[SCHEDULED FOR ORAL ARGUMENT ON MAY 11, 2009]

Nos. 08-5500 & 08-5506

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,
Plaintiffs-Appellants/
Cross-Appellees,
v.

KEN SALAZAR, SECRETARY OF THE INTERIOR, et al.,
Defendants-Appellees/
Cross-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLEES/CROSS-APPELLANTS

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **Page**

* Authorities on which we chiefly rely are marked with asterisks.

STATUTES

REGULATIONS

LEGISLATIVE MATERIALS

GLOSSARY

1994 Act	American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239
APA	Administrative Procedure Act
GA	Government Appendix
IIM Accounts	Individual Indian Money Accounts

SUMMARY OF ARGUMENT

Plaintiffs cannot make the series of legal leaps required to defend the monetary award issued by the district court.

They offer no persuasive defense of the linchpin of the district court's ruling – its holding that the accounting activities mandated by Congress are "impossible." The finding of impossibility rests on the untenable conclusion that Congress required a multi-billion dollar review of the history of transactions in Indian trust accounts beginning in 1887, an endeavor it had no intention of funding. This Court already rejected that proposition as "inherently implausible." 428 F.3d 1070, 1075 (D.C. Cir. 2005); 392 F.3d 461, 466 (D.C. Cir. 2004). The district court, in the orders now on review, recognized that it was construing the governing legislation to require an accounting that was "irrationally expensive," 569 F. Supp. 2d 223, 250 (D.D.C. 2008), and that Congress would be "nuts" to fund such requirements, 532 F. Supp. 2d 37, 86 (D.D.C. 2008). This Court's decisions left no room for interpreting the statute to impose requirements that would be funded only by an irrational legislature.

Plaintiffs make little attempt to defend the next step in the district court's reasoning – that agency action is "unreasonably delayed" within the meaning of the Administrative Procedure Act if the agency fails to accomplish a task made impossible by inadequate appropriations. Id. at 39. As this Court explained in vacating a similar finding of unreasonable delay, a problem that "stem[s] from a lack of resources" is "'a

problem for the political branches to work out.'" Mashpee Wampanoag Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100, 1101 (D.C. Cir. 2003).

Plaintiffs muster no authority for their next legal leap – that Congress's failure to appropriate funds for an (ostensibly) impossible accounting rendered the United States liable for a monetary award in lieu of that accounting. The governing rule, grounded in the constitutional separation of powers, is that a court may not remedy statutory violations except with funds appropriated by Congress. No support exists for the proposition that a court may compensate for a failure to appropriate funds by issuing a cash award.

Unable to defend the premises of the monetary award, plaintiffs also cannot explain how the district court had jurisdiction to issue it. If class members have cognizable claims for monetary relief for past breaches of statutory trust obligations, they should be plead and proved in the Court of Federal Claims under the standards just reaffirmed by the Supreme Court. United States v. Navajo Nation, 556 U.S. __, No. 07-1410 (April 6, 2009). The district court had jurisdiction to compel agency action unreasonably delayed. It did not have jurisdiction to remedy purported delays with an award of money.

As plaintiffs' brief makes clear, this case has long ceased to be a quest for an accounting. Plaintiffs do not want a multi-billion dollar accounting; since 2003, their aim has been to demonstrate that an accounting is impossible and to convert that

finding into a cash payment. Their endeavor rests on a series of flawed premises that have culminated in an award the district court had no jurisdiction or authority to make.

Just as this case is no longer about unreasonable delay, there is likewise no basis for continuing jurisdiction to monitor progress. As the decisions on review demonstrate, there is no evidence of continuing agency delay. The only delay found by the district court was a failure "of dedicated public servants to do the impossible," 532 F. Supp. 2d at 86, a finding premised on legal error. The judgment should be vacated and the court's continuing jurisdiction concluded.

ARGUMENT

I. CONGRESS DID NOT MANDATE AN IMPOSSIBLE ACCOUNTING.

A. As This Court Has Already Held, Congress Did Not Require A Multi-Billion Dollar Accounting Project.

In an effort to establish a predicate for a monetary award, plaintiffs defend the central premise of the district court's ruling, that "The Accounting Is Impossible." Reply 3.

Plaintiffs begin by defending the court's decision to treat as "'presumptively correct'" the accounting parameters that formed the basis for two previous injunctions vacated by this Court. Reply 3 (quoting 532 F. Supp. 2d at 94 n.16). Those prior orders directed Interior to review transactions in accounts closed before passage of the 1994 Act, including the probated accounts of deceased individuals, 283 F. Supp. 2d 66, 169-171, 173-175 (D.D.C. 2003); to review historical transactions in trust

"assets" distinct from the funds in the IIM accounts, id. at 175-177; to review transactions dating back to the 1800s, id. at 172-173, and to treat post-2000 transactions as historical rather than current account activity, id. at 171 n.54.

