Interior
25 would use sampling and the District Court has said again, no,

1 you cannot do that.

2 THE COURT: This is the, now you're getting into the
3 sampling issue? General sampling issue or specific as it
4 relates to that last issue?

5 MR. STERN: That's the District Court that is vital
6 in doing that function, you know, whether you call it
7 verification or audit, to make that at all feasible, Interior
8 has to be able to use sampling. It can't go back for every
9 transaction in every account and try to get that --

10 THE COURT: And it's your position that the district
11 judges are, how should I say, hostility to sampling is not
12 warranted by prior opinions of this Court?

13 MR. STERN: That's correct, Your Honor. And so
14 that's another key portion of it. And then there are items
15 that are related to this sort of that you could say they're
16 subsumed but they're sort of listed separately so you have to
17 go back and revisit every probate determination --

18 THE COURT: Right.

19 MR. STERN: -- you know --

20 THE COURT: Yes.

21 MR. STERN: -- that was made. I mean, you know, so
22 there are some items like that.

23 THE COURT: Okay, now I have another question for
24 you. Basic question. What is the significance of the latest
25 appropriations rider limiting the accounting cost to 58

1 million dollars? How are we to take that?

2 MR. STERN: I don't think that the appropriations
3 rider is, the latest appropriations, you know, is dispositive
4 of anything but what --

5 THE COURT: It isn't?

6 MR. STERN: Well, we think, well, look at it this
7 way, Congress has made absolutely clear of what it is
8 appropriated for this year and --

9 THE COURT: It's also making clear what it isn't
10 appropriated for.

11 MR. STERN: And it's also made it clear --

12 THE COURT: (Indiscernible.) Judge Williams --

13 MR. STERN: -- what it --

14 THE COURT: Judge Williams' point it seems, is, I'm
15 amazed at your position. I thought you would come in --

16 MR. STERN: I withdraw --

17 THE COURT: -- and say --

18 MR. STERN: I withdraw it.

19 THE COURT: Well, hold because I'm not totally
20 amazed. So, after you have finished amazing Judge Silverman,
21 I'll (indiscernible). I'll ask you a question then.

22 JUDGE SILBERMAN: I assumed you would take the
23 position which I understand which Judge Williams suggests that
24 Congress has said 58 million dollars and no more. That
25 doesn't mean it has to be up to 58 million dollars but it

1 can't exceed that.

2 MR. STERN: Now --

3 JUDGE SILBERMAN: Is that true or is that not true?

4 MR. STERN: Yes, it's absolutely true.

5 JUDGE SILBERMAN: Now, what significance does that
6 place upon litigation?

7 MR. STERN: I think that again, it goes back to the
8 question of can you, what is Congress' what, that you cannot
9 order an accounting. This is a perspective administrative
10 matter and what Congress means to appropriate and what
11 Congress intends to --

12 JUDGE SILBERMAN: Counsel, let me ask a question.

13 MR. STERN: -- are vital.

14 JUDGE SILBERMAN: Let me ask the question again.
15 What is the legal significance of Congress's limit of 58
16 million dollars? How does that affect this lawsuit? How does
17 this affect the possible injunction? How does it affect the
18 plans the department of interior comes forward? How does it
19 affect, what is the legal significance of it?

20 MR. STERN: I think that the legal significance is
21 in this, I mean, there's both a this year significance but
22 taken over time with several years and Congress' action
23 there's also a long term significance that we know the Court
24 cannot really order within this fiscal year that more money be
25 spent on historical --

1 JUDGE SILBERMAN: Well, this is where I'm getting
2 off the amazed bus just for the moment.

3 MR. STERN: I knew it.

4 JUDGE SILBERMAN: And I assume that the reason that
5 you were making this as a dispositive argument is that this
6 probations act only applies for this year so we don't know
7 what Congress would do the following year. Now we can make
8 political judgments but unfortunately or fortunately that's
9 not our job. All we know from the statute is how much can be
10 spent this year, right?

11 MR. STERN: That's right. But that's why it's
12 significant to look at the long term sort of history of what
13 Congress has always said.

14 JUDGE SILBERMAN: Well, we have three series of, I
15 guess three appropriations bills here, right? These three,
16 and this one is limited to this year. The one before was
17 limited to that year. Now, the one before that was quite
18 different. The one before that said don't do anything.
19 Right? Congress could have passed a statute that said don't
20 do anything. They didn't. And they could have passed a
21 statute for this appropriations year which said don't do
22 anything. But they didn't. So, with this track record of
23 these three appropriations bill it's a little hard for me to
24 plot the graph as to what Congress will do the following year.

25 MR. STERN: Right, but we're not asking the Court to

1 plot the graph in that way. What we think is significant is
2 to go back to what Congress always understood this accounting
3 to be about and that takes you back to 1992 with the original.

4 JUDGE SILBERMAN: So in other words you're not
5 taking the position that the 58 million dollars is a permanent
6 lid on the amount of money that can be spent on the accounting
7 process?

8 MR. STERN: No, it's a fiscal year.

9 JUDGE SILBERMAN: Okay, so the only legal
10 significance is you can't spend more than 58 million dollars
11 this year?

12 MR. STERN: That's right.

13 JUDGE SILBERMAN: So it has no significance with
14 respect to the district judge's remedy assuming they are based
15 as they should be under Corbell XIII on appropriate legal
16 grounds, it has no significance as to what the cost might be
17 over five or six or seven, eight years?

18 MR. STERN: It has, I mean, to the extent that you
19 could comply with one year's worth of those provisions within
20 that 58 million dollars, that would be right.

21 JUDGE SILBERMAN: No, let me just hold. That
22 actually my question. I was going to get back on your amazing
23 bus here for a moment. With respect to the one year, is there
24 some element of the structural injunction that it would be
25 impossible for you comply with because it would cost more than

1 58 million within that time period? I mean, it's a very long
2 structural injunction. I haven't looked at all the time
3 schedules. You have a time schedule that it would be
4 impossible to comply with given only 58 million?

5 MR. STERN: The answer is, Your Honor, I don't know.

6 JUDGE SILBERMAN: Okay.

7 MR. STERN: The --

8 THE COURT: I thought your argument was that the
9 appropriation for '06, plus the pattern and the previous
10 language of Congress suggests a very strong judgment against
11 spending resources on accounting that are vastly
12 disproportionate to the amounts of actual trust corpus at
13 issue?

14 MR. STERN: That's exactly right, Your Honor.

15 THE COURT: That is a concept that would apply,
16 first place, apply very strongly in terms of the compliance
17 with the injunction during fiscal '06, in terms of setting
18 priorities and presumably, although maybe Congress will
19 appropriate 6 billion, you know, seven, it hasn't done that,
20 but presumably there would be a general reasonableness overlay
21 for the entire injunction, right?

22 MR. STERN: I think that's a bit --

23 THE COURT: And that would require prioritizing.

24 MR. STERN: No, that's right. I mean, when --

25 THE COURT: Wouldn't that be true whether or not

1 Congress had put the cap on appropriations for the '06 fiscal
2 year?

3 MR. STERN: Yes, but the --

4 JUDGE SILBERMAN: Has this court ever specifically
5 held that? That their accounting remedies should not be
6 disproportionate to the value of the corpus?

7 MR. STERN: I don't know that the Court has held
8 that but it would have to be, first --

9 JUDGE SILBERMAN: Let me raise the point, at any
10 point --

11 MR. STERN: Yes, I mean --

12 JUDGE SILBERMAN: -- (indiscernible) litigation?

13 MR. STERN: Yes, I mean a fundamental point of this
14 appeal is not only has Congress not like required or
15 authorized this, it would, Congress when it looked at this and
16 nobody can explain, plaintiff's do not explain why the members
17 of Congress who said this was nuts were wrong.

18 JUDGE SILBERMAN: Can I hold on this for one second?
19 So, maybe I can get what I regard as the crux issue here.
20 What you just said requires us to look at individual
21 statements of members of Congress and as you know there is
22 some disinclination to do that. But why not look to general
23 equitable principles --

24 THE COURT: Exactly.

25 JUDGE SILBERMAN: -- which actually both sides seem

1 to be in complete agreement on. That is, your position is
2 that it's going to cost 12 billion dollars to do this and
3 there is not 12 billion dollars or anything like this that is
4 owed to the beneficiaries. Their position is the same. They
5 disagree with how much is owed to the beneficiaries but their
6 position is that this 12 billion dollars, it would be a
7 mistake to spend it. So as far as I understand the point, the
8 settler of the trust, the trustee, and the beneficiaries all
9 think that it would be an abuse discretion which is our
10 standard of review, for anyone to spend more money on the
11 accounting then there is money available or money owed to
12 beneficiaries. That's right, isn't it?

