

ORAL ARGUMENT SCHEDULED MAY 11, 2009

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

Nos. 08-5500 & 08-5506

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

v.

**KENNETH SALAZAR, SECRETARY OF THE INTERIOR, *et al.*,
Appellees/Cross-Appellants,**

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

**RESPONSE AND REPLY BRIEF FOR
APPELLANTS/CROSS-APPELLEES**

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GLOSSARY

AA	Arthur Andersen
APA	Administrative Procedure Act
BIA	Bureau of Indian Affairs, Department of the Interior
GAO	General Accounting Office
IIM	Individual Indian Money, e.g., IIM Trust Beneficiaries. The terms “Individual Indian Trust beneficiary” and “IIM Trust beneficiary” are synonymous.
IG	Inspector General, Department of the Interior
IT	Information Technology
ICCA	Indian Claims Commission Act
IRA	Indian Reorganization Act
LRIS	Land Records Information System
MMS	Interior’s Minerals Management Service
OIG	Office of Inspector General, Department of Interior
OTFM	Office of Trust Funds Management
TGA	Treasury General Account
Trust	Individual Indian Money Trust
Trust Reform Act	American Indian Trust Reform Act of 1994, Pub. L. No. 103, 412, 108 Stat. 4329 (1994) (codified in part of 25 U.S.C.).

SUMMARY OF ARGUMENT

1. In 1994, Congress reconfirmed the government's pre-existing duty to account for all trust funds of individual Indians. Since then, the district court on three occasions and this Court once have concluded that defendants unreasonably delayed that accounting. That century-long delay, coupled with Congress' failure to fund the accounting, led the district court to conclude that the accounting is impossible. As a result, the district court determined that plaintiffs are entitled to a restitutionary award of \$455,600,000.

2. The scope of the mandated accounting is a question for the court; defendants are owed no deference. The district court properly rejected the accounting's scope as set forth in defendants' 2007 Plan, holding that it is inconsistent with this Court's guidance.

3. Defendants continue to engage in undue delay. They have not formulated a plan to provide an accounting to beneficiaries which satisfies the purpose for which an accounting is conducted – to allow beneficiaries to ascertain whether the trustee has discharged its fiduciary duties. Moreover, their duty to remedy subsidiary breaches of trust, including maintaining adequate records, computer systems, and staff remains unfulfilled.

4. Restitution and specific relief are equitable remedies, not damages, and the government has waived its immunity under 5 U.S.C. §702. Consistent

with *Bowen v. Massachusetts*, 487 U.S. 879 (1988), plaintiffs are seeking the very thing to which they are entitled, undisbursed principal and interest that has accrued on their funds held in trust, both of which have benefited the government.¹ Accordingly, an award of restitution is proper and, as the monetary relief is equitable and does not predominate, is authorized for a Rule 23(b)(1)(a) and (b)(2) class.

5. However, the court erred in calculating restitution. First, it improperly denied interest, the recovery of which is explicitly authorized by statute and within the waiver of immunity in §702. Second, it erred by not applying traditional trust principles to the government as trustee. While conceding \$14.31 billion of plaintiffs' funds had been entrusted to them, they were not required to document any disbursement or withdrawal from the Trust. Third, the court erred in excluding from the restitution award funds entrusted to the government but not credited to individual Indian accounts.

6. Finally, the Osage Tribe has no standing to intervene. The funds in the Osage account belong to individual Indians, not the tribe, as held by the district court. Neither the government nor tribe appealed that decision. It may not be contested now through intervention.

¹ As attested to by former Office of Management and Budget Director and Chairman of the Federal Trade Commission Hon. James C. Miller, III, undisbursed IIM constitutes a significant and quantifiable benefit to the Government. Jun. 2008 Tr. 06/10/08 A.M. 250: 16-24 (Miller)[A12166].

I. THE ACCOUNTING IS IMPOSSIBLE.

A. Introduction.

Defendants argue the scope of an accounting under *Cobell v. Kempthorne* (“*Cobell XX*”), 532 F. Supp. 2d 37 (D.D.C. 2008), is too costly and beyond that which Congress mandated. Defs.’ Br. at 20. However, they disregard this Court’s decision in *Cobell v. Norton* (“*Cobell VI*”), 240 F.3d 1081 (D.C. Cir. 2001), which specified what an accounting requires.

Moreover, they erroneously equate that decision with previously vacated structural injunction decisions. Defendants misconstrue this Court’s decisions, implying they are premised on the district court improperly mandating the accounting’s scope. *See generally* Defs.’ Br. at 18-21. However, neither reversal was based upon such determination. *See Cobell v. Norton* (“*Cobell XIII*”), 392 F.3d 461, 465 (D.C. Cir. 2004); *Cobell v. Norton* (“*Cobell XVII*”), 428 F.3d 1070, 1077 (D.C. Cir. 2005).

While defendants criticize the district court for treating prior district court conclusions as “presumptively correct,” *Cobell XX*, 532 F. Supp. 2d at 94 n.16, in doing so it adhered to this Court’s guidance. *See Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991). Nonetheless, at times it departed significantly from those opinions, each time favorably to defendants. *See generally Cobell XX*, 532 F. Supp. 2d at 89, 91-92, 95, 97-98.

B. The Plan's Scope Was Properly Rejected.

The Trust Reform Act requires that defendants “account” for “all funds held in trust by the United States” for the benefit of individual Indians. 25 U.S.C. §4011. It “reaffirms the government’s preexisting fiduciary duty to perform a complete historical accounting of trust fund assets.” *Cobell VI*, 240 F.3d at 1102. This accounting must be “*fair and accurate*” and encompass “*all accounts.*” *Id.* (emphasis in original).

There is no ambiguity as to essential requirements of an accounting. It must “serve the purposes for which a trust accounting is typically conducted.” *Id.* at 1103. It “necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception,” and a “report of all items of property, income, and expenses.” *Id.* (internal quotations omitted). It must “tak[e] into account past deposits, withdrawals, and accruals,” determine accurate account balances by “confirming historical balances,” *id.* at 1102, and provide “supporting documentation that is adequate to demonstrate that each listed transaction actually took place,” *Cobell XVII*, 428 F.3d at 1077 (internal quotations omitted). Moreover, the accounting must encompass “all funds” held in trust in “all accounts.” *Cobell VI*, 240 F.3d at 1102.

Defendants’ plan excludes all class members with accounts closed before 1994; documents and justifies no account balances or transactions; identifies no

assets from which income is derived; discloses no fees charged by defendants; provides no certification by a certified public accountant; and documents no withdrawals. *See generally Cobell XX*, 532 F. Supp. 2d at 74-76, 80, 93, 98-101; Pls' Opening Br. at 5. Thus, it fails to satisfy the minimal requirements of an accounting. Efforts to justify it based on alleged deference and congressional intent, *see* Defs.' Br. at 22-23, have no basis.

1. Defendants' Plan Is Not Entitled To Deference.

Where a statute is unambiguous, a court will not defer to an agency's interpretation. *Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058, 1065 (2009). There is no ambiguity as to fundamental elements of the accounting under the Trust Reform Act as decided by this Court. Defendants' plan does not satisfy these requirements.