Plaintiffs assert that the district court, in reinstating these parameters, "adhered to this Court's guidance," Reply 3, but they never address this Court's opinions vacating the injunctions. Those rulings made clear that Congress had not mandated a multi-billion dollar accounting and that the district court had improperly invoked common law principles to create obligations never enacted by Congress. This Court vacated the first accounting injunction in the wake of Pub. L. No. 108-108, which had been enacted "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d 461, 466 (D.C. Cir. 2004). As this Court explained, the conference committee "'reject[ed] the notion that in passing the'" 1994 Act "'Congress had any intention of ordering an accounting on the scale of that which has now been ordered by the Court.'" Ibid.

When this Court vacated the accounting injunction for a second time, it held that the "general language" of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." 428 F.3d 1070, 1075 (D.C. Cir. 2005). "Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense." Ibid.

Plaintiffs do not discuss these rulings. Instead, they assert that the understanding of the 1994 Act adopted by the district court – and twice vacated by this Court – was established by this Court's 2001 decision which, they contend, "specified what an accounting requires." Reply 3 (citing 240 F.3d 1081 (D.C. Cir. 2001)). But in 2001, this Court did not review any particular plan for an historical accounting or pre-judge plans that were yet to be developed. Instead, the Court addressed the antecedent issue of whether plaintiffs had a judicially enforceable right to compel an historical accounting of their IIM accounts. 240 F.3d at 1102. This Court held that the duty codified in 25 U.S.C. § 4011(a) to account for the current balance of funds in an account entailed a retrospective inquiry into historical account activity. Ibid.

This Court's 2001 decision affirmed a remand to Interior to conduct an historical accounting, id. at 1107, stressing that the relief ordered by the district court was "relatively modest": "The government must develop written policies and procedures, but the court does not tell the government what these procedures must entail." Id. at 1109. Even so, this Court admonished the district court "to be mindful of the limits of its jurisdiction," id. at 1110, which, the Supreme Court subsequently confirmed, was limited to compelling "a discrete action" the agency is "legally required" to take. Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 63 (2004). Nothing in this Court's decisions or Southern Utah allowed the district court to impose multi-billion

dollar accounting obligations found nowhere in the 1994 Act that were, by the court's own account, "impossible" to implement. 532 F. Supp. 2d at 102.

B. Congress Expected Interior To Perform An Accounting That Was Practicable, Given The Constraints Of Time And Cost.

Plaintiffs do not suggest that Congress had any intention of funding the requirements posited by the district court. To the contrary, plaintiffs endorse the district court's view that Congress mandated an accounting that, while not "literally and permanently impossible," would be "irrationally expensive" to implement. 569 F. Supp. 2d 223, 250 (D.D.C. 2008). At the current appropriations level, an accounting of this kind would not be finished "for about two hundred years, generations beyond the lifetimes of all now living beneficiaries." 428 F.3d at 1076.

Unsurprisingly, Congress has never, in all the enactments and reports relating to accounting responsibilities, suggested that it had legislated requirements of the cost and magnitude imposed by the district court. In the Misplaced Trust report that was a catalyst for the 1994 Act, Congress recognized that "cost and time ha[d] become formidable obstacles to completing a full and accurate accounting of the Indian trust fund"; declared that it "makes little sense" to spend "as much as $281 million to $390 million to audit the IIM accounts"; and directed Interior to "review a range of sampling techniques and other alternatives" and undertake "as complete an audit and reconciliation as

practicable[.]" H.R. Rep. No. 102-499, at 26 (1992) (emphasis added).

Echoing this guidance, the 1994 appropriations legislation that plaintiffs cite (Reply 9) prevented Interior from transferring management of trust accounts to a private party until the funds had been reconciled "to the earliest possible date" through "the most complete reconciliation of such funds possible." Pub. L. No. 103-332, 108 Stat. 2499, 5311 (1994) (emphases added). That provision, which explicitly contemplated a reconciliation that is "possible," provided no warrant for requiring an accounting that is "impossible."

Similarly, when, in 2003, the district court issued its first accounting injunction, Congress passed appropriations legislation "to clarify Congress's determination that Interior should not be obliged to perform the kind of historical accounting the district court required." 392 F.3d at 466.

Plaintiffs' disregard for congressional guidance is epitomized by their assertion that Interior's 2002 report to Congress "conceded that the accounting requires reconciliation of predecessor accounts," Reply 11, and "would begin with the earliest opened account," Reply 16. Interior did not suggest that such an accounting should be required or would make sense. The report advised Congress of the costs that would be entailed in conducting a full reconciliation of current and former accounts, which the report described as "an enormously

complicated, complex, controversial, and costly initiative." A13391.