13 MR. STERN: I think you'd have to confirm with
14 plaintiff's counsel.

15 JUDGE SILBERMAN: Don't worry, I'm not asking you
16 speak for them. I understand that there's some difficulty in
17 you speaking for them or in them speaking for you. Not only
18 in this case but in every case. But that, but without getting
19 into the nitty gritty of the specifics of the structural
20 injunction, your underlying position is is that it's an
21 abusive discretion to spend more money on an accounting then
22 there is available to distribute to the beneficiaries, right?

23 MR. STERN: Broadly speaking, that's right, Your
24 Honor.

25 JUDGE SILBERMAN: So if that's the case --

1 THE COURT: Actually, if I might interrupt for just
2 a second, if I understand the other side's position, it's not
3 that the judge committed an abuse of discretion, it's rather
4 that there's an impossibility of performance because of the, I
5 think it's the, because of the appropriation limitation.

6 MR. STERN: Yes, that's right. I mean, plaintiffs
7 say look, I mean, they've got a whole variety of reasons.

8 JUDGE SILBERMAN: They're getting ready. They'll be
9 happy to tell us.

10 MR. STERN: Yes.

11 JUDGE SILBERMAN: They'll be happy to tell us as
12 soon as you're --

13 MR. STERN: A couple points about how these
14 equitable principles work out here and they both go back to
15 common law trust principles and to statute or and to general
16 principles, you know, that govern implementation of
17 requirements that money spent from the fisc and I think that
18 they both work together here and there really is the case that
19 a court looking in a case like this when we're looking not,
20 we're looking at a forward looking implementation of the law
21 and a court really cannot, I think, properly order the
22 billions or even a millions of dollars be spent if there's a
23 reason to believe that Congress not only didn't require but
24 didn't even authorize it.

25 And relatedly common law trust principals have to be

1 looked at in marrying up common law as the principles with
2 those of general principles. In common law trust as this
3 court previously recognized, the expenses are for doing any
4 kind of an accounting, are paid for by the trust itself so
5 that there's a normally a conversation that takes place
6 between the beneficiary and in the trustee that says I want X
7 and X kind of account and but trustee can say that well that's
8 fine but that's going to cost X amount and there has to be
9 some judgment made about rationality.

10 THE COURT: Mr. Stern, I have a background question.
11 Your open brief gives an account of this parcel of land worth
12 \$8000 on which the government is annually spending nearly
13 \$18,000 to handle the accounting for the income which is a
14 small fraction of the \$8000. Is there no, in the first place,
15 it would seem to be a case where the government itself is
16 completely disregarding the principle that we all seem to
17 otherwise agree on. Is there no mechanism by which the
18 government can bring that process to an end?

19 MR. STERN: Well, Your Honor, I don't know all --

20 THE COURT: And if there isn't, why doesn't --

21 MR. STERN: Well there have been.

22 THE COURT: -- Interior ask Congress for authority?

23 MR. STERN: I mean there have been efforts to, in
24 the past, you know, to end the fractionation process and to
25 consolidate land holdings and they, I believe that one of them

1 ended up being subject to Supreme Court decision that found
2 that one to be valid.

3 THE COURT: Well, that was without compensation.

4 MR. STERN: Right. There are, I mean it's an
5 ongoing concern and yes, there are ongoing efforts to find a
6 way legislatively to end one is --

7 THE COURT: I just think an ordinary trustee would
8 very insidiously seek out those ways that and implement them.

9 MR. STERN: Well, no, that's right but you know, as
10 professor I might testified on behalf of the Government this
11 trustee can go to Congress and try to get things changed but a
12 real trustee doesn't have to deal with a situation like this
13 one and all the restraints which are involved which is another
14 reason why the analogs between common law Judies and the way
15 this trust operates while that's the only relationship that
16 got to be looked at with regard to the specifics of this
17 trust. So in the end it really --

18 JUDGE SILBERMAN: So why didn't you make the
19 argument that without regard to Congress' appropriations,
20 which is a tricky area as we've just discussed, that it's an
21 abuse of discretion for the Judge to order an injunction that
22 will cost for accounting much more than the corpus of the
23 trust? It's a simple argument. I don't see it in your brief.

24 MR. STERN: Well, we say that even under common law
25 principles this would be wrong but --

1 JUDGE SILBERMAN: Where?

2 MR. STERN: -- our point it's not. It's --

3 JUDGE SILBERMAN: Where? Where in your brief do you
4 make that argument?

5 MR. STERN: I'd have to find --

6 THE COURT: He'll have a chance on rebuttal to that.

7 MR. STERN: Yes, but the key point is --

8 THE COURT: But only if you hurry up because your
9 red light's been on for a long time.

10 MR. STERN: Thank you, Your Honor, I'll just finish
11 one point, is that for us, it's not just a question of equity
12 in the air, you really do look to what Congress has required
13 or not required and we think that going to the statutory
14 language, to its original legislative history, that the
15 district court's and to --

16 JUDGE SILBERMAN: There's nothing that, I appreciate
17 there is something in the legislative history but there's
18 nothing in the language that makes the argument, that express
19 argument that you're making now, right? What in the original
20 language would you be relying on?

21 MR. STERN: You have to read a lot into the language
22 that you provide daily and annual account balances for trust
23 fund holders to get from, for funds invested pursuant to the
24 1938 Act, language that clearly contemplates open accounts,
25 monies that were invested pursuant to the 1938 Act --

1 JUDGE SILBERMAN: I'm talking about the more general
2 argument that is made in the legislative history which is this
3 balancing of corpus against accounting. That language isn't in
4 the text of the statute, is it?

5 MR. STERN: No, but what we think the significance
6 of it is that it confirms that Congress, both that and the
7 Arthur Anderson experience to Congress because Congress was
8 actually looking at something that had been done.

9 THE COURT: Would that legitimately be before us if
10 Congress hadn't said a word about anything on --

11 MR. STERN: That's right. We would be --

12 THE COURT: Because of the incorporation of common
13 law trust principles.

14 MR. STERN: That's right, but we do think that what,
15 the fact, I mean, I don't want to fight like a one way of
16 winning in favor of another --

17 JUDGE SILBERMAN: This takes up back to where we
18 started. If you come in and say this is just an APA case and
19 we should not look at equitable principles at all, may turn
20 out to be worse for you then if you argue that we should look
21 at equitable principles.

22 MR. STERN: Your Honor, we're happy to have the
23 Court look at equitable principles but we do think that when a
24 court is directing the expenditure of funds from the treasury
25 it has to look in determining, it can't exercise equity

1 without looking to what Congress is authorized or required and
2 that's the sort of simple proposition we're offering.

3 THE COURT: Sure, we could say, you can only spend
4 58 million dollars a year for the next 25 years.

5 MR. STERN: Yes, and what we also know is when
6 Congress passed the statute --

7 THE COURT: Right, that would have been a staggering
8 amount of money.

9 MR. STERN: Right. It would be, I mean, look, with
10 this 13 billion is all, is equivalent of all the money that
11 has ever passed through this trust.

12 THE COURT: No, we understand. We understand the
13 point. I'm still puzzled why you didn't make that direct
14 argument or maybe it's implicit in what you're arguing. I
15 hope it's implicit.

16 MR. STERN: I think it is. I believe it is at least
17 implicit.

18 THE COURT: We'll hear from Mr. Austin now.

19 MR. STERN: Thank you.

20 ORAL ARGUMENT OF G. WILLIAM AUSTIN, III, ESQ.

21 ON BEHALF OF THE APPELLEE

22 MR. AUSTIN: May it please the Court. Good morning,
23 my name is --

24 JUDGE SILBERMAN: Do you agree with Judge Garland's
25 characterization of your position?

1 MR. AUSTIN: Judge Garland expressed as best I can
2 recall opinions regarding a number of issues and positions.

3 JUDGE SILBERMAN: No, he said your position was the
4 district judge engaged in abuse of discretion.

5 MR. AUSTIN: No, I do not.

6 THE COURT: Maybe he thinks that's implicit.

7 MR. AUSTIN: Let me address that question because it
8 really is fundamental to what is at issue here and what the
9 Court should do about it.

10 JUDGE SILBERMAN: Judge Garland thought that you
11 were conceding that the district judge engaged in abuse of
12 discretion.