Moreover, to the extent there is ambiguity, which there is not, deference normally accorded an agency's interpretation has no application here. *See Cobell v. Kempthorne* ("*Cobell XVIII*"), 455 F.3d 301, 304 (D.C. Cir. 2006). First, defendants' statutory trust obligations must be construed "liberally in favor of the Indians," and where ambiguous, they must be "interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Second, defendants' current interpretation of the scope of its accounting duties is inconsistent with its prior interpretations. *See infra* at 11, 13, 15-16, 17. This

marked change is entitled to no deference. *See Carcieri*, 129 S. Ct. at 1069-70 (Breyer, J. concurring); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). This is particularly true where, as here, that change is solely the result of legal posturing.² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). Defendants' scope limitations are not based on cost. *Cobell XX*, 532 F. Supp. 2d at 89.

Moreover, defendants are entitled to no deference as the common law of trusts limits such deference when interpreting their statutory trust duties. *Cobell XVIII*, 455 F.3d at 306. While trust law may not always provide a “clear path for resolving statutory ambiguities regarding accounting methodology,” *id.*, it does “‘flesh out’ the statutory mandates and determine the precise contours of the government’s responsibilities,” *id.* at 307. Accordingly, it is the court, not the breaching trustee, that must determine whether the “accounting” plan is “sufficient to serve the purposes for which a trust accounting is typically conducted.” *Cobell VI*, 240 F.3d at 1103. *See also Cobell XIII*, 392 F.3d at 472 (trust law particularizes statutory obligations); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (trustee’s duties are determined by the court).

² The government’s “land-based transaction reconciliation work performed after the issuance of the 2003 Plan was largely part of a project entitled ‘Litigation Support Accounting’” (“LSA”), a self-titled project for “reducing [the] liability” of the trustee-delegates and for settlement purposes. *See Cobell XX*, 532 F. Supp. at 60.

Defendants suggest that the “staggering” number of accounts justifies its neglect of fiduciary standards. Defs.’ Br. at 23-24. However, Congress understood the complexity of the Trust and explicitly rejected the argument defendants now assert. *See Review of the BIA’s Management of \$1.7 Billion Indian Trust Fund, Hrg. Before the H. Subcomm. on Environment, Energy and Natural Resources*, 101st Cong., 1st Session at 40 (Oct. 26, 1989) (the “10/26/89 Hrg.”)(questioning by Chairman Mike Synar)(BIA is “going to tell us . . . that this system is so complex, so burdensome . . . I can’t believe that if we can administer . . . [other] trust funds efficiently and effectively, it can’t be done by BIA.”) [A13292]. In fact, the IIM Trust pales in comparison to other public and privately managed trust funds.³

The Trust Reform Act reaffirms the application of fiduciary duties; it does not disavow them. *See Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499, at 8 (Apr. 22, 1992)(“Misplaced Trust”)(BIA’s “fiduciary responsibilities are not dissimilar to the duties performed by many private trustees”) [A01006]; *Hrg. On H.R. 1846 & H.R. 4833, Before H. Subcomm. on Native American Affairs*, 103d Cong., at 3

³ Fidelity Management Trust Co. has 10,593,325 managed and non-managed accounts. Citigroup has 1,418,378 managed trust accounts. The Social Security Administration has 175 million accounts with \$600 billion in assets, having received \$8.7 trillion in assets and paid out \$7.4 trillion dollars in benefits. *See* <http://www.fdic.gov/bank/individual/trust/table4.htm>; <http://www.socialsecurity.gov/history/trustfunds.html>.

(Aug. 11, 1994) (“8/11/94 Hrg.”) (Statement of Chairman Bill Richardson) (“[w]e should hold the Federal Government to the same standard as any other trustee”) [A13301].

2. The Act’s History Supports The District Court’s Decision.

Defendants argue the accounting “parameters” set forth by the district court are inconsistent with legislative intent. Defs.’ Br. at 22. To the extent legislative history is relevant, *compare Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006), with *Dolan v. United States Postal Service*, 546 U.S. 481, 486 (2006), defendants misconstrue it.

In construing a statute, “the problem Congress sought to solve should be taken into account.” *PDK Labs., Inc. v. United States Drug Enforc. Agency*, 362 F.3d 786, 796 (D.C. Cir. 2004). Congress left no doubt about the problem to be corrected.

A Congressional Subcommittee investigated the Trust in 1989. *See* *Misplaced Trust* at 5, 13 [A01003, A01011]. It identified “mismanagement” of the Trust “for more than a century.” *Id.* at 9 [A01007]. Its purpose was to review efforts by BIA “to implement repeated congressional directives to provide a *full and accurate* accounting.” *Id.* at 2 (emphasis added) [A01000]. At that time, BIA’s attempt “to scale back the audit and reconciliation effort” was characterized as “just one more outrage.” *Hrg. on FY 1994 Interior and Related Agencies*

Appropriations Bill Before the H. Subcomm. on Interior Comm. on Appropriations, 103d Cong., at 2 (May 13, 1993)(“05/13/93 Hrg.”) [A13373]; *see also* *Misplaced Trust* at 20 [A01018] (BIA criticized for “pass[ing] off” its engagement of Arthur Andersen (“AA”) as “a full audit and reconciliation as required by law,” where it verified neither individual transactions nor historical balances). Interior reaffirmed that “*to the greatest extent possible* previous inaccuracies in accounting and crediting of accounts [would be] identified and rectified.” *Testimony of Ada Deer, Asst. Sec. for Indian Affairs*, 08/11/94 Hrg. at 21 (emphasis added) [A13319].

Contemporaneous legislation reaffirmed the Trust must be reconciled “to the earliest date possible,” and the reconciliation must be certified “as the most complete reconciliation of such funds possible.” Interior and Related Agencies Appropriations Act for Fiscal Year 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994) (“1994 Appropriations Act”) at 2511.⁴ *See also Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972)(statutes enacted by the same legislative body at the same time on the same subject matter must be construed *in pari materia*). BIA’s protest over cost of the accounting was characterized as “arrogant” and “offensive.” 5/13/93 Hrg. at 2 [A13373].

⁴ This is the sixth successive appropriations act containing identical language.

3. Defendants' Objections To Scope.

Defendants object to six conclusions by the district court regarding the accounting's scope. Defs.' Br. at 24-31. Plaintiffs address each seriatim.

a. Reconciliation Of IIM In Closed And Probate Accounts.

Defendants contend the district court expanded their accounting duty by requiring an accounting of closed and probated IIM accounts. Defs.' Br. at 24-27. However, the February 4, 1997, class certification order encompassed "present and former beneficiaries" of the IIM Trust. *See* Dkt. No. 27 [GA-000028-31]. Rejecting an accounting for beneficiaries then deceased, the district court limited the duty to those living on or after October 25, 1994. *Cobell XX*, 532 F. Supp. 2d at 98. However, the court required reconciliation of predecessor accounts because the Trust Reform Act specifies that defendants establish "the beginning balance" of each account. 25 U.S.C. § 4011(b)(2). Defendants concede that "it is impossible to determine the accuracy of an account balance without confirming the accuracy of the account's opening balance." *Cobell XX*, 532 F. Supp. 2d at 75. Such balances cannot be determined accurately without "confirming historical account balances." *Cobell VI*, 240 F.3d at 1102. Confirming historical account balances requires reconciliation of predecessor accounts. *See Cobell XX*, 532 F. Supp. 2d at 76.

