IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**Civil Action No. 1:96 CV 01285 (JR)**
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' BRIEF REGARDING THE NATURE AND SCOPE OF THE HISTORICAL ACCOUNTING AND EXCLUSIONS FROM DEFENDANTS' HISTORICAL ACCOUNTING PLAN

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I. Introduction.

During the May 14, 2007 Pre-Trial Status Conference, this Court requested that plaintiffs file two briefs. This is the first of those two. As described by plaintiffs' counsel during the Conference, this brief sets forth the ways in which the government's proposed accounting excludes the vast majority of beneficiaries that have a right to an accounting, and why that is contrary to law. *Tr. May 14, 2007 Status Conference* at 70:11-70:15. To put that discussion in context, it is important to understand the nature and scope of defendants' duty to account as it has been declared in this case.

The need for this brief is manifest. Defendants continue to impermissibly exclude from the accounting vast parts of the trust corpus as well as the majority of the beneficiary class despite rulings of this Court and the Court of Appeals making clear such exclusions are not allowed. Understanding the inadequacy of their accounting is the first step for this Court to consider exercising its inherent broad equitable authority to protect the beneficiary class.

This Court and the Court of Appeals have determined through a series of decisions both the scope of the accounting and what the accounting must demonstrate to be deemed "adequate." To be sure, defendants have some discretion in deciding the manner in which they will fulfill their fiduciary duty so long as, when completed, the accounting they produce satisfies applicable standards. What is equally clear, however, is that defendants cannot take as long as they want to complete the requisite tasks. Moreover, defendants certainly do not have the authority to determine the nature and scope of their duty and whether the "accounting" they have rendered satisfies applicable trust law standards. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("The extent of the duties … of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be

applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney.”).

It is the province of this Court to assess through an appropriate evidentiary hearing – *i.e.* the trial commencing October 10, 2007 – whether defendants meet the governing standard. *See, e.g., Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C.Cir.1981) (court determined that accounts were inadequate); *Osage Tribe of Indians of Oklahoma v. U.S.*, 68 Fed.Cl. 322, 334 (2005) (Court adjudged that Department of Interior had not provided an adequate or “meaningful” accounting); *Frett v. Benjamin*, 187 F.2d 898, 900 (3d Cir. 1951) (describing the province of the trial court to determine the adequacy of an accounting made by the defendants”); *In re H. King & Associates*, 295 B.R. 246, 272 (Bkrtcy. N.D. Ill. 2003) (Describing how “[a]fter the accounting is filed” there is a need “to determine the adequacy of the accounting”). *Cf. In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1299 (11th Cir. 2006) (“fiduciary duty includes an obligation to provide this Court … with an adequate accounting”).

What we show in this brief is that this Court need not wait any longer to determine whether the final accounting will be adequate. The inadequacy is apparent from the vast exclusions from defendants’ plans. Defendants, by their own admission, are impermissibly denying *in toto* an accounting for the vast majority of the members of this certified class. In addition, defendants, by their own admission, are not providing any accounting or even a cursory review for the vast majority of transactions (even for the beneficiaries for which they claim they will be providing an “accounting”). Also, defendants are not performing certain tasks – *e.g.,* cadastral surveys and accounting of underlying assets – which are necessary to an adequate accounting of all funds. What is more, defendants continue to make these remarkably vast

exclusions despite rulings by this Court and the Court of Appeals that have made unmistakably clear that they cannot provide an adequate accounting while maintaining these exclusions.

This brief first outlines the nature and scope of the accounting required by law, as elucidated in numerous decisions of this Court and the Court of Appeals. We then turn to the exclusions from that accounting which defendants acknowledge they are making and those which plaintiffs believe they will continue to make. Finally, we address the indispensability of the Treasury trustee-delegate participating in the upcoming trial.

II. The nature and scope of the duty to account has been declared and is law-of-the-case.

Over eighty published opinions have been issued by this Court and the Court of Appeals, and hundreds of other matters central to defendants' declared accounting duties have been resolved by court order. It would be both a violation of the law-of-the-case doctrine and a waste of judicial resources to re-litigate these decided matters, and would further delay resolution of this case on the merits. Of particular relevance for present purposes, this Court has described the nature and scope of the declared accounting duty and it has ruled on specific items that must be included for the accounting to be adequate and for the duty to be discharged. What follows is a summary of key rulings, a necessary antecedent to this Court's evaluation of the adequacy of defendants' accounting plan and the reasonableness of steps they say they have taken to implement an adequate accounting plan.

Before we address the duty to account, it is important to clarify a preliminary issue. Defendants insist that only trust duties expressly stated in statute are enforceable against them with respect to their exercise of control over plaintiffs' trust assets and their management of the Individual Indian Trust. But, they are wrong. Settled law and the law of this case is to the contrary and the government's position, in that regard, has been rejected consistently by the

Supreme Court,[1] this Court, this Circuit, and courts in other circuits.[2] We begin with a discussion of this important point.

A. Defendants' fiduciary duties include "implied" duties.

In *Cobell v. Norton ("Cobell VI")*, 240 F.3d 1081 (D.C. Cir. 2001), the Court of Appeals held that "[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties," the duties are "traditional fiduciary duties" which are applicable to, and enforceable against, the defendants "unless Congress has unequivocally expressed an intent to the contrary." *Id.* at 1099 (citations and quotations omitted). Furthermore, where, as here, the government, in fact, has exercised control over plaintiffs' trust assets since the inception of the trust, such duties are "defined in traditional equitable terms." *Id.* The Court explained that by its nature, trust instruments – here the statutes creating the trust – necessarily do not expressly restate each and every applicable fiduciary duty, but that "many of the duties and powers are *implied*" by the establishment of the trust relationship. *Id.* To be sure, enforceable trust duties

[1] *See United States v. White Mountain Apache Tribe,* 537 U.S. 465, 475 (2003) (the government as trustee held to same trust duties as private trustee, including the "duty to preserve and maintain trust assets"); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (government conduct to be "judged by the most exacting fiduciary standards"); *United States v. Mason*, 412 U.S. 391 (1973) (government owes ordinary trust obligations including duty of care); *Nevada v. United States*, 463 U.S. 110, 142 (1983) ("[W]here only the relationship between the Government and the [Indians] is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States."); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*") ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians").

[2] *See, e.g., Assiniboine and Sioux Tribes of the Fort Peck Indian Reservations v. Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 794 (9th Cir. 1986) ("Courts judging the actions of federal officials taken pursuant to their trust relationship with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries."); *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) ("[w]here a trust relationship between Indians and the Government is established, the Government's actions normally are judged according to standards established in traditional trust law doctrine").

must find "root[s]" in statutes and other federal law – *i.e.* "the substantive laws creating those obligations." *Id.* at 1098. But, "[t]his does not mean that the failure to enumerate the trustee's duties absolves the government of its responsibilities." *Id.* at 1099 (emphasis added).

That a fiduciary duty need not be explicitly stated in the text of the statute was confirmed in *White Mountain Apache Tribe*. The central issue before the Supreme Court was whether the "1960 Act" placing "Fort Apache" in trust status could be read "to infer a[n enforceable] fiduciary duty" to preserve Fort Apache. *White Mountain Apache Tribe*, 537 U.S. at 469, 473. The Court readily acknowledged that the "1960 Act does not … expressly subject the Government to management and conservation duties" or expressly impose the duty to preserve and maintain trust assets. *Id.* at 475. Nevertheless, because the 1960 Act did create a trust relationship, the government was, by implication, subject to the "common law dut[y] of a trustee … to preserve and maintain trust assets." *Id.* (citations and quotations omitted).[3]

Accordingly, to the extent that the government's arguments, contentions, or accounting plans assume that only express statutory duties are enforceable, they are in conflict with settled law and law of this case and are without merit.

B. The nature and scope of the duty to account has been declared.

In its seminal decision, *Cobell v. Babbitt ("Cobell V")*, 91 F. Supp. 2d 1 (D.D.C. 1999), this Court ruled that defendants must provide an adequate accounting of "all money" held in the IIM Trust. *Id.* at 58. This Court also held that trustee-delegates had breached this duty to account by failing to provide any accounting, let alone an adequate one. *Id.* The Court of Appeals affirmed the decision on both counts. *Cobell VI,* 240 F.3d at 1104-1105. *Cobell VI*

[3] *See also Cobell v. Norton ("Cobell XIII")*, 392 F.3d 461, 472 (D.C. Cir. 2004) (*citing White Mountain Apache* for the conclusion that to determine if a fiduciary duty is applicable, the court must "look to trust law to find ... a particular common law duty" and then determine if it was "implied" (*i.e.* not expressly stated) in the statutory scheme).

further found – based on the *Cobell V* trial record developed in the summer of 1999 – that trustee-delegates had "unconscionabl[y] delay[ed]" carrying out this fundamental duty to account. *Id.* at 1096.

Cobell V and *Cobell VI* decreed with great specificity the scope of defendants' declared accounting duty and identified certain actions that must be taken to discharge that duty. In defining the scope of this traditional trust duty, it is helpful to begin with a discussion of the origins of the duty itself since much of what defendants exclude from the accounting is grounded in their discredited claim that the Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001 *et seq*. ("1994 Act") is the sole source of their duty to account. Not only have this Court and the Court of Appeals rejected that claim, but Congress expressly confirmed and codified the government's duty to account for all funds since the time it first exercised control over the trust assets of the plaintiff class – within a few years after the establishment of the trust and before the turn of the 20th century.[4]

1. The duty to account "pre-exist[ed]" the 1994 Act.

This Court and the Court of Appeals have rejected the notion that the accounting defendants must perform is defined by the 1994 Act. This central issue was addressed by the Court of Appeals in *Cobell VI*. A principal argument made by defendants in that appeal was that the metes and bounds of their accounting obligation is "defined by the 1994 Act." *Cobell VI*, 240 F.3d at 1099. In response, the Court of Appeals held:

> The fundamental problem with appellants' claims is the premise that their duties are solely defined by the 1994 Act. The Indian Trust Fund Management Reform Act <u>reaffirmed and clarified preexisting duties</u>; <u>it did not create them</u>. It further

[4] 30 Stat 495, 55th Cong., Sess. II, Ch. 545 at 1399 (1899) ("hereafter Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and be responsible therefore under their official bonds.").

> sought to remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of appellants' obligations.

Id. at 1100 (emphasis added). Further, the Court explained that

> [e]nactment of 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.

Id. (emphasis added). Accordingly, the Court held that "the 1994 Act plainly reaffirm[ed] the government's preexisting duty to provide an accounting to IIM trust beneficiaries," and furthermore, "that such an obligation inheres in the trust relationship itself." *Id.* at 1103 (emphasis added). *See also id.* at 1102 (holding that the 1994 Act "reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting"). Put simply, "[n]othing in the 1994 Act, nor any other federal statute, limits or alters this right [to a complete accounting]." *Id.* at 1104. Defendants never explain how the duty to account is limited to the express terms of the 1994 Act since the Act does not "create," "limit" or "alter[]" the duty.

2. This Court and the Court of Appeals have defined the nature and scope of the accounting.

Defendants suggest that if they simply itemize transactions that are recorded on their failed trust management systems, label that itemized list as a "Statement of Account," and transmit the list to a beneficiary, then it is within their discretion, not this Court's, to determine they have discharged their accounting duty. However, such a primitive substitute would be utterly "inadequate" for any trustee. Aside from the fact that such a rendering would accomplish nothing of value with respect to an accounting of all funds for each class member, it is within the discretion of this Court, not defendants, to determine whether the government has discharged its accounting duty; authority that is solely vested in this Court sitting in equity. *See Cobell VI* at

1103 (holding that the court will determine adequacy of the accounting). *See also Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 112 (1989).

On the issue of adequacy, this Court and the Court of Appeals have made rulings which are law of the case and binding in these proceedings. *Cobell VI* reaffirmed that to be adequate the accounting must be for "*all* funds" in "*all* accounts," and must verify *all* "past deposits, withdrawals, and accruals." *Id.* at 1102. It cannot be otherwise because a critical purpose of an accounting is to "determine an accurate account balance." *Id.* at 1103. And, as the Court of Appeals explained, even "the government's own expert acknowledged" that such a determination is <u>not</u> possible without first validating the accuracy and completeness of all transactions – or throughput – since the inception of the trust. *Id.* This is crucial where, as here, the trust management systems are unreliable, trust records systemically have been destroyed, and the funds are commingled with trust funds of other beneficiaries as well as with funds of the government and third parties, including tribes.

