IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' RESPONDING BRIEF REGARDING THE
NATURE AND SCOPE OF THE HISTORICAL ACCOUNTING

PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director
ROBERT E. KIRSCHMAN, JR.
(D.C. Bar No. 406635)
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 616-0238

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

At the May 14, 2007 Pre-hearing Conference, the Court expressed interest in resolving, before the October trial, issues regarding the scope of the historical accounting which can be addressed without further testimony. Tr., May 14, 2007 at 61; see id. at 46. Accordingly, the following brief is organized first to address these issues. We show how the scope decisions reflected in Interior's accounting plan comport fully with the requirements of the 1994 Act. Secondarily, and for the Court's information, the brief addresses issues relating to the methodology embodied in the accounting plan, which was filed with the Court on May 31, 2007. Finally, we address Plaintiffs' contentions about the role of the Department of the Treasury.

The historical accounting undertaken by the Department of the Interior ("Interior" or "DOI") is of unprecedented magnitude. Interior's plan presents a comprehensive approach to providing historical statements of account to over 300,000 account holders in accordance with the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Act"). That statutorily-based obligation presents "the only 'live' claim in this litigation." Cobell v. Norton, 226 F.R.D. 67, 76 (D.D.C. 2005). Because this very costly accounting is funded entirely at taxpayers' expense and with limited appropriations, Interior has proceeded prudently, methodically, and in close coordination with Congress.[1]

Plaintiffs urge the Court to re-write the accounting plan[2] to conform with a structural

---

[1] See, e.g., Blueprint for Developing the Comprehensive Historical Accounting Plan for Individual Indian Money Accounts, Sept. 10, 2001 (Dkt. 823); Report Identifying Preliminary Work for the Historical Accounting, Nov. 7, 2001 (Dkt. 930); Report to Congress on the Historical Accounting of Individual Indian Money Accounts, July 2, 2002 (Dkt. 1365).

[2] Plaintiffs' Brief Regarding the Nature and Scope of the Historical Accounting and Exclusions From Defendants' Historical Accounting Plan (Dkt. 3331), dated May 29, 2007 ("Plaintiffs' Brief" or "Pl. Br.").

injunction decision which they wrongly assert has "precedential value" despite having been twice stayed and vacated by the Court of Appeals.[3] Plaintiffs urge the Court to make the accounting so onerous that Interior's efforts must inevitably fail, which, contrary to the relief sought in the Complaint,[4] is Plaintiffs' apparent objective. However, Congress, which was well-informed regarding the problems surrounding Indian trust administration, did not require the impossible. Nor does the relevant statutory language "support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." Cobell XVII, 428 F.3d at 1075.

Plaintiffs cherry-pick from common law virtually all of their criticisms of the Interior accounting plan. In its Cobell VI[5] decision, the Court of Appeals looked to common law trust principles to reinforce its holding that the 1994 Act required an historical accounting, as the Court declared in Cobell V.[6] As the Court of Appeals later made clear, however, it did not thereby suggest that enforceable duties may be "abstracted . . . from any statutory basis." Cobell XIII, 392 F.3d at 471. To the contrary, the "government's duties must be 'rooted in and outlined by the relevant statutes and treaties,' although those obligations may then be 'defined in traditional equitable terms.'" Id. at 472 (quoting 240 F.3d at 1099).

Seemingly oblivious to this holding, Plaintiffs continue to read Cobell VI precisely

---

[3] See Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003) ("Cobell X"), vacated in part, Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004) ("Cobell XIII"), on remand, 357 F. Supp. 2d 298 (D.D.C. 2005) ("Cobell XIV"), vacated, 428 F.3d 1070 (D.C. Cir. 2005) ("Cobell XVII").

[4] Complaint to Compel Performance of Trust Obligations, Jun. 10, 1996 ("Complaint").

[5] Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

[6] Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999).

contrary to the Court of Appeals ruling and "abstract from" the 1994 Act a host of common law standards Interior allegedly fails to meet. In doing so, they repeatedly cite common law precedents in a situation where "common law precedents don't map directly onto the context," Cobell XVII, 428 F.3d at 1078. Moreover, they continue to present a "selective picture" of so-called "common law" trust standards, "taking advantage of those principles that they think favor them, and neglecting those that would clip their wings." Expert Report of John H. Langbein, Feb. 27, 2003at 4-5 ("Langbein Report") (attached hereto as Exhibit 1). As the Court of Appeals stated, "In this class action under the APA the court may to a degree use the common law of trusts as a filler of gaps left by the statute, but in doing so it 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. The path Plaintiffs would have this Court follow ignores this clear admonition.

II. BACKGROUND

Interior administers approximately 260,000 Individual Indian Money ("IIM") accounts. Money deposited in unrestricted IIM accounts is paid to the account owners unless they request that Interior retain the funds. See 25 C.F.R. § 115.701.[7] Treasury invests IIM funds at Interior's direction and performs related funds management functions.

In relevant part, the 1994 Act provides that "[t]he Secretary shall 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

[7] By regulation, IIM accounts are classified as unrestricted, restricted, or estate. 25 C.F.R. § 115.701. The regulation limits the circumstances where Interior may leave funds on deposit absent instructions to that effect from the account holder. See id.

U.S.C. 162a)." 1994 Act, § 102(a) (codified at 25 U.S.C. § 4011(a)).

Plaintiffs brought this class action in 1996. The Court defined the class on February 7, 1997 using language Plaintiffs had proposed. See Plaintiffs' Motion for Class Certification (filed Sept. 6, 1996) (Dkt. 5). Plaintiffs' current description of the class, see Pl. Br. at 10, is at odds with the class certification order, which defines the class as follows:

> [A] plaintiff class consisting of present and former beneficiaries of Individual Indian Money accounts (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint).

Order of February 4, 1997 at 2-3 (Dkt. 27). This definition does not include every owner of allotted land but only those who have had IIM accounts. It also expressly excludes individuals who had pursued claims on their own prior to the commencement of this case. The definition does not include anyone who "should have" had an account but did not.[8]

This Court dismissed with prejudice Plaintiffs' common law claims for an accounting asserted in the Complaint but held that Interior had an enforceable duty under the 1994 Act to account for IIM funds. Cobell V, 91 F. Supp. 2d at 28-31. Because the agency had not yet provided such an accounting, the Court remanded the matter to Interior following a "Phase 1" trial, retaining jurisdiction for five years and requiring DOI to file quarterly reports. Id. at 56.

In February 2001, the Court of Appeals largely affirmed in Cobell VI. The court held

---

[8] Although Plaintiffs have been aware of the disconnect between their perception of the class and the record for nearly a decade, they have never sought to amend the class certification order. See generally United States Memorandum Addressing Plaintiffs' Scope Of Class Memorandum (March 26, 1999) (noting that "plaintiffs' expanded vision of the class . . .does not purport to seek modification of the certified class and is at most a statement of views," and demonstrating that "the class simply does not include individuals who have never held IIM accounts"). (Dkt. 229.)

that agency action had been unreasonably delayed under 5 U.S.C. § 706(1), the governing APA standard, 240 F.3d at 1108, and noted that this Court had properly remanded the matter to Interior, leaving to the agency the choice of how the accounting would be conducted. Id. at 1104, 1109.

In July 2001, the Secretary of the Interior established the Office of Historical Trust Accounting ("OHTA") and charged it with "plan[ning], organiz[ing], direct[ing] and execut[ing] the historical accounting of IIM accounts." Secretarial Order No. 3231 (Sec. 1) (Dkt. 791, Ex. 1). In July 2002, OHTA issued its Report to Congress on the Historical Accounting of Individual Indian Money Accounts, proposing an accounting in several phases over ten years and costing approximately $2.4 billion. (Dkt. 1365.)

On September 17, 2002, this Court scheduled a "Phase 1.5" trial to approve an approach to conducting the historical accounting and to evaluate additional remedies with respect to "fixing-the-system," which the Phase 1 trial had addressed. (Dkt. 1477.) The Court ordered the parties to submit historical accounting and fixing-the-system plans to be examined in the Phase 1.5 trial. Id. On January 6, 2003, Interior filed both its Historical Accounting Plan for Individual Indian Money Accounts (Dkt. 1705) ("2003 Accounting Plan") and its Fiduciary Obligations Compliance Plan (Dkt. 1707). Plaintiffs filed both a Plan for Determining Accurate Balances in the Individual Indian Trust (Dkt. 1714) and a Compliance Action Plan Together with Applicable Trust Standards. Id.

Interior's 2003 Accounting Plan differed from the plan OHTA submitted to Congress in July 2002, primarily in that it proposed the use of statistical sampling. Sensitive to both

congressional concerns about the cost of the July 2002 plan,[9] and the Court's concerns about sampling the accounts to be reconciled,[10] Interior's January 2003 plan proposed to employ a combination of transaction-by-transaction and statistical sampling methodologies to verify the accuracy of transactions.

---

[9] For example, in a letter to the Secretary, the Chairman of the House Committee on Resources stated:

> We are sure . . . that the Department recognizes that Congress will necessarily determine the funding for any accounting, and we find the [Report to Congress on the Historical Accounting of Individual Indian Money Accounts] troubling in several areas. . . . 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 key Indian programs, we request that you promptly consider ways to reduce the costs and the length of time necessary for an accounting. . . . The Committee asks that before committing significant resources to the broad approach described in the Report, the Department consider all available options regarding the use of alternative accounting methods.

Letter from James V. Hansen, Chairman, U.S. House of Representatives, Committee on Resources, to Gale Norton, Secretary of the Interior (Dec. 9, 2002). (Dkt. 1775, Ex. 5.) Similarly, the Chairman and the Ranking Minority Member of the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations stated in a letter to the Secretary:

> [T]he Committee remains very concerned over the effect the Cobell v. Norton litigation is having on the Department's ability to marshal the resources that are needed for trust reform to be successful. We are particularly concerned about the Department's plan to allocate over $2.4 billion over ten years for an historical accounting. We remain convinced that such a process would not yield the desired results, but instead would simply drain resources away from effectively implementing trust reform.

Letter from Joe Skeen, Chairman, and Norman D. Dicks, Ranking Minority Member, U.S. House of Representatives, Committee on Appropriations, Subcommittee on Interior and Related Agencies, to Gale Norton, Secretary of the Interior 1 (Dec. 10, 2002) (Dkt. 1775, Ex. 6).

[10] In October 2001, this Court stated that a proposal to sample accounts rather than perform the historical accounting that the Court had ordered was "clearly contemptuous." Tr., Oct. 30, 2001, at 29.

Plaintiffs' plan was premised on the assumption that individual accountings are impossible. Cobell X, 283 F. Supp. 2d at 207. Rather than using actual financial records to review transactional activity in IIM accounts, Plaintiffs' plan used a model to calculate aggregate historical revenues and required Defendants to prove proper distribution of the revenues to members of the plaintiff class. Id. at 208.

The Court held a ten-week "Phase 1.5" trial and, on September 25, 2003, entered a structural injunction embodying its ruling. Cobell X, 283 F. Supp. 2d 66. The structural injunction made substantial alterations to Interior's 2003 Accounting Plan that would have increased the estimated cost of the accounting twenty times or more. See Cobell XVII, 428 F.3d at 1077. For the most part, however, the Court ignored Plaintiffs' alternative plan.

The injunction ordered Interior to address all funds and assets, including land interests, that have been part of the individual Indian trust since 1887, and to reconcile the accounts of all present and past beneficiaries, including decedents. Cobell X, 283 F. Supp. 2d at 123. The Court also required Interior to account for payments made directly to Indian landowners without passing through government-managed accounts. Id. at 180. Each and every one of tens of millions of transactions was to be verified with supporting documentation, while statistical sampling could be used only redundantly to audit the accounting. Id. at 184.

On December 10, 2004, the Court of Appeals vacated the structural injunction almost entirely. Cobell XIII, 392 F.3d 461. The court held that Public Law 108-108[11] changed the

---

[11] Public Law 108-108 provided in relevant part that

> nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or

underlying substantive law and removed the legal basis for the historical accounting elements of the injunction. 392 F.3d at 465.[12] On February 23, 2005, following expiration of the limit imposed by Public Law 108-108, the District Court reissued the accounting portion of the structural injunction without further hearing and without modification. Cobell v. Norton, 357 F. Supp. 2d 298 (D.D.C. 2005). The Government appealed, and the Court of Appeals vacated the structural injunction on November 15, 2005. Cobell XVII, 428 F.3d 1070.

On May 31, 2007, Interior filed with this Court its Historical Accounting Project Document. Notice of Filing (Dkt. 3333). The Historical Accounting Project Document presents Interior's current plans for meeting its duties under the 1994 Act to provide an historical accounting to IIM account beneficiaries. Exhibit II to the Historical Accounting Project Document is Interior's revised accounting plan, the Plan for Completing the Historical Accounting of Individual Indian Money Accounts ("Interior's Plan" or "2007 Plan"). Exhibit III to the Historical Accounting Project Document serves as the foundation for the changes to the 2003 Accounting Plan that will allow completion of the historical accounting. Since the submission of the 2003 Accounting Plan to this Court, Interior has continuously reviewed and

---

> continue historical accounting activities with respect to the Individual Indian Money Trust until the earlier of the following shall have occurred: (a) Congress shall have amended the American Indian Trust Management Reform Act of 1994 to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust; or (b) December 31, 2004.

Cobell XIII, 392 F.3d at 465 (quoting Pub. L. No. 108-108 (2003)).

[12] The Court of Appeals held, further, that much of the fixing-the-system elements of the injunction exceeded the Court's remedial discretion and vacated all but the requirement that Interior complete and file its "To-Be Plan." 392 F.3d at 465.

evaluated the results of its work to date and other relevant factors, such as the level of congressional funding for accounting activities and the desirability of providing Historical Statements of Account ("HSAs") to beneficiaries as promptly as practicable. Thus, among other things, Exhibit III describes the accounting work completed to date and identifies the work remaining. Interior's Plan builds upon and replaces the 2003 Accounting Plan, which is attached as Exhibit V to the Historical Accounting Project Document.

III. DISCUSSION

"The most relevant source for ascertaining the [Government's historical accounting duty] is the 1994 Act." Cobell XVII, 428 F.3d at 1074; see also Cobell V, 91 F. Supp. 2d at 27 ("plaintiffs narrowly seek . . . to affirmatively force defendants to comply with the law as stated by Congress") (emphasis added). Plaintiffs' Complaint sought to compel an accounting under both the common law and the 1994 Act. Cobell V dismissed Plaintiffs' common law claims with prejudice, 91 F. Supp. 2d at 28-31, and Plaintiffs did not appeal. The only "live" claim in this case, therefore, is for an accounting under the 1994 Act. Cobell v. Norton, 226 F.R.D. at 76.

The 1994 Act does not define or even use the term "historical accounting" but provides, among other things, that the Secretary of Interior must

> 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.

1994 Act § 102(a), 25 U.S.C. § 4011(a). Although the 1994 Act imposes current and prospective funds management duties, the historical element of the section 102 accounting requirement derives from the necessity, upon undertaking those duties, to reconcile accounts, "taking into account past deposits, withdrawals, and accruals." Cobell VI, 240 F.3d at 1102.

Congress enacted this accounting requirement with the knowledge of the existence of many congressional, GAO, Inspector General, and independent agency reports criticizing extensively IIM administration over many years, see Cobell V 91 F. Supp. 2d at 53; see also Cobell XVII, 428 F.3d at 1075 (1994 Act plainly faulted IIM management), but it did not order Interior to do the impossible. An accounting should be judged for adequacy under the 1994 Act in light of, among other things, the limitations of which Congress was well aware when it imposed the requirement.