In the years following the Trust Reform Act, defendants themselves conceded that the accounting requires reconciliation of predecessor accounts. *See, e.g.,* 10/23/07 AM Tr. 1575:9-1576:15 (Homan) [A08191]. On July 2, 2002, Interior, in its Report to Congress (the “7/2/02 Report”), confirmed the accounting includes such reconciliation. AR-561 at 25-02-40 [A13415].

On appeal, defendants make two arguments. First, they mistakenly contend legislative history forecloses consideration of predecessor accounts. Defs.’ Br. at 25. This argument was not raised below and should not be considered. *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 867 (D.C. Cir. 2008). Nevertheless, Congress understood, and Interior confirmed, that the accounting must go back as far as possible. *See supra* at 8-9. Nothing in the legislative history suggests Congress intended to limit the accounting, penalize beneficiaries and insulate defendants from full accountability by restricting it to the last probated estate.

Second, defendants erroneously argue that probate is a “final determination” of estate assets. Defs.’ Br. at 26. The probate judge does not assess the completeness of trust assets listed in the probate file. 10/25/07 AM Tr. at 1999:3-13 (Willett) [A08405]. The probate is limited to the information before the judge at that time, *id.* at 2015:7-2016:22 [A08409]. As a result, probates regularly are modified to correct inaccuracies in the inventory, due principally to errors in BIA records. *Id.* at 2016:13-19 [A08409]. *See also* NORC Analysis of LRIS Tract

History Reports (Feb. 28, 2003) (“NORC LRIS Report”), AR-405 at 50-02-01 (noting frequent modifications to probates) [A13487].

A BIA probate identifies heirs and restates the contents of BIA records. *Cobell XX*, 532 F. Supp. 2d at 76. It does not provide an accounting or settle trust assets. *Id.* Requests for an accounting are refused. *See, e.g., Estate of Ervin Lyle Waits*, 36 IBIA 46 (2001).

Defendants’ reliance on current regulations setting forth time limits during which probate determinations may be challenged, Defs Br. at 26-27, is likewise without basis. Certain regulations cited by defendants were first issued after the trials below.⁵ Initially, there were no procedures for identifying or contesting estate assets. Regulations Concerning the Handling of Individual Indian Money at ¶53-54 (1913)(the “1913 IIM Reg’s”) [A102616]. Moreover, defendants themselves have reopened beneficiaries’ estates to correct discovered breaches of their fiduciary duties. *See* United States’ Statement on Predecessors in Interest for Purposes of Document Production, at 2 n.3 (Apr. 8, 1999) (“4/8/99 Production Report”) [A13517] (reopening estates to “redistribute to individuals” land interests unconstitutionally removed from the Trust).

⁵ *See* 43 C.F.R. §§ 30.205 and 30.207.

b. An Accounting Requires Disclosure Of Trust Assets.

The defendants' plan provides no information about assets from which trust income is derived. *See Cobell XX*, 532 F. Supp. 2d at 98-100. The Trust Reform Act requires statements of account to identify the "source" of funds. 25 U.S.C. § 4011(b). To do so, they must provide "information sufficient to allow a recipient to connect her receipt of funds to specific assets." *Cobell XX*, 532 F. Supp. 2d at 99. The district court found this "probative of what a 'fair and accurate' historical accounting of 'all funds' is." *Id.* The court's conclusion conforms to this Court's guidance and common law. *Cobell VI*, 240 F.3d at 1103 (an accounting requires disclosure of each item of trust property).

Defendants' present position is inconsistent with its prior understanding. Interior recognized that allottees did not know what IIM checks were for, what land they owned or whether it was leased, and were unable to protect their interests in trust land or challenge the amount of trust income received, if any. 10/23/07 PM Tr. at 1752:23-1753:15 (Infield) [A08262]. The Secretary testified in 1999 that identification of trust property is necessary for an accounting. 07/09/99 Trial 1 Tr. at 3858:10-3859:22 (Babbitt) [A02678]. Defendants' accountants,⁶ legal counsel,⁷

⁶ *See* Ernst & Young Report: Office of Historical Trust Accounting, Accounting Methods (Mar. 12, 2002), AR-025 at 01-18-03 [A13531].

⁷ *See* Hughes & Bentzen, PLLC Memorandum (Apr. 2, 2003), AR-612 at 64-02-03 to 05 [A13545-47].

and statisticians,⁸ concurred. On July 2, 2002, Interior told Congress the proposed accounting included land assets. AR-561 at 25-02-87 [A13462]. A similar requirement is contained in its January 6, 2003 Plan. *See* PX-507 at 2 [A13551].

Defendants' current position, that there are two trusts, one for land, and another for funds derived from those lands, Defs.' Br. at 29, is unsupported, was rejected by the district court, *Cobell XX*, 532 F. Supp. 2d at 100, n.18, and is inconsistent with Supreme Court precedent. *United States v. Mitchell*, 463 U.S. 206, 225 (1983)(*Mitchell II*).

c. Defendants Must Account For Transactions Prior To 1938.

Under common law, the temporal scope of an accounting extends “back to the date when the trustee had responsibility for the trust property.” 10/24/07 PM Tr. at 1904:11-1905:5 (Fitzgerald) [A08355]; *Cobell VI*, 240 F.3d at 1103. Defendants have been holding and managing IIM for trust beneficiaries since the mid-1800's by treaty and the late 1800's under the Dawes Act. *Cobell XX*, 532 F. Supp. 2d at 94. Moreover, Congress first codified the fiduciary duty to account for individual Indians in 1898. *See* 30 Stat. 571, 55th Cong., Sess. II, Ch. 545 at 595 (1898).

The Trust Reform Act does not “limit[] the temporal scope of Interior's accounting obligation,” *Cobell XX*, 532 F. Supp. 2d at 93, and nothing in the

⁸ *See* NORC LRIS Report, AR-405 at 50-02-05 [A13491].

legislative history suggests any limitation. *See supra* at 8-9. Defendants, however, argue incorrectly that the phrase “funds held in trust . . . which are deposited or invested pursuant to the Act of June 24, 1938,” limits the accounting obligation to funds deposited or invested after 1938.

The 1938 Act, known as the Indian Reorganization Act (“IRA”), 25 U.S.C. §162a, reconfirmed Interior’s authority to deposit IIM in commercial bank accounts bearing interest and invest IIM in Treasury securities. *Cobell XX*, 532 F. Supp. 2d at 94.⁹ It contemplated management of IIM already held in Treasury. *Id.* Accordingly, the reference to the IRA in the Trust Reform Act is an instruction to account for “all funds” the Secretary invests pursuant to the authority of the IRA, *including* those deposited or invested prior to 1938. *Id.*¹⁰

Once again, defendants’ present argument differs from prior positions. On May 1, 2002, the Secretary conceded that the accounting must begin with each original allotment. *See* Ninth Report to the Court (May 1, 2002), AR-553 at 24-22-04 [A13629]; *see also* Department of the Interior Office of Historical Trust Accounting, Accounting Conference (March 18-20, 2002), AR-56 at 4-02-331, 335 (confirmed by defendants’ accountants) [A13649, A13653]. Similarly, defendants

⁹ IIM was regularly invested since at least the late 1800s. *See infra* at 48-49.