Additionally, for the accounting to be adequate, "the accounting must be sufficient to serve the purposes for which a trust accounting is typically conducted." *Id*. This means that in addition to deposits, withdrawals and accruals, "[a]n accounting necessarily requires a <u>full disclosure and description of each item of property constituting the corpus of the trust</u> at its inception." *Id.* at 1103 (internal quotations and citations omitted). At a bare minimum, in addition to the accounting of all funds, there must be an identification and description of all allotments and a validation of the accuracy and completeness of all land ownership records in order to conclude that the purported allocation of trust income is correct.

As this Court stated in *Cobell v. Norton ("Cobell X")*, 283 F. Supp. 2d 66, 175-76 (D.D.C. 2003), *rev'd on other grounds*, 392 F.3d 461 (D.C. Cir. 2004): "[B]lack-letter trust law

mandates that an accounting include a full disclosure and description of each item of property constituting the corpus of the trust at its inception [and, thus,] Interior's historical accounting must include such a full disclosure and description." *See also Cobell VI* at 1103 ("defining accounting as 'the report of all items of property, income, and expenses' prepared by the trustee for the beneficiary") (*quoting* BLACK'S LAW DICTIONARY (7th ed. 1999)). After all, as *Cobell VI* held, "[t]he trustee's report must contain sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out." *Id*. (alteration in original) (citation and quotation omitted).[5]

In sum, defendants are obliged to perform an adequate accounting. To be adequate, "Interior must perform an accounting of *all* funds deposited or invested in the IIM trust fund since the passage of the General Allotment Act in 1887." *Cobell X*, 283 F.3d at 173. To do so, defendants must identify with specificity the trust corpus and its value when received and currently, all income, withdrawals, expenses, and current trust balances as well as the particular

[5] It is no surprise that trust cases which have assessed the nature and scope of an adequate accounting are in accord with the holdings of this Court and the Court of Appeals. Take for example *Kelly v. Sassower*, 382 N.Y.S.2d 88, 89 (N.Y. App. Div. 1976), where the Court held that, "[i]nter alia, a proper accounting, should state in clear and understandable terms the nature and value of the trust corpus when received; any realized increases or decreases on principal; any income received; any disbursements and distributions to beneficiaries; any commissions paid; and the amount and location of any balance on hand." This, along with the necessary verification records, is the kind of detailed information routinely required. *Accord State ex rel. King v. Harvey*, 214 So. 2d 817, 819 (Miss. 1968) ("An accounting is by definition a detailed statement of the debits and credits between parties arising out of … a fiduciary relation. It is a statement in writing of debts and credits or of receipts and payments. Thus an accounting is an act or a system of making up or settling accounts, consisting of a statement of the account with debits and credits arising from the relationship of the parties.") (citation omitted); *Rothschild v. Village of Calumet Park*, 262 Ill. App. 96, 104, 1931 WL 3041 (1931) ("Where a trust relation exists between parties, the *cestui que trust* is entitled to a complete accounting from the trustee, in which all data in the trustee's accounts, which it is his duty to keep, should be furnished. . . . An accounting is a statement of receipts and payments by a trustee concerning the estate intrusted to his care, the detailed statement of its administration while in his hands, what has been received and from what sources, and the balance, if any, remaining.") (citation and quotation omitted).

beneficial interests – divided and undivided – of each present and former beneficial owner of the trust corpus in all securities (including bearer and registered securities) purchased with pooled trust revenue in the name of, or on behalf of, each such beneficiary, and in the common or pooled trust funds themselves. Anything less would be inadequate.

3. Each present and former beneficiary has a declared right to an adequate accounting.

Defendants seek to narrow the class to those trust beneficiaries whose names defendants have entered in their systems and exclude from the class certified those who are "off the system" without regard to the income generated from trust lands owned by such beneficiaries and without regard to the funds collected and held for the benefit of such beneficiaries. In effect, they define and limit the nature and scope of their trust duties to that which corresponds to the information recorded on their deeply flawed and unreliable trust management systems – thus implying that the government can relieve itself of trust duties simply by failing to set up an "account" or by "closing" an "account" through an internal administrative process or by error. But the scope of the class was determined by this Court on February 4, 1997. The *Order Certifying Class Action* found that the "class of present and former beneficiaries … number[s] in excess of 300,000."[6] *Id.* at 1. Further and most directly on point, the "plaintiff class consist[s] of present <u>and former</u> beneficiaries" of the IIM Trust. *Id.* at 2-3 (emphasis added). The order does not limit the class

[6] The Court used the term "in excess" because the parties have long disagreed on the number of members in this class. Defendants have contended that there are fewer than 300,000, while plaintiffs believe the class of current beneficiaries consists of well over 500,000. Plaintiffs' estimate is based on an IIM trust database that included 300,000 open and active accounts and 200,000 closed or inactive accounts. Such data was produced by defendants' experts. Unfortunately, because of the systemic spoliation of critical records, a more precise estimate cannot be made by plaintiffs without substantial additional discovery. No estimate has been made on the number of former beneficiaries.

to beneficiaries recorded on defendants' failed trust management systems. That would be illogical given powerful, uncontested evidence of record of deeply troubled trust management.

To the contrary, in accordance with the terms of the class certification order, the plaintiff class consists of every individual Indian (or, in appropriate cases, his or her heirs, estate, or personal representative) on whose behalf, as trust beneficiary, a trust account is, has been, should be, or should have been maintained with the United States or its agent. An "account holder" and a "beneficiary" are simply two terms that describe members of this class. In the case of the "accountholder," trustee-delegates opened an "account" (and, in many cases, multiple "accounts") as an administrative device to help them "manage" the financial activity or transactions relating to a beneficiary's divided or undivided interests in the trust *corpus*. In the case of the "beneficiary," notwithstanding trustee-delegates' fiduciary duty that has been established through "elaborate control,"[7] the term includes members of the class for whom defendants either have not opened or improperly closed account(s).

C. This court has decided critical issues that govern the trial commencing October 10, 2007 and should not be re-litigated.

Law-of-the-case doctrine precludes re-litigation of issues decided previously by this Court in these proceedings. *See, e.g., Westside Mothers v. Olszewski*, 454 F.3d 532, 538 (6th Cir. 2006) ("The law of the case doctrine . . . precludes a court from reconsideration of issues 'decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.'") (*quoting Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)); *Northwestern Ind. Tel. Co. v. F.C.C.,* 872 F.2d 465, 471 (D.C. Cir. 1989) (same); *Laffey v. Northwest Airlines, Inc.,* 740 F.2d 1071, 1090 (D.C. Cir. 1984) (same). Where defendants

[7] *Cobell VI*, 240 F.3d at 1086: "[A] fiduciary relationship necessarily arises when the Government assumes ... elaborate control over forests and property belonging to Indians." (*citing Mitchell II*, 463 U.S. at 225) (alteration in original).

should have raised issues on appeal, but failed to do so, the doctrine applies with special force. Indeed, "[a]rguments that were not advanced on appeal may be lost because they are found wrapped up with a larger issue that was decided" before. 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 801 (1981); *id*. at 625 (1994 Supp.). *See also Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.,* 810 F.2d 243, 250 (D.C. Cir. 1987). ("[A] legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation.")

There are other important issues which have been decided and are relevant to both the duty to account and the adequacy of the accounting. They include the following.

1. It is law-of-the-case that neither the statute of limitations nor laches bars or limits plaintiffs' claims or remedies.

Plaintiffs' claims and remedies in this litigation are not barred or limited by the sstatute of limitations or laches. *Cobell v. Norton*, 260 F. Supp. 2d 98, 105 (D.D.C. 2003). In 2003, defendants moved for summary judgment asserting both limitations and laches, contending their accounting need only begin in 1984. This Court, relying on the law of this Circuit, traditional trust law principles, *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), and a host of other decisions in other circuits denied defendants' motion. The Court explained that:

> where, as here, there is a fiduciary relationship between the parties, the universal rule is that a statute of limitation does not begin to run where there is a fiduciary relationship between the parties until the relationship is repudiated. Thus, the statute does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship terminated.

Cobell, 260 F. Supp. 2d at 105 (citations and quotations omitted).

This is the rule of decision with respect to statute of limitations questions "well-established in recognized treatises on trust law." *Id.* This Court quoted the "leading treatise on the law of trusts," which provides that "'the beneficiaries of an express trust are not barred by laches or by the statute of limitations from enforcing the trust merely because of lapse of time; and it is only where the trustee has repudiated the trust to the knowledge of the beneficiaries that they may become barred from enforcing the trust.'" *Id.* (*quoting* AUSTIN W. SCOTT & WILLIAM F. FRACHTER, THE LAW OF TRUSTS § 481.1 (4th ed. 1987)). This Court went on to explain that not only is the repudiation requirement mandated in general trust law cases and in Indian trust litigation such as *Manchester Band* and *Loudner*, but "it is also the controlling law of this Circuit." *Id.* at 106 (*citing Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963) ("in order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits")).

Defendants have conceded "they ha[d] neither repudiated the existence of the IIM trust nor repudiated plaintiffs' right to enjoy the benefits of the trust," prior to the filing of this action in equity. *Id.* at 108. Since repudiation has not occurred, the statute of limitations has not begun to run, no claims are barred and no remedies are limited. The government's denial of repudiation did not prevent this Court from carefully reviewing record evidence of defendants' conduct in their management of the trust and reaching the following conclusion: "Instead, defendants have consistently chosen the coward's route by failing to provide the IIM beneficiaries with the information that the beneficiaries were entitled to by law, while simultaneously insisting that they were fully complying with their fiduciary obligations to the beneficiaries." *Id.* Further, this Court also held that repudiation is also necessary to satisfy laches and, in the absence of

repudiation, that defense would not limit defendants' accounting duty or bar remedies available to plaintiffs. *Id*. at 110.

Accordingly this Court's decision that neither the statute of limitations nor laches bars or limits plaintiffs' claims and remedies in these proceedings is law-of-the-case.

2. This court has held that the General Accounting Office ("GAO") has not rendered an accounting, a comprehensive audit, or settled accounts of the IIM trust beneficiaries, and that the GAO possesses no checks for the period 1932 to 1955.

On April 28, 2003, this Court granted plaintiffs' motion for summary judgment and held that the GAO had not reconciled, audited or provided an accounting of the IIM Trust or settled the accounts of individual Indian trust beneficiaries. *Cobell v. Norton*, 260 F. Supp. 2d 110, 132 (D.D.C. 2003) ("*GAO SJ*"). Plaintiffs' motion was filed in response defendants' motion for summary judgment which was supported by an affidavit defendants "knew to be false." *Cobell v. Norton*, 214 F.R.D. 13, 21 (D.D.C. 2003).

In that regard, on September 19, 2000, defendants filed their *Third Phase II Motion for Partial Summary Judgment (Re: Settlement of Accounts by Treasury and GAO)*, (September 19, 2000) ("Def's GAO MSJ") [Dkt. No. 558] wherein defendants asked this Court to exclude from the scope of the declared historical accounting decades of IIM trust funds that defendants falsely claimed had been settled or reconciled pursuant to a settlement of accounts process undertaken by GAO, Treasury and Interior – and that such settlement had discharged the declared accounting duty. Defendants falsely stated:

> [B]etween 1817 and 1951, governing law required each disbursing officer to submit his accounts, including those relating to IIM accounts, for settlement. Settlement consisted of a double audit – one by the Indian Office in Washington, D.C. and then by a second agency (the Department of the Treasury ("Treasury") until 1921 and the [GAO] between 1921 and 1951). This settlement process provided a regular and specific procedure for checking the accuracy of accounts maintained on behalf of individual Indians . . . . Thus, under any circumstances,

> Plaintiffs are not entitled to an accounting or reconciliation that revisits transactions subject to this settlement process.

Defs' GAO MSJ at 1-2. Fourteen months later, on December 4, 2001, plaintiffs discovered the existence of the GAO Letter that repudiated defendants' claims. This letter made clear that at the time Defs' GAO MSJ was filed -- as early as August 27, 1999 -- defendants knew that individual Indian trust accounts were not settled or audited by GAO:

> Over the past several weeks, GAO staff have had numerous telephone conversations with members of your staff and attorneys from the Justice Department, as well as a meeting with Treasury officials, to answer questions and share information. In response to questions, we have explained that our records do not establish that GAO conducted a 'final' GAO comprehensive audit of IIM accounts, nor do they establish any regular practice of auditing IIM accounts.

Letter from Gene Dodaro, Principal Assistant Comptroller General, Gov't Accountability Office, to John Berry, Assistant Secretary for Policy, Management & Budget, Interior Dep't ("Dodaro Letter") at 2. Defendants concealed from this Court and plaintiffs the existence of the Dodaro Letter.