The Court of Appeals has reiterated that "the IIM trust differs from ordinary private trusts along a number of dimensions." Cobell v. Kempthorne, 455 F.3d 301, 306 (D.C. Cir. 2006) (quoting Cobell XVII, 428 F.3d at 1074). Because "neither statutory language nor [common law] trust principles establish[ ] a 'definitive balance between exactitude and cost' in performing the accounting," 455 F.3d at 306 (quoting 428 F.3d at 1076), "the district court owe[s] substantial deference to Interior's plan." Id.

In exercising its "primary responsibility for 'working out compliance with the broad statutory mandate,'" 455 F.3d at 306 (quoting 428 F.3d at 1076), Interior is pursuing an approach that employs "both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators." Id. Interior's Plan is designed so that beneficiaries will receive the best accounting practicable, and the work performed thus far is clearly directed toward that goal.

Plaintiffs' contrary arguments rely to a great degree on the Court's rulings in Cobell X,[13] the structural injunction decision. They contend that "Cobell X should remain dispositive

[13] See note 3 above.

regarding the scope of the exclusions addressed in [plaintiffs'] brief." Pl. Br. at 21. They assert that an opinion of this Court should continue to have "precedential weight" so long as "the holding on the specific issue is undisturbed and there is no binding contrary authority," and contend that "[n]othing in the vacature of the Cobell X injunction remotely suggests that the underlying determinations on scope . . . were incorrect." Pl. Br. at 21-22. Plaintiffs are wrong. The Court's opinion in Cobell X was not "left undisturbed." Instead, the Court's structural injunction, including every one of its determinations on the scope of the historical accounting, was completely vacated by the Court of Appeals and, thus, carries no weight.

The language employed by the D.C. Circuit in Cobell XVII establishes beyond cavil that every holding in Cobell X regarding the scope of the historical accounting was vacated. The Court of Appeals determined that "the district court invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain. It thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" 428 F.3d at 1076 (citing Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004)). The Court of Appeals also found the Court erroneously "relied on its earlier contempt findings to justify a remedy more intensive than its initial remand to the defendants," and erred in "completely disregard[ing] relevant information about the costs of its injunction." Id. at 1076-77. The Court of Appeals thus ruled that "the district court abused its discretion by reissuing the injunction," and specifically stated that the injunction, "if to be reissued at all will require drastic modification." 428 F.3d at 1077. After rejecting this Court's "ban on statistical sampling," the Court of Appeals instructed this Court that "[t]he other specific challenges to the injunction raised by defendants should be resolved (if necessary) by the district court under the same

principles that we have applied here." Id. at 1078-79 (emphasis added). Obviously, if the D.C. Circuit had left Cobell X "undisturbed," there would have been no reason to expressly direct the Court on how it should, if necessary, resolve "the other specific challenges" raised by Defendants. Plaintiffs simply ignore Cobell XVII in inviting reliance upon Cobell X. However, contrary to Plaintiffs' assertion that this Court should take guidance from Cobell X, it is clear that "the most comprehensive source of guidance available on the . . . questions at issue," Pl. Br. at 22, is the D.C. Circuit's opinion in Cobell XVII.

A. Interior's Plan Satisfies The "All Funds" Accounting Mandate Of The 1994 Act

The scope of the accounting requirement of the 1994 Act determines the population of accounts and transactions the Government must address.[14] The 1994 Act imposes a prospective

[14] Plaintiffs provide no support whatsoever for their allegation that Interior is denying an accounting for the "vast majority" of the members of the certified class. Pl. Br. at 2. Such a statement is hardly plausible even using Plaintiffs' bald estimate of "well over 500,000" class members, id. at 10 n.6, where Interior's Plan states it is providing accountings to 364,523 individuals. Equally baffling is Plaintiffs' gratuitous allegation that Interior is not accounting for the "vast majority" of transactions. Plaintiffs contend that Interior does not intend to address income that should have been collected and un-posted collections. Pl. Br. at 36-41. However Interior's Plan explains its Land-to-Dollars test as follows:

> To verify that funds collected by BIA actually made it into IIM or tribal accounts, Interior is conducting tests that trace receipts to accounts. In this process, Interior is also examining income *expected to have been generated* from leased allotments (based on contemporaneous contract or production records) to verify that the money was in fact received and entered the IIM trust fund system. This testing began in 2006. This test addresses the accuracy and completeness objective for the historical accounting using cost effective test methods. To date, a pilot test indicates there is no evidence that money that should have been received was not. The test also showed that all the money received moved into IIM or Tribal Trust Fund Accounts.

2007 Plan, Exhibit II at 19 (p. 21 of 32) (emphasis in original).

duty that is not served by reconciling accounts which no longer exist much less funds that were never held by the Government. The Act, on its face, requires no accounting for accounts closed before the 1994 Act went into effect, direct-pay funds never "deposited or invested" by the Government, pre-1938 transactions, or land holdings. Interior's Plan properly incorporates these limitations.

1. Interior's Plan Provides For Historical Accountings To All IIM Account Holders With Accounts Open On Or After October 25, 1994

Although clearly prospective, the accounting duty imposed under section 102(a) of the 1994 Act cannot be executed effectively without first determining accurate balances in the accounts to be administered under the Act. See Cobell VI, 240 F.3d a 1102. This historical element or component of the accounting duty, "reconciling the accounts, taking into account past deposits, withdrawals, and accruals," id., corresponds with and is logically confined to the same accounts to which the accounting duty itself relates, i.e., open accounts. This conclusion accords with the specific terms of the 1994 Act, the general scheme of the Act, and the absence of any indication to the contrary.

a. The 1994 Act Establishes Specific Accounting Obligations For Funds Held In Trust On Or After Passage Of The Act

The 1994 Act contains two specific provisions, sections 101 and 102, of relevance to the Secretary's accounting duties. Section 101, captioned "Affirmative Action Required," provides:

> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
>
> (1) Providing adequate systems for accounting for and reporting trust fund balances.
> (2) Providing adequate controls over receipts and disbursements.
> (3) Providing periodic, timely reconciliations to assure the

> accuracy of accounts.
>
> (4) Determining accurate cash balances.
>
> (5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.
>
> (6) Establishing consistent, written policies and procedures for trust fund management and accounting.
>
> (7) Providing adequate staffing, supervision, and training for trust fund management and accounting.
>
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d). When Congress requires affirmative action, it can only be mandating future action; it is impossible to act affirmatively in retrospect. Moreover, the word "shall" connotes a duty owed on a going-forward basis. See, e.g., Independent U.S. Tanker Owners Committee v. Skinner, 884 F.2d 587, 596 (D.C. Cir. 1989) (quoting 1A C. Sands, Sutherland on Statutory Construction 693 (4th ed. 1985)) ("It is obvious that the word 'shall,' in itself, cannot 'include' the past.'"); see also INS v. St. Cyr, 533 U.S. 289, 316 (2001) (only prospective application unless Congress has "directed with requisite clarity that the law be applied retrospectively") (citing Martin v. Hadix, 527 U.S. 343, 352 (1999)). Thus, section 101 should be construed as directing prospective action.

Section 101's forward-looking language demonstrates that it does not embrace accounts distributed and closed prior to passage of the 1994 Act. Closed accounts do not have "balances" to which to apply the duty to "[p]rovid[e] adequate systems for accounting for and reporting trust fund balances," 25 U.S.C. § 162a(d)(1), or the duty to "[d]etermin[e] accurate cash balances," id. § 162a(d)(4), or the duty to "[p]repar[e] and [s]upply account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis," id. § 162a(d)(5). Nor do such accounts have current receipts or disbursements to which

to apply the duty to "[p]rovid[e] adequate controls over receipts and disbursements." Id. § 162a(d)(2).

Section 102 of the 1994 Act is entitled "Responsibility of Secretary to Account for the Daily and Annual Balances of Indian Trust Funds." Subsection 102(a) (captioned "Requirement to Account") provides: "The Secretary shall 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 section 162a of this title." 25 U.S.C. § 4011(a) (emphasis added).

Subsection 102(b), captioned "Periodic Statement of Performance," provides:

> Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title. The statement, for the period concerned, shall identify –
>
> (1) the source, type, and status of the funds;
> (2) the beginning balance;
> (3) the gains and losses;
> (4) receipts and disbursements; and
> (5) the ending balance.

25 U.S.C. § 4011(b) (emphasis added). It is an "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." National Credit Union Admin. v. First Nat'l Bank & Trust, 522 U.S. 479, 501 (1998). It is readily apparent that section 102(b) imposes future reporting requirements in regard to funds held when the reports are made. Under the "similar language" canon of construction, section 102(a)'s accounting requirement should also be read as applying to funds held when the accounting is performed.

Finally, subsection 102(c) (captioned "Annual Audit") requires the Secretary to conduct

an annual audit of all funds held in trust and directs that the Secretary "shall include a letter relating to the audit in the first statement of performance provided under subsection (b) of this section after the completion of the audit." 25 U.S.C. § 4011(c).

As with section 101, section 102's forward-looking language confirms that Congress did not intend for its requirements to apply to accounts closed prior to the enactment of the 1994 Act. The periodic statement of performance mandated by section 102(b) is to be provided "[n]ot later than 20 business days after the close of a calendar quarter," and the specific elements of the statement described in subsection (b) are to be provided "for the period concerned." 25 U.S.C. § 4011(b). It is, of course, impossible for the Secretary to provide such a statement for any calendar quarter ending prior to October 25, 1994, within twenty business days after the close of the calendar quarter. Insofar as retrospective application of the 1994 Act can only be mandated through a construction leading to this impossible and absurd result, such a construction is improper and must be rejected. See, e.g., FTC v. Ken Roberts Co., 276 F.3d 583, 590 (D.C. Cir. 2001) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982)).

The 1994 Act's title (American Indian Trust Fund Management Reform Act) casts further light on the statute's scope. See Murphy Exploration and Prod. Co. v. Dep't of the Interior, 252 F.3d 473, 481 (D.C. Cir. 2001) (title is an available interpretative tool). The term "Reform" expresses a clear purpose to institute better management practices for Indian trust funds. Such a reformation begins with reconciling existing accounts, not accounts that were distributed and closed before instituting the improvements mandated by the Act.

b. Legislative History Confirms Congress's Intent That The Specific Accounting Requirements Set Forth In The 1994 Act Apply To Those Funds Held In Trust On Or After The Date Of Enactment

The 1994 Act's legislative history confirms that Congress never intended that the Secretary prepare an accounting for IIM accounts that had been distributed and closed prior to October 25, 1994. The Misplaced Trust Report[15] described BIA's costly efforts in the early 1990s to conduct a complete audit and reconciliation of all IIM accounts and concluded that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices." Misplaced Trust Report at 26. Of particular relevance here is the Report's reference to the "300,000 accounts in the Indian trust fund." Id. at 26 (emphasis added). In its description of the IIM trust fund, the Misplaced Trust Report explained:

> The IIM trust fund is a deposit fund, usually not voluntary, for individual participants and tribes. It was originally intended to provide banking services for legally incompetent Indian adults and Indian minors without legal guardians. In addition to these fiduciary accounts, the IIM trust fund now contains deposit accounts for certain tribal operations and for some tribal enterprises. Approximately 300,000 accounts are held in the IIM trust fund.

Misplaced Trust Report at 2 (emphasis added). The present tense, describing how many accounts "are held" in the IIM trust fund, indicates that Congress focused on the existing trust accounts when it established the specific accounting duties in the 1994 Act. See also H.R. Rep. No. 103-778, at 9 ("[t]he BIA is currently managing . . . nearly 337,000 separate IIM accounts") (emphasis added).

Finally, Congressman Synar, the principal author of the Misplaced Trust Report, stated during a 1989 hearing of the House Subcommittee on Interior Appropriations, that "these [IIM] accounts will be reconciled and audited before there is any movement or transfer." Misplaced Trust Report at 21. Interior could not "move" or "transfer" accounts no longer in existence.

---

[15] Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (Apr. 22, 1992) ("Misplaced Trust Report").

Thus, from all indications, Congress was concerned regarding then-existing accounts. Given the relatively higher costs associated with accounts closed before the legislation took effect, Congress surely would have expressly required an accounting for closed accounts had it so intended.

c. The 2001 Court Of Appeals Decision Does Not Support An Accounting Relating To Accounts Closed Before Passage Of The 1994 Act

In Cobell VI, the Court of Appeals stated, "'All funds' means all funds, irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)," 240 F.3d at 1102 (emphasis in original), in rejecting the Government's assertion that it could assume the accuracy of account balances as of 1994 and only account prospectively. The Government had argued that the 1994 Act could not be interpreted to require any historical accounting because the language did not contain an "unambiguous directive" or show clear congressional intent that the statute have such an effect. See Landsgraf v. USI Film Prods., 511 U.S. 244, 263 (1994). The Court held that this retroactivity principle did not preclude reconciling past transactions because the Government had a preexisting duty to account for trust funds. See 240 F.3d at 1102-04. The Court did not decide whether the accounting must address closed accounts because that issue was not then before the Court. When the issue was later squarely presented to the Court of Appeals, the Court determined that it was "unnecessary at this stage" to address it. Cobell XVII, 428 F.3d at 1077. Such a determination to defer ruling would have been unnecessary if the Court believed it had resolved the issue in 2001.

Although the Court of Appeals did not rule on the issue, language in the 2001 opinion lends support to the conclusion that the accounting required by the 1994 Act does not extend to closed accounts. The Court stated that the 1994 Act "did not alter the nature or scope of the

fiduciary duties owed by the government to IIM trust beneficiaries. Rather, by its very terms the 1994 Act identified a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out." 240 F.3d at 1100 (emphasis added); see also id. at 1102 ("the 1994 Act clarified and augmented aspects of the government's preexisting obligation to facilitate their fulfillment") (emphasis added). The "very terms" of the 1994 Act at issue here require an accounting for funds "which are deposited or invested." Thus, the "additional means" created by the 1994 Act are not available to enforce obligations not "identified," i.e., accounting for funds that "were" but no longer "are" deposited or invested.

In sum, the text of the 1994 Act, its legislative history, and the Court of Appeals decisions in this case confirm that the statutory accounting obligation does not extend to accounts that did not exist when the 1994 Act took effect, on October 25, 1994.

2. Interior's Obligation To Perform An Accounting Does Not Extend To The Closed Accounts Of Deceased IIM Account Holders

Even if the 1994 Act did not already exclude closed accounts as discussed above, rendering historical accountings for decedents would be unwarranted in light of the long-established regulatory process for probate of Indian trust estates.

a. Comprehensive Probate Proceedings Eliminate Further Need To Review IIM Account Balances

Plaintiffs contend that Interior may not rely upon final probate orders in completing the historical accounting. Pl. Br. at 26-28. However, if Interior were to ignore many decades of regulated proceedings which have settled Indian trust estates, it would not be a prudent use of limited resources. Aside from general notions of trust duties cited in White Mountain Apache Tribe of Arizona v. United States, 26 Cl. Ct. 446 (1992), Plaintiffs provide no legal authority to

support their position that Interior must provide accountings for decedents.

Plaintiffs erroneously claim that Interior's "probate process is little more than a compilation of recorded balances and an unverified statement of non-financial assets - whatever happens to be on the books at the time the estate is probated." Pl. Br. at 27. To the contrary, probate determinations are the product of either administrative or judicial proceedings that provide a full measure of due process to interested parties.