13 MR. AUSTIN: No. The district judge was faithful to
14 the mandates of this court, faithful to the evidence
15 presented, made the decisions this Court directed him to do,
16 telling the judge you've got to exercise an additional level
17 of oversight here because the level of resistance --

18 JUDGE SILBERMAN: But you concluded --

19 MR. AUSTIN: -- of fulfillment of duties --

20 JUDGE SILBERMAN: You concluded, let me push you
21 here. You concluded the district judge's order is impossible
22 to perform. Why is it --

23 MR. AUSTIN: Your Honor, this --

24 JUDGE SILBERMAN: Excuse me.

25 MR. AUSTIN: Yes.

1 JUDGE SILBERMAN: You did say that in the brief.
2 Why is it impossible to perform?

3 MR. AUSTIN: Well, that is, in fact, what we have
4 been convinced for years now, but I want to give the district
5 judge a fair shake --

6 JUDGE SILBERMAN: You'll get a --

7 MR. AUSTIN: -- in regard to that issue.

8 JUDGE SILBERMAN: You'll get a chance to come back
9 on that. I knew you didn't say, you did not say he abused his
10 discretion. I hear you.

11 MR. AUSTIN: No.

12 JUDGE SILBERMAN: But you did say --

13 MR. AUSTIN: And that is not our position.

14 JUDGE SILBERMAN: -- his order is impossible to
15 perform.

16 MR. AUSTIN: He was not --

17 JUDGE SILBERMAN: Why is it impossible to perform?

18 MR. AUSTIN: Okay. Just to complete the response
19 regarding the district judge. He made the decision that was
20 correct based upon the information he was provided. In fact,
21 as the Court is aware --

22 JUDGE SILBERMAN: Counsel.

23 MR. AUSTIN: -- his injunction asked --

24 JUDGE SILBERMAN: Counsel, in the appellant, excuse
25 me. The appellant argument that's useful to respond to the

1 Judge's question.

2 MR. AUSTIN: Yes, Your Honor and --

3 JUDGE SILBERMAN: Now, my question --

4 MR. AUSTIN: -- that I will endeavor to do.

5 JUDGE SILBERMAN: -- to you, in your brief you said
6 the judge's order is impossible to perform. Why?

7 MR. AUSTIN: The record is filled with information
8 suggesting that --

9 JUDGE SILBERMAN: Since when?

10 MR. AUSTIN: -- and plaintiffs have believed that
11 for years, but --

12 JUDGE SILBERMAN: Wait a minute.

13 MR. AUSTIN: -- what has brought the issue to the
14 forefront, Your Honor, is the disclosure. For the first time
15 in this litigation, on March 9 of this year, in a declaration
16 submitted by Deputy Interior Secretary Casen, stating this
17 accounting that the Court has directed be done will cost 12 to
18 13 billion dollars, possibly significantly more. That's at
19 page 1 of the declaration.

20 THE COURT: But the numbers have always been very
21 high.

22 MR. AUSTIN: Your Honor --

23 THE COURT: The numbers at the time --

24 MR. AUSTIN: -- they have been --

25 THE COURT: -- of the --

1 MR. AUSTIN: They have been talked about.

2 THE COURT: -- last year's decision --

3 MR. AUSTIN: They were talked about.

4 THE COURT: -- were enormous.

5 MR. AUSTIN: You're correct. Multibillion dollar
6 numbers were discussed --

7 THE COURT: I think it's a quibble between --

8 MR. AUSTIN: -- last year.

9 THE COURT: -- six and 12 billion.

10 MR. AUSTIN: Numbers of that kind were discussed
11 last year but they were never submitted to the District Court.
12 In fact, last year, when the appeal, initial appeal was
13 brought regarding the earlier structural injunction, to get
14 the ball rolling, the defendants filed notices of appeal and
15 requests for stay and when information was included in a stay
16 request, submitted to the District Court to satisfy circuit
17 rule 8, the defendants then obtained an administrative stay
18 from this court and took the position and the proceedings
19 below hands off. You can't look at this. Yes, information in
20 the media, in the halls of Congress, has been bandied about
21 with respect to cost figures. But Your Honor --

22 THE COURT: All right, Counsel.

23 MR. AUSTIN: -- if you look at the record --

24 THE COURT: Counsel.

25 MR. AUSTIN: -- the first time that it has been

1 revealed that not only are the cost what they are --

2 THE COURT: Counsel. Stop.

3 MR. AUSTIN: -- but the impossibility and
4 impracticability results -- I'm sorry, Your Honor.

5 JUDGE SILBERMAN: Have you argued before --

6 MR. AUSTIN: The first time is (indiscernible).

7 JUDGE SILBERMAN: Have you argued before this Court
8 before?

9 MR. AUSTIN: I have not appeared before this
10 particular panel, Your Honor.

11 JUDGE SILBERMAN: Have you argued before this Court
12 at all?

13 MR. AUSTIN: Yes, I have.

14 JUDGE SILBERMAN: And when Judges ask questions do
15 you normally stop and hear the question and then answer?

16 MR. AUSTIN: I do my best, Your Honor. Let me --

17 JUDGE SILBERMAN: Your best is not adequate. Let's
18 try from now on in to listen to the questions.

19 MR. AUSTIN: Yes, sir.

20 JUDGE SILBERMAN: When the March submission was made
21 by the Government, what did the district judge do?

22 MR. AUSTIN: The district judge had no opportunity
23 to do anything. The submission was made to this Court, not to
24 him.

25 JUDGE SILBERMAN: Okay. Did --

1 MR. AUSTIN: The request was to stay the order based
2 on information the district judge was not provided.

3 JUDGE SILBERMAN: Did the district judge have any
4 information concerning the cost of the injunction?

5 MR. AUSTIN: None had been submitted to him in
6 connection with what he was asked to decide. And the
7 information about costs that was discussed last fall was never
8 presented to him at any time, even though the order he entered
9 on September 25th of 2003 contained the following provision.
10 Inform me immediately if you are aware, defendants, of any
11 information bearing on your ability to comply with the
12 timetables set forth in this injunction. That identical
13 provision line for line, word for word, is in the February 23
14 order issued by the Court. It is in section 4(b)(5), of the
15 order and it states, if you are aware of any circumstance, you
16 tell me. This is a judge who as I said earlier, was faithful
17 to his charge. He was doing what this Court had directed him
18 to do. He was not provided with information that we have been
19 maintaining for years, could make all the difference because
20 he was searching for, and attempting to implement a
21 reasonable, appropriate, equitable remedy and based on the
22 information that he had at the time, that approach was to
23 enforce the obligations declared by this Court four and a half
24 years early in Cobell VI.

25 JUDGE SILBERMAN: So prior to this appeal there was

1 no submission to the district judge at any time as to what the
2 cost of the nature of the accounting he was contemplating
3 would be?

4 MR. AUSTIN: Judge, I know it seems remarkable. I
5 mean, consider, the Court invited Interior to submit a plan.

6 JUDGE SILBERMAN: Is the answer to my question no?

7 MR. AUSTIN: No, the answer to your question is yes,
8 and consider how remarkable that is that no information --

9 JUDGE SILBERMAN: Wait a minute. There may have
10 been a double negative.

11 MR. AUSTIN: Okay.

12 JUDGE SILBERMAN: My question was, listen to the
13 question again.

14 MR. AUSTIN: Yes, sir.

15 JUDGE SILBERMAN: Are you saying that at no point
16 did any party submit to the district judge any information
17 concerning the cost of the accounting he was contemplating?

18 MR. AUSTIN: Interior submitted a projected cost of
19 its accounting plan which it projected in January of 2003 as
20 335 million dollars. It never provided the Court with any
21 estimate with respect to the cost of proceeding to rectify the
22 breach of trust duty that this Court had identified in Cobell
23 VI.

24 JUDGE SILBERMAN: Counsel.

25 MR. AUSTIN: Consider the significance. Yes?

1 THE COURT: Where in your brief here do you say that
2 the 12 billion was a revelation?

3 MR. AUSTIN: Your Honor, in my brief --

4 THE COURT: I mean, I see you do say that the staty
5 motion --

6 MR. AUSTIN: Yes.

7 THE COURT: -- introduces the 12 billion dollar
8 figure but there's a great deal in your impossibility segment
9 of the brief that isn't focused on that and it doesn't seem,
10 the drift of that section is not that this is pulled out of
11 the blue.

12 MR. AUSTIN: Your Honor, in fact, it was. This
13 information was never provided to the district judge and that
14 is why, that is why we submit the appropriate next step is to
15 remand the record to the District Court to allow this further
16 information, the cost, the statements, the confessions of
17 impracticability and impossibility to be considered by the
18 district judge so that he can then wrestle with the question.

19 THE COURT: Are you saying that the defendants in
20 this litigation, until that submission to the Court of
21 Appeals, never raised the issue of the reasonableness of
22 spending more on accounting than was in the trust? Because I
23 certainly have the strong feeling back in 2004 that that issue
24 was very present in the case.