On April 23, 2002, defendants provided notice to this Court of a second GAO letter ("2002 GAO Legal Opinion"), the legal opinion of GAO General Counsel, Anthony Gamboa.[8] It reconfirmed the Dodaro Letter in emphatic terms and rejected defendants' claim that GAO had in any way helped defendants discharge the accounting duty that they owe the plaintiff class:

> In the Blueprint, you note that between 1921 and 1951, GAO settled the accounts of the United States, and assert that '[r]ecords indicate that all accounts managed by Indian Disbursing Agents, which included IIM funds,' were settled by GAO. Between 1921 and 1950, GAO regularly audited and settled the accounts of all executive agencies' disbursing officers, including those of the BIA Indian agents, to ensure that the disbursing officers accounted for funds in accordance with appropriations made by law, and that they applied funds only for the purposes stated in the appropriations laws. **GAO did not settle other accounts, such as IIM accounts, with which disbursing officers may have engaged in transactions**."

[8] [Dkt. No. 1267].

> * * *
>
> [E]xamination of disbursing officers' accounts under the 1921 Act focused on appropriated, not private, funds, to ensure disbursing officers' accountability for funds charged to them in accordance with appropriations made by law. These IIM accounts were legally distinct from the disbursing officer's account and held the funds of the individual Indian account holder, not government funds. As a result, we would not have expected GAO, as part of settling an Indian Service disbursing officer's account, to settle IIM accounts.
>
> * * *
>
> A settlement of an IIM account at a minimum would have required the same scrutiny of the IIM account and its activity as that to which GAO subjected disbursing officers' accounts. Only an examination of the records of the IIM account itself would ensure the propriety and accuracy of amounts credited and withdrawn, reconcile transactions with a statement of the account, and identify whether other, not disbursing officers, had withdrawn amounts from or credited amounts to the account properly.

Id. at 4, 6, 7 (emphasis added).

On April 28, 2003, this Court granted plaintiffs' motion for summary judgment and held that:

> 1. At no time has the GAO conducted an accounting of any individual Indian trust accounts.
>
> 2. At no time has the GAO conducted a final comprehensive audit of individual Indian trust accounts.
>
> 3. At no time has the GAO engaged in any regular practice of auditing individual Indian trust accounts.
>
> 4. At no time did the GAO settle individual Indian trust accounts.
>
> 5. The GAO possesses no copies of Statements of Outstanding Checks for the years 1932 through 1955.

Cobell, 260 F. Supp. 2d at 131. This judgment bars defendants from asserting, or relying upon, the settlement of accounts process to discharge in whole or in part the declared accounting duty to the class.

3. Trust law does not allow cost to limit the nature and scope of an accounting where defendants have engaged in malfeasance, neglect, and other misconduct.

This action in equity was filed eleven years ago to enforce the trust obligations owed by the government to the plaintiff class. With respect to the duty to account and whether cost should limit the scope of the accounting, the Court of Appeals in *Cobell v. Norton*, *("Cobell XVII"),* 428 F.3d 1070 (D.C. Cir. 2005), recognized that the question in the first instance is whether the "common law of trusts" provides "a clear path for resolving statutory ambiguities" creating the trust duties. Based on the limited factual record and narrow issues before that panel, the appellate court was unable to discern if trust law provided a "clear path" for resolution of that issue.

Nonetheless, the Court of Appeals made clear that trust law does resolve a question central to the scope of defendants' accounting duty where systemic spoliation of trust records, unconscionable delay, or other malfeasance is the sole cause of the increased difficulty of, and extraordinary cost in connection with, the rendering of a complete and accurate accounting. Specifically, the Court held: "Where a trustee has by misconduct or negligence made a proper accounting more difficult, the trustee may be charged for the accounting's cost, and <u>no precept of common law constrains the cost of such an accounting</u>." *Id.* at 1075 (*citing* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 963 36 (rev. 2d ed. 1983) (emphasis added).

Bogert explains further that the trustee will be charged for the cost of the accounting if (1) he "made a suit for the accounting necessary;" <u>*or*</u> (2) if his actions have "rendered the accounting proceeding unusually laborious and costly." *Id.* § 971 (section entitled "Charges against trustee on his accounting") (citing cases). Either is independently sufficient to place the cost on the trustee and both are present here. *Corpus Juris Secundum* is in accord:

> [A] trustee may be charged with the costs and expenses of the accounting where he or she has rendered necessary the incurring of such costs and expenses by misconduct or negligence, or where on a contested settlement the finding is against the trustee. So, also, where a trustee neglects or refuses to file any account, and so compels the cestuis que trust to sue for an accounting, the trustee should be taxed with the costs of the suit. In such cases the trustee may also be liable for the costs of an audit or restatement of the account ….

90A C.J.S. TRUSTS § 652. *See also id.* (court sitting in equity has the power "to require the trustee to pay the costs and expenses of the accounting."). Cases are plentiful that restate this rule. *See, e.g., Haas v. Wishmier's Estate*, 99 Ind. App. 31, 190 N.E. 548, 549 (1934) (The "[c]osts and expenses of proceedings for accounting" can be charged personally to the trustee when expense are due to "misconduct or negligence as to accounting or settling, or when on a contested settlement the finding is against him." (internal quotations and citations omitted)); *In re Whitney's Estate*, 11 P.2d 1107, 1112 (Ct. App. 4th Dis. Cal. 1932) (trustee charged with expense of accounting); *Arrants v. Sweetwater Bank and Trust Co.*, 404 S.W.2d 253, 258 (Tenn. App. 1965) ("We see no abuse of discretion in the action of the Chancellor requiring the Bank to bear the cost of the Special Master and the court costs incurred in the course of the accounting."). Moreover, it is particularly appropriate for the trustee to "incur individual liability for the costs of a compulsory proceeding for accounting" where the suit is necessitated by "<u>undue delay</u> on his part in accounting and settling." 90A C.J.S. TRUSTS § 652 (internal quotations and citations omitted; emphasis added). *See also Malachowski v. Bank One*, 682 N.E.2d 530 (Ind. 1997); 76 Am. Jur. 2d Trusts § 376 (2007) ("If clear, distinct, and accurate accounts are not provided, all intendments and presumptions are against the trustee and all obscurities and doubts are to be taken adversely to him or her. Inadequacy of a trustee's accounts may result … in the trustee's being made to pay the costs of an accounting and the expenses of an accountant.").

That is precisely the circumstance here and plaintiffs are prepared to demonstrate in the October trial that defendants have, through their "misconduct and negligence made a proper accounting [much] more difficult." Accordingly, there is no cost constraint on the accounting, nor – since trust law provides a clear path to resolution – need this Court resort to administrative law for a rule of decision.

Defendants' malfeasance and "unconscionable delay" in fulfilling their trust obligations generally, and specifically their duty to account, has made discharge of their accounting duty far more difficult and far more expensive if not impossible. Accordingly, where trust law provides a clear path for resolution, the application of administrative legal principles with respect to the cost of the accounting and accounting requisites, is improper and wholly unnecessary. Equally important, defendants should not be permitted to benefit from the harm they have caused by their malfeasance and unconscionable delay. The injury to defendants as a consequence of increased difficulty and cost is entirely self-inflicted. No trustee may evade the discharge of his trust duties through pervasive misconduct.

III. Defendants' exclusions will not result in an adequate accounting.

Impermissible exclusions with respect to the scope of defendants' historical accounting plan remain so remarkably broad that an adequate accounting will not be rendered for the plaintiff class.[9] The scope of exclusions are not limited to a specific group of account holders or a particular type of transaction. Instead, the scope exclusions are broad and all-encompassing

[9] Plaintiffs do not here discuss the use of statistical sampling which defendants propose to utilize in the historical accounting plan. Because of the history and complicated nature of statistical sampling in this litigation, plaintiffs propose to address defendants' use of statistical sampling following the filing of defendants' revised plan, which will presumably detail the latest version of any statistical sampling plan.

and every "present and former beneficiary"[10] is adversely affected such that the accounting to-be-rendered will not be adequate. Put simply, defendants' historical accounting plan will never result in an adequate accounting for the plaintiff class.

On May 11, 2007, defendants filed a Bench Memorandum[11] confirming that they were planning to have a number of exclusions to the scope of the proposed accounting. They specifically referenced four such exclusions, but it is clear that additional exclusions remain. After stating that Interior had made many decisions pertaining to the scope of the accounting, defendants provided the following footnote:

> Many of those decisions were examined, in detail, during the course of the "Phase 1.5" proceedings in 2003, and they have been described in various Quarterly Reports filed with the Court. For example, Interior has stated **[1]** that it will not perform a historical accounting for so-called "direct pay" transactions or **[2]** deceased beneficiaries; that it will recognize the results of probate determinations; and **[3]** that the historical accounting will be provided for IIM accounts open as of October 25, 1994, and **[4]** that the historical accounting will go back to the inception of the account or June 24, 1938, whichever is later.

Bench Memorandum at 3 n.1 (bracketed numbers added).

Plaintiffs will first discuss the important precedential value of this Court's *Cobell X* opinion on future proceedings in this case. Next, we explain why the four conceded exclusions violate defendants' declared duty to account.[12] Plaintiffs will then discuss the other likely exclusions and explain why they too are inconsistent with the law-of-the-case and defendants' obligations as a fiduciary. Plaintiffs conclude with an explanation of the Secretary of the

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[10] *See* Order Certifying Class Action at ¶ 1 [Dkt. No. 27] (defining "the Class").

[11] *Defendants' Bench Memorandum Regarding Issues Presented In April 20, 2007 Memorandum Order* ("*Bench Memorandum*") [Dkt. No. 3322-2].

[12] Defendants include as two separate areas "deceased beneficiaries" and "recogniz[ing] the results of probate determinations." These are in fact co-extensive and accordingly we address them as one.

Treasury's critical role in administering the trust funds historically and the necessity of including him in any hearing relating to further relief that may be ordered by this Court.[13]

A. *Cobell X* carries precedential weight and remains dispositive on the accounting exclusions covered here.

This Court found that all of defendants' exclusions from the scope of the accounting were improper. *Cobell X* at 152-207. As will be discussed in this section, even though the injunction granted in *Cobell X* was vacated in *Cobell XIII* and the re-issued injunction from *Cobell v. Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005) *("Cobell XIV"*) was vacated in *Cobell XVII*, the findings in *Cobell X* should be given weight except where defendants can show that there has been a material change in the underlying facts since the issuance of *Cobell X* on September 25, 2003. The fact that certain beneficiaries were excluded from the scope of the accounting in 2003, and remain excluded today, indicates that little has changed since the issuance of *Cobell X*. Thus, *Cobell X* should remain dispositive regarding the scope of the exclusions addressed in this brief.

When an opinion is vacated by a higher court, the lower court's prior opinion continues to have precedential weight, so long as the holding on the specific issue is undisturbed and there is no binding contrary authority. *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, … the expressions of the court below on the merits, if not reversed, will continue to have precedential

[13] While defendants have not furnished plaintiffs a copy of their historical accounting plan as of the date of this filing, counsel for defendants indicated that it was largely unchanged from the 2003 plan with respect to the scope of the historical accounting that defendants intended to render. *See* May 14, 2007 Hearing Tr. at 74: 18-21 ("[Concerning the 2007 historical accounting plan, the] 2003 accounting plan addressed many of these same parameters. These are not new . . . and they were all presented in 2003.").

weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law ....” (internal quotations and citations omitted)). *See also Edmond v. United States Postal Service General Counsel*, 949 F.2d 415, 424 n.17 (D.C. Cir. 1991); *Hopkins v. Price Waterhouse,* 920 F.2d 967, 975, n.5 (D.C. Cir. 1990). This is particularly true where, as here, the vacated decision “stands as the most comprehensive source of guidance available on the . . . questions at issue in this case.” *Christianson v. Colt Industries Operating Corp.*, 870 F.2d 1292, 1298 (7th Cir. 1989). Nothing in the vacature of the *Cobell X* injunction remotely suggests that the underlying determinations on scope which we address below were incorrect. Accordingly, they have substantial precedential weight and should be followed.

B. There is no justifiable basis, legal or factual, for defendants’ four enumerated exclusions.

The government has exercised complete control over Individual Indian Trust assets and the revenues generated therefrom since the inception of the trust. Accordingly, under *Mitchell II* and *White Mountain Apache Tribe,* the government is obligated to render a complete and accurate accounting of all funds since the trust was first established in 1887. As we outlined in Section I, *supra,* this Court by decree has declared defendants’ duty to account and has specified the nature and scope of such accounting in specific and definitive ways. Nevertheless, defendants impermissibly exclude from the accounting the vast majority of the beneficiary class and their trust assets. Set forth in this section are the expressly enumerated exclusions and an explanation as to why they contravene the determinations of this Court and the Court of Appeals.