In response, Congress made clear that it regarded such an undertaking as altogether inappropriate. In a letter to Secretary Norton, the House Committee on Resources observed that "Congress will necessarily determine the funding for any accounting" and described the report as "troubling in several areas." GA2921. "Specifically," the committee noted that the report "detailed a plan for an accounting that would cost, in 2002 constant dollars, more than $2.4 billion and take ten years," a plan that was, "by its own admission, an enormously complicated, complex, controversial, and costly initiative." Ibid. "Given the length of time required to complete the broad accounting outlined in the Report, as well as the costs associated with such an activity, which are likely to come at the expense of other Indian programs," the committee asked that the Secretary "promptly consider ways to reduce the costs and length of time necessary for an accounting." Ibid. Although the committee expected that "any such accounting should be sufficient to ensure beneficiaries of the trust that they can rely on their account balances," the committee advised the Department to "consider all available options regarding the use of alternative accounting methods." Ibid.

That admonition was reflected in Interior's 2003 accounting plan, which included none of the parameters imposed by the accounting injunctions or in the order now on review. Plaintiffs

cannot plausibly contend that the "enormously complicated, complex, controversial, and costly initiative" described in the 2002 report, GA2921, was mandated by Congress or that the Secretary believed such an accounting appropriate.

Plaintiffs do not explain why Congress would legislate requirements it had no intention of funding or why it would have mandated a "cost-unlimited accounting" that would take hundreds of years to complete. 428 F.3d at 1075, 1076. Instead, they assert that this "inherently implausible" result, id. at 1075, is compelled by the statute's "unambiguous" text, Reply 5. But the 1994 Act contains none of the requirements on which plaintiffs insist. As this Court concluded, the Act's text "offers little help in defining the accounting's scope." 428 F.3d at 1074.

Plaintiffs' invocation of common law trust principles is similarly unavailing. As this Court held, the "common law of trusts doesn't offer a clear path for resolving statutory ambiguities." Ibid. Because "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost," this Court held that "the district court owed substantial deference to Interior's plan." Id. at 1076. Plaintiffs' insistence that Interior's implementation of its accounting responsibilities is "not entitled to deference" (Reply 5, heading "1") contradicts this Court's explicit rulings.

C. The Specific Parameters That Plaintiffs Defend Are At Odds With The Text And History Of The 1994 Act.

Plaintiffs' attempt to defend the specific parameters of the accounting defined by the court lacks grounding in the text or history of the 1994 Act. Moreover, although plaintiffs purport to invoke broad principles of equity to support their position, they profess no interest in securing the accounting they insist is required. Since 2003, plaintiffs have made clear that their only objective is to have the accounting declared "impossible," thus (they mistakenly believe) creating the predicate for a massive monetary award. They insist on standards beyond the contemplation of Congress precisely because Congress never would fund such an accounting. That argument inverts all normal principles of interpretation.

1. Closed accounts and probated estates

The 1994 Act requires that Interior account for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. § 162a)." 25 U.S.C. § 4011(a). As our opening brief explained, closed accounts have no "daily and annual balance" and no funds which "are" deposited or invested on an ongoing basis. The Act's text reflects the premise of the Misplaced Trust report, which was that Interior would account for the balances of the roughly 300,000 accounts open at that time.

H.R. Rep. No. 102-499, at 26. Once an account is closed, the trust relationship ends and trust duties cease.

Plaintiffs do not address the language of § 4011(a) or acknowledge that "'Congress' use of a verb tense is significant in construing statutes.'" United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 493 (D.C. Cir. 2004); cf. Carcieri v. Salazar, 129 S. Ct. 1058, 1064 (2009). Nor do they address the premise of the Misplaced Trust report, other than to state (Reply 11) – incorrectly – that the government failed to cite that legislative history below. See GA2924-2925.

Plaintiffs note that under § 4011(b), Interior's quarterly statements of current account activity must state "the beginning balance" in the account. Reply 10. But that provision refers to the beginning balance "for the period concerned," that is, "the calendar quarter"; it has nothing to do with closed accounts.

Plaintiffs never come to grips with the particular anomalies created by the order to examine the closed accounts of deceased individuals whose estates have gone through probate. The district court recognized that deceased individuals have no standing to demand an accounting, but believed that Interior must reopen probate to verify the accuracy of any probate receipts that might have been deposited in an IIM account. 532 F. Supp. 2d at 98.

As our opening brief explained, that ruling rests on a series of errors. It presumes, incorrectly, that funds in an estate must be deposited in an IIM account when, in reality, they

may be "paid directly to" creditors or heirs. 25 C.F.R. § 115.502. Indeed, many accounts have no probate receipts. GA2926 (nearly 200,000 electronic era accounts had no probate receipts).

Moreover, the court imposed a verification requirement on probate receipts that it did not and could not impose for any other receipt, such as revenue derived from mining or timber sales. Under Interior's plan, probate receipts are treated like any other receipt and subject to verification under the same methodologies. 532 F. Supp. 2d at 75. To require special verification for probate receipts is particularly misguided, since the point of probate is to produce a final determination of the assets of the estate. Although the mechanics of probate have changed over the years, the fundamentals have not, including the opportunity to present evidence and challenge agency determinations. See, e.g., GA2927 (1935 regulations).