Since 1910, the Secretary of the Interior has had broad authority to ascertain the legal heirs of Indians who die without leaving a will. See 25 U.S.C. § 372. Individual Indians may also convey their trust or restricted property by executing a will approved by the Secretary. Id. § 373.[16] Congress granted the Secretary express authority to prescribe rules and regulations for probate matters and required the Secretary to provide notice and an opportunity to be heard to potential beneficiaries before ascertaining the heirs of a deceased Indian. 25 U.S.C. § 372. Interior has established regulations and an administrative process designed to afford such rights, as well as rehearing and appeal rights, to interested parties. See 43 C.F.R. §§ 4.210 et seq. Interior has explained its probate process to interested parties in a question and answer format. 25 C.F.R. §§ 15.1-15.403. BIA, the Office of the Special Trustee, and the Office of Hearings and Appeals coordinate this process, which involves case preparation, adjudication, and closure. Interior's quarterly Status Report to the Court Number Twenty-Nine ("QR29") at 39 (May 1, 2007) (Dkt. 3318). The process involves attorney decision makers, Indian probate judges, and

[16] An exception to this statutory scheme exists with respect to members of Five Civilized Tribes and the Osage Tribe of Oklahoma, for whom probate proceedings are conducted in the courts of Oklahoma. 25 U.S.C. §§ 355, 373c, 375; 25 C.F.R. §§ 16.1-16.9; Act of June 28, 1906, ch. 3572, § 6, 34 Stat. 539, 545; Act of April 18, 1912, ch. 83, § 3, 37 Stat. 86, 87-88; Act of August 4, 1947, ch. 458, § 3, 61 Stat. 731, 733.

administrative law judges, depending on the complexity of the case. Id.

Judicial review is available once administrative remedies have been exhausted. Arenas v. United States, 197 F.2d 418, 422 (9th Cir. 1952). However, courts have permitted judicial review of constitutional claims arising from probate notwithstanding a failure to exhaust administrative remedies. See Anderson v. Babbitt, 230 F.3d 1158 (9th Cir. 2000).

Plaintiffs rely erroneously on a 2000 Inspector General report to support their claim that Interior's "probate process is notoriously flawed and admittedly incomplete." Pl. Br. at 28. Though Plaintiffs add brackets in quoting from the report to make it appear as if the report refers to a probate backlog, id. at n.16, the context of the quoted paragraph makes clear that the backlog referred to is a backlog in updating ownership records. Id. at Exhibit 6 (Pl. Br. at 59). Moreover, though Plaintiffs' editing implies that the "BIA agrees" that there is a probate backlog, id. at 28, n.16, the report actually says, "The BIA agrees that there is a significant backlog in updating land ownership records." Id. at Exhibit 6 (emphasis added).[17] In any event, the existence of a probate backlog[18] would not necessarily hamper Interior's accounting of pre-2000 beneficiary accounts, much less reveal systems that are "woefully flawed." Pl. Br. at 27 n.15.

Despite Plaintiffs' claims to the contrary, Interior provides Indians and their heirs an extensive administrative process. See Kicking Woman v. Hodel, 878 F.2d 1203, 1208 (9th Cir. 1989) (discussing Interior's adequate notice, opportunity to be heard, and right to appeal in

---

[17] Though the IG report mentions a probate backlog, it describes it as one of three sub-projects designed to address the backlog in updating land ownership records. Pl. Br. at Exhibit 6 (Pl. Br. at 59).

[18] Interior's status reports to the Court typically report on the number of cases in each stage of the probate process. See, e.g., QR29 at 39.

probate proceedings).[19] Though mistakes are possible when assessing a decedent's assets, in the interest of finality, interested parties should challenge such errors in the probate process.

b. Plaintiffs Lack Standing To Assert Decedents' Rights

While the plaintiff class includes all present and former beneficiaries of IIM accounts, decedents lack the capacity to sue, and heirs or living account holders must have some basis, either on their own or a decedent's behalf, to assert a right to an accounting of a decedent's account. For several reasons, Plaintiffs lack standing to assert decedents' rights.

First, the Cobell Plaintiffs lack Article III standing to compel accountings of their predecessors' IIM accounts, much less accounts of decedents who left no heirs. Plaintiffs must show – and they have not – that they have suffered an injury that will be redressed by the Court ordering Interior to account for every transaction in every deceased IIM beneficiary's account. The existence of an injury-in-fact is speculative. An accounting of the transactions in deceased account holders' accounts would not necessarily inure to the benefit of any living account holder. Such an accounting might show that the accounts balanced. Also, errors, if any, might or might not be in the deceased account holders' favor. Errors in favor of deceased account holders could be offset by overpayments or other obligations.

Second, Plaintiffs' own accounting rights do not embrace transactions in predecessor accounts. IIM account holders' heirs have no actionable right to an accounting of predecessor accounts but have a mere expectancy of heirship. The expectation of inheriting funds in an IIM

[19] The Ninth Circuit decided Kicking Woman one year before Congress amended 25 U.S.C. § 372 to provide additional judicial review of Interior's probate decisions. Prior to 1990, rather than subject to judicial review, the Department's decisions were deemed final and conclusive. See Pub. L. No. 101-301, 104 Stat. 211 (codified as amended at 25 U.S.C. § 372) (1990).

account does not rise to the level of an interest in the predecessor account entitling the heir to sue for an accounting. The heir's accounting right, if any, should be limited to his or her own account transactions including the transfer of inherited funds but not the complete transactional activity in the decedent's account.

Third, any representative capacity standing to assert predecessors' accounting rights would apply only to predecessors who died after enactment of the 1994 Act. If decedents' accounting rights survive, estate representatives could assert their decedents' rights. However, to have survived death, this statutory right to an accounting must have accrued before death. In Neal v. Neal, 250 F. 2d 885, 890 (10th Cir. 1957), the Tenth Circuit stated: "A cause of action does not survive in favor of a personal representative of a decedent unless it accrues in favor of the decedent in his lifetime." See also Kington v. United States, 265 F. Supp. 699, 702 (E.D. Tenn. 1967) (under the law of Tennessee and New Mexico, claim was barred by the statute of limitations because the claim must have accrued during the decedent's life time in order to survive), aff'd on other grounds, 396 F.2d 9 (6th Cir. 1968). The right to sue for an accounting under the 1994 Act could not have accrued prior to October 25, 1994.

3. Interior's Plan Traces Transaction Histories Starting From 1938

The 1994 Act provides, in pertinent part, "The Secretary shall 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. § 4011(a). The Court of Appeals acknowledged this requirement when it held that Interior Defendants must account for all funds, "irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)." Cobell VI, 240 F.3d at

1102 (emphasis added). Plainly, if Congress had intended an unlimited accounting obligation, it would not have included the phrase "deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). Accordingly, Interior's Plan anticipates that each eligible IIM account holder will receive an historical statement of account which includes the account history from the later of the inception of the account or June 24, 1938, until December 31, 2000.[20]

4. Interior's Accounting Obligation Does Not Extend To Direct Payments

By longstanding practice,[21] individual Indians have leased their trust land to third parties

[20] December 31, 2000 marks "the end of the historical accounting period and the beginning of the current accounting period" because earlier that year Interior, using the Trust Fund Accounting System ("TFAS"), had begun sending quarterly account statements to IIM account holders. 2007 Plan at 4 n.10 (Exhibit II, page 6 of 32); accord 2003 Plan at II-4 (Exhibit V, page 9 of 70). As of that date, the relevant Interior offices were fully converted to the TFAS. Plaintiffs complain that Defendants have "not provided regular, quarterly statements of accounts with *accurate* information to the plaintiff class." Pl. Br. at 42 (emphasis in original). Plaintiffs' unsupported allegation ignores not only the Phase 1.5 trial evidence but also the twenty-nine quarterly reports to the Court that have consistently detailed the status of the TFAS conversion in 2000 and subsequent related developments. This Court recognized that TFAS "should allow Interior to bring [the Office of Trust Fund Management's] financial management practices up to commercial standards." Cobell V, 91 F. Supp. 2d at 18. Interior has made good on its plan to convert to TFAS. See QR 29 at 11.

[21] Since 1947, Interior's regulations have permitted the payment of various types of lease income directly to individual allotment owners. See Secretarial Order No. 2342, amending Section 171.4 of Title 25 of the Code of Federal Regulations (July 1, 1947); see also 25 C.F.R. pt. 162 (current regulations permitting lease payments to be made directly to Indian landowners); id. pt. 166 (current regulations permitting grazing rental payments to be made directly to Indian landowners); id. pt. 212 (current regulations permitting direct payments to Indian landowners after production is established if specifically provided for in mineral lease); see, e.g., Regulations Governing the Leasing of Allotted Indian Lands for Farming and Grazing Purposes, p. 4, ¶ 3 (July 1, 1916). Since 1947, the direct-pay regulations have been amended infrequently; thus, from year to year the language of the regulations is largely identical. Although direct-pay leases of the surface of allotted lands required Interior's approval, the regulations did not require the lessee to report payments or otherwise notify Interior whether payments had been made under a lease after it was approved. The individual allotment owner negotiated the terms of the lease,

and received rental payments directly rather than through IIM accounts. The 1994 Act requires Interior to account for funds "held in trust by the United States." 1994 Act § 102(a). Funds that were never received by the United States because they were paid directly to an Indian lessor were never "held in trust by the United States," nor are they "deposited or invested pursuant to the Act of June 24, 1938" as section 102(a) of the 1994 Act also requires. This conclusion is consistent with the Court's ruling that the 1994 Act requires Interior "to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." Cobell V, 91 F. Supp. 2d at 58 (emphasis added).

Furthermore, the Complaint seeks certification of the named Plaintiffs "as representatives of a class consisting of all present and former beneficiaries of IIM accounts," and "a decree ordering an accounting and directing the defendants to make whole the IIM accounts of the class members." Complaint at 26-27 (emphasis added). Direct payments by-pass IIM accounts. Present and former IIM account holders either are not direct-pay recipients or are not before the Court as such. Accordingly, Plaintiffs either lack standing to seek an accounting for direct payments or have waived their right to seek such an accounting by not requesting it.

Plaintiffs cite a 1960 Interior Solicitor's memo, see II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1890 (1960 WL 12652) (Nov. 1, 1960), that opines that Interior must verify the accuracy of rental and royalty payments under oil and gas leases of trust lands even where payments are made directly to Indian lessors.

---

arranged for payment directly to himself, and Interior was not informed of payments after the lease was approved.

Pl. Br. at 24. The opinion bases the existence of such an obligation on "the trust or restricted character of the leased land and the relationship between the Indian landowner and the United States which has been likened to that of a guardian and ward." However, at most, the opinion discusses a non-specific duty to monitor transactions. Nothing in that opinion imposes an obligation on Interior's part to account for innumerable such transactions decades after the fact nor does it have any relevance to the accounting duty owed under the 1994 Act, which is specifically limited to funds held in trust.

Plaintiffs also cited the holding in Brown v. United States, 86 F.3d 1554 (Fed. Cir. 1996), that Interior possesses a fiduciary duty to Indian beneficiaries with respect to direct-pay commercial leases. Pl. Br. at 25. However, Brown places a key qualification on the enforceability of any specific duty: any claim (in that case, a monetary claim) must fail "where no specific statutory requirement or regulation is alleged to have been breached by the Secretary." Id. at 1563.

Brown concerned allottees who sued Interior for damages arising out of a lease of land for a golf course. The lease appears to be direct-pay, though that term does not appear in the Federal Circuit decision. Notably, upon remand, the trial court dismissed four of five claims for relief. Brown v. United States, 42 Fed. Cl. 538 (1998), aff'd, 195 F.3d 1334 (Fed. Cir. 1999) (appeal concerned only two of the four claims dismissed on statute of limitations grounds). The dismissed claims included alleged breach of a fiduciary duty to require the lessee to submit quarterly certified statements of gross receipts[22] and to determine whether gross receipts reported

[22] In Brown, the lease expressly obligated the lessees to send a certified statement of receipts from operation of the golf course both to the lessors and to the Secretary. 42 Fed. Cl. at 548 n.2.

by the lessee were accurate. Instead of supporting any direct-pay accounting, Brown seemingly contradicts it by holding that an alleged failure to verify transactions, a duty not unlike that discussed in the 1960 Solicitor's opinion, was not actionable absent a statute or regulation imposing such an obligation.[23]

Interior requires tenants to maintain payment records to assist in resolving disputes that might arise. The system was discussed when Interior proposed revising its surface leasing regulations and sought comments on whether to continue to allow direct payment to Indian landowners. See Proposed Rule - Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held In Trust, 65 Fed. Reg. 43,874 (July 14, 2000).[24] Subsequently, the notice accompanying publication of the final regulations contained the following statement:

> Consistent with the majority of comments, the final regulations continue to provide for direct payment to Indian landowners for leases on their trust lands, as long as direct payment is a specific term in the lease or permit. In order to ensure that the Secretary can properly enforce lease and permit payment terms, leases and permits authorizing direct payments must require that tenants maintain documentary proof of payment. Several respondents suggested that the Secretary should require that proof of payment be submitted to the agency with every direct payment. However, such a requirement would be inconsistent with historic practice and would result in an unsustainable drain on agency resources. Absent a system for tracking such notices, the requirement would not produce the desired

---

[23] This reading of Brown depends to a great extent on whether its reasoning would apply to an action for declaratory or injunctive relief under the APA as well as to an action for damages under the Tucker Act. It would be anomalous that a court could order the Government to perform, at a cost of billions of dollars, something which, for purposes of a damages action, the Government has no duty to perform.

[24] In soliciting comments, the notice of proposed rulemaking questioned "the compatibility of [direct] payments with the Secretary's legal obligation as trustee to obtain the information regarding payment history that is needed to perform the necessary accounting." 65 Fed. Reg. at 43,880. The final rule makes clear that direct payments lie outside the scope of the 1994 Act accounting requirements. See Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001).

> goal of ensuring prompt enforcement of payment of trust income. Further, it would be far less effective than relying on the Indian landowner to advise the BIA immediately upon discovering that a payment has not been made and requesting enforcement assistance. Therefore, the final regulations provide that the Indian landowner notify the Secretary that a required payment has not been made. The Secretary then will take prompt and effective action based on that specific information. The Department continues to recognize the advantages to Indian landowners of direct payments. However, this advantage necessarily brings with it increased responsibility of Indian landowners to assist in the enforcement of non-payment of their leases and permits. With this regulatory change, Indian landowners who opt for and negotiate direct payments are clearly notified of their responsibilities to notify the BIA of late payments. Similarly, tenants are notified both by these regulations and in the lease itself that documentary proof of payment will be necessary to demonstrate that a payment was timely made in the correct amount due, should there be any question about a payment.

Trust Management Reform: Leasing/Permitting, Grazing, Probate and Funds Held in Trust, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001). The final rule also made clear that Interior was not undertaking any obligation to manage or account for direct payments:

> The Department is not taking on any obligation to manage or account for funds paid directly to Indian landowners that are not actually held in trust by the United States. This is consistent with section 102(a) of the American Indian Trust Management Reform Act of 1994, 25 U.S.C. [§] 4011. Although we invited the public to comment on the question of accounting for direct payments, no specific recommendations were received beyond a general recommendation to collect proof of payment.

Id. (emphasis added).

Moreover, Interior's trust fund regulations do not permit the deposit of "direct pay" funds into an IIM account unless the direct payment cannot be effectuated. The regulations provide that Interior "will not accept funds from sources that are not identified in the table in [25 C.F.R.] § 115.702 for deposit into a trust account." 25 C.F.R. § 115.703. That table includes only those direct pay funds that have been returned by mail to the payor as undeliverable. 25 C.F.R. § 115.702 (Interior "must accept proceed[s] on behalf of . . . individuals from . . . [f]unds derived

directly from trust lands, restricted fee lands, or trust resources that are presented to the Secretary, on behalf of the . . . individual Indian owner(s) of the trust asset, by the payor after being mailed to the owner(s) as required by contract (i.e. direct pay) and returned by mail to the payor as undeliverable.") (emphasis added). Thus, Interior's direct-pay program accommodates the desires of IIM account holders to be more involved in the management of their financial affairs and to enjoy greater privacy about the details of those financial affairs.