¹⁰ 1938 is meaningless from an accounting perspective; it is neither the date the accounting duty arose nor the date of any prior accounting. *Id.*

conceded the accounting would begin with the earliest opened account in their July 2, 2002 Report to Congress. AR-561 at 25-02-40 [A13415].

d. The Fiduciary Duty Does Not End On December 31, 2000.

Defendants limited their reconciliation to December 31, 2000. Defs.' Br. at 30-31. They did not discharge their fiduciary duty to render an adequate accounting after December 31, 2000 and in 2006 this Court confirmed that the government "remains in breach of its trust responsibilities." *Cobell v. Kempthorne* ("Cobell XIX"), 455 F.3d 317, 335 (D.C. Cir. 2006). That Interior began sending account statements in 2000 does not end its accounting duty. *Cobell XX*, 532 F. Supp. 2d at 95.

e. Defendants Must Account For Administrative Fees.

The obligation to account extends to "all funds held in trust." The government reduced IIM balances by withdrawing administrative fees from entrusted funds, *id.* at 96, but it objects to accounting for such withdrawals. Defs.' Br. at 31.

Defendants' efforts to trivialize the fees it charges, *id.*, underscores the need to account for them. Defendants have charged significant administrative fees since the early years of the Trust. *See, e.g.*, 1913 Reg's at ¶10(B) [A10258] (deducting \$15 from IIM to cover cost of identifying heirs), at ¶67 [A10268] (fees to cover mining leases); at ¶82 [A10269, A10271] (fees from timber sales), at ¶100

[A10272](deductions related to expenses such as cattle breeding and shipping). The practice continues today. *See generally* 25 U.S.C. § 413 (charging fees for any and all work performed for individual Indians). *See also* 10/18/07 AM Tr. at 1235:15-1236:1 (Angel)(timber fees) [A08011]; 10/23/07 PM Tr. at 1702:10-21 (McCarthy)(leasing fees) [A08249]; Trial 1.5 7/3/03 A.M. Tr. at 27:18-29:18 (Duncan)(undisclosed fees deducted leaving no account balance) [A03486].¹¹ Standard fees are as high as 10% of each transaction. 6/23/99 Trial 1 Tr. at 1793:10-1794:16 (Erwin) [A03796]. Moreover, Interior collected undisclosed fees beyond amounts authorized. 10/23/07 PM Tr. at 1729:14-1730:3 (McCarthy) [A08296] (charging a \$66,000 fee on a single transaction where only \$22.50 permitted).

Trust expenses, including fees and other withdrawals from plaintiffs' accounts, are within the proper scope of an accounting. *Cobell VI*, 240 F.3d at 1103; Restatement (Third) of Trusts, § 83 cmts. A & B (2007). By excluding them, the plan is deficient. *Cobell XX*, 532 F. Supp. 2d at 96.

f. Defendants Must Account For Escheated Assets.

The Supreme Court twice has held unconstitutional statutes escheating IIM interests to tribes. *Hodel v. Irving*, 481 U.S. 704, 716-718 (1987); *Babbitt v.*

¹¹ Defendants' claim that fees were not routinely charged, Defs.' Br. at 31, is based on testimony of James Cason, but Mr. Cason actually testified he was unaware of amounts charged beneficiaries. 10/11/07 AM Tr. at 232:19-24 (Cason)[A07564].

Youpee, 519 U.S. 234, 243-45 (1997). Defendants object to accounting for those assets and income therefrom that *they* unconstitutionally removed from the Trust. Defs.’ Br. at 31.¹² Defendants cannot provide beneficiaries current account balances without accounting for all Trust assets and income.

Once again, defendants’ current position is inconsistent with their previous representations. In 1998, Interior ordered the restoration of wrongfully escheated interests to beneficiaries. 10/25/07 AM Tr. at 2019:6-9 (Willett) [A08410]. In April 1999, defendants averred that the escheated interests were being restored. 4/8/99 Production Report at 2 n.3 [A13517]. In July 1999, the Secretary acknowledged that Interior must account for those interests. 07/09/99 Trial 1 Tr. at 3682:6-12 (Babbitt) [A02634]. The district court properly held that defendants have a duty to account for them. *Cobell XX*, 532 F. Supp. 2d at 96.

II. DEFENDANTS ENGAGED IN UNDUE DELAY

A. Defendants’ Delay Is Unreasonable

While federal agencies have the “discretion to determine *in the first instance*” how to rectify their wrongful conduct, *Global Van Lines, Inc. v. ICC*, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986)(emphasis added), defendants exhausted their opportunity to do so. Three findings of undue delay were made by the district court. *See Cobell v. Babbitt* (“*Cobell V*”), 91 F. Supp. 2d 1, 54-55 (D.D.C. 1999),

¹² Ten years ago, defendants reported there were 774,749 fractionated interests to be restored to the Trust. 4/8/99 Production Report at 2 n.3[A13517].

Cobell v. Norton (“*Cobell VII*”), 226 F. Supp. 2d 1, 150 (D.D.C. 2002), and *Cobell XX*, 532 F. Supp. 2d at 39. This Court affirmed the initial finding of undue delay eight years ago, explaining that Interior’s “reasonable time to discharge its fiduciary obligations has expired,” *Cobell VI*, 240 F.3d at 1095 (internal quotations omitted), and warned that the consequences of further delay were “potentially quite severe,” *id.* at 1097.

Congress similarly found undue delay. An accounting was congressionally mandated in 1898, *see supra* at 14, which directive was reaffirmed in 1938 with the IRA. *See Cobell XX*, 532 F. Supp. 2d at 93-94. During the 1980s, repeated congressional directives for an accounting went unanswered, *Misplaced Trust* at 14 [A01012], as did requests by the GAO in 1985, *id.* at 4[A01002], and the Comptroller General in 1991, *id.* In 1990 Interior acknowledged it was “totally unsatisfactory” that beneficiaries “should wait much longer for a true accounting of what their real assets are.” *Id.* at 24 [A01022]. Accordingly, in 1992 Congress determined that BIA’s delay is “arbitrary, capricious and unreasonable.” *Id.* at 58 [A01056].

Defendants provide no response other than to claim the district court “usurped the authority of Congress” in determining the accounting is impossible, *Defs.’ Br.* at 31-32, and that agency delay is not “unreasonable” if due to a “shortage of resources,” citing *Mashpee Wampanoag Tribal Council v. Norton*,

336 F.3d 1094 (D.C. Cir. 2003) and *In re Barr Laboratories, Inc.*, 930 F.2d 72 (D.C. Cir. 1991). This is not a typical agency case, and defendants' position was rejected in *Cobell VI*. See 240 F.3d at 1099. Accordingly, non-fiduciary administrative law cases cited by defendants do not aid their cause. To the contrary, this Court found eight years ago that "neither a lack of sufficient funds nor administrative complexity" justify defendants' "extensive delay." *Id.* at 1097.