Citing Estate of Ervin Lyle Waits, 36 IBIA 46 (2001), plaintiffs declare that "[r]equests for an accounting are refused" at probate. Reply 12. But in Waits, the agency found "a total of $0.06 in Decedent's IIM account when the estate was submitted for probate," and "Appellants [did] not contend that this amount [was] incorrect." 36 IBIA 46. "Instead, they request[ed] that the Department be required to prove that the amount is correct." Ibid. The Board of Indian Appeals explained that "[i]n the absence of an assertion that Appellants have some specific information suggesting that the reported amount is

incorrect, the Board will not require additional proceedings in the context of this probate to prove the correctness of the amount in Decedent's IIM account." Ibid.

2. Asset statements

The district court held that Interior must reconstruct historical transactions in trust lands and other "assets" distinct from the funds in the IIM accounts. As plaintiffs do not dispute, that task would dwarf the task of accounting for funds in the accounts. Gov't Br. 28. Contrary to their assertion (Reply 14), no "similar requirement" was contained in Interior's 2003 plan. The "similar requirement" was contained in the accounting injunction, 283 F. Supp. 2d at 175-177, which, this Court noted, increased the cost of Interior's plan by an order of magnitude. 428 F.3d at 1077.

Plaintiffs do not attempt to ground the "asset statement" requirement in the language of § 4011(a), which requires that Interior account for the balances of "funds" in IIM accounts. They cite § 4011(b) but, as explained above, that provision concerns statements of current account activity. They declare the notion of separate trusts for lands and funds to be "unsupportable," Reply 14, without acknowledging this Court's contrary determinations. See 392 F.3d at 464 ("funds have quite a different legal status from the allotment land itself"); 391 F.3d 251, 254 (D.C. Cir. 2004) (relevant trust "corpus" is "revenues derived from land"). In the case they cite, the Supreme Court engaged in close analysis of the provisions that

governed the sale of timber on Indian lands, confirming that separate trusts are governed by distinct statutory frameworks. United States v. Mitchell, 463 U.S. 206, 219-223 (1983) (Mitchell II).

3. Transactions dating back to the 1800s

Plaintiffs assert that the 1994 Act does not "'limit[] the temporal scope of Interior's accounting obligation.'" Reply 14. They are, in a sense, correct, because § 4011(a) does not directly address the historical accounting at all. This Court concluded that the obligation to account for current balances (the balance of funds which "are" deposited or invested for an individual Indian) entails an examination of historical account activity. 240 F.3d at 1102. But this Court did not determine the scope of the accounting and noted that statute of limitations issues had been reserved by the district court. Id. at 1110.

Invoking the "common law," plaintiffs insist that Interior must examine transactions dating back to the 1800s. Reply 14. But at common law, there is no affirmative duty to account; the duty arises "'upon [the] request'" of the beneficiary, made "'at reasonable times.'" 532 F. Supp. 2d at 101 (quoting Restatement (Third) of Trusts § 173). By application of statutes of limitations and the doctrine of laches, a request may be "'prejudicially late'" if it extends too far back in time. 569 F. Supp. at 250 (citing Bogert § 962). As this Court stressed, in interpreting the 1994 Act a court "may not assume a fictional plaintiff class of trust beneficiaries completely and uniformly

free of bars or limitations that the common law may provide." 428 F.3d at 1079.

To the extent that Congress addressed the temporal scope of the accounting in the 1994 appropriations legislation that plaintiffs cite (Reply 9), it prevented the transfer of funds to private management until the funds are reconciled "to the earliest possible date." Pub. L. No. 103-332, 108 Stat. 2499, 2511 (1994). That formulation presumes that Interior will make judgments about the tasks that reasonably can be accomplished within the constraints of resources and time, "classic reasons for deference to administrators." 428 F.3d at 1076.

4. Transactions after 2000

In 2003, the district court rejected Interior's plan to treat December 31, 2000 as the dividing line between historical and current account activity because there was, in the court's view, no evidence that Interior had begun to issue quarterly statements of account. 283 F. Supp. 2d at 172 n.54. By contrast, plaintiffs admit that "Interior began sending account statements in 2000" but assert that this "does not end its accounting duty." Reply 16. They evidently believe that something more than the detailed quarterly statements of performance specified by Congress is required, but they provide no basis for overriding Interior's judgment or making the end date for historical statements a moving target.

5. Administrative fees and unrestored escheatments

Plaintiffs quarrel with the finding that administrative fees "likely amount to a tiny fraction of the monies that pass through the IIM trust," 532 F. Supp. 2d at 96, but they do not dispute that fees and unrestored escheatments "are not reflected as specific IIM account transactions," ibid. Fees are not, as plaintiffs assert (Reply 17), "withdrawals" from an account. GA102 (Cason). Like unrestored escheatments, they form no part of an accounting for account balances.