1. Defendants exclude “accounts” closed before October 24, 1994.

This Court and the Court of Appeals have rejected the notion that the accounting is defined by the 1994 Act. This was a central issue addressed by the Court of Appeals in *Cobell VI.* Defendants’ principal argument in that appeal was that the scope of their accounting

obligation is "defined by the 1994 Act." *Cobell VI*, 240 F.3d at 1099. In rejecting that argument, the Court of Appeals held:

> The fundamental problem with appellants' claims is the premise that their duties are solely defined by the 1994 Act. The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them…. it did not define and limit the extent of appellants' obligations.

Id. at 1100 (emphasis added).

Further, the Court explained that "[e]nactment of the Indian Trust Fund Management Reform Act in 1994 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." *Id.* (emphasis added). Accordingly, the Court made clear that "the 1994 Act plainly reaffirm[ed] the government's preexisting duty to provide an accounting to IIM trust beneficiaries" and furthermore "it is plain that such an obligation inheres in the trust relationship itself." *Id.* at 1103 (emphasis added). *See also id.* at 1102 (holding that the 1994 Act "reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting" (emphasis added)). Put simply, "[n]othing in the 1994 Act, nor any other federal statute, acts to limit or alter this right [to a complete accounting]." *Id.* at 1104.[14]

Despite the mandate of *Cobell VI*, defendants have excluded all beneficiaries if their "accounts" were closed prior to October 25, 1994, the date of enactment of the 1994 Act. It is plain though, as shown above, that this position is untenable in light of *Cobell VI,* since the duty to account is "pre-existing" and is not "defin[ed]," "limit[ed]" or "alter[ed]" by the 1994 Act.

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[14] *Accord Cobell X*, 283 F. Supp. 2d at 173 n.55 ("It bears mentioning that it is very difficult, to say the least, for the Court to believe that Interior takes its fiduciary obligations seriously when it attempts to sidestep one of its clearly-mandated duties with an argument tantamount to "It depends on what the meaning of the word 'are' is.").

2. Defendants' Accounting Plan excludes payments made directly to individual Indian trust beneficiaries (direct pay transactions).

Defendants have long recognized that they owe a fiduciary duty to beneficiaries for payments made directly by third party lessors – sometimes referred to as direct pay transactions. As early as 1960, then-Interior Solicitor (and now-Senator) Ted Stevens was asked to opine on "the responsibility of the Secretary for the accuracy of payments made to individual Indians pursuant to 25 C.F.R. § 172.14, which provided for selected Indian landowners to receive rental and royalty payments directly from the oil and gas lessee." *See* Plaintiffs' Exhibit 1 at 1. Solicitor Stevens opined as follows:

> The Secretary of the Interior has a duty to verify the accuracy of the lessee's rental and royalty payments when administering oil and gas leases on allotted Indian lands under the Act of March 3, 1909,39 Stat. 781, 783, as amended in the Act of August 9, 1955, 69 Stat. 539, 540, 25 U.S.C. 396.
>
> Accordingly, *the regulations of this Department pertaining to oil and gas leasing on Indian land provide that the lessee furnish statements containing information from which the accuracy of the lease payment may be determined, whether the payment be transmitted to the Department* <u>*or directly to the Indian landowner*</u>. In the event payment is inaccurate and the amount due is not paid by the lessee, than appropriate action must be taken to cancel the lease and/or take such other suitable action against the lessee and his bondsman as is provided for in the lease or in the applicable regulations.

Id. (emphasis added) (internal citations omitted) 1960 WL 12652. This legal opinion was reaffirmed in 1965: "[i]t is settled beyond debate, of course, that the direct income from a trust allotment partakes of the character of the corpus of the allotment itself and is subject to all the authorities and responsibilities of the trust undertaking relating to the allotment itself." *Lease of Restricted Land – Federal Supervision Over Rentals Payable Directly to Lessor*, 72 Interior Dec. 83 (Feb. 17, 1965), 1965 WL 12755 (citing *Squire v. Capoeman,* 351 U.S. 1 (1956)).

The former Special Trustee, Paul Homan, testified before this Court in Trial 1.5 to this point:

> Q. With regard to direct pay contracts, do you believe that the United States government still has trust responsibility?
> A. Oh, absolutely, it does.

See Plaintiffs' Exhibit 2, Trial 1.5 Day 1, PM (May 1, 2003) Tr. at 95:12-15. Even defendants' expert on trust law opined in the context of direct pay that: "what is so special [about the IIM trust] as I understand it is that the [withdrawn] asset continues to be treated as a part of the trust corpus, and some level of trustee duties will apply, [n]otwithstanding that it has escaped the management control of the fiduciary." *See* Plaintiffs' Exhibit 3, Trial 1.5 Day 19, PM (June 2, 2003) Tr. at 73:13-17. Associate Deputy Secretary, James Cason, conceded Interior's fiduciary duty with respect to direct pay contracts: "at best I could suggest that in some circumstances we do, but I don't know the limitations of those." *See* Plaintiffs' Exhibit 4, Trial 1.5 Day 21, PM session (June 4, 2003), at 29:1-4. Cason also noted his understanding that the United States bears responsibility for enforcing direct-pay leases. *Id.* at 27:20-23.

In *Cobell X*, this Court addressed this issue directly. Relying on *Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996) – in which individual Indian allottees had collectively entered into a direct-pay lease for the use of their land as a commercial golf course – this Court explained:

> It is plain that the allottees do not control the leasing of their lands. First, they can only grant those leases of which the Secretary approves. Second, they can grant leases only on terms and forms that the Secretary dictates. Third, an allottee cannot cancel a lease without the Secretary's prior approval under 25 C.F.R. § 162.14. Fourth, the Secretary can cancel a lease without the allottee-lessor's consent.... Nor may the Secretary's power be considered a mere oversight power, inasmuch as its exercise is a necessary prerequisite to the execution of a valid and binding lease. Oversight power is an after-the-fact power to review transactions that have been negotiated and executed by others. The Secretary's approval power over leases, by contrast, must be exercised *before* any valid leasing transaction can occur.

283 F. Supp. 2d at 179 (*quoting Brown,* 86 F.3d at 1561-62 (internal citations omitted)). *Brown*, *Cobell X* found, is relevant because "the court concluded that 'by virtue of the control they place

in the hands of the Secretary, section 415(a) and the implementing regulations of part 162 impose upon the government a fiduciary duty in the commercial leasing context.'" *Id.* (quoting *Brown,* 86 F.3d at 1563). As such, this Court held:

> that Interior's fiduciary duty to account, which predates the 1994 Act, mandates that <u>any adequate historical accounting of the IIM trust must include an accounting of all monies paid to IIM beneficiaries in conjunction with direct-pay leases and contracts</u>. The Court further concludes that the failure of Interior's Plan to include an accounting of such monies renders it a Plan that will necessarily delay, rather than accelerate, the performance of an adequate historical accounting of the IIM trust fund.

Id. at 180 (emphasis added).

3. Defendants' Accounting Plan excludes deceased beneficiaries, also known as predecessors-in-interest.

As this Court noted on an earlier occasion, defendants have a tendency to "conflate[] two issues – whether Interior may treat the results of an Indian probate proceeding as presumptively valid, and whether Interior must account for transactions occurring in the accounts of deceased IIM beneficiaries." *Id.* at 174. The distinction is important. As this Court explained, "if these [misstated] transactions [of deceased beneficiaries] were to be excluded from Interior's proposed accounting, then [deceased beneficiaries'] heirs – who are living IIM beneficiaries – would never discover that the balances of their respective trust accounts are [] lower than they presently should be." *Id*. at 176.

Nevertheless, defendants continue to exclude deceased beneficiaries, contending that the Secretary's fiduciary duty to render an adequate accounting is substantively and legally satisfied through the probate determination process.[15] This argument is untenable. Defendants are not

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[15] *See* Plaintiffs' Exhibit 5, 2003 Historical Accounting Plan [Dkt. No.1705] at II-4 (emphasis added).

> <u>[I]t is reasonable for a trustee to rely on the probate order as a correct statement of the property due the beneficiary, and the trustee is not required to conduct an</u>

contending that they historically undertook a process of compiling the relevant statements and records of a deceased beneficiary so that the heirs could "readily … ascertain whether the trust has been faithfully carried out." *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 449 (1992). Instead, the 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. There is no "accounting" and the information relied upon in the probate process is presumed to be accurate and complete. This is a far cry from a complete and adequate historical accounting.

That is precisely why this Court held that "it does not follow … that Interior is thereby not required to account for any transactions in deceased beneficiaries' IIM accounts." *Cobell X*, 283 F. Supp. 2d at 174. As this Court noted, 25 U.S.C. § 372 provides, in relevant part:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under the Indian Land Consolidation Act or a tribal probate code approved under such Act and pursuant to such rules as he may prescribe, <u>shall ascertain the legal heirs</u> of such decedent, and his decisions shall be subject to judicial review to the same extent as determinations rendered under section 373 of this title.

Id. (emphasis added). As such, whether or not defendants' identification and determination of legal heirs is presumptively valid, that presumption of heirship does not mean defendants' duty to account is discharged. Nor does it mean that trust assets conveyed through probate are

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> <u>accounting of the decedent's trust account</u> in order to provide a full account of the trust account of the current beneficiary.

Of course, the government's contention begs the question. It is the "former" beneficiary who is entitled to an accounting of all funds to the same extent that the current beneficiary is entitled to an accounting. Further, an accounting of "all funds" – not simply an accounting of "accounts" on defendants' woefully flawed systems – must be rendered.

entitled to the same presumption of correctness, where, as here, the probate process is notoriously flawed and admittedly incomplete.[16]

In short, excluding from the declared accounting funds of deceased beneficiaries, on its face, is entirely inconsistent with the explicit terms of the class certification order and the Court of Appeals' holding in *Cobell VI*: "'All funds' means *all funds,* irrespective of when they were deposited." 240 F.3d at 1102. That is why this Court "conclud[ed] that Interior must include in its historical accounting all transactions that occurred during the lives of IIM beneficiaries who are now deceased." *Cobell X*, 238 F. Supp. 2d at 175.

4. Defendants' exclude all transactions from their historical accounting that occurred prior to June 24, 1938.

Defendants concede that they are excluding beneficiaries and trust assets prior to June 24, 1938.[17] Their exclusion rests on a flawed interpretation of the 1994 Act which requires

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[16] Importantly, external auditors have found, repeatedly, that the probate process results in inaccurate distributions to individual Indian heirs. *See, e.g.*, Plaintiffs' Exhibit 6, U.S. Department of the Interior, Office of the Inspector General, Rep. No. 00-I-434 (May 2000): *Independent Auditors Report on the Financial Statements for Fiscal Years 1998 and 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management*, Appendix I (page 59 of 63 page exhibit):

> Finding No. 8: Ownership records at the Area and Agency Offices are not updated in a timely manner. This results in the potential for inaccurate distributions of lease income to the IIM account holders. Lack of resources to process the significant number of changes causes this [probate] backlog.
>
> Response: The BIA agrees . . . .

Id. (emphasis added).

[17] This Court will note that it is common for trustee-delegates to open an "account" for a beneficiary to process a particular one-time transaction and then to close the "account" if future revenues are not anticipated. A simple example: Defendants enter into a timber contract to clear cut the allotment of Beneficiary A and open an "account" to deposit the revenue received from the harvest of the timber. At the conclusion of the work harvesting the timber a check is disbursed from Beneficiary A's account and the account is closed. Ten years later defendants enter into a commercial lease on behalf of Beneficiary A and a second "account" is opened to deposit collected revenue. In such circumstances, defendants would not render an accounting of

defendants to "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) (emphasis added).

Defendants' interpretation is grounded in the erroneous presumption that the Act of June 24, 1938 created defendants' duty to render a historical accounting. That proposition, however, was squarely addressed and rejected by the Court of Appeals in *Cobell VI*, which held instead that "the government's preexisting duty to provide an accounting to IIM trust beneficiaries. . . inheres in the trust relationship itself." *Cobell VI*, 240 F.3d at 1103 (emphasis added). This Court further elucidated on this point:

> If Interior's obligation to account inheres in the trust relationship itself, then its obligation to account arose at the very moment that the trust relationship was created. Accordingly, its duty to account is not satisfied until it has performed an adequate accounting for all funds deposited in the IIM trust fund, regardless of whether they were deposited in 1887, 1938, 1994, or 2003. The 1994 Act did not place any limitation on this pre-existing duty to account to IIM beneficiaries whose funds were being held for their benefit. *See id.* at 1104 ("In 1996 (prior to the filing of the initial complaint in this case) the Interior Department's Solicitor issued an opinion that government trustees have an 'affirmative duty ... to make a *full and proper accounting*.' Nothing in the 1994 Act, nor any other federal statute, acts to limit or alter this right.")