Even were this principally an APA case, where an agency fails to timely provide relief, the court may "adjust its relief to the exigencies of the case." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939); see also *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987); *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992). Faced with inaction, as well as the impossibility of the accounting itself, the district court properly determined a remedy.

B. There Is No Progress In Remediating Breaches Of Trust

Defendants argue that the district court's determination of undue delay is in error, claiming that "a sea change in agency practice ... is clear from the opinions now on review," at least with respect to their continuing breach of trust duties subsidiary to their fiduciary duty to account including: (1) management and staffing, (2) records collection and retention, and (3) computer systems. Defs.' Br. at 34-35. Notably, defendants omit mention of the district court's fourth declared breach regarding their duty to "collect[] from outside sources missing information

necessary to render an accurate accounting of the IIM trust.” *Cobell V*, 91 F. Supp. 2d at 58.¹³ Defendants’ claims are erroneous.

Management and Staffing. “[The AA] audit documented internal control weaknesses attributable to inadequate training, lack of experienced supervisors, understaffing, and out-of-date accounting manuals, and concluded that the ‘accounting systems [were] unreliable.’ *These concerns have been reflected in more recent audits as well.*” *Cobell XX*, 532 F. Supp. 2d at 54 (citations omitted) (emphasis added).

Record Collection and Retention. After considering defendants’ evidence (Defs.’ Br. at 34-35), the district court rejected their claim, finding that “it is impossible to imagine that all documents necessary to perform a complete historical accounting are presently accessible to Interior.” *Cobell XX*, 532 F. Supp. 2d at 46. Notably, ongoing problems with defendants’ records management programs “prevent a finding that the records management problems chronicled in earlier opinions have been fully rectified.” *Id.* at 56.¹⁴

Computer and Business Systems. Defendants’ contentions regarding the adequacy of IT systems are particularly suspect in light of the district court’s

¹³ Defendants have delayed remedying this declared breach for more than nine years, and have no plans to do so. *See, e.g.*, 10/10/07 P.M. Tr. at 137:13-138:4 (Cason)[A07514].

¹⁴ One court has recently described defendants’ record-keeping system as “unreliable,” precluding effective review. *Ak-Chin Indian Community v. United States*, 85 Fed. Cl. 397, 401-2 (2009).

unchallenged finding that “severe and sometimes catastrophic problems remain.” *Cobell v. Norton* (“*Cobell XVI*”), 394 F. Supp. 2d, 164, 309 (D.D.C. 2005), and this Court’s conclusions that “the evidence of flaws in Interior’s IT security is extensive,” *Cobell XVIII* at 315 (D.C. Cir. 2006), and “we have no doubt Interior’s trust account information has serious reliability problems.” *Cobell XIX*, 455 F.3d at 325.

Most significantly, defendants fail to discuss their “actual legal breach, [which] is the failure to provide an accounting, not [defendants’] failure to take the discrete individual steps that would facilitate an accounting.” *Cobell VI*, 240 F.3d at 1107.

C. Reconciliation Efforts Remain Far Off.

Defendants represent on appeal (for the first time in these proceedings) that they now are “in a position to produce historical statements of account for nearly 250,000 accounts.” Defs.’ Br. at 36.¹⁵ No such evidence was proffered to the district court. Further, their claim is in conflict with all record evidence, including testimony of their experts and findings of the district court. Defendants rely solely on the January 16, 2009, report they prepared after the close of the trial record that discusses the preparation of purported accounting statements. As this evidence

¹⁵ Defendants, presumably, are adding 163,795 land based “statements” to 96,823 judgment account “statements” [260,618] to reach the 250,000 total. Defs.’ Br. at 36.

was not produced at trial, it may not be considered. *Morgan v. Fed. Home Loan Mortgage. Corp.*, 328 F.3d 647, 654 n.8 (D.C. Cir. 2003). However, even defendants concede these “statements” are a work-in-process, incomplete, temporally limited, and inconsistent with holdings of this Court. *See, e.g., Cobell VI*, 240 F.3d at 1089.

Defendants’ plan states, at least with respect to electronic era (1985-2000) transactions, that “completion of the Data Completeness Validation [“DCV”], Interest Recalculation, and Land-to-Dollars Posting Tests constitute ‘all the [remaining] steps necessary to mail land-based account HSAs[.]’” *Cobell XX*, 532 F. Supp. 2d at 63. Yet, nowhere do they address the status of those tests or explain why none were completed at the conclusion of the 2008 trial.¹⁶ Even now, there is no plan to render an historical accounting of IIM transactions posted prior to 1985 and “defendants do not yet have a complete understanding of the work that will be involved in the [pre-1985] ‘paper ledger era.’” *Cobell XX*, 532 F. Supp. 2d at 58, 81. Defendants also concede that accounting for the “pre-1985 transactions entails *far greater* expenditures of time and money.” Defs.’ Br. at 37 (citation omitted)(emphasis added).

¹⁶ Defendants suggest that DCV tests are “nearly complete,” citing to their January 16, 2009 quarterly report. Defs.’ Br. at 41. However, they withheld evidence that might corroborate this.

Additionally, the court found significant problems with the nature and scope of defendants' reconciliation efforts to date. Specifically, defendants' statistical expert "conceded that the population [of sampled transactions] . . . was incomplete [and n]o assurance has been offered, either that the entire population [of transactions] can be restored, or that additional sampling . . . will precede completion of the historical accounting project." *Cobell XX*, 532 F. Supp. 2d at 93. Consequently, the court ruled "the ultimate statistical validity of the HSA plan has yet to be demonstrated." *Id.* The court found further that no conclusions can be reached about the adequacy of defendants' accounting "until several other tests are done, chief among them, the Land-to-Dollars tests." *Id.*¹⁷ Accordingly, record evidence refutes defendants' contention that they are "in a position to produce" statements for 250,000 beneficiaries.

D. Reconciliation Projects Are Deficient.

The district court considered defendants' reconciliation projects during trial and dismissed them as inadequate, finding that "although the defendants have attempted and continue to attempt to cure the breach of their fiduciary duty . . . they have not succeeded in doing so." *Id.*

¹⁷ Allegedly due to other priorities, no work was performed on Land-to-Dollars testing since *Cobell v. Kempthorne* ("*Cobell XXI*"), 569 F. Supp. 2d 223 (D.D.C. 2008). See Status Report to the Court 34 dated November 3, 2008 [Dkt. No. 3589] at 6 and Status Report to the Court 35 dated January 16, 2009 [Dkt. No. 3598] at 6 [A14075 & A14131].