II. INTERIOR SHOULD BE ALLOWED TO IMPLEMENT ITS ACCOUNTING PLAN FREE OF CONTINUING DISTRICT COURT JURISDICTION.

A. Interior Has Effectively Addressed The Systemic Problems Cited In The 1999 Unreasonable Delay Ruling.

As our opening brief explained, the October 2007 trial and the record as a whole preclude a finding of ongoing unreasonable agency delay. Interior has addressed the problems cited when it was found to have unreasonably delayed action in 1999. Gov't Br. 33-35. It is now in a position to produce historical statements of account for nearly 250,000 accounts. Gov't Br. 36-42.

In response, plaintiffs declare that "[t]hree findings of undue delay were made by the district court," Reply 18, citing the 1999 ruling, the 2002 contempt ruling, and January 2008 ruling now on review. That assertion confirms that there is no basis for continuing jurisdiction.

The 1999 ruling addressed the state of agency action ten years ago and cannot provide the basis for a finding of ongoing

agency delay. As this Court stressed in vacating the accounting injunction, it was error for the district court to rely on findings that were (at the time) only 17-months old. 428 F.3d at 1076 ("For the district court to rely on the old record in the face of ... subsequent developments was error.").

The 2002 contempt findings are seven years old, and, more important, they were vacated by this Court in a decision that plaintiffs neglect to cite. 334 F.3d 1128 (D.C. Cir. 2003). That decision emphasized the creation, in July 2001, of "the Office of Historical Trust Accounting, which has since made significant progress toward completing an accounting." Id. at 1148. This Court stressed that reasoning when it vacated the second accounting injunction, and declared it error for the district court to have relied on the vacated contempt findings. 428 F.3d at 1076.

The third "finding" cited by plaintiffs – the January 2008 opinion – made no finding of agency inaction or delay. To the contrary, the district court frankly acknowledged Interior's extraordinary investment of resources in the historical accounting project and the tangible results. The court believed, however, that Interior's plan was flawed as a matter of law because it did not include the parameters of the multi-billion dollar accounting discussed above. Thus, the court declared that "Interior's 2007 plan reflects the efforts of dedicated public servants to do the impossible." 532 F. Supp. 2d at 86. The only sense in which the accounting was "unreasonably delayed" was

that, in the court's view, "completion of the required accounting is an impossible task." Id. at 39. But as we have already shown, the court's parameters are not required and Congress did not mandate "an impossible task."

The record and the decisions on review document Interior's progress since the 1999 unreasonable delay ruling was affirmed and make clear that no basis exists for the district court's continuing jurisdiction.

Management and Staffing: As plaintiffs do not dispute, Interior established the Office of Historical Trust Accounting to supervise the historical accounting project, 532 F. Supp. 2d at 82, and engaged five outside accounting firms, two historian firms, and a statistical consultant to assist with the project, id. at 64 (citing GA2278).

Plaintiffs claim that "recent audits" reflect problems of management and staffing. Reply 21. But the audits they invoke date from periods between FY1988 and FY2000. GA2935-2963. Thus, they pre-date this Court's 2001 decision and reflect none of the reforms that have since been implemented.

Computer and Business Systems: As plaintiffs do not dispute, Interior overhauled its trust fund accounting system and adopted a new land ownership system that "facilitated vastly improved accounting of IIM and all tribal trust funds." GA2534; 532 F. Supp. 2d at 44.

Plaintiffs renew a contention rejected by this Court, that vulnerabilities in IT security pose a risk to individual Indian

trust data and thus to the historical accounting. Reply 22; Pl. 28(j) Letter (4/2/2009). Despite a 59-day trial on IT security, this Court found "no evidence" of a threat to individual Indian trust data or to the accounting. 455 F.3d 301, 315 (D.C. Cir. 2006). As explained at the IT trial, the database used for historical accounting is "managed offline and has been offline the entire time." GA2982 (Cason); see also GA2971 (27th quarterly report, filed 11/1/2006) (Interior and its contractors "have never stored IIM transaction data used to perform historical accounting on any system connected to the Internet"). This Court held that vulnerabilities in IT security do not authorize "perpetual judicial oversight of Interior's computer systems," 455 F.3d at 315, and the district court subsequently vacated the remaining restrictions on Interior's internet connections, acknowledging that "it is not [the court's] role to weigh IT security risks." GA2978.

Records Collection and Retention: Plaintiffs do not dispute that Interior "has made an impressive (and very expensive) effort in recent years to find, scan, and preserve whatever documents exist." 532 F. Supp. 2d at 47. They argue that the government has not made sufficient efforts to obtain records from third parties, Reply 20-21 & n.13, a position rejected by the district court. Having assembled a massive collection of federal records, Interior determined to collect records from third parties (such as timber companies) only where necessary data is missing. 283 F. Supp. 2d at 156. As the district court acknowledged, this

common sense policy, which takes into account the burdens that document requests place on third parties, is well within the Department's prerogatives. 532 F. Supp. 2d at 93.