A 1965 Solicitor's opinion, see II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974, at 1949, 1965 WL 12755 (Sol. Gen.) (Feb. 17, 1965), also cited by Plaintiffs, Pl. Br. at 24, states that direct-pay revenues are trust assets, subject to the Secretary's authority, until the payments are actually made. This would, for example, permit the Secretary to take control of a future stream of payments to protect an incompetent beneficiary. However, until such a point is reached, if ever, direct-pay revenues are not deposited in IIM accounts, and we are aware of no authority, including the 1965 opinion, requiring that Interior account for such funds.

For Interior to account for direct payments, Interior would have to have either eliminated direct-pay (which would be contrary to the strong preferences of beneficiaries) or created a cumbersome and costly monitoring system. Both options would frustrate "the objective of an orderly withdrawal of Government supervision of Indian affairs." Comptroller General, Audit Report to the Congress of the United States, Administration of Individual Indian Moneys by Bureau of Indian Affairs, Department of the Interior, Transmittal Letter at 1 (Nov. 1955).

> The policy of Congress, as declared in House Concurrent Resolution 108, Eighty-third Congress, is that Indians within the territorial limits of the United States should assume their full responsibilities as American citizens as rapidly as possible. The withdrawal of the Bureau [of Indian Affairs] from IIM activity in

> accordance with this policy is dependent to a great extent on finding solutions to problems encountered in administering Indian lands.

Id. at 23 (emphasis added). The Comptroller General's report further states as follows:

> To reduce the number of individual Indian money accounts, to reduce the cost of administering the IIM activity, and to assist in the eventual elimination of the activity, we recommend that the Commissioner [of Indian Affairs] require the appropriate area officials to:
>
> * * *
>
> Review all leases and permits on which payments are made to the Bureau and to have such payments made directly to Indian lessors or permitters whenever possible.

Id. at 27 (emphasis added); see also H.R. Rep. No. 1093 (1955), reprinted in 1955 U.S.C.C.A.N. 2691, 2692 (citing "long-term objective of removing restrictions from Indian lands as rapidly as the Indian owners become able to handle their own affairs without assistance from the Federal Government").

Finally, the law of private trusts offers no support for a direct-pay accounting because direct payments to beneficiaries are unknown in private trust administration. See Tr., June 2, 2003, p.m., at 72-74 (J. Langbein). Professor Langbein testified during the Phase 1.5 trial that the "ability on the part of beneficiaries of certain of the land interests to, in effect, withdraw the trust assets from the direct management of the trustee, and have the beneficiary do its own leasing or other management decisions with respect to the trust property . . . is not something that I recognize in the law of trusts, normally in ordinary trust practice." Tr., June 1, 2003, p.m., at 72-73. Plaintiffs characterize this testimony as indicating that the direct-pay system is somehow flawed. Pl. Br. at 25. To the contrary, it illustrates that the statutory trust in this case is governed by policy determinations having no analog in the private sector.

As the Supreme Court has noted,

> the [General Allotment Act of 1887] removed a standard element of a trust relationship by making "the Indian allottee, and not a representative of the United States, . . . responsible for using the land for agricultural or grazing purposes." Id., at 542-543, 100 S.Ct. 1349; see id., at 543, 100 S.Ct. 1349 ("Under this scheme, ... the allottee, and not the United States, was to manage the land."). We also determined that Congress decided to have "the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land . . ., but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from state taxation." Id., at 544, 100 S. Ct. 1349.

United States v. Navajo Nation, 537 U.S. 488, 504 (2003) (quoting United States v. Mitchell, 445 U.S. 535 (1980)); cf. United States v. Algoma Lumber Co., 305 U.S. 415, 420-21 (1939) (Secretary of Interior's prescribing form of contract and approving Indians' contract with lumber company did not involve assumption of contract obligations by the Government). The policy objective of Interior having limited control over the Indian owners' use of their land is inconsistent with Interior having a degree of control over direct payments from such use that would carry a corresponding obligation to account.

In sum, neither the Complaint, the 1994 Act, federal policy, nor trust law supports Plaintiffs' claim that the historical accounting should embrace direct payments.

5. Land Holdings And Land Accounting Are Not At Issue In This Case

Even though the Complaint seeks only an accounting of IIM funds, Plaintiffs now demand that Interior also account for all land held in trust for individual Indians since 1887. Cobell V held that the 1994 Act requires "defendants to provide plaintiffs an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." 91 F. Supp. 2d at 58 (emphasis added); see also Cobell v. Norton, 226 F. Supp. 2d 1, 116 (D.D.C. 2002) ("[T]he defendants must provide plaintiffs an accurate accounting of all money in the IIM trust.") (emphasis added).

As noted above, the certified plaintiff class consists solely of IIM account holders. Plaintiffs thus lack standing to seek a land accounting for landowners who are not IIM account holders, either because they are direct-pay recipients or because their land holdings produce no revenues. See also Cobell v. Norton, 391 F.3d 251, 254 (D.C. Cir. 2004) (corpus of the trust in this case "consists of the revenues derived from land . . . .") (emphasis added).

Plaintiffs also rely on duties beyond the 1994 Act but fail to cite any other statute or regulation imposing an enforceable duty to perform a land accounting. Plaintiffs' lands accounting requirement does not even pretend to lie within the scope of the accounting which Congress envisioned. It would require Interior to reconstruct the entire process of "fractionation" of land that, as the Misplaced Trust Report at 28 observed, has yielded over the past century land ownership interests recorded to the forty-second decimal point. See also id. at 28 n.94 ("One 320-acre tract at the Standing Rock reservation has 542 owners, including 531 individual Indians and 11 tribal or other owners. . . . The land size equivalent of the smallest ownership interest in that tract is smaller than the dimensions of this page [0.35 square feet or 7.1 inches by 7.1 inches]."). This endeavor (assuming that it is even feasible) would dwarf the task of accounting for the funds in the IIM accounts.[25]

---

[25] A tract identified in Hodel v. Irving, 481 U.S. 704 (1987), illustrates the complexities that may arise as trust land becomes increasingly fractionated:

> Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $0.05 in annual rent, and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming all 439 owners could agree) for its estimated $8,000 value, he would be entitled to $0.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at

Moreover, even if a basis existed to require an accounting of current trust lands, of the twenty to forty million acres of land that were allotted between 1887 and 1934, only about eleven million acres are owned by individual Indians today. Cobell V, 91 F. Supp. 2d at 80. Thus, wholly apart from any other issues, a land accounting would have Interior devote scarce resources to document the history of lands that are no longer held in trust.

Finally, while a relationship exists between land ownership and Land-Based IIM accounts, a land ownership accounting – or a boundary adjustment following a cadastral survey – would not change either the current balances in the IIM accounts or the transaction histories leading up to those balances and, therefore, would be irrelevant to this lawsuit. The correction of such errors, regarding either land or money, is an asset management issue that would have to be the subject of a separate administrative, legislative, or judicial proceeding.[26]

$17,560 annually.

Id. at 713.

[26] Plaintiffs argue without basis that Interior has "impermissibl[y]" excluded from its historical accounting *"Youpee* interests and trust revenue generated therefrom." Pl. Br. at 36. *"Youpee* interests" are highly-fractionated interests in allotted Indian lands that escheated to tribes under the Indian Land Consolidation Act ("ILCA") before the Supreme Court ruled those transfers to be unconstitutional in Babbitt v. Youpee, 519 U.S. 234 (1997). Since 1997, BIA has been working to divest the Tribes of the escheated interests and return the interests to the proper owner. QR28 at 39 n.3 (Feb. 1, 2007). Interior has not excluded the "trust revenue generated" from *Youpee* interests from its historical accounting. Nowhere in the 2003 Plan or 2007 Plan is the *Youpee* issue even mentioned. Plaintiffs erroneously conclude that such revenue was excluded based on Special Trustee Ross Swimmer's Trial 1.5 testimony, which indicated that even as of 2003, revesting of *Youpee* interests had not resulted in IIM account transactions. Tr., Phase 1.5 Day 36 p.m. at 62, cited in Pl. Br. at 35. Thus, any IIM revenue generated from revesting thereafter would not have occurred as of the December 31, 2000 end date of the historical accounting. 2007 Plan at 4; accord 2003 Plan at II-4. Nevertheless, such IIM revenue would appear in current accounting statements mailed quarterly to IIM account holders since the end of calendar year 2000. QR29 at 37.

6. Statute Of limitations and Laches

Defendants raised statute of limitations and laches defenses in a summary judgment motion preceding the Phase 1.5 trial. See Defendants' Corrected Memorandum Of Points And Authorities In Support Of Motion For Partial Summary Judgment Regarding Statute Of Limitations And Laches (Jan. 31, 2003) (filed under seal) (Dkt. 1782). Therein, Defendants argued that, given the general six-year statute of limitations in 28 U.S.C. § 2401 and tolling language appearing in an appropriations rider that has been enacted annually since 1990, claims for an accounting of transactions six years prior to 1990, or October 1, 1984, were time barred. In April 2003, the Court ruled that claims for "trust mismanagement," including failure to provide an accounting, cannot accrue for purposes of 28 U.S.C. § 2401(a) "until the trustee has repudiated the beneficiary's right to the benefits of the trust."[27] Cobell v. Norton, 260 F. Supp. 2d 98, 105 (D.D.C. 2003).

Defendants briefed the statute of limitations issue in both appeals of this Court's structural injunction; however, neither appellate decision addressed the issue. As it currently stands, this Court's ruling would allow Indian beneficiaries to sue for any claimed breach of trust occurring at any point in the history of the Indian trust, even if the beneficiary had full

[27] In Shoshone Indian Tribe v. United States, 364 F.3d 1339 (Fed. Cir. 2004), cert. denied, 544 U.S. 973 (2005), the Federal Circuit ruled against the United States with respect to the statute of limitations, but its ruling was based not on a lack of "repudiation," but instead on the appropriations rider that has been enacted annually since 1990. The rider states: "[N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds." Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990). (The precise wording has changed over the years.). The Federal Circuit held that the rider operated to revive even claims for which the statute of limitations had already expired in 1990.

knowledge of the alleged breach and failed to bring an action within the six-year limitations period. That is the case because the trust relationship between the Federal Government and Indian tribes and individual Indian beneficiaries is established by statute and thus cannot be "repudiated," as the Court would require. In conflict with that view, courts have repeatedly held, without discussing any "repudiation" of the trust, that actions brought by Indian beneficiaries for breaches of trust are barred by the applicable statutes of limitations if the beneficiaries knew or should have known of the alleged breach. See, e.g., United States v. Mottaz, 476 U.S. 834, 843-44 (1986); Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed. Cir. 1988); cf. City of Sherrill, New York v. Oneida Nation, 544 U.S. 197 (2005) (tribe's claim against municipality barred by laches). Moreover, it is long established that the limitations period in 28 U.S.C. § 2401 applies to both legal and equitable claims. See Blassingame v. Secretary of the Navy, 811 F.2d 65, 70 (2d Cir. 1987); Geyen v. Marsh, 775 F.2d 1303, 1306-07 (5th Cir. 1985). Indeed, that limitations period has been applied in Indian trust cases presenting claims for equitable relief. See Sisseton-Wahpeton, 895 F.2d at 592; Christensen v. United States, 755 F.2d 705, 707 (9th Cir. 1985).

In sum, Defendants adhere to the position stated in their January 2003 summary judgment motion regarding the statute of limitations and laches.

B. Interior's Plan Meets The Legal Requirements For And Accommodates The Practical Limitations Upon The Accounting Congress Ordered It To Perform

The following discussion, relating to the nature of the historical accounting, is provided for the Court's information and to respond to arguments asserted by Plaintiffs. It is to be distinguished from the foregoing discussion of the "scope" issues, which the parties believe can

be resolved before the October trial.

1. The Secretary Has Discretion And Flexibility In Determining How The Accounting Should Be Accomplished

Interior's statutory accounting duty is "construed in light of the common law of trusts." Cobell v. Babbitt, 52 F. Supp. 2d 11, 22 (D.D.C. 1999). However, even if that duty were construed "to conform with" common law, the very different standard seemingly argued by Plaintiffs, the common law adds little specificity to govern choices of methodology. The Court of Appeals held that section 102 of the 1994 Act requires "reconciling the accounts, taking into account past deposits, withdrawals, and accruals." 240 F.3d at 1102. The court also held that an "adequate" accounting is one that is "sufficient to serve the purposes for which a trust accounting is typically conducted." Id. at 1103. Therefore, the accounting "must contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out." Id. (quoting White Mountain Apache Tribe of Ariz. v. United States, 26 Cl. Ct. 446, 449 (1992)). The Court of Appeals also noted that "[i]t is black-letter trust law that '[a]n accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception.'" 240 F.3d at 1103 (quoting Engelsmann v. Holekamp, 402 S.W.2d 382, 391 (Mo.1966)).[28]

Notwithstanding these statements, a "black-letter trust law" definition of an accounting remains elusive even beyond the confines of this case. During the Phase 1.5 trial, Professor John Langbein of Yale University, the Government's expert and a leading American authority on trust and fiduciary matters, testified that the terms "account" and "accounting" are no longer even

[28] In this case, the corpus of the trust, "consists of the revenues derived from land . . . ." Cobell v. Norton, 391 F.3d 251, 254 (D.C. Cir. 2004).

used in the Uniform Trust Code because of confusion surrounding their meaning. He testified that five distinct meanings of "account" or "accounting" exist in trust practice. Tr., June 2, 2003, p.m., at 85 (J. Langbein).

Nor has any more rigid standard been established to define a government-specific duty to account. Under the Indian Claims Commission Act, the Court of Claims held that availability of the general law of fiduciary relationships in making determinations involving the United States as a trustee

> does not mean . . . that all the rules governing the relationship between private fiduciaries and their beneficiaries and accountings between them necessarily apply in full vigor in an accounting claim by an Indian tribe against the United States. [Such inapplicable rules might include] the principle that once a breach of fiduciary duty is merely charged (without any supporting material), the beneficiary is entitled to recover unless the fiduciary affirmatively establishes that it properly discharged its trust, and the theory that failure to render the precise form of accounting required may be sufficient, in and of itself, to establish liability.

Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980).

Congressional statements, both pre- and post-1994 Act, indicate that Congress intended the accounting under the 1994 Act to be judged by practical standards and that Congress understood the project would take a long time to complete. In its report accompanying H.R. 4833, the bill ultimately enacted as the 1994 Act, the House Natural Resources Committee discussed the Misplaced Trust Report previously issued by the House Committee on Government Operations. H.R. Rep. No. 103-778, at 10. The Misplaced Trust Report described costly efforts by the Bureau of Indian Affairs ("BIA") in the early 1990s to conduct a complete audit and reconciliation of all IIM accounts and concluded that "it might cost as much as $281 million to $390 million to audit the IIM accounts at all 93 BIA agency offices." Misplaced Trust

Report at 26. The Report continued:

> Obviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991. Given that cost and time have become formidable obstacles to completing a full and accurate accounting of the Indian trust fund, it may be necessary to review a range of sampling techniques and other alternatives before proceeding with a full accounting of all 300,000 accounts in the Indian trust fund. However, it remains imperative that as complete an audit and reconciliation as practicable must be undertaken.

Id. (emphasis added and footnote omitted).

The Court of Appeals summarized post-1994 Act Congressional sentiment as follows:

> Congress's post-1994 appropriations fall equally short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite. Our analysis in *Cobell XIII* of the fiscal year 2004 appropriations bill, Pub.L. No. 108-108, 117 Stat. 1241 (2003), quoted [Senator Dorgan's] conclusion that completing the judicially ordered accounting would be "nuts." 392 F.3d at 466. More importantly, Congress later limited Interior's annual expenditures for historical accounting to $58 million for two years in a row. See Pub.L. No. 108-447, 118 Stat. 2809 (2004) (appropriating funds for fiscal year 2005 for the operation of trust programs for Indians, "of which not to exceed $58,000,000 shall be available for historical accounting"); Pub.L. No. 109-54, 119 Stat. 499 (2005) (appropriating such funds for fiscal year 2006, "of which not to exceed $58,000,000 from this or any other Act, shall be available for historical accounting").