25 MR. AUSTIN: The argument was made in 2004, as it is

1 being raised again, that the cost of rectifying declared
2 breaches of trust duty is more valuable than the amount of the
3 trust. In fact, as Your Honor recognized --

4 THE COURT: And did the District Court --

5 MR. AUSTIN: -- in Cobell XIII --

6 THE COURT: -- at any time grapple with that
7 proposition?

8 MR. AUSTIN: The District Court in its September
9 25, 2003 opinion talked about costs, made reference to the
10 Cobell VI determination that the factor that expense would be
11 incurred did not excuse non-compliance for an unreasonable
12 delay.

13 THE COURT: So that issue is right before us then.
14 Excuse me, Counsel.

15 MR. AUSTIN: Yes.

16 THE COURT: Listen carefully.

17 MR. AUSTIN: Yes, sir.

18 THE COURT: The judge has made a legal ruling that
19 the expense of the accounting and its relationship to the
20 corpus is irrelevant in terms of his remedy. Is that correct?

21 MR. AUSTIN: The Court made the ruling that it made
22 based on the information available to it. The Court did not
23 have --

24 THE COURT: Yes, but it adopted a principle.

25 MR. AUSTIN: -- before it --

1 THE COURT: Right?

2 MR. AUSTIN: The court did not have before it the
3 following information which is so important that I am doing my
4 job bringing it to this panel's attention.

5 THE COURT: Well, if the district judge ruled that
6 the cost was irrelevant with respect to remedying violations,
7 then it seems to me he's made a legal ruling that is clearly
8 before us. Isn't that correct?

9 MR. AUSTIN: He made a legal ruling because
10 defendants have consistently disputed our contention, what was
11 being requested was impossible. He made a legal ruling based
12 on the evidence presented. It was not before him --

13 THE COURT: I'm saying, give me that sentence again?

14 MR. AUSTIN: It was not before, the information that
15 is before this court.

16 THE COURT: I understand that.

17 MR. AUSTIN: The March 9 motion said there would be
18 no value derived.

19 THE COURT: What is the position that you
20 repeatedly --

21 MR. AUSTIN: I'm sorry.

22 THE COURT: -- advocated? That what you were
23 requesting was impossible? Because, I mean, that's the way it
24 came out.

25 MR. AUSTIN: The position that we have advocated is

1 that it is impossible for the government to rectify a breach
2 of trust duty that has been allowed to go unremedied for so
3 long at such a level of malfeasance and recalcitrance --

4 THE COURT: You aren't saying that you oppose the
5 structural --

6 MR. AUSTIN: -- that an accounting cannot be
7 accomplished.

8 THE COURT: Are you saying that you oppose the
9 structural injunction?

10 THE COURT: Yes, that's what I understood to be your
11 point. You have opposed --

12 MR. AUSTIN: The position that we took, as is
13 reflected in our January 6th, 2003 submission is this. In our
14 plan to achieve a proper adjustment of account balances, we
15 spent the first 35 pages saying the record demonstrates an
16 accounting cannot be accomplished. Too many records --

17 THE COURT: All right.

18 MR. AUSTIN: -- have been destroyed.

19 THE COURT: Can I, let me interrupt for a moment
20 now.

21 MR. AUSTIN: Yes.

22 THE COURT: I certainly didn't mean to imply the
23 implication that Judge Silberman said which is that you were
24 agreeing that the District Court had abused its discretion.
25 Okay, we'll start with that. But I do want to figure out

1 exactly what your position is and how much different it is
2 from government's with respect to the structural injunction.
3 Now, I appreciate there is something else you want. But what
4 we have before us today is a structural injunction.

5 MR. AUSTIN: Yes.

6 THE COURT: Now, as I read your briefs, I'm going to
7 read them to you because I want to know what you agree with
8 still and what you don't. My understanding is that you never
9 wanted a structural injunction and that you don't want it
10 today. In fact, you've asked us, although you didn't ask for
11 a vacation, you did ask for a remand, right? That's right.

12 MR. AUSTIN: Yes.

13 THE COURT: Compound questions.

14 THE COURT: I'm sorry. You a.) you've never asked
15 for a structural injunction and you don't want one? Is that
16 correct?

17 MR. AUSTIN: We have not requested a structural
18 injunction because we have convinced for some time based on
19 the evidence known to us that it would be a complete and utter
20 futility.

21 THE COURT: Well, why wasn't that an abuse of
22 discretion then?

23 MR. AUSTIN: --that justice would not be --

24 THE COURT: And then Judge Garland's point. Why
25 wasn't that an abuse of discretion?

1 MR. AUSTIN: But Your Honor, I don't know why the
2 other side didn't argue it. Perhaps it's because the
3 information that is the basis of determining an abuse of
4 discretion was not provided to the District Court.

5 THE COURT: Counsel, if you sang telling the judge
6 we don't want it. The other side says we don't want it and he
7 gives it anyway, why is that not abuse of discretion?

8 MR. AUSTIN: The other side didn't take the position
9 we don't want it. The other side took the position here's our
10 plan and go with it. And that's --

11 THE COURT: Well, that certainly --

12 MR. AUSTIN: -- that's where the difference is.

13 THE COURT: If that wasn't a pretty clear position
14 against the alternative I don't know what you want.

15 MR. AUSTIN: Let me propose this to the panel
16 members and Judge Silberman, if I hadn't done as good a job as
17 I needed to be doing to listen to your questions, I want to
18 take a moment and apologize and perhaps offer an explanation.
19 First, I want to thank the Court for expediting this
20 proceeding. We value the opportunities to be before the
21 Court. We have a sense of urgency about our responsibility
22 representing 500,000 trust beneficiaries to be here and when
23 the opportunity arrives to make the most of them. Apparently
24 I tried doing too much at making the most of it.

25 THE COURT: As you've noticed Judge Garland will

1 give you all the time you need. You don't have to worry about
2 that.

3 MR. AUSTIN: Not only are all the members of
4 litigation team present today for this argument but Eloise
5 Cobell, our lead plaintiff has traveled here from Montana to
6 be present and she is here and we are so eager to present our
7 position because we look to the Court with the following
8 confidence and I believe that it helps explain what I've, to
9 this point, feel I have not done a sufficient job of
10 presenting.

11 We believe that when the Court is given sufficient
12 information, to see the situation for what it is, that the
13 Court will then direct the principles of equity brought to
14 bear, that we not waste millions of dollars pursuing futility,
15 that instead we move ahead --

16 THE COURT: Well, counsel, I --

17 MR. AUSTIN: -- with achieving a just and fair
18 outcome.

19 THE COURT: I am confused. What is it that you
20 want?

21 MR. AUSTIN: Okay.

22 THE COURT: If you do not want accounting, what do
23 you want?

24 MR. AUSTIN: This is what --

25 THE COURT: The case is in a --

1 MR. AUSTIN: This is what we want.

2 THE COURT: Excuse me.

3 MR. AUSTIN: We want remand to the Court.

4 THE COURT: Let me finish my statement or question.

5 MR. AUSTIN: Yes, sir.

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

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

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

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

4 THE COURT: Counsel. Counsel.

5 MR. AUSTIN: -- Cobell VI --

6 THE COURT: Counsel, wait a minute. Stop.

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

8 THE COURT: Counsel.

9 MR. AUSTIN: Yes, sir.

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

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

14 THE COURT: Counsel. I'm asking --

15 MR. AUSTIN: -- at additional facts.

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

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

20 THE COURT: No, are you at this point?

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

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

25 MR. AUSTIN: No. The accounting is this invaluable

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

7 THE COURT: Doesn't that sound --

8 MR. AUSTIN: -- of this case --

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

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

13 THE COURT: For what?

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

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

21 MR. AUSTIN: -- based on the facts.

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

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

1 situations are brought to bear.

2 THE COURT: Which are?

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

5 THE COURT: Counsel, just state them.

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

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

8 THE COURT: Tell us what they are.

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

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

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

23 MR. AUSTIN: Yes, sir.

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

1 you're not seeking an accounting?