B. Interior Has Completed The Accounting Work Necessary To Issue Historical Statements of Account For Nearly 250,000 IIM Accounts.

As a result of its major commitment of resources, Interior is in a position to produce historical statements for nearly 250,000 accounts. Inexplicably, plaintiffs declare that "[n]o such evidence was proffered to the district court." Reply 22.

Requests to mail statements for judgment and per capita accounts have been pending with the district court for years. Gov't Br. 44. As of 2007, requests to mail more than 66,000 statements were pending. GA2327-2328.

With respect to land-based accounts, Interior's 2007 plan explained that the agency would request permission to mail statements once systems tests for a given region were complete. GA2322. To date, Interior has met the ambitious targets set out in the 2007 plan. The plan projected that 50,000 statements for land-based accounts would be ready to mail by the end of 2007. GA2297. Interior's 31st quarterly report, filed February 2008, confirmed that that goal had been met. See GA2410 ("As of December 31, 2007, data completeness validation tests and interest recalculation work was completed for over 50,000 Land-Based IIM accounts."); see also 532 F. Supp. 2d at 67 (recognizing that data completion validation work for the six largest regions was "largely complete"). Subsequent quarterly

reports likewise confirmed that Interior was meeting the plan's targets. GA2474 (40,000 additional accounts as of 3/31/2008); GA2536 (24,475 additional accounts as of 6/30/2008); GA2596 (35,415 additional accounts as of 9/30/2008); GA2652 (13,907 additional accounts as of 12/31/2008, for a cumulative total of 163,795 land-based accounts).

Interior is barred by court order, however, from sending these statements to the accountholders. Gov't Br. 44-45. As our opening brief explained, that injunction turns this lawsuit on its head. This case was brought to compel agency action unreasonably delayed. There has long ceased to be agency delay and the court has no authority to bar Interior from carrying out its statutory responsibilities.

Interior should be permitted to implement its accounting plan free of any ongoing judicial supervision. Plaintiffs have no interest in securing the required accounting, and their attacks on Interior's methodology – like their defense of the district court's parameters – are designed to define a project that would be impossible to complete. Their critique of the Rosenbaum study (Reply 26) is illustrative. That study of the accounts of the named plaintiffs and their agreed predecessors examined 160,000 historical documents dating back to 1914, found supporting documentation for 93% of the dollar value of the 12,617 transactions reviewed, and uncovered no significant errors – at a cost of $20 million. Gov't Br. 40; see also GA2920 (2001 letter from the Chairman of the House Subcommittee on Interior

and Related Agencies). When Interior proposed to conduct a similar analysis of the remaining accounts, Congress made abundantly clear that it had not required and would not fund such a "complicated, complex, controversial, and costly initiative." GA2921. Nonetheless, plaintiffs insist that the Rosenbaum study was itself "[d]eficient," Reply 24, because it did not "inquire into the authenticity" of the underlying historical documents. Reply 26. The contention that Congress expected Interior to authenticate the 43 miles of historical records amassed in aid of the accounting project, 532 F. Supp. 2d at 45, makes sense only as a tactic to define a task that could not be performed.[1]

The work that remains under Interior's plan involves examination of pre-1985 transactions in the relatively small subset of accounts that were open during the paper ledger era. Gov't Br. 36-37. As plaintiffs recognize (Reply 23), that work is apt to be expensive and may not prove cost effective. As Congress has admonished, funds spent on accounting "come at the expense of other Indian programs." GA2921; see also H.R. Rep. No. 110-187, at 50 (2007) ("Since the inception of the Cobell

[1] Plaintiffs wrongly assert that no records could be found for 30% of 36 identified beneficiaries. Reply 26 & n.18. Pursuant to paragraph 19 of the first document production order, records for all 36 individuals were found and produced to plaintiffs. See 532 F. Supp. 2d at 49-50 (discussing the paragraph 19 project). However, those records indicated that some of the 36 individuals had no IIM account. For instance, one of the named plaintiffs apparently did not, in fact, have an IIM account. Exhibit 325, pp.22-23, 1.5 Tr. (sealed deposition). He and his seven listed predecessors thus were not part of the Rosenbaum study.

case, the Committee has appropriated hundreds of millions of dollars for litigation and accounting activities. The Committee believes that these funds would have been better used to fund greatly needed health care, law enforcement and education programs in Indian country."). Judgments about the allocation of limited resources among competing programs would not be amenable to judicial supervision even if plaintiffs had not abandoned the effort to compel an accounting six years ago.