Cobell XVII, 428 F.3d 1070 at 1075. The $58,000,000 was appropriated for both individual and tribal historical accounting activities.

In this case, the issue of cost is especially relevant. Plaintiffs contend that "no precept of the common law constrains the cost" of an accounting where "a trustee has by misconduct or negligence made a proper accounting more difficult." Pl. Br. at 17 (quoting Cobell XVII, 428 F.3d at 1075).[29] Although Plaintiffs characterize this as the holding of the Court of Appeals, the

[29] The Court further noted that "[a]bsent such misconduct or negligence, however, the cost of an accounting would fall on the trust estate itself, which, as we said before, would

Court of Appeals not only did not so hold but also foreclosed their argument in the next sentence of its opinion. The Court noted that, while the 1994 Act faults the Government's management, "the Act's general language doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." 428 F.3d at 1075 (emphasis added). The Court continued:

> Nor does the Act have language in any way appearing to grant courts the same discretion that an equity court would enjoy in dealing with a negligent trustee. Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense.

Id. Later in the opinion, the Court stated that

> [u]nder the circumstances presented here, neither beneficiaries' preferences nor the absence of precedent, nor the combination, could properly be deemed controlling. Where trade-offs are necessary because it is costly to increase accuracy, the preference of a party that will bear none of the monetary costs can't sweep the cost issue off the table. And in the situation here, where common law precedents don't map directly onto the context, the absence of precedent tells us little.

Id.

Indeed, if all common law precedents "map[ped] directly onto the context," 428 F.3d at 1078, their rigorous application "would turn out to be a Pandora's box, eliminating a vast portion of the Plaintiff class." Langbein Report at 5. That would follow from the common law principle that "the trustee is entitled to reasonable compensation out of the trust estate for his services as trustee . . . ." Id. (quoting Restatement (Second) of Trusts § 242 (1959)). Service fees commensurate with the costs of maintaining IIM accounts, which are not charged, would result in many thousands of those accounts either never coming into existence or being extinguished

---

automatically give private beneficiaries an incentive not to urge extravagance. *Cobell XIII*, 392 F.3d at 473." 428 F.3d at 1075.

through insolvency because administrative costs often exceed the value of the accounts. See, e.g., QR29 at 15 ("As of March 31, 2007, there were 19,241 accounts that have a $.01 - $1.00 balance with no activity for the previous 18 months. The total sum in these accounts is $5,517.55."); Report to Congress (July 2002) at 30, Table 3-1 (showing 143,744 "medium value" accounts with a total balance as of December 31, 2000, of $1 million, or average balance of less than $7.00).

Interior's 2003 Accounting Plan was predicated upon receiving appropriated funding of approximately $100 million each year up to the current year. See 2003 Accounting Plan at Table IV-1.[30] Congressional funding has never come close. To date, Interior has spent the money appropriated by Congress – approximately $127.1 million, or less than forty percent of the funding assumed in the 2003 Accounting Plan.

Because Congress has not fully funded Interior's requests for the historical accounting work in the 2003 Accounting Plan, Interior has properly reevaluated competing considerations, including, but not limited to, the costs and delays associated with some of the testing and reconciliation activities contemplated in the 2003 Accounting Plan.[31]

Interior's Plan recognizes the realities of congressional support for the 2003 Accounting Plan and contemplates completion in FY 2011, predicated upon congressional appropriations

---

[30] Table IV-1 in the 2003 Plan showed funding assumptions of $15.35 million in FY 2003, $100 million in FY 2004-FY 2006, and $19.725 million in FY 2007, for a total cost of $335.075 million.

[31] For example, as the Historical Accounting Project Document explains, in light of congressional funding and the experience of work performed to date, if Interior retained the sampling plan described in the 2003 Plan, the historical accounting work would not be completed for decades. See Historical Accounting Plan Document, Exhibit III at pages 4-5.

totaling $144 million, or $36 million per year. While seeking funding for the 2007 Plan, Interior also will need to seek appropriations to fund historical accounting work related to tribal accounts and Special Deposit Account ("SDA") work. The total funding requests for tribal and SDA work will likely exceed Interior's requests related to the 2007 Plan. Congressional appropriations will continue, therefore, to affect significantly Interior's ability to achieve the goals of the 2007 Plan.

In the absence of a "definitive balance between exactitude and cost," Cobell XVII, 428 F.3d at 1076, Interior is owed "substantial deference" in choosing how to meet the accounting obligation. Id.; see also Cobell v. Norton, 455 F.3d at 305 ("court of equity will not interfere to control [trustees] in the exercise of a discretion vested in them by the instrument under which they act") (quoting Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111 (1989)) (original brackets and emphasis); Restatement (Second) of Trusts §§ 186-87 (1959) (trustee is granted powers "necessary or appropriate to carry out the purposes of the trust" and the exercise of those powers is "not subject to control by the court, except to prevent an abuse by the trustee of his discretion").

2. The Phase 1.5 Trial Discredited Plaintiffs' Impossibility Theory

The record of the 2003 Phase 1.5 trial disproves Plaintiffs' insistence that the accounting their Complaint seeks to compel is impossible because relevant records are unavailable. In the Phase 1.5 trial, professional historians, Edward Angel and Alan Newell, testified a combined total of seven days regarding the work they have performed to assist Interior to close gaps in historical records. Their contributions have included locating document collections, developing search plans and finding aids, producing a catalog of record repositories, providing reservation and allotment histories, and creating a database regarding production and value of certain natural

resources on Indian lands over a nearly 100-year period. See Expert Report of Edward Angel, Feb. 28, 2003 (Dkt. 1839); Expert Report of Alan Newell, Feb. 28, 2003 (Dkt. 1841). The historians' expert opinions regarding the availability and utility of records to perform the historical accounting[32] withstood attack by the Plaintiffs.

The Government also presented detailed evidence regarding the IIM accounts of the named Plaintiffs and their predecessors-in-interest. This was the so-called "Paragraph 19" project, which referred to paragraph 19 of the First Order for the Production Of Information (Dkt. 16). Mr. Robert Brunner, who oversaw the work of the consulting firm engaged in connection with the document collection effort, and Mr. Joseph Rosenbaum, who reviewed the collected documents under a contract with Ernst and Young, testified a combined total of three and a half days regarding the painstaking collection process and analysis of the results. Plaintiffs were provided electronic copies of the documents along with software linking accounts with transaction listings and supporting documentation. Mr. Rosenbaum's expert report of February 28, 2003 (Dkt. 2186) (under seal) found no indication that the transaction listings were not substantially accurate or that the transactions recorded were not substantially supported by contemporaneous documentation. Mr. Rosenbaum found only one transaction that was not

[32] The existing historical record includes, among many collections of records, a massive volume of documents from the "settlement of accounts" process whereby, over a period of several decades, the accounts of Indian Service Special Disbursing Agents were subject to examination by representatives of the GAO or Treasury. Defendants dispute and object to Plaintiffs' assertions, Pl. Br. at 14-16, regarding the settlement of accounts process, the veracity of representations made to the Court, and the disclosure of information by government counsel. In any event, Interior's Plan does not rely upon any theory regarding the settlement of accounts process that would be foreclosed by rulings of the Court. The vast historical record regarding the settlement of accounts process could provide support to certain determinations to be made regarding the historical accounting that is being performed, not justify not performing one.

recorded in the available ledgers – a collection of $60.94 that was incorrectly credited to the IIM account of an individual with a similar account number. Id. at 3, ¶ 3.

It has never been disputed that Interior will encounter gaps in transaction histories or supporting records as the historical accounting proceeds. Interior's 2003 Plan did not require that all documents be found, see Tr., June 4, 2003, p.m., at 82-84 (J. Cason),[33] and Interior developed adaptive strategies to take into account record deficiencies, see id.; Interior's 2003 Plan, at III-9, 13-14, 18-20; Expert Report of Edward Angel, at 46 (Dkt. 1839) ("[B]y making allowances for missing records, OHTA's plan both addresses gaps in the records and uses other historical records combined with the forensic abilities of skilled accountants to overcome those gaps.").

To the extent Plaintiffs theorize that insufficient records exist to perform the historical accounting, they have taken their bite at that apple. The issue was squarely presented at the Phase 1.5 trial, and the evidence proved Plaintiffs' theory wrong.[34]

3. Interior's Historical Accounting Plan Comports Fully With the 1994 Act

Interior's 2007 Plan describes an accounting that comports fully with the requirements of the 1994 Act. Arguably, Interior's historical accounting obligation would be satisfied by providing account holders with a transaction history of "past deposits, withdrawals, and accruals," Cobell VI, 240 F.3d at 1102, and determining whether the current balance is correct in light of the account history. The effort described in Interior's Plan goes further. Interior is

---

[33] Mr. Cason is the Associate Deputy Secretary of the Interior.

[34] Moreover, as Interior's quarterly reports have indicated, since the Phase 1.5 trial, Interior's collection of documents has become more robust as the Lenexa project has collected and indexed relevant documents. See also "Historical Accounting for Individual Indian Money, A Progress Report," Exhibit IV to the Historical Accounting Project Document.

taking significant steps to assess the accuracy of the account histories by reviewing supporting documentation. Moreover, Interior is performing numerous system tests to assess the integrity and completeness of the underlying data. Interior believes these are prudent steps that will provide IIM account holders with the best available information about their accounts.

The goal of the historical accounting effort as described in the Plan is to provide each eligible IIM account holder, as soon as is practicable, with both an account transaction history and a reliable assessment regarding its accuracy. See Interior's Plan at 1, 3, 5 ("Executive Summary" and "Introduction"). The Plan describes an appropriate method for accomplishing this goal, which entails collecting relevant and available trust records and using those records to verify the accuracy of the account activity recorded in electronic and paper account ledgers. In accordance with the 2003 Plan, Interior has enlisted many top experts in the fields of accounting, statistics, historic research, trust operations, and other disciplines to compile and review accounting and transaction records necessary to provide accurate HSAs to beneficiaries in a reasonable, time- and cost-effective fashion. See id. at 4-8.

Pursuant to the 2007 Plan, which generally retains the same approach proposed in the 2003 Plan, HSAs are being prepared for three different types of accounts: (1) Judgment accounts, (2) Per Capita accounts, and (3) Land-Based accounts.[35] Descriptions of these types of accounts may be found in numerous places in the record. See, e.g., 2007 Plan at 9 (Judgment and Per-Capita) and 11 (Land-Based).

---

[35] The 2003 Plan included procedures for preparing HSAs for SDAs. See 2003 Plan at III-1. Interior will continue work with regard to these types of accounts, but because they are not truly a part of the "historical accounting" effort, the work related to these accounts has been removed from the 2007 Plan. See 2007 Plan at 26.

a. Judgment and Per Capita Accounts

For Judgment and Per Capita accounts, Interior has been reviewing and will continue to review documentation for every underlying transaction – a "transaction-by-transaction reconciliation" – to assess the reliability of the business records to be utilized to prepare the HSAs for these types of accounts.[36] The rationale for conducting this type of review is described at page 10 of the 2007 Plan.

b. Land-Based Accounts

The process for reviewing transactions in the Land-Based accounts is more complex for numerous reasons, such as the nature of revenue sources for land interests and fractionation, which frequently results in a tract of land having as many as thousands of underlying undivided and minuscule beneficial interests. The work is further complicated by the fact that, while a majority of the Land-Based accounts originated after the introduction of electronic data processing for maintenance of accounting records, a significant number of accounts have transactions that were recorded on paper.

To date, Interior's historical accounting activities related to Land-Based accounts have largely focused on the post-1984 "Electronic Ledger" era, where transactions have been recorded and maintained in computer systems. Interior's work in this area has relied upon a combination of transaction-by-transaction reconciliation activities for individual transactions valued at $100,000 or more and reconciliation activities for a statistically sampled group of transactions

[36] As of the filing of the 2007 Plan, Interior had completed its review for 83,711 of the 96,823 Judgment and Per Capita accounts. Interior currently plans to defer completion of work on the remaining Judgment and Per Capita accounts to allow it to focus resources on other aspects of the accounting work.

with individual values under $100,000. Based upon this work, Interior was able to confirm that virtually every Electronic Ledger transaction reviewed was, in fact, accurately recorded and that the infrequent errors discovered tended to be very small. See Exhibit III to the Historical Accounting Project Document at 6-7. The errors found went both ways, i.e., some favored and some disfavored account holders, and the errors did not result from fraud or systemic flaws in the accounting records. Id.

Interior's activities with regard to Land-Based accounts will continue with regard to the pre-1985 "Paper Ledger" era. In its 2007 Plan, Interior has modified its sampling plan, making adaptations based upon what it has already learned from work to date, in an effort to complete the historical accounting in a fashion that is both time- and cost-sensitive, while providing IIM account holders with reliable HSAs, consistent with the 1994 Act. One of the significant modifications will involve sampling to assess whether the population of Paper Ledger accounting records differs materially from the population of Electronic Ledger accounting records. If they do not differ, Interior will be able to rely upon conclusions drawn from work performed to date and apply them to remaining work on the Paper Ledger era. Interior's Plan at 13.

c. Other Work Contemplated By Interior's Plan

The work described above largely pertains to testing the reliability of transactional records by selecting transactions and comparing them to supporting documentation. Interior has been conducting and will continue to conduct other work, however, to assess the completeness of the data Interior uses to prepare HSAs – known as "Data Completion Validation" and "Land-to-Dollars Posting Test" work, see Interior's Plan at 17-19 – and to test the posting of interest to

accounts, see id. at 19. When this is completed, Interior will have thoroughly tested the business records for accuracy, through tests of the entries in the records, and completeness, through tests to ascertain whether there are omissions in the records. Id. at 17-19.

The 2007 Plan further includes steps to identify missing addresses for account holders, known as "Whereabouts Unknown" accounts. Interior's Plan at 20. This formidable task involves thousands of accounts which lack accurate addresses for a variety of reasons. See QR29 at 39.

Finally, Interior's Plan contemplates the creation of an administrative appeals process for account holders to challenge information contained in their HSAs and to obtain timely and cost-effective relief. Such a process will necessarily follow rulemaking through the publication of proposed regulations, the receipt of public comments, and finalization of regulations. Interior's Plan at 20-21.

C. Plaintiffs Overstate Treasury's Limited Role In The Historical Accounting Process

The Court invited Plaintiffs to explain the role Treasury should play in the October 2007 trial, the subject of which is "the methodology and results of the accounting project up to the time of the hearing." Memorandum Order at 3 (Apr. 20, 2007) (Dkt. 3312). But Plaintiffs have briefed an entirely different subject, apparently in an effort to re-litigate Treasury's liability and prospective duties. These issues were decided during Phase 1 of the case. Treasury can shed no light on "the methodology and results of the accounting project." Id.

Interior is responsible for determining the scope and methodology of the historical accounting. The 1994 Act specifically requires the "Secretary of the Interior," not the Secretary of the Treasury, to account for Indian trust funds. 1994 Act, § 102(a). The Court has stated that

"Treasury's role as trustee-delegate is generally limited to holding those IIM trust funds kept by Interior on deposit at the Treasury and investing those funds as directed by Interior." Cobell V, 91 F. Supp. 2d at 21-22. Treasury also performs central accounting for the Federal Government and manages some aspects of the Government's finances. Id. at 11. Treasury does not maintain funds for individual beneficiaries. Id. While Treasury may provide documents to Interior to support account administration,[37] Interior is responsible for planning and executing the historical accounting. The facts about Treasury's role were fully explored during the Phase 1 trial in 1999. Plaintiffs have identified no issue relating to these topics on which additional testimony is necessary.