Cobell X, 283 F. Supp. 2d at 173 (emphasis added); *see generally id.* Consequently, this Court concluded that "Interior must perform an accounting of *all* funds deposited or invested in the IIM trust fund since the passage of the General Allotment Act in 1887." *Id.* It is notable that various accounting statutes covering individual Indian trust assets preceded the Act of June 24, 1938, including 30 Stat 495, 55th Cong., Sess. II, Ch. 545 at 1399 (1899): "hereafter Indian agents shall

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the timber revenue deposited into Beneficiary A's first "account" since they will not render a historical accounting prior to the inception of an "account." Of course, Interior holds no funds in a specific account for a single member of the class; the funds are commingled.

account for all funds coming into their hands as custodians from any source whatever, and be responsible therefore under their official bonds."

It is dispositive for purposes of the upcoming trial to find, as defendants concede, that the historical accounting will not cover beneficiaries or trust funds prior to June 24, 1938 or, if the account had been opened after June 24, 1938, it will not render a historical accounting prior to the inception of a beneficiary's account. However, even if defendants believed they had a fiduciary duty to render a historical accounting for beneficiaries and assets prior to June 24, 1938, defendants have not maintained records sufficient to identify those beneficiaries for purposes of a historical accounting.

> THE COURT: But there is not any roll you could go to right now that would even show whose accounts were even opened on June 24th, 1938 I take it?
> THE WITNESS: That is the best of my understanding, yes. That particular piece of information is not captured in our system.

Plaintiffs' Exhibit 4, Trial 1.5 Day 21, PM (June 4, 2003) Tr. at 22:14-19 (James Cason).

C. There is no justifiable basis for any of the other exclusions <u>likely</u> included in defendants' historical accounting plan.

For the last seven years, defendants have also impermissibly excluded other beneficiaries, transactions and accounts from their accounting. Accordingly, we address the other likely exclusions below and explain why they are improper.

1. Defendants are excluding the non-financial corpus of the trust from their historical accounting.

As this Court has noted:

> The allotted lands themselves are the "trust corpus" or "trust assets" or "trust property," which are held in trust by the United States. Not only does the IIM trust contain these lands, they are an indispensable element of the trust. These lands generate income, which Interior (as trustee-delegate) must distribute to the IIM beneficiaries. The IIM accounts are the means by which this income is distributed to the beneficiaries. In short, the monies deposited into the IIM

> accounts represent the *income* generated by the allotted lands held in trust by the United States, not the *corpus,* which is made up of the lands themselves.

Cobell X, 283 F.3d at 177 (emphasis original).[18] In this case, there is powerful and incontestable record evidence that the systems of record with respect to the beneficiaries' corpus, and the land, title and ownership data, are unreliable and inaccurate. As reported by the Special Trustee:

> The trust fiduciary responsibility to manage trust assets and accurately report on their status to beneficiaries is not being met. The existing trust system does not account for each and every asset under its responsibility and there is no method for gauging the accuracy of information depicting the assets for which they do account. The trust system is unable to provide the individual Indian account holder with a statement of assets and transaction for non-financial assets. A major deficiency in the existing system is the lack of accounting and control of the most important trust asset to the beneficiary-the land.

See Plaintiffs' Exhibit 7, *United States Department of the Interior Needs Analysis Project Final Report, Office of the Special Trustee of American Indians*, DOI, (April 1997) (emphasis added) ("Macro Report") at ii. The Special Trustee continued: "A reconciliation of historical land titles and the appraisal of Indian lands must be completed before any new system can provide accurate information to account holders regarding this critical trust asset." *Id*. at iii (emphasis added).[19]

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[18] Former Special Trustee Paul Homan was in accord. In testimony before this Court during Trial 1.0, he testified as follows:

> Q. Can you describe for the Court generally what the corpus of these trusts is?
> A. Yes. Principally, the corpus for the individuals involves the resource management of some 11 million acres, which are held in trust for individual Indians. In addition, the individual Indians are sometimes beneficiaries of per-capital judgments, awards, or other special legislation on the part of Congress.

See Plaintiffs' Exhibit 8, Trial 1.0 Day 1 (June 10, 1999) Tr. at 114:1-8.

[19] *See also* former Special Trustee's testimony before this Court during Trial 1.5:

> Q. You made several references in your answer just now to looking at land records, studying land assets, correct?
> A. Right.
> Q. You consider that as part of your understanding of the accounting?
> A. Absolutely. I mean accounting -- if you don't know the title of the person that you are accounting for, how can you determine that the accounts are to the appropriate beneficiaries. So land title land natural resource ownership records are very important.

Defendants, however, have no plans to reconcile conflicting and inconsistent historical land titles or ownership interests for the class. This is a significant and substantial exclusion. What is more, defendants point to no statute limiting their fiduciary duty to only the financial assets of the trust, where, as here, a complete and accurate accounting of all funds cannot be rendered unless the land and ownership interests are accurately stated.[20] The 1994 Act does not bar or limit defendants' historical accounting duty with respect to the corpus of the trust – the land. As this Court has noted, "[i]t is difficult to understand how an adequate system for accounting for and reporting trust balances could be maintained without an understanding of how the assets in the trust – the allotted lands – were affected over time." *Cobell X*, 283 F. Supp. 2d at 176 n.57. It is, in short, impossible to render an adequate historical accounting if the assets which produced the trust income are excluded from the accounting. There is no case law to support such a contention and the common law stands for the exact opposite proposition. *Id*. at 176 n. 59.[21] This Court has found such exclusions to be "without merit." *Id*. at 177.

See Plaintiffs' Exhibit 9, Trial 1.5 Tr. at Day 4 PM 16:17-17:1.

[20]Defendants' counsel have suggested that the 1994 Act limits their duty to financial assets, despite *Cobell VI's* admonishment that the Act does not "limit" the preexisting accounting duty. Furthermore, the principal Interior official in charge of trust management has conceded that no limit exists in the 1994 Act when he testified in Trial 1.5:

> Q. Are you aware that the 1994 Act is not exclusive as to its terms?
> A. Yes.
> Q. And are you aware that the stated responsibilities include but are not limited to those that are enumerated?
> A. Yes, I recall that.
> Q. Is there anything in the Act that says that you are not supposed to account for the trust assets or the trust revenues of all Individual Indian Trust beneficiaries?
> A. I don't believe that there is anything in the Act that says that we have no responsibility for accounting for assets.

Trial 1.5 Day 21 PM, Tr. at 64:22-65:8.

[21] *See also Cobell X,* 283 F. Supp. 2d at 175-76 ("[B]lack-letter trust law mandates that an accounting include a full disclosure and description of each item of property constituting the corpus of the trust at its inception, [thus] Interior's historical accounting must include such a full disclosure and description.").

2. **Defendants are excluding cadastral surveys from their accounting; "There will never be a <u>true and accurate accounting</u> of Indian Trust Assets until there is true and accurate data about the location of land ownership and trust resources."**

Cadastral surveys are the most basic and critical type of trust information that enable defendants to discharge their fiduciary duties to individual Indian trust beneficiaries. As defendants admit, "An original cadastral survey of public and Indian lands does not ascertain boundaries; it creates them." *See* Plaintiffs' Exhibit 10 (Eighth Quarterly Report) at 66. The importance of accurate cadastral surveys to the proper administration of the trust is conceded by defendants:

> It is a well-settled principle of law that a cadastral survey plat becomes a part of every Government trust land patent that refers to any subdivisions whose descriptions are to be found upon such plats. The legal significance of the plat is as important as though a copy of such plat has been incorporated into trust patents. The same applies to any subsequent deeds of transfer. The public and Indian land is not to be regarded as "surveyed" until it has been duly shown upon an approved cadastral survey plat, and no subdivisions are to be "disposed of" until so identified.

Id. at 65-66. Thus, defendants candidly state that: "*There will never be a <u>true and accurate accounting</u> of Indian Trust Assets until there is true and accurate data about the location of land ownership and trust resources*." *Id*. at 69 (emphasis added).

This has been confirmed in a pilot study conducted by defendants which disclosed that the "gross acreages in the legal descriptions of those allotments varied from 0.7% (0.56 acres) to 20.7% (9.54 acres)." *See* Plaintiffs' Exhibit 11 (Eleventh Quarterly Report) [Dkt No. 1586] at 20. Defendants concede that "this could impact the <u>income value of the land</u> if actual acreage is a factor in determining value." *Id*. (emphasis added). Here, the revenues derived from a particular beneficiary's allotment are known to be misstated by 20% or more (*id*.), yet defendants will not examine cadastral surveys to ensure that trust revenue was properly allocated in the correct amount to each beneficiary.

We agree with defendants that no "true or accurate accounting of Indian Trust Assets" can occur without examining and correcting cadastral surveys.

3. Defendants' accounting plan excludes trust assets unlawfully escheated to tribes.

In 1983, Congress set out to address the burgeoning fractionation problem in Indian Country by passing a law which mandated that the title to trust beneficiaries' property would escheat to the particular tribe if that interest constituted less than two percent of an allotment and earned less than $100 in the preceding year.[22] The Supreme Court struck down the statute in 1997,[23] but not before 775,000 individual Indian interests unconstitutionally escheated to tribes across the western United States over the course of fifteen years.

In April 1999, prior to this Court's *Cobell V* opinion declaring trustee-delegates' duty to render a historical accounting for all funds, the Deputy Commissioner of Indian Affairs explained the impact of the unconstitutional escheats to all Area Directors:

> On February 19, 1999, the Secretary of the Interior issued an order opening all estates wherein interests were transferred by escheat to Indian tribes pursuant to 25 U.S.C. 2206, and ordering probate orders to be modified to re-distribute such escheat interest to the rightful heirs and beneficiaries. The *Youpee* case and subsequent Secretarial Order will have a substantial impact on the Bureau's title and trust resource management programs. Based on data gathered . . . <u>the title program will modify the probate orders for 12,925 estates to re-determine 64,955 fractionated interests and create 774,749 fractional interests . . . . [and] redistribute[] proceeds derived over a 10 year period from the escheat interests and paid to tribes</u>.[24]

[22] *See Cobell X*, 283 F. Supp. 2d at 183 for a more detailed discussion.
[23] *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997).
[24] *See* Plaintiffs' Exhibit 12 *United States' Statement on Predecessors-in-Interest for Purposes of Document Production*, filed April 8, 1999 at 11 of 13 page exhibit (emphasis added).

This redistribution of unconstutionally escheated interests and income was reported by the Assistant Solicitor to cost between $5 million and $10 million.[25] However, work on re-distribution of the *Youpee* interests has not commenced in any meaningful way and an astonishing probate backlog remains.[26]

Accordingly, at least as of April 1999, it was the policy of the Department of the Interior to modify the probate orders for escheated interests and redistribute such collected IIM trust funds that unlawfully had been transferred to tribal accounts at Treasury. That policy changed again sometime prior to the publication of the January 6, 2003 historical accounting plan. As testified by Interior's expert:

> Q. So isn't it correct that the revenues from the escheated interests are not included in the samples?
> A. That would be correct. That would be correct.

See Plaintiffs' Exhibit 13, Trial 1.5 Day 35PM Tr. at 85:11-13. The Special Trustee also confirmed that the escheated *Youpee* interests would not be included in the historical accounting:

> Q. Is the correction of the Youpee accounts a part of this process?
> A. They will be. I don't think that they are right now as far as the funds aspects of it. *They won't be a part of the IIM, and they won't be a part of the accounting, or part of any account unless at some point in the future there is a revesting, and a subsequent beneficiary has revenue come in that we would set up an account for. Presently, I don't believe that any of the Youpee interests have accounts.*

See Plaintiffs' Exhibit 14, Trial 1.5 Day 36 PM 62:5-14.

Obviously, defendants must abide by the Supreme Court's determination in *Youpee* and account for all assets that have unconstitutionally escheated and IIM income that has been

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[25] *See* Interior *Fact Sheet: Reopening of Probate Cases Processed Under the Escheat Provision of Section 207 of the Indian Land Consolidation Act* at 3. Originally attached to *United States' Statement on Predecessors-in-Interest for Purposes of Document Production.*

[26] *Id.* Interior now reports an increase in the probate backlog by 116 to 31,310 open estate accounts. *Status Report to the Court Number Twenty Five* [Dkt. No. 3318-2] at 39. No review of closed estate accounts has begun.

collected and transferred to tribal accounts at Treasury. That is the ruling of this Court in *Cobell X:*

> In sum, the Court concludes that Interior must include within its historical accounting project all interests that escheated pursuant to ILCA and that reverted back to IIM beneficiaries during the historical accounting process. Additionally, all interests that escheated pursuant to ILCA and that reverted back to IIM beneficiaries after the historical accounting process is completed must be accounted for in subsequent accounting reports to those beneficiaries.