III. THERE WAS NO JURISDICTION, AUTHORITY, OR RECORD BASIS FOR THE MONETARY AWARD.

A. The Award Rests On The Flawed Premise Of Impossibility.

Plaintiffs concede that the monetary award rests on the premise of "impossibility." Reply 28. They urge that the award also rests on a finding of unreasonable delay. Ibid. As explained above, however, the unreasonable delay ruling itself turned on the court's mistaken belief that Congress had mandated accounting activities that it would not fund.

Even if Congress had refused to appropriate funds to implement the 1994 Act, that would not authorize a monetary "remedy." Reply 28. Control over appropriations lies with Congress alone. The district court could not direct Congress to appropriate funds to implement a statutory mandate; and it had no power to award money as a "remedy" for a congressional failure to appropriate funds.

As this Court stressed, delay attributable to a "shortage of resources" is not unreasonable agency delay. Mashpee Wampanoag

Tribal Council, Inc. v. Norton, 336 F.3d 1094, 1100, 1101 (D.C. Cir. 2003). A problem that "stem[s] from a lack of resources" is "'a problem for the political branches to work out.' (quoting In re Barr Laboratories, 930 F.2d 72, 75 (D.C. Cir. 1991)). The district court disregarded that principle – first by creating a "resource problem" through its flawed interpretation of the 1994 Act, and then by awarding plaintiffs money to solve the problem, instead of allowing the political branches to work it out as they did in response to the 2003 accounting injunction.

B. The Award Was Not Permissible Under The APA.

Even apart from its flawed premises, the monetary award was not permissible under the APA. Plaintiffs make no effort to reconcile the award with the representations that they made in 1998 to avoid dismissal of this case. Then, class counsel assured the court that "all of the money that should be held collectively in their IIM accounts is already there," and that "plaintiffs do not ask this Court to order the government to make cash infusions into the IIM accounts to recompense the plaintiffs for lost or mismanaged funds, but instead ask this Court solely for ... an accounting of money already existing in the account." 30 F. Supp. 2d 24, 39, 40 (D.D.C. 1998). Plaintiffs "repeatedly and expressly stated that their Complaint does not seek an additional infusion of money or other damages for other losses, but rather requests only an accounting," and the court held that it would "construe the Complaint in that light," striking allegations that could be read to seek money from the complaint.

Id. at 39-40. The court held that it was "not presented with a request to ... add to the collective balance of the accounts, so the Court cannot possibly grant such relief." Id. at 40 (emphasis added). The court reiterated that holding in the 1999 decision reviewed by this Court, which emphasized "plaintiffs' disavowal of seeking an order from this court to force defendants to pay money," 91 F. Supp. 2d at 25, and rejected the government's effort "to make plaintiffs' claims something that they are not," id. at 27.

As plaintiffs acknowledged in disclaiming any entitlement to an "infusion of cash," a monetary award for lost or dissipated funds is not available in this action under the APA. If a class member wishes to seek money because "'trust funds have been improperly dissipated,'" Mitchell II, 463 U.S. at 215, his remedy lies under the Tucker Act, assuming that he can identify a "specific, applicable, trust-creating statute or regulation that the Government violated" and a "money mandating" statute. United States v. Navajo Nation, 556 U.S. __, No. 07-1410, Slip Op. 14 (April 6, 2009). A claimant cannot circumvent these requirements by labeling his demand for money "equitable restitution" and seeking relief in district court. Indeed, in ascertaining jurisdiction under the APA, it is irrelevant "whether a particular claim for relief is 'equitable' (a term found nowhere in [5 U.S.C. § 702])[.]" Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999). Moreover, APA review is unavailable unless there is "no other adequate remedy in a

court," 5 U.S.C. § 704, and no other statute "impliedly forbids the relief which is sought," id. § 702. The district court's monetary award contravened these limitations on APA review.

Contrary to plaintiffs' assertion, this Court did not reject "a similar argument" in 2001. Reply 30. This Court held that "injunctive and declaratory relief" were available under the APA. 240 F.3d at 1094, and contrasted these "prospective remedies" with the monetary relief available under the Tucker Act. Id. at 1104 (citing Mitchell II, 463 U.S. at 227); see also Mitchell II, 463 U.S. at 227-228 & n.32.

C. The Award Was Not "Restitution."

Plaintiffs attempt to revive theories rejected by the district court, urging that the monetary award is "[r]estitution ... designed to prevent unjust enrichment." Reply 33. The district court found no basis for this "unjust enrichment" theory, finding "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts," 569 F. Supp. 2d at 238, and "no evidence" of any benefit to the government, id. at 241. Plaintiffs' attempt to demonstrate clear error in these findings by culling snippets from historical documents, Reply 34-36, fails for reasons discussed in our opening brief, Gov't Br. 63-66.

The district court's own analysis showed that its award is not "restitution." The court based its award on a statistical analysis of aggregate-level throughput of the "IIM Trust" since the creation of the first accounts in the 1800s, including

accounts held by individuals long deceased. That analysis did not establish any underpayments in any class members' accounts; indeed, it showed that current balances could be overstated by $200 million. GA2919. Although the court chose to credit all uncertainty to plaintiffs, 569 F. Supp. 2d at 238, it had no authority to penalize the government and the taxpayers for gaps in aggregate data spanning a 120-year period.