Plaintiffs' proposed foray into Treasury's more general role as funds administrator would have as its only objective a search for evidence to try to develop a claim for asset mismanagement that would lie beyond this Court's jurisdiction. Their hypothetical overpayment to one IIM account holder, Pl. Br. at 50-51, would not affect every IIM account holder as Plaintiffs contend. Interior administers IIM accounts on an individual basis, and it is accounting for funds on an individual, not a group, basis. IIM deposits – like the deposits of multiple individuals in a private bank – are pooled for investment purposes. However, the individual account holders have no property interest in the pooled funds. Cf. Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 21 (1995) (a bank account does not consist of "money belonging to the depositor and held by the bank" but "of nothing more or less than a promise to pay, from the

[37] Plaintiffs illogically propose that just because certain records evidencing disbursements prior to October 1990 are unavailable, no such disbursements ever took place, and that, therefore, all such funds remain in the TGA and are available for disbursement to Plaintiffs. Plaintiffs overreach by suggesting entitlement to such a windfall.

bank to the depositor"). Even if the rules governing private financial institutions were applicable to the U.S. Treasury, Plaintiffs, who try to impose private trustee standards on the Government where it suits their purpose, cite no authority that a private trustee's duty to account encompasses the transactional activity of a depository bank the trustee employs.

If Plaintiffs' commingling hypothesis were correct, that any activity in the pooled fund affects all account holders, it would not prove that every account holder has an interest in the pooled fund but would lead to the absurd conclusion that every account holder has an interest in every other individual's account. An accounting of the pooled fund, that Plaintiffs seemingly urge is necessary, would be meaningless because it would be impossible to tell from any particular transaction affecting the pool's balance whether the change resulted from a correct or incorrect transaction. Instead, Plaintiffs' theory would mean that Interior would have to provide each IIM account holder an accounting not only of transactions in his or her account but also of every transaction in every other IIM account. That would be preposterous.

In theory, errors in management of the pooled fund itself could give rise to claims for damages. As has been held repeatedly, however, such claims would be outside the scope of this lawsuit. Therefore, to the extent that Treasury issues are "on the table" at all, they are, for the reasons stated above, limited to those Treasury document retention practices necessary for Interior to complete its historical accounting.

IV. CONCLUSION

Interior's Plan presents a comprehensive approach to continuing and completing the accounting mandated by the 1994 Act. Making optimum use of scarce resources, Interior has developed a professional organization, invested substantial time and money in gathering and

organizing records, established sound methodologies, and in the process, completed thousands of historical statements of account. Plaintiffs offer no basis to overrule Interior's Plan.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

MICHAEL F. HERTZ
Deputy Assistant Attorney General

J. CHRISTOPHER KOHN
Director

ROBERT E. KIRSCHMAN, JR.
(D.C. Bar No. 406635)
Deputy Director

/s/ John T. Stemplewicz
JOHN T. STEMPLEWICZ
Senior Trial Counsel
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 616-0238
Facsimile: (202) 514-9163

June 11, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on June 11, 2007 the foregoing *Defendants' Responding Brief Regarding the Nature and Scope of the Historical Accounting* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

Case No. 1:96CV01285
(Judge Lamberth)

INTERIOR DEFENDANTS' NOTICE OF FILING OF EXPERT REPORT OF JOHN H. LANGBEIN

Interior Defendants hereby give notice of filing and attach hereto the Expert Report of John H. Langbein.

Dated: February 28, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

SANDRA P. SPOONER
D.C. Bar No. 261495
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-3368
(202) 514-9163 (fax)

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on February 28, 2003 I served the foregoing *Interior Defendants' Notice of Filing of Expert Report of John H. Langbein* by U.S. Mail:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004

Elliott Levitas, Esq.
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Avenue, N.W.
13th Floor
Washington, D.C. 20006

Joseph S. Kieffer, III
Special Master Monitor
420 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

Jay St. John

JOHN H. LANGBEIN

14 TULIP TREE LANE
WOODBRIDGE, CT 06525
(203) 389-6564
FAX (203) 389-2608

YALE LAW SCHOOL
P.O. BOX 208215
NEW HAVEN, CT 06520-8215

COURIER DELIVERIES:
127 WALL STREET
NEW HAVEN, CT 06511

(203) 432-7299
FAX (203) 432-1109

February 27, 2003

John T. Stemplewicz, Esq.
Senior Trial Counsel
U.S. Department of Justice
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Re: Cobell v. Norton

Dear Mr. Stemplewicz:

You have asked me, in my capacity as an expert on trust and equity matters, to examine questions that have arisen in the Cobell litigation.

Expertise

1. Employment. I am Sterling Professor of Law and Legal History at Yale Law School. Previously, I have held chairs or other academic appointments at the University of Chicago, Cambridge University, Stanford University, Oxford University, the University of Michigan, and the Max Planck Institutes in Freiberg and Frankfurt, Germany. I have specialized in the connected fields of trusts, fiduciary administration, probate administration, and pension and employee benefits for more than three decades.

2. Publications. I coauthor the principal book, Langbein & Wolk, Pension and Employee Benefit Law (Foundation Press, 3d ed. 2000 & 2002 Supp.), which is used in most American law schools that teach the field. I have written extensively about the impact of modern investment practice on trust investment law. I coauthor a student book that is widely used in trusts courses, Langbein & Waggoner, Uniform Statutes on Trusts and Estates: 2002-03 Edition (Foundation Press, 2002; prior eds. since 1987).

My c.v., attached as an exhibit, lists my publications in these and other areas.

3. Law revision activity. Since 1984 I have served continuously under gubernatorial appointments from Illinois and Connecticut as a Uniform Law Commissioner. From 1991 to 1997 I chaired the Commission's probate and trust division (Division D). I was the reporter and principal drafter for the Uniform Prudent Investor Act (1994), which governs fiduciary investing in 38 states and the District of Columbia and has been emulated in nonuniform acts in most of the rest. I am a member of the drafting and oversight committees responsible for preparing the Uniform Trust Code, the first comprehensive national codification of the law of trusts. For the American Law Institute, I am one of two reporters drafting the Restatement (Third) of Property: Wills and Other Donative Transfers (Vol. I, 1999; Vol. II, 2003). I served on the advisory panel for the Restatement (Third) of Trusts: Prudent Investor Rule (1992), and I presently serve on the advisory panel that is overseeing a complete revision of the Restatement (Third) of Trusts.

4. Litigation and advisory work. I have served as an expert in trust and pension litigation, and as an advisor and consultant on fiduciary practice and fiduciary investment matters, for more than 20 years. Since 1994, I have appeared in a series of training videos for bank trust officers on aspects of fiduciary investing produced by Federated Investors.

5. Exhibits. I attach my c.v. (Exhibit A); a schedule of prior deposition and trial testimony (Exhibit B), together with a statement respecting my compensation in this matter (Exhibit C).

Question Presented

6. "Common law trust standards." You have asked me to examine the Department of Interior's "Fiduciary Obligations Compliance Plan" of January 6, 2003 [hereafter the DoI 2003 Plan, or the Plan]; and to evaluate the Plaintiffs' contention that "common law trust standards" should be applied to DoI's "management and administration of the Individual Indian Trust." Plaintiffs' Opposition to the [DoI Plan], filed January 31, 2003 [hereafter Plaintiffs' Opposition], at 4 (emphasis deleted). DoI takes the position that its trusteeship of the Individual Indian Trust [hereafter, IIT] is based in statute, not in the common law of trusts, and that the statutory basis of DoI's trusteeship obliges DoI to take into account considerations to which the common law of trusts is not addressed, in particular DoI's "co-existing statutory obligations, the obligation to work within the parameters of the statutory and budgetary constraints imposed by Congress ..., and the obligation to consult with tribes and consider tribal sovereignty and the priorities to be accorded to tribal rights of self-governance and self-determination."

Defendants' Motion for Partial Summary Judgment, filed January 31, 2003, at 10 [hereafter DoI Partial SJ Motion]. In this report I evaluate the consequences of basing DoI's administration of the IIT on "common law trust standards."

7. Matters excluded. You have asked me to take note that DoI believes it has strongly principled defenses and objections to several aspects of the Plaintiffs' submissions. In particular:

(A) DoI insists that the Cobell litigation is limited to and limited by its character as a trust accounting case under 25 U.S.C. § 4011(a). This position has been lately reiterated with citations to governing authority, including the law of the case, in DoI Partial SJ Motion, at 1-7.

(B) DoI contends that constitutional barriers preclude any decree appointing a receiver. See DoI's brief, Opposition to Plaintiffs' Motion to Amend Their Motion to Reopen Trial One in This Action to Appoint a Receiver, dated November 15, 2002.

(C) DoI believes that its trust responsibilities for the IIT derive exclusively from statute (including most importantly the American Indian Trust Fund Management Reform Act of 1994) and not from common law trusteeship standards, although the common law tradition will sometimes inform the standards appropriate to DoI's statutorily-based trusteeship. "The primary standard that [DoI] must meet in regard to accounting is set by the 1994 Act." DoI 2003 Plan, at 13. "[I]n meeting the 1994 Act's requirements," DoI has regard to, inter alia, "applicable federal statutes," departmental and other governmental regulations and guidelines, "generally accepted accounting and auditing standards, ... as well as other sources of relevant fiduciary practices." Id. at 15.

Opinion

8. "Co-existing statutory obligations" would prevail as trust law. "Common law trust standards" would introduce a new vocabulary but would offer the Plaintiffs no material advantage over DoI's statute-based framework of analysis. Indeed, thorough adoption of common law trust standards would disadvantage the IIT by subjecting each account to service charges that the accounts do not now pay. Furthermore, DoI's "co-existing statutory obligations" which Plaintiffs hope to escape, would continue to prevail as a matter of trust law, for two reasons that are developed below. First, particular terms trump default law. The common law of trusts is default law, which yields to the contrary terms of the particular trust. In this instance the "co-existing statutory obligations," which DoI must obey, work like the terms

of the trust instrument in the law of private trusts. Congress, which is the settlor-equivalent source of the IIT, is also the source of DoI's budgetary and institutional constraints. These "co-existing statutory obligations" have the effect of modifying the default law in order to implement the more particular standards imposed by Congress. Second, the prudence norm that governs the conduct of common law trust duties would, if applied to DoI's administration of the IIT, adjust DoI's standard of care to take account of DoI's "co-existing statutory obligations." Prudence is situation-specific. The prudence standard is that of a prudent trustee in similar circumstances, meaning in this instance a trustee that must be an agency of the government of the United States, operating under the budgetary constraints and other restrictions that the Plaintiffs wish to escape. I conclude, therefore, that adopting supposed common law trust standards would ultimately lead to the same principled accommodations that DoI makes under the existing statutorily derived framework.

Discussion

9. "Applicable trust standards." In a document titled Plaintiffs' Compliance Action Plan Together with Applicable Trust Standards, filed January 6, 2003 [hereafter Plaintiffs' Plan], the Plaintiffs provide a "catalogue" of the "applicable trust standards" that they purport to derive from the common law of trusts. Id. at 18. Plaintiffs admit that "not all [these] duties and relevant standards are expressly stated [in the terms of the IIT]; many are implied by the creation of the trust." Id. The Plaintiffs' catalogue of trust duties, mostly based upon the formulations in the Restatement (Second) of Trusts (1959), begins with the duty of loyalty, id. at 20, and the duty of prudent administration, which they identify imperfectly, calling it "the duty of administration." Id. at 21 and n. 29, citing Restatement (Second) of Trusts § 174 (1959). Section 174 requires the trustee "to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property ...." Id. This prudence norm is the trust-law standard of care, and it underlies a host of more specific trust duties, including those identified by the Plaintiffs. Plaintiffs' list of prudence-derived "applicable trust standards" includes the duties to take control of and to protect the trust property, to segregate trust property, and to maintain adequate records; the duty to enforce and defend claims, the duty to report and inform beneficiaries, and the duty of prudent investing. Plaintiffs' Plan, at 20-25, citing Restatement (Second) of Trusts §§ 172-3, 175-79, 189, 227 (1959). Plaintiffs also endorse the duty of impartiality among multiple beneficiaries, which is an application of the duty of loyalty. Id. at 22, citing Restatement (Second) of Trusts § 183.

10. What the plaintiffs omitted. Plaintiffs cannot cherry-pick common law trust standards, taking advantage of those

principles that they think favor them, and neglecting those that would clip their wings. Among the important principles of trust law that are needed to fill out the selective picture portrayed in Plaintiffs' Plan are the deferential standard of review and the principle of reasonable trustee compensation.

11. Deferential review. The law of trusts as codified in the Restatement grants trustees the powers "necessary or appropriate to carry out the purposes of the trust," and it makes the exercise of those trust powers "not subject to control by the court, except to prevent an abuse by the trustee of his discretion." Restatement (Second) of Trusts §§ 186-87 (1959). Thus, the highly deferential standard of review characteristic of administrative law is also characteristic of trust law when the question concerns the trustee's exercise of its conceded powers of administration.

12. Trustee compensation. Also omitted from the plaintiffs' selective account of the common law of trusts is the rule that "the trustee is entitled to reasonable compensation out of the trust estate for his services as trustee ...." Id. § 242. If DoI were to charge fees commensurate with the costs of maintaining hundreds of thousands of tiny IIT accounts (especially accounts that are worth less than the cost of servicing them), those accounts would be extinguished through insolvency and thus would cease to have the claims that the Plaintiffs press in the Cobell litigation. Accordingly, for the Plaintiffs the common law of trusts, rigorously applied, would turn out to be a Pandora's box, eliminating a vast portion of the Plaintiff class.

13. Trust law is default law. The central fallacy in Plaintiffs' efforts to invoke the standards of the common law of trusts is their expectation that those standards would allow them to hold DoI to a higher standard of care than that which arises under the 1994 Act and related federal legislation. If DoI were to adhere to common law trust standards, the Plaintiffs contend, DoI would not be able to pay attention to the competing considerations that frustrate the Plaintiffs' wishes--that is, what DoI has identified as its "co-existing statutory obligations, [especially] the obligation to work within the parameters of the statutory and budgetary constraints imposed by Congress ...." DoI Partial SJ Motion at 10. What the Plaintiffs have not recognized or understood is that all the rules of trust law to which they point are default rules, rules that can be and routinely are abridged by the more specific terms of the particular trust. The Uniform Trust Code of 2000, which is declaratory of the common law of trusts, articulates this point with great clarity. Section 105(b) of the Code (titled "default and mandatory law") provides that "[t]he terms of a trust prevail over any provision of" the codified common law, subject to a few exceptions not here germane. The Uniform Prudent Investor Act of 1994 also spells out this default character of trust law. It says:

"The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." Id. at § 1(b). The terms of a trust can override the whole of trust fiduciary law, including every element of the Plaintiffs' chosen "applicable trust standards." I have developed this point in the scholarly literature in an article that Plaintiffs cite for other purposes: John H. Langbein, The Contractarian Basis of the Law of Trusts 625, 655 (1995), cited in Plaintiffs' discussion of the "applicable trust standards" in Plaintiffs' Plan, at 20 n. 28.

14. Implications for this litigation. In a trust such as that in Cobell, which Congress creates, Congress is the functional equivalent of the settlor of a private trust whose trust instrument establishes the terms of that trust, and Congressional legislation bearing on the trust would have the effect of trumping any otherwise applicable common law standard. Thus, under an analysis resting on the common law of trusts, DoI's "co-existing statutory obligations" would continue to trump trust default law. Recasting the trust in Cobell as one governed by the common law of trust would not, therefore, provide the Plaintiffs any better basis for ignoring DoI's "co-existing statutory obligations."