283 F. Supp. 2d at 183. Excluding *Youpee* interests and trust revenue generated therefrom is impermissible.

4. Defendants' accounting plan excludes income that should have been collected and deposited in a beneficiary's account.

Defendants' historical accounting plan excludes income that was never collected, including uncollected or underpaid royalties and penalty interest. As defendants readily concede, they "[a]bsolutely" have a trust duty to ensure that revenue properly due is collected.[27] As such, defendants believe that it is a breach of trust to fail to properly collect such revenue.[28] Still, trust funds that are not deposited in the proper beneficiary's account are excluded from defendants' historical accounting plan.

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[27] *See* Plaintiffs' Exhibit 15, Trial 1.5 Day 39 PM (Special Trustee Swimmer) Tr. at 14:14. *See also* Plaintiffs' Exhibit 16, Trial 1.5 Day 37 AM Tr. at 39:10-12: ("It's a responsibility of the trust to collect the money, to audit those leases, and to make sure that the money gets into the appropriate trust agency . . . .). Swimmer confirms that "responsibility" is analogous to a "trust function" or "trust responsibility" *Id*. at 39:5-9.

[28] Plaintiffs' Exhibit 16, Trial 1.5 Day 37 AM Tr. at at 39:21-24:

> Q. And if they fail to collect on those leases, would that be a breach of trust?
> A. I think it would be on behalf of the Department, the trustee.

See also id. 40:13-17:

> Q. And if MMS fails to properly monitor and ensure – monitor the processes that they are involved in as far as oil and gas is concerned, would you believe that that is a
> breach of trust?
> A. I think it would be, yes. That's their obligation.

First, it is axiomatic that proceeds from trust lands are trust funds. *See, e.g.,* BOGERT § 921 (Rev. 2d ed.) ("It is also a commonplace of American legal theory that . . . the equitable owner of the trust property . . . is entitled to that which arises out of the trust property by sale, exchange, or otherwise."). If defendants failed to collect such funds, that failure does not eliminate their duty to account for them. Defendants cannot gain such ill-gotten advantage through a clear breach of fiduciary duty. Indeed, it would be troublesome if, by failing to collect funds it is required to collect, the government could thereby vitiate its duty to account. The accounting should demonstrate what was collected and what was not; that is the complete accounting of all funds to which each trust beneficiary is entitled.

Second, an accounting is a valuable remedy in and of itself – because it tells the beneficiary what the trustee has done with its property. If an accounting established the propriety of all transactions and account balances, that knowledge is of great value to the beneficiary. To the extent improprieties are discovered that information is likewise important. Moreover, even if to obtain full relief necessitates the filing of a separate action for damages, that does not mean this Court does not have jurisdiction. It is well-settled that just because a district court action "hints at some interest in a monetary reward from the federal government or because success on the merits may obligate the United States to pay the complainant" does not make it a claim for money damages. *Kidwell v. Dept. of the Army,* 56 F.3d 279, 284 (D.C. Cir. 1995). In fact, "[e]ven where a monetary claim may be waiting on the sidelines," the touchstone is whether plaintiffs' claim has "<u>considerable value</u> independent of any future potential for monetary relief." *Id.* (emphasis added) (citation and quotation omitted). Here, plaintiffs' accounting right is a vested property right that has "considerable value" in and of itself. The accounting provides vital

information to permit the beneficiary to protect his or her interest or, alternatively, to have the assurance and peace of mind that the trustee is faithful.

Third, whatever relief may be available to the trust beneficiary as a consequence of a breach of trust identified through the accounting is a separate question from what the accounting must reveal. Though plaintiffs might have an action for damages as a result of breaches identified in the accounting, that is by no means the only remedial avenue open to them for uncollected funds. Defendants, as trustee-delegates, have a "duty to enforce claims" against, *inter alia*, third-parties. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 177 (1959). If there are uncollected funds, plaintiffs could seek, instead of damages, injunctive relief requiring defendants to bring an action to collect those funds from the third party withholding the payment. *Id.* at § 199 ("The beneficiary of a trust can maintain a suit … to compel the trustee to perform his duties as trustee …."). Alternatively, plaintiffs here may, among other options, file an action against the non-payor seeking payment of withheld funds in violation of the lease or other agreement. *See, e.g., Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 372 (1968) ("federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a governmental official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights"). The critical point is that the determination of which remedial option to exercise is appropriately done *after* the accounting is rendered and beneficiaries have the information to determine the best approach.

A colloquy between this Court and the Special Trustee regarding the nature of this exclusion is revealing:

> THE WITNESS: If you go back to the -- to what I understand to be the transactional analysis, and you look at each transaction in the account holder's account, you would not find a transaction that indicated that payment was due to be made.

> THE COURT: But if you had the lease you would find that it was due and owing.
> THE WITNESS: If there was a lease, and if there was a history of payments that should have been received, or that were being received, and you missed a payment, it should show up some place in the accounting. Now there could be a reason why it didn't get paid. It could be that the lessee took bankruptcy or something, and quit making payment on it. But even though you didn't have the money in the account, I would expect the accountants to go back and try to confirm the purpose for that lease not being paid. But the accounting, as I understand it, was for the accounting of funds that were on deposit that did make its way -- the funds that did make their way into the trust fund account.
> THE COURT: Where did that notion come from? Clever lawyers.
> THE WITNESS: I will accept that, Your Honor. I think it came from an interpretation of the accounting and the statute.
> THE COURT: Clever accountants, too. Go ahead.

See Plaintiffs' Exhibit 15, Trial 1.5 Tr. at Day 39 PM (Swimmer) 28:17-29:18 (emphasis added). There is no justifiable basis for defendants to exclude trust revenue which they had a duty to collect.[29]

Most disturbing, defendants' accounting plan is based on the following clearly erroneous assumption: "The oil and gas sales reports received from the lessee will not be verified against production documents."[30] The purported basis for this is that MMS conducts periodic audits of oil and gas payors. However, this assumption has been repudiated by Interior's Inspector General who continues to report fundamental problems with the oil and gas royalty program audits: "MMS failed to fully adhere to the standards in its own audit manual. This has resulted in unreliable audit quality and documentation, and precludes established controls from functioning effectively." *See* Plaintiffs' Exhibit 18 (March 31, 2003 Inspector General Report) at 12.[31]

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[29] This Court will note that this exclusion is separate and apart from the $13 billion defendants concede was collected by trustee-delegates.
[30] *See* Plaintiffs' Exhibit 17 (Defendants' Accounting Standards Manual) at D059-0010 (excerpts only, bulky exhibit).
[31] It is notable that the defendants' reliance on the deficient audit process gives the Special Trustee "concern." *See* Plaintiffs' Exhibit 19, Trial 1.5 Tr. at Day 39 AM (Swimmer) 24:23-25-2.

Plaintiffs suggest that the deficient MMS "audit" program does not discharge defendants' accounting duty.

5. Defendants' accounting plan excludes all un-posted collections.

Defendants' historical accounting plan presents a "downstream" approach to accounting in that it traces only IIM collections that are recorded in a particular statement.[32] Such a limited approach necessarily excludes all collections which should have been, but were not**,** deposited to the credit of beneficiaries; only an "upstream" analysis would ensure that all collected revenues are properly and completely posted to beneficiaries' trust accounts. Of course, such an "upstream" collections analysis requires complete documentation, including but not limited to, leases, collection vouchers, deposit tickets, schedules of collections and other related source documentation; the reason defendants exclude such an analysis is that the systemic spoliation of trust records makes it impossible.

Under cross examination during Trial 1.5, the Special Trustee admitted that such unrecorded or improperly recorded transactions should be included in "an appropriate" accounting plan.

> Q. Do you know -- do you believe that if such a transaction is unrecorded, an accounting plan – an appropriate accounting plan should be able to detect that and ensure that those funds are nevertheless accounted for?
> A. If money were received into the system but wasn't recorded, it should be accounted for.

[32] Defendants' expert testified as follows:

> Q. And if the transaction was a royalty payment that went into the MMS account to Treasury but there was no hard-copy documentation or electronic entry in IRMS, you're not going to identify that transaction if the money never went to the individual indian trust beneficiary's account.
> A. If the credit was never made to that beneficiary's account and there was no balance change, that is correct.

See Plaintiffs' Exhibit 21, Trial 1.5 Tr. at Day 36 AM (Lasater) 15:7-13.

See Plaintiffs' Exhibit 20, Trial 1.5 Day 40 AM 62:19-24. Here, again, the discussion between this Court and the Special Trustee is illustrative.

> THE COURT: [If] you don't have any obligation to account for it unless it got to the BIA IIM funds. When does it become your responsibility?
> THE WITNESS: Well, Your Honor, <u>it is our responsibility to account any time there is money owed</u>. What I was trying to refer to is that it is my understanding, maybe wrongly so, but in the accounting plan, in the historical plan it was to account for those funds on deposit from any source in the beneficiary's account.
> THE COURT: <u>But if it never got to the beneficiary's account, it is lost</u>?
> THE WITNESS: <u>It is lost, and it could be the subject of a damage claim</u>.

See Plaintiffs' Exhibit 15, Trial 1.5 Tr. at Day 39 PM (Swimmer) 27:17-28:6 (emphasis added).

This exclusion is meritless. At bottom, plaintiffs' claim in this litigation is that the balances in their trust balances are incorrect. As such, among other things, this exclusion ignores trust funds in the possession of defendants that are misidentified or unidentified and, in effect, it purports to prove the validity of an incorrect balance. By way of example, if Beneficiary A claimed that the balance in his trust account was incorrectly recorded as $25.00 when he believed the balance to be $100.00, defendants' exclusion would limit the historical accounting to an examination of only the $25.00 currently recorded in the account. No doubt defendants would then proclaim there to be no evidence that trust monies are missing from Beneficiary A's account.

This is not an accounting of all funds.

6. Defendants are excluding all beneficiaries and assets after December 31, 2000, including any new "accounts" that may have been opened.

Defendants' January 6, 2003 historical accounting plan indicates that it "covers all IIM "accounts" that were open as of December 31, 2000. . . ." *See* Plaintiffs' Exhibit 5 (Defendants' *Historical Plan*) at 2. There is no rationale provided to explain why a beneficiary whose

"account" was opened after December 31, 2000 is not entitled to a historical accounting of his or her trust funds. This Court did not agree with defendants' arbitrary cut-off date:

> The 1994 Act required Interior to transmit quarterly statements of account to the IIM beneficiaries. To date, no evidence has been presented to this Court that Interior has complied with this requirement. Accordingly, until Interior has demonstrated to this Court that it has a system in place to transmit quarterly statements of account reflecting the current state of the IIM trust fund, it will not be appropriate to designate December 31, 2000, or any other date, as an end date for Interior's historical accounting of the transactions in the land-based accounts.

Cobell X, 283 F. Supp. 2d at 172-73 n.54. In fact, notwithstanding the Congressional mandate, defendants have not provided regular, quarterly statements of accounts with *accurate* information to the plaintiff class. Accordingly, the exclusion of "accounts," beneficiaries, and transactions after December 31, 2000 is in conflict with the law of this case.

7. Defendants' historical accounting plan excludes beneficiaries and assets managed by tribes under contract, compact and cooperative agreements.

A massive but unquantified number of beneficiaries and their financial and non-financial assets have been administered by tribes under the Indian Self-Determination Act and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203.[33] The '638' contracts between tribes and the government are entered into without notice or consent of individual beneficiaries. Interior now takes the position that trustee-delegates' fiduciary responsibility to individual Indian trust beneficiaries is eliminated by the '638' contracts. However, the Interior Solicitor has opined that "the fact that a tribe takes over federal duties by entering into one or more contracts or a

[33] These are often referred to as '638' agreements, contracts, compacts or cooperative agreements. They are substantively identical and only differentiated by particular tribe and the type(s) of federal functions conveyed thereunder.

compacting program does not extinguish the federal trust responsibility."[34] Indeed, the 1994 Act:

> unequivocally requires the Secretary to '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 ....' Nothing in the [1994] Act suggests that this mandate would be waived if the records relating to that trust responsibility were generated in the context of an Indian self-determination contract or compact program, or if the records were simply being held by a tribe.[35]

Understandably, this position has been embraced by the Associate Deputy Secretary, the official overseeing the historical accounting.[36]

Most importantly, this Court has "conclude[d] that Interior's historical accounting must include an accounting of IIM accounts whose assets are administered or managed by Tribes as agent for the government pursuant to contract, compact, or other form of agreement." *Cobell X*, 283 F. Supp. 2d at 182. Thus, it is law-of-the-case. Yet, defendants have still developed no plans to account for the individual Indian trust assets managed by tribes.