Defendants' Litigation Support Reconciliation Process. Defendants allege that a reconciliation of a subset of posted transactions, the LSA, found few or no funds missing. Their LSA tested a limited subset of transactions. Defs.' Br. at 38-39. During trial, however, defendants withheld production of the LSA work-product. Still, the nominal evidence proffered disclosed that their sampling cannot detect unposted transactions or those posted improperly. 10/24/07 A.M. Tr. 1859:18-1860:21 (Pallais)[A08319-20]; 10/25/07 P.M. Tr. at 2175:24-2176:6 (Hinkins)[A08480]; 10/17/07 A.M. Tr. at 1033:2-11, 1034:1-7 (Scheuren) [A07913]; NORC Memorandum (Mar. 15, 2007), AR-427 at 52-03-04[A07913]. Defendants further conceded that gaps exist in the electronic era database that cannot be quantified and, as a result, accuracy and completeness of their reconciliation procedures and conclusions cannot be validated. U.S. Dept. of Justice IRMS Data Analysis, Procedures and Findings Report (Jul. 20, 2001), AR-233 at 10-20-05[A13666].

Meta-Analysis. Defendants argue that their meta-analysis study confirms that trust account losses were not "realized." Defs.' Br. at 39-40. But no certified public accountant or financial professional validated these findings and defendants produced no source documents and "work product." *Cobell XX*, 532 F. Supp. 2d at 64; *see also* 10/17/2007A.M. Tr. at 1047:7-25 (Scheuren)[A07917].

Nonetheless, plaintiffs' expert accountant determined from the limited source reports available to plaintiffs that pervasive risks afflicted defendants' trust management systems, which resulted in significant losses. *See* Jun. 2008 6/11/08 P.M. Tr. at 426:22-428:6[A12317-19], 406:4-407:15[A12297-98]], 402:25-403:11 [A12293-94](Pallais).

Five Named Plaintiffs. Defendants assert that the account balances of the named plaintiffs are supported by adequate documentation. Defs.' Br. at 40. But defendants' consultant, Mr. Rosenbaum, reviewed only 70% of the named plaintiffs and their predecessors-in-interest and made his conclusions on the *assumption* that all supporting data exist and are reliable.¹⁸ Rosenbaum conceded that he did not verify that any IIM funds were paid to beneficiaries. *See Cobell XX*, 532 F. Supp. 2d at 50; Trial 1.5 6/10/03 Tr. P.M. at 84:16-85:4[A06114]; 6/11/03 P.M. Tr. at 52:13-17[A06185], 62:15-63:10[A06189]; Jun. 2008 6/19/08 A.M. Tr. at 1407:10-17 (Rosenbaum)[A13081].

Further, Rosenbaum made no inquiry into the authenticity of documents or data that defendants provided and did not verify the accuracy of any information. Trial 1.5 6/10/03 A.M. Tr. at 7:3-8:11[A06060], 44:14-45:5[A06069]; 6/11/03

¹⁸ Mr. Rosenbaum reviewed transactions for 25 of the 36 identified beneficiaries. No records could be found for 30% of the identified beneficiaries. Trial 1.5 Tr. 6/9/03 A.M. at 65:15-66:7[A06012-13]. Of the 25 beneficiaries for whom documentation was produced, there existed gaps in the ledgers.

A.M. Tr. at 11:20-12:5[A06141]; Jun. 2008 6/19/08 A.M. Tr. at 1412:14-1413:22 (Rosenbaum)[A13086-87].

Defendants' Accountants and IG Confirmed Significant Losses Were "Realized." Work conducted by defendants' external auditors and the IG confirmed significant problems. In March 1986, Interior's IG reported that 103 of 851 beneficiaries polled reported that they did not receive a total of \$327,952 in IIM disbursements the government claimed had been made. Jun. 2008 6/11/08 P.M. Tr. at 406:4-407:15 (Pallais)[A12297-98]; Jun. 2008 PX-65 at 46 ¶261 [A09485]. In 1988, 32% of beneficiaries who responded to an inquiry by Interior's external accountant reported that they did not receive payments listed on their IIM statements. *Id.* at 47 ¶267 [A09486]; Jun. 2008 6/9/08 P.M. Tr. at 125:5-126:9 (Ziler)[A11971]; AA Audit (Sept 30, 1988), Jun. 2008 PX-31 at 7 [A08825]. In 1989, 44.4% of beneficiaries who responded to a second inquiry said that they did not receive their trust disbursements posted by Interior. Jun. 2008 PX-65 at 49 ¶283 [A09488]; Jun. 2008 6/11/08 P.M. Tr. at 407:16-409:8 (Pallais)[A12298-300]. Ray Ziler, defendants' accountant and engagement partner on the late-1980's audits, found the responses "alarming." Jun. 2008 6/9/08 P.M. Tr. at 126:10-25 (Ziler)[A11971].

III. MONETARY RELIEF IS PROPER.

A. The Remedy Is Authorized.

Defendants criticize the restitution award, arguing the impossibility finding and the award of equitable monetary relief are improper. However, a finding of impossibility is justified. *See supra* at 3-18. Moreover, defendants mischaracterize the district court's conclusion as premised solely on that finding, ignoring the holding that defendants continue to delay unreasonably the mandated accounting. *Cobell XX*, 532 F. Supp. 2d at 39. That, likewise, is correct. *See supra* at 18-20. Accordingly, the district court properly proceeded to a remedy.

B. Specific Relief Is Proper.

1. Immunity Is Waived.

The APA waives defendants' immunity for plaintiffs' claim. 5 U.S.C. §702; *see Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981). The core question under §702 is whether the relief is "money damages" (or compensatory) or whether it is specific relief (and restitution), recovery of which is authorized in the district court as "the very thing to which [they were] entitled" (which is not money damages). *Bowen*, 487 U.S. at 893-96; *see also* Jun. 2008 6/9/08 A.M. Tr. at 57:2-4 (Laycock)[A12068].

Section 702, as amended in 1976, expanded the waiver of immunity to cover "any action seeking relief other than money damages." *Schnapper*, 667 F.2d at 107; *see also* H.R. Rep. No. 94-1656 at 9 (1976), *as reprinted in* 1976

U.S.C.C.A.N. 6121, 6129 (explaining sovereign immunity is waived “in all equitable actions for specific relief”). The waiver extends to “any suit whether under the APA or not.” *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). “Restitution, which lies within [the court’s] equitable jurisdiction, ... differs greatly from ... damages.” *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). The leading treatise on remedies is emphatic: “[R]estitution is not damages; restitution is a restoration required to prevent unjust enrichment.” 1 Dan B. Dobbs, *Law of Remedies* § 4.1(2) (2d ed. 1993), at 557 (emphasis in original); see also *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 944 F.2d 940, 945 (D.C. Cir. 1991).

Where, as here, plaintiffs seek money that is “the thing unjustly taken,” their recovery is not damages. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 747 (D.C. Cir. 1995); see also *Aetna Cas. & Sur. Co. v. United States*, 71 F.3d 475, 479 (2d Cir. 1995). It makes no difference that the identical funds have been dissipated. See, e.g., *id.*; *Am.’s Cmty. Bankers v. FDIC*, 200 F.3d 822, 829-30 (D.C. Cir. 2000); Jun. 2008 6/9/08 A.M. Tr. at 65:21-66:8 (Laycock)[A12077-78]. Trust funds are the very thing to which plaintiffs are entitled, and relief fashioned to ensure plaintiffs’ recovery is other than “money damages” under §702.