2 MR. AUSTIN: We are seeking an equitable remedy.

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

4 MR. AUSTIN: But we need the facts.

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

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

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

15 THE COURT: What's the remedy?

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

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

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

3 MR. AUSTIN: Your Honor --

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

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

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

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

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

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

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

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

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

1 MR. AUSTIN: Even as I think this discussion we're
2 having confirms, you can direct, as Judge Lambert has done,
3 faithful to the mandates of this Court, that steps be taken to
4 rectify the long-standing breach of trust duty. You can spend
5 13 billion dollars, you can spend 10 times that amount, but if
6 the information is not there, if the records --

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

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

9 THE COURT: -- generating information.

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

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

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

1 our accounting plan because it's of no value. Look to other
2 ways. We advocate an equity based, for lack of a better term
3 rough justice approach. There is submitted in our August 4,
4 2003 proposed conclusions of law, that we submitted after the
5 1.5 trial had been completed and the part of (indiscernible)
6 defendants, we submitted three pages, page 8 to 10 of that
7 submission that described a series of cases where courts, most
8 of them state appellant, a few federal, were confronted with
9 this type of situation. For whatever reason, no information
10 to be used, in doing the accounting required by law. It is
11 difficult to summarize --

12 JUDGE SILBERMAN: So what remedies did these
13 courts --

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

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

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

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

7 THE COURT: Is that gross or net?

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

11 THE COURT: Well if 12 billion went out --

12 MR. AUSTIN: That's the problem.

13 THE COURT: If 12 billion went out --

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

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

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

19 THE COURT: I don't know but --

20 MR. AUSTIN: And where?

21 THE COURT: I have no idea what --

22 MR. AUSTIN: Where? I know.

23 THE COURT: -- the facts are.

24 MR. AUSTIN: I have no idea.

25 THE COURT: But the 12 billion sounds, from your

1 account, totally irrelevant.

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

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

6 MR. AUSTIN: But where did it go?

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

8 MR. AUSTIN: Okay, I'm sorry.

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

11 MR. AUSTIN: But the problem is --

12 THE COURT: You understand that.

13 MR. AUSTIN: -- we don't have the information.

14 There aren't the records available to know how much went out
15 and more importantly, to whom, where? Did our beneficiaries
16 in fact receive any of it. The problem is exacerbated by the
17 fact that the Department of the Treasury failed, until a few
18 years ago, to keep the checks that would be executed by the
19 beneficiaries and --

20 THE COURT: Let me step back a moment.

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

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

25 MR. AUSTIN: Yes.

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

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

6 MR. AUSTIN: Yes.

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

10 MR. AUSTIN: Right.

11 JUDGE SILBERMAN: That's the government's position.
12 Now I take it you disagree that the balance should still be
13 416 million?

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

17 THE COURT: Yes.

18 MR. AUSTIN: -- or to whom.

19 THE COURT: But let me just --

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

21 THE COURT: -- finish.

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

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

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

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

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

12 MR. AUSTIN: Yes.

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

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

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

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

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

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

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

7 MR. AUSTIN: -- equity can produce.

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

9 MR. AUSTIN: Yes.

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

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

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

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

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

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

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

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

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

19 THE COURT: Right?

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

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

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

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

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

4 MR. AUSTIN: -- have --

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

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

8 THE COURT: Counsel, this is not a game.

9 MR. AUSTIN: And Judge, perhaps --

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

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

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

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

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

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

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

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

13 MR. AUSTIN: Your Honor, we have requested that the
14 judge invoke equitable remedies. We presented in the phase
15 1.5 trial --

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

18 MR. AUSTIN: We presented --

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

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

1 just sum.

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

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

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

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

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

25 MR. AUSTIN: What we told the district judge was

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

6 THE COURT: But you said --

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

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

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

16 THE COURT: Counsel, are you seeking --

17 MR. AUSTIN: And there's a --

18 THE COURT: Are you seeking --

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

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

22 MR. AUSTIN: With respect to --

23 THE COURT: Yes?

24 MR. AUSTIN: With respect to the --

25 THE COURT: Counsel.

1 MR. AUSTIN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: In essence --

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

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

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

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

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

1 THE COURT: I think before you explain let's --

2 MR. AUSTIN: Yes.

3 THE COURT: -- ask Judge Williams whether that was
4 the answer to the question he was asking?

5 JUDGE WILLIAMS: Well, I heard a yes and then a
6 further detail to follow.

7 THE COURT: The problem is we're way over your time
8 and if you're going to have any chance, if we're going to have
9 any chance to finish this this morning we're going to have to
10 shorten the explanations just a little. Could you try to do
11 that for us?

12 MR. AUSTIN: Certainly. Let me try in a nutshell to
13 set forth our position, because we really are confronted with
14 competing remand requests. The Government says we can take
15 care of it, give it back to us, they said that in Cobell XIII,
16 Cobell XII, Cobell VI. In fact, this Court has determined and
17 explicitly so, most recently in Cobell XII, that's not an
18 acceptable solution. Our hands aren't tied. The Court has an
19 obligation in fact, to do more than accept what's told when
20 what is being talked about and presented is inadequate to
21 satisfy the obligation. So the Government's position is not
22 acceptable. Remanding would condemn our clients to further
23 delay.

24 THE COURT: I thought you asked for a remand.

25 MR. AUSTIN: To additional (indiscernible). We're

1 asking for remand of an entirely different sort.

2 THE COURT: All right. Can I --

3 MR. AUSTIN: The difference is night and day.

4 THE COURT: Let me ask a series of questions to see
5 if there's any common ground here at all. You heard, I saw
6 you sitting here for the previous case. A lot of discussion
7 about this Court's authority to issue advisory opinions. The
8 way we don't issue advisory opinions is by focusing on what we
9 have before us. What we have before us is a structural
10 injunction. Right? That's the only thing that's on appeal
11 here today, is a structural injunction ordering the Department
12 of the Interior to do something by various dates, correct?

13 MR. AUSTIN: Yes.

14 THE COURT: All right. You don't want that, right?

15 MR. AUSTIN: What we want instead --

16 THE COURT: I don't want to know what you want
17 instead. I've heard what you want instead.

18 MR. AUSTIN: Okay.

19 THE COURT: I want to know. You do not want the
20 structural injunction that the Court entered. Is that right?
21 I see co-counsel nodding but you don't want that.

22 MR. AUSTIN: We are convinced that it would be a
23 futility, a monumental waste and would not achieve justice.

24 THE COURT: So you don't want it, right? It's not
25 the appropriate remedy here, right?

1 MR. AUSTIN: Based on the information now available
2 we would agree.

3 THE COURT: Right and you, and you don't dispute,
4 perhaps because you have no way to value this yourselves, the
5 Government's estimate that it's going to cost 12 billion
6 dollars to do what the judge ordered them to do.

7 MR. AUSTIN: At this point, since the District Court
8 has not had a chance to examine the basis for the testaments,
9 I have no way of knowing.

10 THE COURT: So you have no way to dispute that. And
11 you sent us a letter which said, trustee delegates recognition
12 that this amount is inadequate, that is, the 58 million
13 dollars for the year, further demonstrates that the historical
14 accounting provisions are impossible of the structural
15 injunction are impossible of compliance. And you stand by
16 that position that you sent us in the letter, right?

17 MR. AUSTIN: Yes.

18 THE COURT: And in your brief you said that those
19 recent developments including the 13 billion dollar amount
20 meant that this injunction was impossible, right?

21 MR. AUSTIN: Yes.

22 THE COURT: Okay. So that means both sides agree
23 that this injunction should not stand. Correct?

24 MR. AUSTIN: Yes, and so the question becomes --

25 THE COURT: Well, hold on. If I am the trustee, the

1 settler or the beneficiary of \$1000 account for my daughter
2 and I then go out and hire Goldman Sachs at a cost of 10
3 million dollars to administer that account, that would be
4 unreasonable, wouldn't it?

5 MR. AUSTIN: I am confident that a court sitting in
6 equity would never find that an appropriate solution.

7 THE COURT: All right.

8 MR. AUSTIN: And that is why our remand request has
9 been made.

10 THE COURT: All right. Now, why, let me ask two
11 more questions. The other things that you're talking about
12 here that you're discussing with each of my colleagues, those
13 are not before us in that the Judge has not ordered any of
14 those things, right?

15 MR. AUSTIN: Correct.

16 THE COURT: He hasn't ordered what you want and he
17 hasn't ordered what the Government wants, right?

18 MR. AUSTIN: Yes.

19 THE COURT: Okay. So, the remaining question is you
20 asked remand, they asked vacate. Why shouldn't we vacate
21 here? If both sides agree that this injunction should not
22 stand, either on the Government's side because they don't want
23 to spend the money in this way. They have another way of
24 doing it, or on your side because you don't want the money to
25 be spent in this way because you want the money to be

1 available to your beneficiaries. It seems to me that you both
2 want vacation. Of course, we all want vacation. You know
3 what I mean here. We all want, that both of you want vacation
4 of this structural injunction, right?

5 MR. AUSTIN: But where the matter then goes and with
6 what instruction makes all the difference.

7 THE COURT: Now you're asking for a set of advisory
8 opinions.

9 MR. AUSTIN: No.

10 THE COURT: Now, we can discuss -- hold for one
11 second.

12 MR. AUSTIN: Okay.

13 THE COURT: You're asking what you want to add to
14 the vacation but you're not disputing that we should vacate
15 the structural injunction, are you?