D. The Secretary of Treasury is an indispensable party who as trustee-delegate has a critical fiduciary duty regarding the accounting.

The Secretary of the Treasury is a trustee-delegate and an indispensable party to these proceedings. Since the inception of this trust, the Secretary has had significant and varied responsibilities with respect to the management of individual Indian trust beneficiaries' assets, including without limitation the pooling and holding of plaintiffs' trust funds, the preparation and maintenance of trust records, auditing, the investment of trust funds in bonds and notes, the redemption of investment securities, the transfer of trust funds, and the disbursement of trust

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[34] *See* Plaintiffs' Exhibit 22 (Memorandum from John D. Leshy, Office of the Solicitor to Ken Rossman, Director, Office of Trust Litigation Support and Records 2 (Nov. 28, 2000) (Trial 1.5 Pls.' Ex. 259)) at 3.
[35] *Id*. at 5 (footnote omitted).
[36] Trial 1.5 Day 22PM 52:12-14.

monies. These responsibilities are historical and continuing and are integral components of the upcoming trial – especially as it relates to a meaningful equitable remedy.

It therefore cannot be seriously argued that the Secretary of the Treasury does not have "substantial trust responsibilities."[37] Yet, defendants contend precisely that – arguing: "Treasury's document retention practices and policies – the one breach *Cobell V* identified – would be redundant, would not resolve any pending issue, and would not be relevant to issues regarding the historical accounting being performed by Interior."[38] Notwithstanding Treasury's wishful thinking to the contrary, this Court's *Cobell V* order decision is not so limited, as can be seen from the pertinent parts of this Court's *Cobell V* order and the corresponding parts of the affirming opinion in *Cobell VI*.[39]

Tellingly, the Order of this Court in *Cobell V* is not limited to Interior. Section II, Paragraph 1 declared the accounting duty, which "requires <u>defendants</u> to provide plaintiffs <u>an accurate accounting of all money in the IIM trust</u> held in trust for the benefit of plaintiffs, without regard to when the funds were deposited." *Cobell V*, 91 F. Supp. 2d at 59, ¶ 1 (emphasis added). In addition, this Court identified in a separate operative paragraph of the order further <u>prospective</u> relief directed only at Treasury:

> To the extent that <u>prospective</u> relief is warranted in this case and to the extent that the issues are in controversy, it has been shown that defendant Lawrence Summers, Secretary of the Treasury, owes plaintiffs, pursuant to the statutes and regulations governing the management of the IIM trust, the statutory trust duty to

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[37] *Cobell VI*, 240 F.3d at 1088 ("the Treasury Department has substantial trust responsibilities").
[38] *Bench Memorandum* at 12.
[39] As an aside, this Court's *Cobell V* order (91 F. Supp. 2d at 58) was careful to indicate which defendant (or defendants) it was referring to at a particular time: "defendants" (*see, e.g.,* 91 F. Supp. 2d at 59, ¶¶ 1, 2, and 5); "defendant Bruce Babbitt, Secretary of the Interior, and defendant Kevin Gover, Assistant Secretary of the Interior" (*see, e.g., id.* at 58, ¶3); or, "defendant Lawrence Summers, Secretary of the Treasury" (*see, e.g., id.* at 58, ¶ 4). Accordingly, using the term "defendants" meant all defendants, not some subset, and cannot be properly interpreted to exclude Treasury.

> retain IIM trust documents that are necessary to render an accurate accounting of all money in the IIM trust held in trust for the benefit of plaintiffs.

Id. at ¶ 4 (emphasis added). It is clear then that the decree declaring the accounting duty is intended to cover both Treasury and Interior – the trustee-delegates – as it should since they both play critical roles in accounting activities.

Cobell VI is in accord. It reframed the *Cobell V* holding, making it clear that:

> [t]he actual legal breach is the failure to provide an accounting, not its failure to take the discrete individual steps that would facilitate an accounting. . . . [However,] the bottom line is the same: By failing to take reasonable steps toward the discharge of the federal government's fiduciary obligations to IIM trust beneficiaries, appellants breached their duties.

Cobell VI, 240 F.3d at 1106.[40] In other words, both Treasury's and Interior's legal breach is the failure to render a historical accounting, not the failure to take the discrete step of drafting new document retention policies. It is the "federal government's fiduciary obligations to IIM trust beneficiaries, [and] appellants [both Treasury and Interior] breached their duties." *Id.* (emphasis added). That is not to say that Interior and Treasury, as co-trustee-delegates, do not have different responsibilities with respect to the duty to render an historical accounting; they do. But that makes this Court's authority to ensure Treasury carries out its specific duties even more crucial.[41]

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[40] Again, this Court will note that there is no distinction between Interior and Treasury. Both are identified as "appellants." Collectively, they are referred to as "trustee-delegates."

[41] Importantly, trustee-delegates never appealed this Court's holding that the Secretary of the Treasury has a duty to render a historical accounting in conjunction with the Secretary of the Interior and Assistant Secretary – Indian Affairs. Instead, defendants collectively and generally, challenged *Cobell V*, arguing that there is no such duty to render a historical accounting. This, obviously, was discounted by the Court of Appeals. But, Treasury, as an indispensible party litigant and trustee-delegate, never challenged this Court's holding that it, in conjunction with the Department of the Interior, had a fiduciary duty to render a historical accounting. The distinction is important because Treasury did challenge individually the *Cobell V* order as it related to its document retention policies. In any event, this Court's *Cobell V* order was unambiguous and was upheld by the *Cobell VI* court.

Accordingly, and for this reason alone, the Secretary of the Treasury is an indispensable party and must remain engaged fully in the October trial. But, this is far from the sole reason. Outlined below are a series of other reasons why removing Treasury from the October trial will dramatically diminish the effectiveness and efficiency of these proceedings.

1. Though beneficiaries' financial assets are held in a commingled account, the Treasury General Account ("TGA"), at the Department of Treasury, an examination of the assets in the TGA is unlawfully excluded from defendants' historical "accounting."

The entirety of the financial corpus of this trust collected by the Government passes through and is, for a period of time, held in a commingled account at the Department of Treasury – the TGA.[42] As a result, the TGA is central to any determination that trustee-delegates, including the Secretary of Treasury, fulfilled their fiduciary duty to account. Nevertheless, defendants have no plan to examine the transactions posted to this account. The significance of this exclusion can hardly be overstated.

Treasury maintains a TGA for managing the general operations of the federal government; but it also contains beneficiaries' trust funds. All deposits to the federal government are routed to the Department of Treasury and deposited into the TGA – the federal government's operating account at the Federal Reserve Bank of New York.[43] Most importantly, as noted by this Court: "The Treasury General Account at the Federal Reserve Bank is a cash account, but the various agency accounts maintained at Treasury do not actually hold funds.

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[42] *See* Plaintiffs' Exhibit 23 Trial 1.0 Day 19 Tr. at 3401:20-22 (testimony of Richard L. Gregg, Commissioner Financial Service, Department of Treasury) ("I think any funds that are deposited into the Treasury general account are almost by definition commingled.").

[43] *Cobell V*, 91 F. Supp. 2d at 12 (citation omitted):

> When Interior deposits funds for credit to the IIM trust account, the funds themselves go into Treasury's operating account at the Federal Reserve Bank of New York. Like the accounts in which money is deposited at the area or agency level, this account is referred to as Treasury's General Account or TGA.

Instead, amounts are debited and credited to the various agency accounts **only as accounting entries**."[44] Each particular agency is responsible for classifying, tracking, segregating and accounting for its own deposits into the TGA.[45] Thus, Interior (and, every other federal agency) and Treasury identify the flow of funds via an Agency Location Code ("ALC"). Here, the IIM Account, along with many other accounts, is part of the 4844 ALC. This Court explained:

> At the time of deposit, Interior does not tell Treasury to which agency account the deposit should be credited. Rather, Interior reports deposits to Treasury by Agency Location Code (ALC). An ALC is a code assigned by Treasury to an agency and is used by the agency to report financial transactions.

Id. at 11 (citations omitted). Importantly, the 4844 ALC "covers transactions made at a higher organizational" level and includes far "more than just IIM trust transactions." *Id.* This means that "[e]ach agency is responsible for classifying its own deposits placed into the TGA and for reporting this information on a monthly basis to Treasury." *Id*. As a result, Treasury readily acknowledges that they must "work cooperatively to ensure complete and accurate information with regard" to the individual Indian trust.[46] In short, almost all financial transactions involving

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[44] *Id*. at 12 (emphasis added).

[45] *Id*. at 13 (citations omitted). In this case, trustee-delegates maintain a pooled account for the individual Indian trust beneficiaries known as the IIM Account. *Id.* at 12. This account is also known as the 14X6039 account; plaintiffs discuss this account, *infra*.

[46]

> Q. So your information in this regard is almost totally dependent upon Interior. Is that correct?
> A. Again, depending on the account, if they are reporting with an Interior ALC, they have the responsibility to have the detailed records to support that transaction, and they would be the only ones, certainly not Treasury, that would have the information to support what was contained in that specific transaction. We simply do not have the information.
> Q. So the answer is you are totally dependent on Interior for this information. . . . is that correct?
> A. They send us the summary information on these and as well as other Government agencies. So, to say that I'm dependent on them, they're the ones that initiate the flow of funds into the account, as well as initiate the flow of funds out

the individual Indian trust – both deposits and disbursements – pass through the TGA, but are indistinguishable from the other transactions and activity of the federal government in the TGA.

Under these circumstances – *i.e.*, the commingling of beneficiaries' trust funds with the other funds of the trustee – it undeniably critical to the proper administration of the trust, that the commingled account be properly reconciled on a regular basis such that the beneficiaries' trust assets are identified and segregated from the other funds on deposit.

This gives rise to an obvious and significant query: Are individual Indian beneficiaries' trust assets on deposit at the Department of Treasury regularly reconciled, identified and segregated from the other deposits of the federal government? The answer is unequivocal: No.

At all times before and after the publication of the Special Trustee's Strategic Plan in April 1997, Interior and Treasury have never been able to reconcile the balances that should stand to the credit of the individual Indian trust beneficiaries. As reported in the Special Trustee's Strategic Plan, "The cash account at the U.S. Treasury is not verifiable due in part to inadequate Bureau procedures and also because the U.S. Treasury is not able to provide the Bureau with accurate information regarding cumulative balances."[47] Accordingly, it was plainly

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of the account and have the responsibility to have the detailed records to support that.
Q. So is it fair to say Treasury and Interior have to work cooperatively to ensure complete and accurate information with regard to these accounts? Is that a fair statement?
A. That's -- which accounts are we talking about now?
Q. Any account which holds the individual Indian trust funds at the Department of the Treasury in order to –
A. That's certainly a fair statement with regard to the IIM fund.

Trial 1.0 3412:10-3413:11 (testimony of Richard L. Gregg, Commissioner Financial Services, Department of Treasury).

[47] See Plaintiffs' Exhibit 24 (Special Trustee's Strategic Plan) at Tab 8, p 8 (emphasis added) (excerpts only, bulky exhibit). This is a recitation of the Fiscal Year 1995 *Report of Independent Public Accountants on Financial Statements*: "(1) cash and overnight investments are maintained by a related U.S. Governmental Agency (U.S. Treasury) and cannot be independently confirmed,

correct for this Court to conclude that "Treasury's records are important to a proper accounting of plaintiffs' trust money." *Cobell V*, 91 F. Supp. 2d at 12 (emphasis added).

A very brief illustration of this out-of-balance condition will be helpful. Trustee X deposits a beneficiary's trust funds in Bank Y. Over the course of 50 years, Trustee X makes deposits and withdrawals on behalf of the beneficiary at Bank Y. However, Trustee X and Bank Y did not maintain adequate records nor did they regularly reconcile the account activity. Today, Trustee X thinks (but cannot prove that) there should be $100 deposited, but Bank Y's records show only $75, creating an out-of-balance condition of $25.

The foregoing illustration is precisely the situation that Interior and Treasury created over the course of the last century with the commingling of beneficiaries' trust assets. And, it has been reiterated in every audit report since 1995 (no audits were performed before fiscal year 1995 with respect to the individual Indian trust) and continues to be identified as a "material weakness."[48] That Interior and Treasury purport to quantify the out-of-balance condition is true, but that is not the most critical observation. The central point is that they have no idea what the correct balance should be, having failed to maintain adequate records or periodically reconcile the accounts.

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(2) cash balances reflected in the accompanying financial statement are materially greater than balances reported by the U.S. Treasury . . . ." *See* Plaintiffs' Exhibit 25 (Report of Independent Public Accounts is on page 16 of 60 page exhibit).