Defendants, however, argue the waiver is inapplicable, suggesting this action in equity could have been brought under the Tucker Act, 28 U.S.C. §1491.

Defs.’ Br. at 49. A similar argument was rejected by this Court. *Cobell VI*, 240 F.3d at 1104. The Court of Claims has no jurisdiction to provide equitable relief for breaches of trust. *See, e.g., Anderson v. United States*, 85 Fed. Cl. 532, 538 (2009); *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 149 (2002). This jurisdictional limitation was recently reaffirmed by the Federal Circuit. *Tohono O’odham Nation v. United States*, ___ F.3d ___, 2009 WL 650283, at *9 (Fed. Cir. Mar. 16, 2009). The Tucker Act does not confer exclusive jurisdiction on the claims court. The claims court’s exclusive jurisdiction is limited to contract claims against the government. *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 609 (D.C. Cir. 1992). Nor does that Act nullify equitable remedies available to individual Indians in the district court.

This is a trust case, not a contract claim. Nonetheless, the sole authority cited by defendants is a contract case, *Albrecht v. Committee of Employee Benefits of the Federal Reserve Employee Benefits System*, 357 F.3d 62, 68 (D.C. Cir. 2004). The term “contract” in the Tucker Act is construed narrowly. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982); *Transohio*, 967 F.2d at 611. *Albrecht* made this clear, explaining that an action against a trustee would “implicate a trustee’s duties,” and the “common law of trusts,” not contract law. 357 F.3d at 68.

Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999), is unhelpful to defendants. In *Blue Fox*, the Supreme Court rejected an attempt to guise a claim seeking substitutionary relief as “equitable” where the relief sought was an equitable lien to satisfy a damages claim and no benefit had been conferred on the government. *Id.* at 262-63. Here, plaintiffs seek equitable relief to recover their trust money, restitution in its purest form.

Defendants’ argument, Defs.’ Br. at 50-51, that *Mitchell II* limits relief to a damages action in the claims court, has already been rejected. *See Cobell VI*, 240 F.3d at 1108 (finding the possibility of a damages remedy does not preclude equitable relief in district court). The government conceded in *Mitchell II* that at least prospective equitable remedies were available under the APA for breach of trust duties. *Id.* at 1107; 463 U.S. at 227 n.32.

In arguing the district court identified no money-mandating statute justifying relief under *Bowen*, defendants again ignore controlling law. As in *Mitchell II*, the government assumed traditional fiduciary obligations of a private trustee, *Cobell VI*, 240 F.3d at 1088, 1100. One such obligation is the duty to “allocate and pay trust funds.” *Cobell XXI*, 569 F. Supp. 2d at 243. To remedy a breach of these duties and vindicate plaintiffs’ rights, district courts have “the full range of remedial powers — legal as well as equitable.” *Cobell VI*, 240 F.3d at 1108 (internal citations omitted).

Defendants erroneously argue plaintiffs have disclaimed any right to monetary relief. Defs.' Br. at 52-53. However, plaintiffs always have maintained that an accounting must be accompanied by an order correcting and restating account balances. *See Cobell XIII*, 392 F.3d at 470. Defendants conceded this point in arguing to the district court that the "true remedy" of an accounting yields a "restitutionary award." *Cobell V*, 91 F. Supp. 2d at 28 n.20. *See also Cobell XIII*, 392 F.3d at 468.

2. Waiver of Sovereign Immunity Is Not Required Here.

This claim may still proceed because it is constitutionally impermissible for the government as trustee to enrich itself at the expense of trust beneficiaries. Jun. 2008 6/9/08 A.M. Tr. at 56:2-18 (Laycock)[A12068]; *Henkels v. Sutherland*, 271 U.S. 298, 301 (1926); *Decision by Comptroller General McCarl*; 11 Comp. Gen. 374, 375-76, 1932 WL 762 (Apr. 5, 1932). Moreover, a waiver of immunity is not needed where the government "has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise" – or, as here, a private trustee. *See, e.g., Library of Congress v. Shaw*, 478 U.S. 310, 317 n.5 (1986); *Std. Oil Co. of N.J. v. United States*, 267 U.S. 76, 79 (1925).

C. The District Court Properly Awarded Restitution.

Trusts are enforced in equity to provide beneficiaries remedies necessary to protect their interests. III SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988).

Defendants breached their duty to properly allocate and pay to beneficiaries their trust revenue. *Cobell XXI*, 569 F. Supp. 2d at 243. The remedy in equity for that is restitution. *Id.*

Restitution is designed to prevent unjust enrichment. *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 217 (D.C. Cir. 1995). It is awarded when the trustee “has gained a benefit that it would be unjust for him to keep.” *People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 420 (D. C. Cir. 2005)(internal citation omitted). In fashioning a remedy based on restitution, a district court has broad discretion, and appellate review is narrow. *Frederick County Fruit Grower's Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1272 (D.C. Cir. 1992).

Defendants contend the award is not restitution, arguing there is no evidence funds were not paid to beneficiaries. Defs.' Br. at 53-54. However, it is defendants, as trustee-delegates, who have the burden of keeping accurate records to document and justify each withdrawal from the Trust; all presumptions run against them if they do not do so. *Corp. Audit Co. v. Cafritz*, 156 F.2d 839, 842 (D.C. Cir. 1946); *see also Cobell VI*, 240 F.3d at 1102; *Cobell XX*, 569 F. Supp. 2d at 226, 251. Congress expressly confirmed this in the Trust Reform Act. *See also Misplaced Trust* at 7 [A01005] (Interior must “affirmatively establish that it [has] properly discharged its trust”)(citation omitted).

Nevertheless, to argue there is no evidence of improperly withheld IIM is to disregard almost a century of congressional findings, audits, complaints from beneficiaries, and the testimony of trust beneficiaries and defendants' experts. *See* Plfs.' Opening Br. at 2-3. For example, millions of dollars in undisbursed trust funds were identified in a non-interest bearing account dating back to the 1880s. Trust Fund Task Force Study (May 20, 1975), Jun. 2008 DX-10 at 9 [A11468]. In 1914, Congress determined that millions of dollars had been converted by the government "to its own use."¹⁹ Jun. 2008 PX-65 at 2 ¶5 [A09441]. In 1935, an investigation for the Commissioner of Indian Affairs noted distributions had not been made as agency records were "badly tangled up." *Id.* at 6 ¶23[A09445].

Audits revealed – on a regular basis – withheld checks,²⁰ arbitrary cash adjustments to cover shortages,²¹ undisbursed funds,²² and no addresses for

¹⁹ Jun. 2008 PX-65 at 2 ¶5 [A09441].

²⁰ *See, e.g.*, Jun. 2008 PX-65 at 7 ¶26 (1940)[A09446] (159 undelivered checks); *id.* at 8 ¶32 (1953)[A09447](checks not delivered); *id.* at 27 ¶153 (1957)[A09446] (checks issued but held by BIA for over a year).