15. The prudence norm is situational. The prudence norm of the common law of trusts, which underlies most of the duties that the Plaintiffs have scheduled in their version of "applicable trust standards," would also have the effect of adjusting DoI's standard of care to take account of its "co-existing statutory obligations." As noticed above, the duty of prudent administration requires the trustee to act with "such care and skill as a man of ordinary prudence would exercise in dealing with his own property ...." Restatement (Second) of Trusts § 174 (1959). The official comment to the Uniform Prudent Investor Act, describing similar language there, explains that "[t]he standard is the standard of the prudent investor similarly situated." Uniform Prudent Investor Act § 2(a), comment (1994) (emphasis supplied). ERISA's version, enacted in 1974, calls for the trustee to act as "a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims ...." ERISA § 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B). What these various formulations share is their understanding that the prudence norm of trust law is the standard of care of a reasonable person similarly situated. In the case of the IIT, the standard would be that of a prudent governmental agency whose trusteeship of the IIT is located amidst that trustee's "co-existing statutory obligations." The IIT is importantly different from the simple donative trust, and the doctrinal structure of the law of trust would take account of the differences in formulating the standard of care. The prudence norm would adjust to the distinctive circumstances of this trust and to the budgetary, institutional, and operational

constraints under which this trustee must operate. Those distinctive attributes of the IIT cannot be wished away by invoking doctrinal labels of trust law.

Respectfully submitted,

Sincerely,

John H. Langbein

JHL/st
encs (3)

February 2003

John H. Langbein

Mailing address:

Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215

Street address (for courier deliveries):

127 Wall Street
New Haven, CT 06511

Telephone: 203-432-7299 (office); 203-389-6564 (home)

FAX: 203-432-1109 (office); 203-389-2608 (home)

Email: john.langbein@yale.edu

I. Professional

Sterling Professor of Law and Legal History, Yale University, from 2001; Chancellor Kent Professor of Law and Legal History, Yale University, 1990-2001

Honorary Fellow, Trinity Hall, Cambridge (elected 2000)

Previous positions: University of Chicago, Max Pam Professor of American and Foreign Law, 1980-90; professor, assistant professor 1971-80

Visiting professor: Arthur Goodhart Professor in Legal Science, Cambridge University (1997-98); Yale Law School (1989-90); Stanford Law School (1985-86); University of Michigan Law School (summer 1976)

Visiting fellow:
Trinity Hall, Cambridge (1997-98)
All Souls College, Oxford (1977)
Max Planck Institute for European Legal History, Frankfurt (1977; 1969-70)
Max Planck Institute for Criminal Law, Freiburg (1973) (Alexander von Humboldt-Stiftung Fellow)

Teaching subjects:
Pension and employee benefit law (ERISA)
Wills and succession
Trusts, estates, and fiduciary administration
English, European, and American legal history
Comparative law (emphasizing German law and legal institutions)

Admitted to the bar:
District of Columbia (1969)
England: Of the Inner Temple, Barrister-at-Law (1970)
Florida (1971)

Member:
Academy of European Private Law (elected 2001)
American Academy of Arts and Sciences (elected 1987)
American Association for the Comparative Study of Law
American Bar Association (sections: Legal Education; Real Property, Probate & Trust)
American College of Trust and Estate Counsel (elected 1985)
American Historical Association
American Law Institute (elected 1983)
American Society for Legal History
Association internationale de droit judiciaire (elected 1984)
Connecticut Bar Association (section: Estates & Probate)
Gesellschaft für Rechtsvergleichung (Germany)
International Academy of Comparative Law (elected 1984)
International Academy of Estate and Trust Law (elected 1985)
International Association of Penal Law
International Commission for the History of Representative and Parliamentary Institutions
Selden Society
Society of Public Teachers of Law (UK)
Wagner Society of America

II. Public Service (current)

Reporter, Uniform Law Commission, Uniform Prudent Investor Act (since 1991)

Associate Reporter, American Law Institute, Restatement of Property (Third): Wills and Other Donative Transfers (since 1990); vols. 1-2 published (1999, 2003), vol. 3 in preparation

Adviser, American Law Institute, Restatement of the Law of Trusts (Third) (since 1993); and Restatement of the Law of Trusts (Third): Prudent Investor Rule (1987-92)

Member, U.S. Secretary of State's Advisory Committee on Private International Law, Study Groups on Trusts and Decedents' Estates (since 1984)

Commissioner, National Conference of Commissioners on Uniform State Laws (since 1984):

Gubernatorial appointments from Illinois, 1984-91; from Connecticut, since 1991. Scope & Program Committee, 1989-91; Director, Division D (Probate and Trust), 1991-97.

Drafting Committee on the Uniform Trust Code, since 1995.

Drafting Committee on Uniform Management of Institutional Funds Act, since 2001

Completed projects: Co-reporter, Uniform Transfer on Death Security Registration Act; Drafting Committee on Uniform Custodial Trust Act; Drafting Committees to Revise Articles II & VI, Uniform Probate Code; Drafting Committee on Uniform Health-Care Decisions Act (right to die); Drafting Committee on Uniform Principal and Income Act; Drafting Committee on Uniform Management of Public Employee Retirement Systems Act; Study Committee on Uniform Management of Institutional Funds Act

Member, Joint Editorial Board for the Uniform Trust and Estate Acts (formerly Joint Editorial Board for the Uniform Probate Code) (Uniform Law Commission representative), since 1985

Member, Connecticut Law Revision Commission, Probate Advisory Committee, since 1990

III. Personal

Born 17 November 1941; American citizen; married 24 June 1973, Kirsti M. Langbein; children, Christopher H., b. 11 July 1979; Julia L., b. 6 June 1981; Anne K., b. 25 March 1983

Languages: fluent German, good French, working Italian

Church: St. Thomas Episcopal Church, New Haven (vestry, 1991-94); member, Board of Managers, St. Thomas Episcopal Day School (1991-97, chair 1995-97)

Listed in: Who's Who in America
Who's Who in American Law
Who's Who in American Education

IV. Degrees

M.A. 1990 (hon.), Yale University

Ph.D. 1971, Cambridge University, England (Trinity Hall). Thesis: "The Criminal Process in the Renaissance"

LL.B. 1969, Cambridge University; first class honours; Trinity Hall Prize in English law; Scholar of Trinity Hall

LL.B. 1968, Harvard Law School; magna cum laude; editor, Harvard Law Review, vol. 80, articles editor, vol. 81; Frank Knox Fellow, 1968-69; Harvard Law School Fellow in Foreign and Comparative Law, 1968-71

A.B. 1964, Columbia University (economics)

V. Principal Publications: Books

The Origins of Adversary Criminal Trial (Oxford Univ. Press 2003)

Uniform Statutes on Trusts and Estates: 2002-03 Edition (with Lawrence Waggoner) (Foundation Press) (previous editions sub nom. Selected Statutes on Trusts and Estates, 2001, 1995, 1994, 1992, 1991, 1989, 1987)

Pension and Employee Benefit Law (with Bruce Wolk) (3d ed., Foundation Press 2000) (2d ed., 1995; 1st ed. 1990) Teacher's Manual (2000, 1995, 1990); annual supplements (2002, 2001, 1999, 1998, 1997, 1994, 1993, 1992, 1991)

Pension and Employee Benefit Statutes and Regulations: Selected Sections (with Bruce Wolk) (Foundation Press 2003) (previous edition 2002)

The Privilege Against Self-Incrimination: Its Origins and Development (with R.H. Helmholz et al.) (Univ. Chicago Press) (1997)

Comparative Criminal Procedure: Germany (West Publ. Co., American Casebook Series 1977)

Torture and the Law of Proof: Europe and England in the Ancien Régime (Univ. Chicago Press 1977)

Prosecuting Crime in the Renaissance: England, Germany, France (Harvard Univ. Press 1974) (awarded the Yorke Prize by Cambridge University); excerpted in part and published in translation as "Die Carolina" in F.C. Schroeder, ed., Die Carolina: Die Peinliche Gerichtsordnung Kaiser Karls V. von 1532 (Wissenschaftliche Buchgesellschaft, Darmstadt 1986)

VI. Principal Publications: Articles

Pension and Investment Law

What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West (forthcoming 2003) (Jan. 2003 working draft disseminated on four SSRN databases)

Trust-Investment Law in the United States: Main Themes of the Uniform Prudent Investor Act, Shintaku No. 189 (Feb. 1997) (in Japanese)

The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa Law Review 641 (1996); republished in Modern International Developments in Trust Law (D. Hayton, ed.) (1999)

The New American Trust-Investment Law, 8 Trust Law International 123 (1994)

Reversing the Nondelegation Rule of Trust-Investment Law, 59 Missouri Law Review 104 (1994) (William Fratcher memorial issue)

The Supreme Court Flunks Trusts, [1990] Supreme Court Review 207 (1991)

The Conundrum of Fiduciary Investing under ERISA, in Proxy Voting of Pension Plan Equity Securities (D. McGill, ed.) (Wharton School: Pension Research Council) (1989)

ERISA's Fundamental Contradiction: The Exclusive Benefit Rule (with Daniel R. Fischel), 55 Univ. Chicago Law Review 1105 (1988)

Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal, in Disinvestment: Is it Legal, Is it Moral? Is it Productive? (National Legal Center for the Public Interest, Washington 1985)

Social Investing and the Law of Trusts (with Richard Posner), 79 Michigan Law Review 72 (1980)

Market Funds and Trust-Investment Law II (with Richard Posner), 1977 American Bar Foundation Research Journal 1

The Revolution in Trust Investment Law (with Richard Posner), 62 American Bar Association Journal 887 (1976)

Market Funds and Trust-Investment Law (with Richard Posner), 1976 American Bar Foundation Research Journal 1

Trust and Estate Law

Mandatory Rules in the Law of Trusts (forthcoming 2003) (originally presented as the Hess Memorial Lecture of the Ass'n of the Bar of the City of New York, April 2002)

The Uniform Trust Code: Codification of the Law of Trusts in the United States, 15 Trust Law International 69 (2001).

The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale Law Journal 165 (1997); republished in Modern International Developments in Trust Law (D. Hayton, ed.) (1999)

The Contractarian Basis of the Law of Trusts, 105 Yale Law Journal 625 (1995)

Will Contests, 103 Yale Law Journal 2039 (1994) (review)

Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code (with Lawrence Waggoner), 55 Albany Law Review 871 (1992) (Uniform Probate Code Symposium Issue)

The Inheritance Revolution, The Public Interest 15-31 (Winter 1991)

Education and Family Wealth, 20 Planning for Higher Education 1 (1991)

Taking a Look at the Pluses and Minuses of the Practice, Trusts & Estates 10-18 (December 1989)

The Twentieth-Century Revolution in Family Wealth Transmission, 86 Michigan Law Review 722 (1988)

The Twentieth-Century Revolution in Family Wealth Transmission and the Future of the Probate Bar, 1988 Probate Lawyer 1 (American College of Probate Counsel)

Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 Columbia Law Review 1 (1987)

Redesigning the Spouse's Forced Share (with Lawrence Waggoner), 22 Real Property, Probate and Trust Journal 303 (ABA, 1987); abridged and republished, 32 Law Quadrangle Notes 30 (Univ. Michigan Law School 1988)

The Nonprobate Revolution and the Future of the Law of Succession, 97 Harvard Law Review 1108 (1984)

Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? (with Lawrence Waggoner), 130 Univ. Pennsylvania Law Review 521 (1982).

Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine, in American/Australian/New Zealand Law: Parallels and Contrasts 59 (ABA Press 1980)Crumbling of the Wills Act: Australians Point the Way, 65 American Bar Association Journal 1192 (1979); substantially republished as The Crumbling of the Wills Act: The Australians Point the Way, 25 Univ. Chicago Law School Record 3 (1979)

Living Probate: The Conservatorship Model, 77 Michigan Law Review 63 (1978)

Substantial Compliance with the Wills Act, 88 Harvard Law Review 489 (1975)

Comparative Law

Cultural Chauvinism in Comparative Law, 5 Cardozo Journal of International & Comparative Law 41 (1997)

Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons, in What Are Law Schools For? (P. Birks, ed.) (Oxford Univ. Press 1996)

Money Talks, Clients Walk, Newsweek, April 17, 1995, at 32-34.

The Influence of Comparative Procedure in the United States, 43 American Journal of Comparative Law 545 (1995) (United States National Report to the Tenth World Congress for Procedure Law).

American Legal Education in Comparative Perspective, in Legal Education in the Netherlands in a Comparative Context 55-64 (Grotius Academy 1995) (ISBN 90-71478-43-2)

The Influence of the German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure, in Einfluß deutsch-sprachiger juristischer Emigranten auf die Rechtsentwicklung in den USA und in Deutschland (Mohr Verlag, Tübingen 1993)

Trashing "The German Advantage," 82 Northwestern Law Review 763 (1988)

Comparative Civil Procedure and the Style of Complex Contracts, 35 American Journal of Comparative Law 381 (1987); republished in Der komplexe Langzeitvertrag/The Complex Long-Term Contract 445 (F. Nicklisch, ed.) (C.F. Müller Verlag, Heidelberg 1987); republished in German as Zivilprozessrechtsvergleichung und der Stil komplexer Vertragswerke, 86 Zeitschrift für vergleichende Rechtswissenschaft 141 (1987)

The German Advantage in Civil Procedure, 52 Univ. of Chicago Law Review 823 (1985)

Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 American Bar Foundation Research Journal 195

Land without Plea Bargaining: How the Germans Do It, 78 Michigan Law Review 204 (1979)

Judging Foreign Judges Badly: Nose Counting Isn't Enough, 18 Judges' Journal 4 (Fall 1979)

Comparative Criminal Procedure: "Myth" and Reality (with Lloyd L. Weinreb), 87 Yale Law Journal 1549 (1978)

Controlling Prosecutorial Discretion in Germany, 41 Univ. Chicago Law Review 439 (1974)

Legal History

Blackstone, Litchfield and Yale: The Founding of the Yale Law School, in History of the Yale Law School: The Tercentenary Lectures (forthcoming, Yale Univ. Press 2003)

Law School in a University: Yale's Distinctive Path in the Later Nineteenth Century, in History of the Yale Law School: The Tercentenary Lectures (forthcoming, Yale Univ. Press 2003)

Trinity Hall and the Relations of European and English Law from the Fourteenth to the Twenty-First Centuries, in The Milestones Lectures (Cambridge, England 2001)

The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors, 58 Cambridge Law Journal 314 (1999) (awarded the Sutherland Prize, American Society for Legal History, 2000)

The Later History of Restitution, in Restitution Past, Present and Future: Essays in Honour of Gareth Jones 57-62 (Oxford 1998)

The Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 Columbia Law Review 1168 (1996)

The Historical Origins of the Privilege Against Self-Incrimi nation at Common Law, 92 Michigan Law Review 1047 (1994)

Chancellor Kent and the History of Legal Literature, 93 Columbia Law Review 547 (1993)

On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial, 15 Harvard Journal of Law & Public Policy 119 (1992); published in translation as Sobre el mito de las constituciones escritas: La desaparicion del juicio penal por jurados, 1996 Nueva Doctrina Penal 45 (Argentina, 1996)

Culprits and Victims, Times (London) Literary Supplement, Oct 11, 1991 (review)

The Twilight of Amateur Law Enforcement, 9 Law & History Review 398 (1991) (review)

The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany: 1700-1900 (Comparative Studies in Continental and Anglo-American Legal History) (Duncker & Humblot, Berlin 1987)

The Constitutio Criminalis Carolina in Comparative Perspective: An Anglo-American View, in Strafrecht, Strafprozess und Rezeption (P. Landau & F.-C. Schroeder, eds.) (Frankfurt 1984)

Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 Univ. Chicago Law Review 1 (1983)

Illustrations as Legal Historical Sources, 29 Univ. Chicago Law School Record 3 (1983)

Encyclopedia of Crime and Justice, entry for the history of the law of torture (Macmillan, 1983)

Albion's Fatal Flaws, Past and Present (No. 98, February 1983) 96-120

Biographical Dictionary of the Common Law (A.W.B. Simpson, ed.), entries for G. Gilbert, W. Lambarde, D. Ryder, T. de Veil, J. Wild (Butterworths 1983)

Introduction, Sir William Blackstone, Commentaries on the Laws of England, Volume III (Univ. Chicago Press, reprint ed. 1979)

Understanding the Short History of Plea Bargaining, 13 Law and Society Review 261 (1979)

Torture and Plea Bargaining, 46 Univ. Chicago Law Review 4 (1978); substantially republished in The Public Interest (Winter 1980); latter version republished in The Public Interest on Crime and Punishment (N. Glazer ed. 1984); republished in spanish as "Tortura Y Plea Bargaining," in El Procedimiento Abreviado (J.B. Maier & A. Bovino eds.) (Buenos Aires 2001)

The Criminal Trial Before the Lawyers, 45 Univ. Chicago Law Review 263 (1978)

The Historical Origins of the Sanction of Imprisonment for Serious Crime, 5 Journal of Legal Studies 35 (1976)

Fact Finding in the English Court of Chancery: A Rebuttal, 83 Yale Law Journal 1620 (1974)

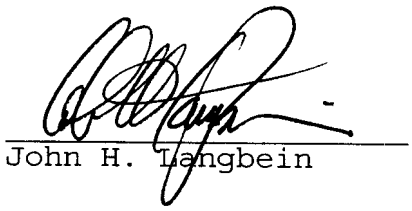
The Origins of Public Prosecution at Common Law, 17 American Journal of Legal History 313 (1973)

February 27, 2003

Statement of John H. Langbein

Re: Cobell v. Norton

I submit the following statement regarding my compensation in connection with service as an expert in this matter: I am being compensated at my normal hourly rate of $400.