[48] The 1995 audit report found this condition to be a material weakness:

> Cash balances converted from the prior general ledger to Omni were approximately $27 million higher than the balance per the U.S. Treasury. Cash reconciliation procedures only reconcile current activity from Omni to Treasury and do not address the unreconciled beginning balance. **The composition of the difference is not known and no reliance has been obtained that either the OTFM balance or the Treasury balance is accurate**. This results in an unconfirmed and unreconciled cash balance on OTFM'S books.

Id. at 26 (page 38 of 60 page exhibit) (emphasis added). The Secretary of the Treasury responded: "Differences are isolated to the period of October 1, *1992* and prior, and have been controlled since that date." *Id*. at 27 (page 39 of 60 page exhibit).

Accordingly, the Treasury trustee-delegate has an indispensable role in the upcoming hearing. The Secretary's commingling of beneficiaries' trust assets at the TGA, along with his failure to maintain adequate records,[49] has created a situation where it is not possible to determine the amount of trust funds that have been disbursed from the commingled account. This has significant implications for plaintiffs' request for the correction and restatement of their trust balances whether such correction and restatement is accomplished through a complete and accurate accounting or through equitable restitution – or both – since trust funds remain in the TGA.

2. The trust funds are deposited in the TGA, a commingled account referred to as the IIM Account; consequently, breaches of trust affect every beneficiary with an interest in the pooled funds.

Each and every beneficiary is impacted by defendants' breaches of trust as a result of being commingled in the IIM Account. As noted, there is only one cash account at the Department of Treasury – the TGA. Other accounts, including the IIM Account (14X6039) are simply accounting entries, posting credits and debits as funds are disbursed from or deposited in the TGA. Here, the IIM Account is a bookkeeping account maintained principally by the Department of the Interior, holding no cash, but collectively and unidentifiably purporting to record all beneficiaries' trust funds in the TGA.

This has significant implications with respect to the commingling of plaintiffs' trust funds. Former Special Trustee, Paul Homan, in Trial 1.0 testified on this point:

> Q. Let's walk through an example of that briefly, just so it will be clear for the Court. Suppose I were a beneficiary and I were overpaid $1,000 out of the IIM pool.
> A. Right.

[49] Plaintiffs discuss the Secretary of the Treasury's destruction of all relevant disbursement records prior to **1990**, *infra*.

> Q. If I had not been overpaid, would that money have been earning interest in the Treasury?
> A. Yes.
> Q. And to whom would the benefit of that interest inure?
> A. The current beneficiaries of the IIM pool, which vary at any point in time.
> Q. **So is it correct to say that one of these overpayments proportionately deprives all beneficiaries of interest income?**
> A. **Current beneficiaries, although someone clearly benefited by the overpayment in the past**.

See Plaintiffs' Exhibit 8, Trial 1.0 Day 1 (June 10, 1999) Tr. at 150:15-151:4 (emphasis added). The effect is dramatic. Every single non-payment, overpayment or incorrect payment affects every other beneficiary of the Individual Indian Trust on a prospective basis. Such consequences are pervasive and they inexorably compound through time due to fewer trust funds stated and available for pooled investment.

3. Interior improperly has recorded disbursements from the IIM Account at the same time beneficiaries' trust funds remain in the TGA.

As the former Special Trustee explained, an erroneous distribution/debit from the IIM Account at Treasury fifty years ago adversely affects every other present and future beneficiary since it reduces the stated balance available for investment. However, because the IIM Account is merely a bookkeeping record, **no trust money ever left the individual Indian trust's pooled funds in the TGA**.

Richard Gregg, the Commissioner of the Financial Management Service – Department of Treasury explained:

> Q. When the Treasury check is cut, what happens? What is the procedure that is followed at Treasury when notice is provided to you that the check is cut by Interior?
> A. The funds are actually -- would -- Interior would make an accounting adjustment to their records to indicate, as it sounds right now, anyway, that a payment has -- has been made, and they would provide us information on payments that day or the following day on the amount that -- or the total amount of checks that were made that day.
> . . . .

> Q. And what information do they provide to Treasury?
> A. They provide the amount, and they provide the check symbol and serial number, and the date the check was issued. I believe that's all, and **it's reported by the ALC, the agency location code**.

See Plaintiffs' Exhibit 23, Trial 1.0 Day 19 (July 7, 1999) Tr. at 3357:20-3358:15 (emphasis added). In other words, the Secretary of the Treasury, as part of the accounting, must prove up the disbursement of trust funds.

Yet, again, Interior has and continues to breach its fiduciary duties by recording improper disbursements as debits from the IIM Account. The reality is that beneficiaries' trust funds remain deposited in the TGA where they are utilized by the Federal Government to reduce its borrowings. Put more simply, an improper recording of disbursements from the IIM Account is a material benefit defendants have acquired in breach of trust duties they owe the plaintiff class because it has the effect of reducing the national debt and related debt servicing costs. This is because such payments would otherwise have been made from borrowed funds.[50] Gregg's testimony is, again, illuminating:

> Q. Did you testify to what it means when funds are available to Treasury during your direct examination?
> A. I believe I did, yes.
> Q. What does it mean?
> A. To me, it means it's within the general account, the Treasury's general account.
> Q. So it's the Treasury's asset at that point?
> A. Well, it's the Government's. It happens to reside within Treasury, yes.
> Q. And I think you testified that when funds are available to Treasury, those funds do not earn interest; is that correct?
> A. That's correct.
> Q. And is it because they don't earn interest because it's considered the Government's funds during that period of time?

[50] The insidious other side of the ledger is that current and future beneficiaries as a whole are robbed of the benefits they would have earned had their trust funds been invested. It is, in effect, a compounded error by (1) reducing improperly the balance that should stand to the credit of the entire beneficiary class, while (2) impairing the asset base which would otherwise productively generate income for the class.

> A. It's really -- yes. It's our -- **the funds that are in our Treasury general account that we use to pay off obligations that are due, and it helps, you know, to look at that to determine how much the borrowing has to be at any given time**.

See Plaintiffs' Exhibit 23, Trial 1.0 Tr. at 3396:4-3396:24 (emphasis added).[51]

4. The Secretary of the Treasury has destroyed all credible evidence of disbursements prior to October 1990.

On November 24, 1998, Pamela Locks, Director – Financial Processing Division, Financial Management, Department of Treasury, testified that all copies of canceled checks were destroyed prior to October 1990:

> Q. How long does the Treasury keep copies of checks?
> A. We're required to retain check copies for six years, seven months after the check issue date.
> Q. What's done with the check after six years, seven months?
> A. They're normally destroyed.
> Q. Do you keep any sort of a microfilm or other record after that time?
> A. No. The microfilm and the original checks are destroyed normally in accordance with that schedule. . . . We have been advised to stop the destruction of the microfilm, so we do have some microfilm copies that may go back to approximately October 1990, but we would not have any check copies prior to that time.

See Plaintiffs' Exhibit 26, November 24, 1998 Hearing Tr. at 171:14-172:4. Put simply, as a consequence of defendants' systemic spoliation of trust records, neither Interior nor Treasury has the ability to prove up disbursements, if any, from the IIM Account prior to October 1990. Thus, such funds remain in the TGA). And it is well established under trust law that the "burden is on

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[51] Gregg testified further that the trust funds on deposit in the TGA are "treat[ed] . . . like any other funds that come into Treasury, really without distinction."

> Q. So, to the extent you know, how does that use of trust funds comply with the trust responsibilities of the United States Government?
> A. **I believe that we treat the IIM account like any other funds that come into Treasury, really without distinction**. The thing that's different here is that Interior writes its own checks, but otherwise it's treated very similar to what other accounts we handle.

Id. at 3396:25-3397:27 (emphasis added).

Interior to demonstrate that each transaction is properly supported."[52] *Cobell X*, 283 F. Supp. 2d at 195. We note that Treasury plays a critical role in properly supporting disbursements from the TGA.

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[52] In *Cobell X,* this Court cited an exhaustive list of applicable authorities regarding what constitutes a valid disbursement from the individual Indian trust. *Cobell X* at 195-196. *Cobell X* cited the following:

> *Red Lake Band v. United States,* 17 Cl. Ct. 362, 369, 370-71 (1989) (finding that "[i]t is the Government's duty to account for those disbursements by documenting them," and listing "backup documents that would normally have formed the support for an accounting," including "vouchers, invoices, bills, receipts, memoranda, or other documents"); *In re Martin's Estate,* 124 N.W. 2d 297, 302 (Wis. 1963) ("The final account of a trustee should show in detail the items expended and show when, to whom and for what purposes the payments were made so the beneficiaries can make a reasonable test of the accuracy of the accounts."); *Hill v. Roberts,* 311 S.W. 2d 569, 571-72 (Ky. 1958) (concluding that trustee had failed to provide adequate documentation of disbursements and explaining that "[a] voucher means, when used in connection with the disbursement of money, a written or printer instrument, in the nature of a bill of particulars, account, receipt, or acquittance, that shows on its face the fact, authority and purpose of the disbursement.... The cancelled checks appellee has filed do not fulfill this requirement. As before noted, many of them failed to show what the disbursement was for, and those that show the nature of the claim paid do not on their face appear to be authorized."); *In re McCabe's Estate*, 220 P.2d 614, 616, 618 (Cal. App. 1950) ("Trustees are also under the duty to prove every item of their account by satisfactory evidence; the burden of proof is on them and not on the beneficiary; and any doubt arising from their failure to keep proper records, or from the nature of the proof they produce, must be resolved against them.... All of these matters have a bearing on whether such charges are established by satisfactory evidence, in the absence of any vouchers or records of any kind, and when all presumptions are against the trustee.") (internal quotation marks omitted); *In re Strickler's Estate,* 47 A.2d 134, 135 (Pa. 1946) ("Where a fiduciary claims credit for disbursements made by him the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits. Accountant's unsupported testimony is generally insufficient.").

This standard is critical to measure the proofs of disbursement transactions that Interior must provide in their accounting or in accordance with principles of equitable restitution.

5. The Treasury trustee-delegate is indispensable because he has significant responsibilities with respect to the administration of individual Indian trust assets.

Along with the Treasury's substantial and ongoing trust responsibilities in the management of beneficiaries' trust funds, it has significant responsibilities with respect to the investment of trust funds and the auditing of those investments. These responsibilities have varied greatly since the inception of the trust.

By 1918, individual Indian beneficiaries' trust funds were invested, *inter alia,* in government bonds. Act of May 25, 1918, § 28, 40 Stat. 561, 591. Soon thereafter, by 1923, Treasury officials began to encourage the deposit and investment of beneficiaries' trust funds at Treasury. *See* Plaintiffs' Exhibit 27, Banking Policy Expert Report at 14. And, by the mid-1930's, Interior officials began shifting the deposit of beneficiaries' trust monies out of agent commercial banks and into Treasury, according to defendants' historical expert. *Id*. at 23. Today, beneficiaries' funds are to be invested by the Treasury "in public debt securities with maturities suitable to the needs of the fund involved . . . and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities." 25 U.S.C. § 161a(b) (2006). While not all beneficiaries' trust funds were historically held and invested by Treasury, it has had and continues to play an integral role in calculating the income earned on the investment of the individual Indian trust funds and in identifying the proceeds of redeemed investment securities that had been purchased with plaintiffs' pooled trust funds..

Their audit duties are significant too. As defendants' historians explained:

> During the 1930s and 1940s, the Bureau of Public Debt regularly performed audits of securities that were held in safe-keeping in the vault of the Securities Division of the Office of the Treasurer of the United States. Taken together, these audits provide a valuable overview of trends in IIM investment policy during this

> period. The vast majority of federal securities purchased with IIM were held at the Office of the Treasurer in Washington. In addition, the securities that commercial banks put up for collateral to secure IIM deposits were also sent to the Treasurer for safe-keeping.

See Plaintiffs' Exhibit 27 at 37-38. Not only does this make clear Treasury's duties with respect to auditing, but also, we note such auditing powers and procedures are also relevant because defendants have relied upon them as evidence. *See, e.g., Interior's 29th Quarterly Report*, filed May 1, 2007 [Dkt. No. 3318] at 3-4.

In sum, Treasury plays varied and critical management roles vis-à-vis the individual Indian trust.

Respectfully submitted,

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May 29, 2007

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFFS' BRIEF REGARDING THE NATURE AND SCOPE OF THE HISTORICAL ACCOUNTING AND EXCLUSIONS FROM DEFENDANTS' HISTORICAL ACCOUNTING PLAN was served on the following via facsimile, pursuant to agreement, on this day, May 29, 2007.

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