16 MR. AUSTIN: What we proposed in our brief, we
17 believe this is the most efficient way or proceeding is hold
18 everything. Do and as the Court determined in connection with
19 the Ormont Drug case cited in our brief, do the following,
20 under your rule 41(b) authority, remand the record, keep the
21 injunction stayed in place, direct the District Court to
22 gather further information regarding the issue that is now
23 clearly front and center as our discussion --

24 THE COURT: Okay, I understand that.

25 MR. AUSTIN: -- as our discussion this morning

1 reflects.

2 THE COURT: Normally the way this Court works is
3 that we vacate unless we think there's a reasonable chance and
4 there's some debate about in the court overall how much of a
5 chance that the order itself will in the end stand. Right?
6 You don't think there's any chance, do you, that the
7 structural injunction given how much it's going to cost, will
8 in the end stand. Because you want that money spent for the
9 benefit of your, one way or the other, whether we call it
10 damages, whether we call it remedy, whether we call it
11 equitable, whether we do it in this Court, whether we do it
12 another Court. You don't want the Government to spend this
13 money on an accounting. On this structural accounting.
14 Right?

15 MR. AUSTIN: Correct. It is a futility.

16 THE COURT: All right, so then it seems to me that
17 it would be a mistake to remand without vacating this thing.
18 There doesn't seem to be any ground that either side has or
19 that either side desires for us to not vacate this injunction.

20 MR. AUSTIN: Well there is a choice for the court to
21 make but let me make the best argument that I know about in
22 support --

23 THE COURT: Please, go ahead.

24 MR. AUSTIN: -- of what I proposed and what our
25 brief described. In the Ormond Drug case you had a contempt

1 situation where the defense was, I don't have the money. My
2 lawyers and accountants won't do the work I've got to have
3 done in order to make the filing and hence what I've been
4 compelled to do and put in jail for not doing is impossible
5 fulfillment and this Court in Ormont Drug said hold
6 everything. Direct the district judge to consider the
7 question of whether it is impossible to comply with the order
8 that resulted in this person being held in contempt and that's
9 entirely consistent, of course, with equitable principles.

10 THE COURT: What's the cite for Ormond?

11 MR. AUSTIN: The cite is in our brief, Your Honor.

12 THE COURT: It is in the brief?

13 MR. AUSTIN: Yes.

14 THE COURT: Okay. Thank you.

15 MR. AUSTIN: Yes.

16 THE COURT: I have a question with respect to that.

17 MR. AUSTIN: Yes, sir.

18 THE COURT: My understanding is that your position
19 of impossibility and performance is based on the total cost,
20 is that correct?

21 MR. AUSTIN: There were other factors, Judge,
22 identified in our brief.

23 THE COURT: Yes, but the total cost --

24 MR. AUSTIN: In addition to that.

25 THE COURT: -- is the key point, right?

1 MR. AUSTIN: That is a very significant one when
2 we're told 13 billion dollars and no value whatsoever.

3 THE COURT: Okay, fair enough.

4 MR. AUSTIN: But there are others.

5 THE COURT: Now. This goes to the question of what
6 other, whether there are other issues before us. Are you now
7 taking the position that you're abandoning the request for an
8 accounting?

9 MR. AUSTIN: No.

10 THE COURT: So you still want an accounting?

11 MR. AUSTIN: What we seek is a fair and equitable
12 adjustment of account balances.

13 THE COURT: So therefore, it seems to me, am I wrong
14 in saying that the issues that the Government, specific issues
15 that the Government has identified as erroneous decisions or
16 orders in the District Court opinion are before us as well?
17 And you have argued to the contrary. The question, for
18 instance, whether statistical sampling is a legitimate basis
19 for doing any kind of accounting?

20 MR. AUSTIN: Right, and since the evidence --

21 THE COURT: That's before us.

22 MR. AUSTIN: That's correct.

23 THE COURT: And we have to decide that.

24 MR. AUSTIN: As is the record.

25 THE COURT: And we have to decide that issue.

1 MR. AUSTIN: Well --

2 THE COURT: Even if we agree with you that the
3 overall burden of the injunction, structural injunction is too
4 high and therefore has to be vacated we still have to deal
5 with the specific issues. Because some kind of accounting is
6 going to be sought down below.

7 MR. AUSTIN: No, you don't. This, again, is about
8 the historical accounting obligation the Court is attempting
9 to enforce and it's about correcting account balances. Let me
10 explain. Depending on what --

11 THE COURT: Can you hold?

12 MR. AUSTIN: -- the judge in the proceedings below
13 decides --

14 THE COURT: I take it that if we --

15 MR. AUSTIN: -- to do.

16 THE COURT: -- said this injunction can't stand
17 because the costs are way out of proportion to what's
18 available, we have no idea what the District Court might do in
19 the next, if the District Court then gives it another
20 accounting this court might well realize that statistical
21 sampling is the only way to provide an amount of money to do
22 it at a cost that's proportional. We might never have to
23 consider this question because the District Court might never
24 think it would be reasonable to eliminate sampling if the
25 District Court realized that it were limited by an amount of

1 money.

2 MR. AUSTIN: The District Court devoted a 44 day
3 trial and the longest opinion issued by a district judge
4 sitting in this circuit, much of it to that issue. What the
5 district judge determined based on this exhaustive examination
6 of the proposal to use statistical sampling is as follows.
7 Number one, the defendants accountant admitted in the hearing
8 on November 25, 1998 --

9 THE COURT: I think I read your briefs. We've all
10 read the briefs.

11 MR. AUSTIN: There's no evidence.

12 THE COURT: If the District Court, are you, perhaps
13 Judge Silberman is quite correct. Are you certain that the
14 judge will just go back and reissue an order saying that
15 sampling is inappropriate, even if we tell the judge that
16 there is a cap, a reasonableness cap on how much money the
17 cost can be. If your position is, is that it's clear, sort of
18 just like we had in the previous case, what Judge Bates would
19 do if we remanded, now the question is what would Judge
20 Lambert do if we remand. If your position is that there's no
21 question that we will again, a year from now, or three months
22 from now, be faced with a decision that says regardless of
23 cost, statistical sampling is not permissible then I think
24 Judge Silberman is correct. We have no question that we must
25 decide this. If your position is that you don't know what

1 kind of (indiscernible) --

2 THE COURT: But I understand you to say, you reject
3 statistical sampling, don't you?

4 MR. AUSTIN: Correct. Because it is not an
5 accounting.

6 THE COURT: You still reject it, don't you?

7 MR. AUSTIN: And our position will not change on
8 that because --

9 THE COURT: So if there's --

10 MR. AUSTIN: -- as a matter of fact in law it is not
11 an accounting.

12 THE COURT: All right, so if it were the case, your
13 position is even if a rejection of statistical sampling
14 requires an expenditure of the entire gross national product
15 of the United States, it still must be done?

16 MR. AUSTIN: Your Honor, this is our position.

17 THE COURT: Is that your position?

18 MR. AUSTIN: Let me try to -- I don't believe that
19 it is, and let me explain. Our position is that there is no
20 reason to address that or any other issues at this point.

21 Remand the case to the District Court --

22 THE COURT: There's only --

23 MR. AUSTIN: -- to determine whether a completely
24 different --

25 THE COURT: Let me turn over my cards. Can you hold

1 for one second?

2 MR. AUSTIN: -- alternative is appropriate. Yes.

3 THE COURT: I agree with that unless you think your
4 position is always going to be that. That no matter what the
5 facts show statistical sampling can never be permitted. If
6 that's your position then there's no reason to resolve that.
7 Just hold for one second.

8 MR. AUSTIN: Yes.

9 THE COURT: You understand?

10 MR. AUSTIN: Yes.

11 THE COURT: If your position is that regardless of
12 the facts, statistical sampling is always prohibited, then of
13 course, we're going to face that question again. Now, is that
14 your position?

15 MR. AUSTIN: The Court may not have to.

16 THE COURT: Why not?

17 MR. AUSTIN: Depending upon subsequent developments.
18 If the Court below decides that an accounting is a futility
19 and that an alternative approach should be used --

20 THE COURT: But you're going to --

21 MR. AUSTIN: -- this issue is gone. There is no
22 further reason --

23 THE COURT: Excuse me but you are going to staunchly
24 argue that in trying to figure out how much should be given to
25 who, no statistical sampling should be employed. Is that

1 correct?

2 MR. AUSTIN: It's because --

3 THE COURT: I see you nodding your head
4 affirmatively. Is that correct?

5 MR. AUSTIN: Your Honor, statistical sampling does
6 not comply with this Court's --

7 THE COURT: Your answer is?

8 MR. AUSTIN: -- guidance in Cobell VI.

9 THE COURT: Your answer is that in no way may a
10 statistical sampling be employed to get the remedy you
11 require. Is that correct?