John H. Langbein

December 2002

John H. Langbein

Prior Deposition and Trial Testimony

Richard L. Berry v. Key Trust Co., et. al., Court of Common Pleas, Cuyahoga County, Ohio, Case No. 431079; trust termination action; retained for petitioner in April 2002 by Martha T. Starkey, Esq., Starkey Law Group, 2 Meridian Corporate Plaza, 401 Pennsylvania Parkway, Suite 100, Suite 100, Indianapolis, IN 46280; 317-705-8888; deposition taken in Cleveland, OH, Sept. 27, 2002.

Keach & Sage v. U.S. Trust Co., N.A., et. al., U.S. District Court, Central District of Illinois, Peoria Division, Case No. 01-1168; ESOP fiduciary investment issues under ERISA; retained by Dean B. Rhoads, Esq., Sutkowski & Rhoads, Ltd., 124 S.W. Adams St., Suite 560, Peoria, IL 61602-1357; 309-680-8000; deposition taken in New York, NY, Aug. 12, 2002.

Bishop v. McNeil, Court of Chancery, New Castle County, DE; trust division proceeding, including issues of co-trustee fiduciary duties; retained for Henry McNeil in April 2002 by Lawrence T. Hoyle, Esq., Hoyle, Morris & Kerr LLP, 1 Liberty Place, Suite 4900, 1650 Market St., Philadelphia, PA 19103-7397; 215-981-5700; deposition taken in Philadelphia, PA, Jun. 13, 2002.

Godfrey v. Kamin, U.S. District Court, Northern District of Illinois, Eastern Division, Case No. 01 C 3433; breach of trust action: loyalty, prudence, and diversification issues arising from investment in close corporation; impartiality issues arising from excessive concentration of financial assets in fixed income investments; retained in Dec. 2000 by David H. Latham, Esq., Suite 1118, 300 West Washington St., Chicago IL 60606; 312-782-1910; retained for plaintiff trust beneficiaries; deposition taken in Chicago, January 8, 2002.

Whetman v. IKON, U.S. District Court, Eastern District of Pennsylvania, Civil No. 00-87, also D. Utah No. Civil 2-98-CV-89; ERISA action involving fiduciary duties of employer and other fiduciaries in the designation of employer stock as an investment option under a 401(k) plan; retained in March 2000 by Ron Kilgard, Esq., Dalton, Gotto, Samson & Kilgard, Suite 900, National Bank Plaza, 3101 North Central Ave., Phoenix, AZ 85012; (602) 230-6324; retained for plaintiff plan participants; deposition taken in New York, August 2, 2001.

Ceridian Corporation Retirement Plan, et al., Claimants, v. Corporate Officers & Directors Assurance, Ltd., Respondents: International Arbitration under the Laws of Bermuda; ERISA attorney fees issues in construction of fiduciary liability insurance policy; retained in April 2000 by R. Scott Davies, Briggs & Morgan PA, 2400 IDS Center, 60 South Eighth St., Minneapolis, MN 55402; 612-334-8561; retained for claimant Ceridian Plan; deposition taken in New York, May 3, 2000; arbitration testimony in Toronto May 31, 2000.

Stoddart v. Miller (Peccole Trusts), Las Vegas, NE, state court; equitable accounting issues; retained for trusts by William R. Phillips, Esq., General Counsel, Peccole Nevada Corp., 851 South Rampart Blvd., Suite 220, Las Vegas, NE 89145; trial testimony in Las Vegas, NE, May 4, 2001.

Tanaka v. First Hawaiian Bank et al., U.S. District Court for the District of Hawaii, Honolulu, HI, Civil No. 96-00734-SPK; fiduciary standards in probate and trust administration; retained in 1997 by Gerald A. Brooks, P.O. Box 121, Honolulu, HI 96810; 808-533-3312; retained for plaintiff, Yoshitaro K. Tanaka; deposition taken in New York, May 5, 2000.

First National Bank of Chicago v. Acco USA, Inc.-IBT Retirement Plan, U.S. District Court, N.D. IL, Chicago IL, No. 93 C 0896; issues of impartiality and prudent administration in the operation of a collective real estate investment trust; retained in 1999 by William Conlan & Mark Blocker, Sidley & Austin, 10 South Dearborn St., Chicago, IL 60603, 312-853-7000; retained for functional defendant, First National Bank of Chicago; deposition taken November 1999, trial testimony in Chicago December 16, 1999.

Board of Pensions of the Municipal Employees Pension and Relief Fund of Prichard, Alabama v. Regions Bank, No. CV-97-002524; Mobile County, AL, Circuit Court; fiduciary duties of trustee under "legal list" trust-investment statute; retained in 1998 by J. Marshall Gardner, Esq., Vickers, Riis, Murray & Curran, LLC, Regions Bank Bldg., 106 St. Francis St., Mobile, AL 36602-3408, 334-432-9772; retained on behalf of defendant trustee; deposition in New Haven, CT, April 22, 1999; trial testimony in Mobile AL, August 29, 1999.

In re Eric A. Knudsen Trust, No. T No. 95-120; First Circuit Court, Honolulu, Hawaii; trust investment issues, including duties of diversification, prudence, and productivity; retained in 1994 by John Hoshibata, Suite 2300 Pauahi Tower, 1001 Bishop St., Honolulu, HI 96813, 808-524-5644; retained on behalf of trust beneficiaries; deposition in New Haven, CT, June 9-10, 1999.

Eychaner & Weiss v. Theodore Gross & Roosevelt University, No. 94 CH 11328; Cook County, IL, Circuit Court, Chancery Division; trust creation issues affecting ownership of landmark structure; retained in 1998 by Susan A. Stone, Esq,, Sidley & Austin, 10 South Dearborn St., Chicago IL. 60603, 312-853-2177; retained on behalf of defendant university, an Illinois not for profit corporation, and its president; deposition in Chicago, May 29, 1998; trial testimony in Chicago, July 7, 1998.

Fisher v. Bank of America National Trust and Savings Ass'n, et. al, U.S. District Court, N.D. CA (San Francisco), No. C 96-0203 CAL; loyalty, prudence, diversification, and remedy issues arising from corporate fiduciary's investing trust accounts in real estate limited partnerships; retained in 1997 by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, 415/464-4770; retained on behalf of plaintiff class; deposition in San Francisco, April 13-14, 1998.

Sheronas v. Glenmede Trust Co. et al., Court of Common Pleas, Montgomery County, Orphans' Court Division, PA, Nos. 90-1320, 84-422; fiduciary loyalty and impartiality issues; retained in 1995 by William T. Hangley, Esq., Hangley Aronchick Segal & Pudlin, 1 Logan Square, 12th Fl., Philadelphia, PA 19103-6933, 215/668-0300; retained for defendant trustee's counsel; expert report June 13, 1997; deposition in Philadelphia, August 1, 1997.

Arthur R. Moore et al. v. Raymond J. Sweeney, et al., Circuit Court, Alexandria, VA, No. CL941029; ERISA loyalty, prudence, and prohibited transactions issues in attorney malpractice action; retained in 1997 for defendant attorney by Nicholas Lobenthal, Esq., Mayer, Brown & Platt, 1675 Broadway, New York, NY 10019-5820, 212/506-2584; deposition in Alexandria, VA, June 12, 1997.

Carol F. Nickel v. Bank of America National Trust and Savings Ass'n, et al., U.S. District Court, N.D. CA (San Francisco), No. C 94 2716 CAL; remedy and measure of damages issues in trustee fee overcharge class action; retained in 1996 by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, 415/464-4770; retained on behalf of plaintiff class; deposition in San Francisco, July 24-25, 1996; trial testimony in San Francisco, September 19, 1996.

In re McCune Foundation, Court of Common Pleas, Orphans' Court Division, Allegheny County (Pittsburgh) PA, No. 2-79-R-4788; trustee loyalty and diversification issues; retained in 1993 by Donald G. Gerlach, Esq., Reed Smith Shaw & McClay, 435 Sixth Ave., Pittsburgh, PA 15219-1886, 412/288-3192; retained for plaintiffs, members of trust distribution committee; trial testimony April 24, 1996.

Fisher v. Wilmington Trust Co. Court of Chancery, New Castle (Wilmington) DE Civil Action 11376; trust investment issues touching diversification and principal and income allocations; retained in 1993 by Phebe S. Young, Esq., Bayard, Handelman & Murdoch, P.A., 922 Market St., 13th Floor, Wilmington DE 19899, 302/429-4236; retained for plaintiff; deposition taken April 18, 1996.

In re William F. Dart Trust, Ingham County (Lansing) MI Probate Court, Probate Case No. G-6372; trustee removal and breach of trust proceedings; retained in 1995 by Allan T. Claypool, Esq., Foster, Swift, Collins & Smith, 313 So. Washington Square, Lansing, MI 48933-2193, 517/371-6264; retained for defendant trustee; depositions taken December 1995 and November 1996.

Chubet v. Huntington Trust Co., Court of Common Pleas, Franklin County, Columbus, OH, Case No. 94CVA-06-4133; trustee loyalty and diversification issues; retained in 1995 by Bernard Mazer, Esq., Mazer & Co., 420 B Metro Place South, Dublin, OH 43017, 614/766-8108; retained for Mary Ann Prescott Chubet, plaintiff; expert report provided; deposition taken October 1995.

Estate of Elizabeth Peebles Jones, Circuit Court for Indian River County, FL, Probate Div., Case No. P-93-374.01; prudence of executor's retention of nondiversified block of shares; retained in 1994 by James G. Pressly, Jr., Esq., 222 Lakeview Dr., West Palm Beach FL 33401-6112, 407/659-4040; retained for Owen Jones, plaintiff; deposition taken June 1995.

Maud Hill Schroll Trust, Ramsey County (St. Paul) District Court, MN; principal and income issues affecting timber lands; retained in 1994 by James M. Dombrowski, Esq., P.O. Box 751027, Petaluma, CA 94975-1027, 707/762-7807; retained for Christopher Schroll, plaintiff; trial testimony May 1995.

In re Trust under Will of Isabel Stillman Rockefeller, Court of Probate, District No. 57, Greenwich CT; trustee loyalty and investment issues; retained 1994 by Charles A DeLuca, Esq,, P.O. Box 3057, 80 Fourth St., Stamford, CT, 203/357-9200; retained in 1994 for John W. Roberts, Esq., Guardian ad Litem; deposition taken February 1995.

Vivian R. Broderick et al. v. Colorado National Bank et al., City and County of Denver CO Probate Court, Case No. 92 PR 1520; trustee's liability for exposing unrelated trust assets to environmental liability of trust-held enterprise; retained in 1994 by Gregory A. Ruegsegger, Esq., Dufford & Brown, 1700 Broadway, Suite 1700, Denver. CO 80290-1701, 303/861-8013; retained for plaintiffs; deposition taken June 1994.

First National Bank of Chicago v. Stephen R. Steinbrink, U.S. District Court, N.D. IL, Chicago IL, No. 92 C 4053, and related federal administrative court hearings, Chicago 1993; prudence and regulatory compliance of bank trustee's administration of collective real estate investment trust; retained by Harold C. Hirshman, Esq., Sonnenschein, Nath & Rosenthal, 8400 Sears Tower, Chicago, IL 60606-6404, 312/876-7934; retained for functional defendant, First National Bank of Chicago; affidavit provided, 1993; deposition taken June 1993; trial testimony in administrative court September 1993.

Virginia D'Addario, et al. v. Stanley Bergman et al., Superior Court for District of Fairfield (Bridgeport), CT, Case No. CV 90-0266582S; trustee's liability for resignation to facilitate third-party's intentional breach of trust; retained by Allan M. Cane, Esq., 1172 Post Rd., Fairfield, CT 06430, 203/255-2626; retained for plaintiffs; pretrial deposition July 1993

CAHP, et al. v. Prudential Securities, Inc., et al., San Mateo CA Superior Court, Case No. 372537; prudence of conduct of stock broker alleged to have been fiduciary regarding investments of non-ERISA pension investor; retained by Michael Lawson, Esq., Steefel, Levitt & Weiss, One Embarcadero Center, 29th Floor, San Francisco, CA 94111-3784, 415/788-0900; retained for defendant, Prudential Securities, Inc.; pretrial deposition June 1993.

Virginia D. Blake et al. v. Federal Deposit Insurance Corp., et al., U.S. District Court, District of Maine, Portland ME, Civil Action No. 91-422 P-C; bank co-trustee's liability for retention of trust holding of the bank's shares; retained in 1992 by Thomas A. Cox, Friedman & Babcock, 6 City Center, P.O. Box 4726, Portland, ME 04112, 207/761-0900; retained for defendant Federal Deposit Insurance Corp. as successor to defendant Bank of New England; pretrial deposition September 1992, in Boston, MA.

Weyerhaeuser Co. v. Geewax Terker & Co., federal district court proceeding in Seattle, WA; pension investment manager's liability under ERISA for investing beyond account authority; retained in 1991 by Harry H. Schneider, Jr., Perkins Coie, 1201 Third Ave., 40th Fl., Seattle, WA 98101-3099, 206/583-8888; retained for plaintiff Weyerhaeuser Co.; pretrial deposition November 1991.

In re Estate of Raymond Marks, Circuit Court of Lake County (Waukeegan) IL, No. 82-P-0547; conflict-tainted executors' breach of fiduciary duties of loyalty and prudence in funding estate's marital devise; retained in 1989 by Lee A. Freeman, Sr., Freeman, Freeman & Salzman, 401 No. Michigan Ave., Chicago, IL 60611, 312/222-5110; retained for plaintiff Carol Marks Jacobsohn; pretrial deposition and trial testimony 1990.

In re Estate of Jaffe, state court action in Seattle Washington; bank trustee's fiduciary duties in funding spousal trust; retained in 1987 by Henry M. Aronson, Esq., Seattle, WA; retained for plaintiff Ruby Jaffe; pretrial deposition and videotaped trial deposition taken in March 1987.