Indeed, although the court demanded an aggregate-level accounting, there is no unitary IIM trust; there are individual accounts held for individuals of discrete periods of time. Gov't Br. 54-56. Requiring the government to pay a theoretical shortfall in throughput for all accounts ever in existence is not "restitution" to any member of the class.

Remarkably, plaintiffs insist that "IIM is held on an aggregate basis and there is no discrete account for an individual Indian." Reply 37. If that were true, the nature of the accounting for Individual Indian Money accounts would be very different, and the 1994 Act would not have been written to refer to accounting for funds held in trust for an "Indian tribe or an individual Indian." 25 U.S.C. § 4011(a). The ruling that plaintiffs cite contradicts their claim, confirming that Interior "keeps individualized accounting records." 91 F. Supp. 2d at 12.

In insisting that "the Trust is commingled," Reply 36, plaintiffs conflate the record-keeping practices of Interior with the investment practices of Treasury. As the district court explained, trust funds held for adults are routinely distributed

as soon as an account balance reaches a low threshold ($15, or $5 for oil and gas revenues). 91 F. Supp. 2d at 10-11. Funds in accounts with balances below that threshold, or funds in supervised accounts such as accounts held for minors, are pooled by Treasury for investment purposes, id. at 10-11, a common financial practice. It is irrelevant that Treasury keeps "summary-level accounting information" because Interior "keeps the individualized accounting records." Id. at 11-12.

D. The District Court Lacked Authority To Convert This Lawsuit Into A Class Action For Money.

The class was certified because class members had a common interest in compelling an examination of historical activity in their separate accounts. By contrast, they have no common interest in having the accounting declared "impossible" or in an aggregated monetary award. Gov't Br. 56-57. Plaintiffs cannot solve these problems with a series of counterfactual assertions.

Plaintiffs reiterate that IIM accounts are "commingled," Reply 42, when they are "individual Indian money" accounts held for separate individuals over discrete periods of time.

Plaintiffs declare that the award is "based not on an individual plaintiff's loss but on the defendants' aggregate gain." Reply 42. But the district court found "no ... evidence" of any such gain. 569 F. Supp. 2d at 238, 241.

Plaintiffs object to the court's statement that they would take the award and "whack it up pro rata, per capita," GA2113. Reply 53. But the court was echoing class counsel, who argued

that distribution "should be done on a per capita basis," because it was "an impossible task to determine how that money should be allocated based on individual resources." GA2111.

Plaintiffs contend that the problems created by the transformation of this lawsuit into an action for money can be overcome "at the distribution phase," and that the court could then "provide notice and opt-out rights." Reply 42. That contention contradicts their assertion that it is "impossible ... to determine how that money should be allocated based on individual resources." GA2111. The district court converted this lawsuit into an action for money because it believed (incorrectly) that individualized determinations are impossible; that was the stated justification for requiring an aggregate-level accounting and issuing an aggregated monetary award.

In any event, it is far too late for opt outs. The court has already held a trial and issued an award. The rules of class action litigation do not permit class members to wait and see if they win before deciding whether to participate. A defendant cannot "be bound by a loss" if "class members would not be bound by its win." In re Veneman, 309 F.3d 789, 795 (D.C. Cir. 2002).

Although the district court declined to address class issues, its impossibility ruling and class-wide monetary award necessarily extinguished the claims of individual class members. Even apart from the many errors already discussed, the award cannot be squared with the protections required in class action litigation or the due process principles on which they rest.

CONCLUSION

The order on review should be vacated and there should be no further retention of district court jurisdiction.

Respectfully submitted.

MICHAEL F. HERTZ
Acting Assistant Attorney General

JEFFREY A. TAYLOR
United States Attorney

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
SAMANTHA L. CHAIFETZ
(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

APRIL 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the foregoing reply brief contains 6,985 words, according to the count of Corel WordPerfect 12.

_____
ALISA B. KLEIN

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2009, I caused the foregoing reply brief and accompanying appendix to be served on the following counsel in the manner indicated, by agreement with counsel:

Bill Dorris
David Smith
Elliot Levitas
Justin Guilder
Kilpatrick Stockton, LLP
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
BDorris@KilpatrickStockton.com
DCSmith@KilpatrickStockton.com
ELevitas@KilpatrickStockton.com
JGuilder@KilpatrickStockton.com

By messenger and by email

Dennis Marc Gingold
607 14th Street, N.W.,
9th Floor
Washington, D.C. 20005
DennisMGingold@aol.com

By email

Merrill C. Godfrey
Akin Gump Strauss
Hauer & Feld, LLP
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
mgodfrey@akingump.com

By email

Earl Old Person (Pro se)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417

By first class mail

_____
Alisa B. Klein