12 MR. AUSTIN: Correct.

13 THE COURT: Correct.

14 MR. AUSTIN: Based upon this Court's guidance and
15 the evidence presented.

16 THE COURT: In Corbell VI.

17 THE COURT: I understand exactly where your position
18 is. You have in mind an ideal accounting system. And you
19 can't get that because of the limitation of cost. Ergo the
20 value of that ideal accounting system should be relevant in
21 determining what the appropriate equitable remedy is. Isn't
22 that your position?

23 MR. AUSTIN: No. What we had in mind is what this
24 Court identified and delineated in Cobell VI. That's an
25 adequate accounting --

1 THE COURT: No but I --

2 MR. AUSTIN: -- a full and complete accounting of
3 all items.

4 THE COURT: That may have been a friendly question
5 to you.

6 MR. AUSTIN: I know but I need to be sure that I am
7 as clear as I can be.

8 THE COURT: But if I understand here.

9 MR. AUSTIN: That is what we have in mind.

10 THE COURT: Let me see if I understand your
11 position. Ideally, if you could have it you would have an
12 ideal accounting system.

13 MR. AUSTIN: An adequate and fully complete
14 accounting as the law required.

15 THE COURT: Yes, it would be your adequate and fully
16 but there's a limitation of cost here. So therefore you ought
17 to be compensated for the failure to get the adequate
18 accounting system.

19 MR. AUSTIN: If it were just an issue of cost, with
20 all the information that's there, if the light could be shone
21 into this darkness and our client be given the information
22 they're entitled to get, we would be advocating till the cows
23 come home. Cost, as this Court recognized in Cobell VI, cost
24 should not be the tail that wags this dog. That would be our
25 position but that's not the situation we're confronted with.

1 The cost reflects, Your Honor, the cost reflects the fact that
2 this is a futility. You can pick any number. What it's about
3 is we can't do it.

4 THE COURT: But it's still relevant to the district
5 judge in your view as to what the adequate accounting
6 framework should be.

7 MR. AUSTIN: If the district judge on remand is
8 provided with the following information that this Court now
9 has, 1.) 12 to 13 billion dollars or maybe more; 2.) No value
10 to the class. The district judge applying what this Court has
11 provided in terms of guidance, may well arrive at an entirely
12 different approach based on principles of equity then has been
13 expressed to this point.

14 THE COURT: And as I understand it you do think that
15 this structural injunction is of no value to the class, and
16 you don't dispute within some order of magnitude, the cost,
17 right?

18 MR. AUSTIN: Your Honor, my problem with agreeing
19 with that question is this.

20 THE COURT: That's the way you put it. You said if
21 the judge were persuaded that this injunction was not of value
22 to the class and that the cost was \$12 billion, the judge
23 wouldn't do. He wouldn't just reorder this injunction and it
24 would be wrong to do that, right? You said that.

25 MR. AUSTIN: We would urge the Court, given those

1 facts to look to another way to make the proper adjustment of
2 the account balances. The accounting obligation that exists,
3 that is reflected in the 1994 format, going forward we would
4 expect to be satisfied. We would urge that these defendants
5 get their house in order to provide our clients with what the
6 law required. But that is, it is important that I make that
7 distinction.

8 THE COURT: We understand. I think we have your
9 position. Are there any questions? Thank you very much, we
10 appreciate it.

11 MR. AUSTIN: Thank you.

12 THE COURT: You're way out of time on rebuttal. On
13 the other hand they were way out of time on response so I'll
14 give you a little more time.

15 ORAL ARGUMENT OF MARK B. STERN, ESQ.

16 ON BEHALF OF THE APPELLANT

17 MR. STERN: Thank you, Your Honor. If I could just
18 begin by giving a couple of joint appendix cites that I think
19 are relevant. The cost, the estimate of the cost of the
20 structural injunction was not only, of course, provided by
21 Congress and cited in this Court's 2004 opinion would hardly
22 have been news to the District Court, was also contained in
23 the affidavit of Mr. Casen. It's in the joint appendix at 759.

24 THE COURT: What date was that presented?

25 MR. STERN: That's 2000 and --

1 THE COURT: No, what date was that presented to the
2 district judge? Is that before he issued the structural
3 injunction?

4 MR. STERN: It was after he issued the original
5 structural injunction at the time when we were seeking a stay
6 but it was obviously before --

7 THE COURT: Did he still have jurisdiction?

8 MR. STERN: Whether he did then or not --

9 THE COURT: You're talking about the original?

10 MR. STERN: That's the original. This is a
11 declaration (indiscernible) in 2003.

12 THE COURT: So this was something that was in the
13 court file when after our most recent Cobell decision went
14 back to the District Court and he --

15 MR. STERN: Yes. It was sitting there. And it's
16 not as though, I mean, I'm just saying even technically, the
17 declaration was in there. But of course, everyone knew, I
18 mean, nobody knew what the cost was after this Court's last
19 opinion and what Congress said you know, would have been out
20 of the question anyway.

21 THE COURT: Did District Court hold hearing before
22 reinstating the structural injunction after our --

23 MR. STERN: No, the Court, no.

24 THE COURT: Wait, let me get the sentence out.

25 MR. STERN: Sorry.

1 THE COURT: That's all right. We issued our
2 decision in Cobell I guess 10, 11, 12, 13, right? And after
3 we issued that the District Court reinstated the structural
4 injunction when the appropriations act ran out, right?

5 MR. STERN: Yes.

6 THE COURT: Between those times, did the District
7 Court hold a hearing on the question of whether he should re-
8 institute the structural injunction?

9 MR. STERN: No.

10 THE COURT: Did you seek one or did you know --

11 MR. STERN: It was done sua sponte.

12 THE COURT: So you had no idea it was coming.

13 MR. STERN: No, it was done sua sponte and in the
14 Court simultaneously denied the stay pending appeal so the
15 Court was very firm in its views.

16 THE COURT: What is your response to the suggestion
17 that our presiding judge makes --

18 THE COURT: Only by implication.

19 THE COURT: -- that if we vacate we shouldn't reach
20 any of the specific issues you raise on appeal with respect to
21 alleged legal errors in the structural injunction.

22 MR. STERN: Your Honor, if it weren't bad form I
23 would get down on my knees and ask you to address those
24 issues.

25 THE COURT: No, but counsel --

1 THE COURT: It's bad form.

2 THE COURT: Counsel, you know what, well, it is bad
3 form and we don't respond to emotion as you noticed. Do you
4 have a logical answer?

5 MR. STERN: Yes, I do have a logical and it's that
6 at this point the District Court has said these are the
7 parameters, legal parameters. This is part of an injunction.

8 THE COURT: Right but do you think if we were to
9 decide the more cosmic question which is that both sides agree
10 that a structural injunction can't be issued without looking
11 at the cost, and if we were to say that it would be
12 unreasonable because the only costs in the record are so much
13 higher than any benefit to the beneficiaries, do we know that
14 the District Court would then reissue an injunction with the
15 same provisions irregardless?

16 MR. STERN: Well, I know that this Court has twice,
17 for example, on statistical sampling said you should be
18 allowed to do it. It said that in 240 F.3d. It said it at
19 392 F.3d.

20 THE COURT: Because that's just futile, whatever we
21 do.

22 MR. STERN: Well, that as you know, is our position.
23 And the, and all we're asking is that the Court has to be
24 specific enough to allow this process to go forward in the way
25 that, if the Court agrees with us. If it doesn't, no, but if

1 the Court agrees with us --

2 THE COURT: If it doesn't, you want us to be specific
3 too?

4 MR. STERN: Yes, I would. I'd rather know the worst
5 so that we can think about what to do so Congress can take
6 action. But this death by 1000 cuts of going back down,
7 having things reinstated, we need to have the guidance so
8 that we can at least go back and do the real accounting and
9 the answer is of course plaintiff's don't want a sort of
10 strapped down sort of accounting of the kind that we are
11 proposing.

12 THE COURT: If the premise is that any accounting to
13 take place should be constrained by a.) availability of funds
14 and b.) reasonableness principles, who should, what
15 institution should in the first instance decide how to make
16 the trade-offs necessary for reconciling optimality in
17 accounting with these constraints?

18 MR. STERN: I think the, that it sort of roughly --

19 THE COURT: I mean --

20 MR. STERN: But it's roughly --

21 THE COURT: There are two possible answers. The
22 Court and the branch of government charged by Congress with
23 running the trust --

24 MR. STERN: Well, I think that -- I put first I put
25 Congress itself in which I do think has made --

1 THE COURT: Yes.

2 MR. STERN: -- judgments.

3 THE COURT: We don't have the authority. Even under
4 the APA we don't have that authority.

5 MR. STERN: No, we believe that Congress' authority
6 comes first.

7 THE COURT: You want us to remand to Congress? Is
8 that what your theory is?

9 MR. STERN: We think that Congress has made
10 judgements. Then the agency makes judgements and then on
11 review if the review who is active in a final agency action.
12 If the agency has failed to comply with substantive law,
13 whatever the source of that law is, then the Court can declare
14 the error.

15 THE COURT: And the answer to my question is, that
16 in the first instance it is the department that should propose
17 what should happen next?

18 MR. STERN: Yes, Your Honor, but if the department
19 has to go back down and this Court has never addressed the
20 legal underpinnings of this structural injunction, we're
21 talking about the beginning of my opening, then the department
22 will be operating under a cloud, whatever it decides to do,
23 when it gets back to the District Court, this Court will never
24 have vacated, well it vacated but it will have never said
25 those were mistaken.

1 THE COURT: Counsel. Counsel. All these kinds of
2 operational and pragmatic concerns are very, may be beside the
3 point. Shouldn't your argument be there are certain legal
4 rulings that the District Court made with respect to the
5 structural injunction regardless of whether or not the overall
6 injunction is impossible to perform we are entitled to review
7 those specific legal decisions he made?

8 MR. STERN: Absolutely.

9 THE COURT: And not make this argument about that
10 you need to get down on your knees and you're having trouble
11 and so forth.

12 MR. STERN: It's just an expression of emotion, Your
13 Honor.

14 THE COURT: That's the response to the question of
15 whether it would be an advisory opinion --

16 MR. STERN: Right.

17 THE COURT: -- to go beyond the vacate.

18 MR. STERN: There is nothing advisory about
19 reviewing the underpinnings --

20 THE COURT: Again we have Article 3 advisory --

21 MR. STERN: -- of a ruling.

22 THE COURT: -- and we have the colloquial meaning of
23 advisory.

24 MR. STERN: I'm sorry, Your Honor, because of this,
25 I can't hear.

1 THE COURT: I can't hear anything either.

2 THE COURT: Will you turn that thing off?

3 THE COURT: It's not within her authority either.

4 THE COURT: Why doesn't the presiding judge do that?

5 THE COURT: Someone forgot to tell me how to get
6 that authority. (indiscernible) a problem of a first time.
7 Again, I think there's no question that we have Article 3
8 authority to decide this question. The issue is is this, are
9 these a series of sort of fact specific decisions that we
10 might not have to decide, that are difficult and that might
11 not recur if we were to tell the District Court that it is
12 constrained by cost?

13 MR. STERN: Well, I don't think first of all the
14 District Court, I mean, you've got the, it can't, there is a
15 relationship between costs and what Congress has either
16 authorized or required and that's why while I agree the
17 principles of equity would preclude this that we believe that
18 when Congress authorizes it is really relevant and that it is
19 not an advisory opinion in a revealing a structural injunction
20 to say that this is afoul of what Congress has authorized.

21 THE COURT: But all we know that Congress has
22 authorized specifically is this 58 million for one year.

23 MR. STERN: I know.

24 THE COURT: If you want to go back to Congress and
25 have Congress say only spend this amount of money. It seems

1 clear that the other side it would not contend that that
2 wasn't the limit.

3 MR. STERN: Your Honor, it's the other side that's
4 relying on that 58 million dollar appropriation. We come to
5 you saying Congress passed a statute, there are words to that
6 statute. There was a legislative history to that statute. It
7 should be informed by notions of rationality --

8 THE COURT: but all the things that you're saying
9 about that could be agreed on both sides. That is, just hold
10 for one second, that words that are in the legislative history
11 are all about the need to be proportional between cost and
12 benefit. And that's not, I don't see exactly how that's
13 distinct from the equitable principles.

14 MR. STERN: Your Honor, that part that I was
15 prematurely objecting to is the notion that there was an
16 agreement on this. Plaintiff's position, and I'll be clear
17 about what it is and I would just prefer the Court very
18 quickly to Plaintiff's plan that they submitted which is
19 particularly a JA-1050 through 66. And also their most recent
20 submission at the time we were putting together this appendix,
21 which is at 9405 through 07, a heading entitled
22 "Disgorgement," which normally sounds like a request for
23 money, which we would believe should -- if that's what this
24 has really come down and we think that it has come down to
25 this, this should now be in the Court of Federal Claims. And

1 that's really what Plaintiff's want.

2 Plaintiff's don't want some version of an accounting
3 based on any form of rationality and if you read Mr. Austin's
4 transcript carefully, you will see that he never, ever, ever
5 went so far as to say anything different. He was very careful
6 about that because what Plaintiff's believe is that this Court
7 had said that we are entitled to an accounting of the order
8 that the District Court required and they will continue to
9 believe that and what they think is that because an account,
10 because the accounting that Congress actually wanted to have
11 cannot be done for reasons of costs and other reasons, that
12 the District Court should instead formulate a model in which,
13 specifically, 13 billion dollars, the amount of the throughput
14 are put into a fund and then it becomes the Government's
15 burden to demonstrate. This is all laid out in Plaintiff's
16 plan. If I'm getting any detailing incorrectly, it becomes
17 the Government's burden to demonstrate that all disbursements
18 were made correctly as if the Government had sort of been
19 found guilty of all manner of trust, you know, like defaults
20 throughout history so that then there will be money passed
21 over.

22 THE COURT: Money passed over being the difference
23 between what the Government can prove was dispersed and what
24 the Government cannot prove was disbursed.

25 MR. STERN: That's exactly right. And again I ask

1 the Court --

2 THE COURT: And the balance then would be dealt with
3 by the "equitable remedy of disgorgement."

4 MR. STERN: Exactly. And that's in Plaintiff's
5 plans and statements. I'm not asking the Court, obviously, to
6 take my word for it. They're saying that fine, you don't any
7 longer want an accounting. Back early on the Government moved
8 to dismiss this case saying this should be in the Court of
9 Federal Claims. The District Court said I'm not going to do
10 that because Plaintiff's aren't seeking a cash infusion. They
11 say all the money that's there should already be there. All
12 right. Fine. So we never appealed that point. However, what
13 is now happened is that we are, the ideas of an accounting, by
14 the Plaintiff's, they don't really want, they use the word
15 accounting, but what they really want at this point is what
16 they've been proposing since 2003. And whether or not that,
17 they're entitled to any of that, that's a question for another
18 Court altogether. That doesn't belong in this Court at all
19 and what we're saying is if you really want --

20 THE COURT: Even as to that question we don't have
21 briefing on whether disgorgement is something that the
22 District Court has authority --

23 MR. STERN: No.

24 THE COURT: -- for or not, right?

25 MR. STERN: No. But what we do believe is that what

1 we've asked is that this Court correct the legal errors
2 because what Plaintiff's, the reason Plaintiff's don't want
3 you to vacate the injunction and address the points, the legal
4 points is that they want to say the D.C. circuit once again
5 didn't address various points. So really this is all still up
6 for grabs and look how much it would have caused and what
7 we're asking for and they never said this really isn't what
8 you were required with any specificity. They just said
9 something about it's too expensive. They never said anything
10 further so now let's proceed along this route. And what we're
11 saying is no, please reach to the legal premises of the very
12 order that's on their review and address them. That's not an
13 advisory opinion.

14 And then allow the agency as this Court contemplated
15 in 2002 to go back and do it. And that's not an advisory
16 request either. We want a real remand, back to the agency.
17 Not round 16 so that we'll be here again in, we're going to be
18 here again in another month but it's like --

19 THE COURT: I'm sorry, you want a remand to the
20 agency for what?

21 MR. STERN: A remand to the agency to finish the
22 historical accounting.

23 THE COURT: You're really asking for restoration of
24 the status quo anti the so-called structural injunction?

25 MR. STERN: What we're really asking for, that's

1 almost right, Your Honor, we were really asking for a status
2 quo anti the 2002 contempt ruling which formally terminated
3 the remand to the agency.

4 THE COURT: Okay. Okay. I see.

5 MR. STERN: What we're saying is you, in 2001, said
6 the remand to the agency, you know, you said a lot of harsh
7 things about the agency but you said nevertheless it's the
8 agency's job and they should be discretion. By the end of
9 that year, the District Court had already said use of
10 sampling, clearly contemptuous. The following year it says
11 you're an unfit trustee, I'm terminating the remand. And
12 that's where we've been since then.

13 THE COURT: See, it worked. Thank you. Case is
14 submitted.

15 MR. STERN: Thank you so much.

16 (Recess.)

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CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

9-30-05

Heather Caban

Date

DEPOSITION SERVICES, INC.