²¹ *See, e.g.*, Jun. 2008 PX-65 at 11 ¶49 (1954)[A09450](\$42,086 eliminated from general ledger accounts by unsupported journal vouchers); *id.* at 34 ¶204 (1969)[A09473](arbitrary adjustment to cover \$295,000 out of balance condition).

²² *See, e.g.*, Jun. 2008 PX-65 at 12 ¶54 (1954)[A09451](235 accounts in which \$257,157.31 was improperly withheld from 1946 to 1954; *id.* at 13 ¶57 (1955)[A09452](undisbursed accounts up to eight years old totaling \$111,354); *id.* at 14 ¶69 (1955)[A09453](undisbursed accounts of deceased Indians up to ten years old); *id.* at 16 ¶85 (1955)[A09455](noting accounts "from which disbursements have not been made for long periods of time"); *id.* at 19 ¶95 (1955)[A09458] (same); *id.* at 34 ¶200 (1966)[A09473] (intentional withholding of IIM to cover improper payments); *id.* at 34 ¶201 (1966) [A09473] (withholding of

beneficiaries, preventing distribution.²³ Auditors identified unexplained disparities between Interior's and Treasury's records of IIM held in trust,²⁴ suggesting "that substantial funds had gone missing over the life of the trust." *Cobell XXI*, 569 F. Supp. 2d at 227. In 1982, the Comptroller General reported that BIA was unable to show disbursements had been made to the proper beneficiaries in the correct amounts. *Id.* at 219. In 1985, a Congressional committee explained that "[c]omplaints from Indians about late [oil and gas royalty] payments, wrong payments or no payments at all have been numerous." *Id.* at 248. Congress and the district court heard testimony from beneficiaries living in poverty as the government failed to disburse funds.²⁵

deposits); *id.* at 40 ¶235 (1984)[A09479] (\$734,534 not distributed); *id.* at 41 ¶239 (1985)[A09480](grazing fees not distributed); *id.* (\$582,000 not distributed); *id.* at 41 ¶238 (1985)[A09480](undistributed funds from minor accounts); *id.* at 44 ¶250 (1985)[A09483] (\$182,714 in royalties and \$58,000 in interest not disbursed); *id.* at 50 ¶289 (1989)[A09489] (accountants report agency withholding funds); *id.* at 55 ¶322 (1995)[A09494](IIM not distributed where accountholders not identified). *See also* Misplaced Trust at 3 [A01001] (interest withheld on royalties).

²³ *See, e.g., id.* at 39 ¶231 (1984)[A09478](explaining check issued without mailing address. *See also id.* at 13 ¶61 (1955)[A09452](37% of addresses unavailable); *id.* at 15 ¶73 (1955)[A09454] (84% of accounts had no addresses); *id.* at 19 ¶98 (1956)[A09458](30% of accounts had no addresses); *id.* at 20 ¶104 (1956)[A09459](74% of accounts had no addresses); *id.* at 20 ¶105 [A09459](87% of accounts had no addresses).

²⁴ Out of balance conditions were significant. *See, e.g., Jun.* 2008 PX-65 at 39 ¶230 (1983)[A09478](\$75 million out of balance condition).

²⁵ *See IT Sec. Trial 7/28/05 P.M. Tr.* at 33:2-15, 34:1-25 (Johnson) [A04942-43](elderly woman with four oil wells on allotment receiving sporadic trust payments); *id.*, 07/29/05 A.M. at 15:11-18:8 (Werelus)[A07086](describing poverty at Fort Berthold Reservation where beneficiaries did not receive trust

Interior was aware that trust funds were withheld, but did nothing. In 1985, BIA was admonished for failing to notify individual Indians they had funds in trust and for instituting a policy that resulted in the withholding of trust funds “unless, the account holder is aware of funds on deposit, which often is not the case....” Jun. 2008 PX-65 at 41 ¶238 [A09480]. *See also id.* at 43 ¶ 243 & ¶247 [A9482]. If trust funds were lost, there existed no policy by which affected beneficiaries were notified. Misplaced Trust at 4 [A01002]. Questions by beneficiaries to BIA regarding the status of allotment checks went unanswered. *See IT Sec. Trial Tr.* 07/29/05 A.M. 17:9-25 (Werelus) [A07086]; 31:6-32-33:11 [A07090]; 76:10-77:18 (Johnson)[A07101]. Evidence of IIM being withheld is overwhelming and is unchallenged.

Secondly, defendants complain the restitutionary award is based on “aggregate” throughput, as the Trust consists of “hundreds of thousands of discrete accounts.” Defs.’ Br. at 54. However, defendants have failed to account to any beneficiary. Nor is it possible to render an accounting to one beneficiary without accounting to all since the Trust is commingled. Trust funds are deposited in

payments); 07/29/05 A.M. at 21:15-21 (Werelus) [A07087] (allottees did not receive income from lessors); *id.* at 26:11-17 [A07089] (allotments leased but no checks received); *id.* at 57:24-59:7 (Chavez) [A07096-97] (allottees with oil wells pumping on their lands but receiving no checks). *See also* A Report of the Special Committee on Investigations of the Selection Committee on Indian Affairs, United States Senate, 101st Congress 1st Session, 101-216 (November 20, 1989) at 11 [A13690].

Treasury, but it has no accounts in the name of individual Indians. *Cobell V*, 91 F. Supp. 2d at 11. Rather, such funds are commingled in Treasury's general account. *Id.* IIM is held on an aggregate basis and there is no discrete account for an individual Indian.

What records exist report IIM on an aggregate basis. Records were produced at trial reporting aggregate IIM data since the early years of the trust.²⁶ Audits of the trust reported revenues and disbursements in aggregate. *See* PX-53 at 2 [A09367]. When Congress demanded that Interior perform a reconciliation of all accounts, it provided instead an *aggregate* audit for a single year. *Misplaced Trust* at 20 [A09367]. Having been unable to provide an accounting to any beneficiary, it was within the discretion of the district court to determine a restitutionary remedy for all class members. The award by the district court is defendants' measurement as testified by their expert. While defendants argue that the district court improperly credited all "uncertainty" in plaintiffs' favor, Defs.' Br at 55, this, in fact, is not the case. Defendants were given credit for every claimed withdrawal from the Trust, regardless of its propriety and without documentation

²⁶ *See, e.g.*, 1909 Annual Report to the Commissioner of Indian Affairs ("Annual Report") at 104 [A09325]; 1912 Annual Report at 7-8 [A09332-33]; 1917 Annual Report at 121 and 175 [A09342-43].

or justification, despite a history of improper withholdings, unauthorized withdrawals,²⁷ and transfers.²⁸

D. Restitution Is Available To A Rule 23(b)(1)(A) And (b)(2) Class

Defendants incorrectly contend that the district court lacks “authority to issue a monetary award on a class-wide basis.” Defs.’ Br. at 57. Monetary relief is permissible in class actions certified under Rule 23(b)(1) or (2) where either (1) the award is in the form of equitable restitution or (2) “monetary relief does not predominate.” *Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997). Meeting either standard is sufficient; the court’s award meets both.

1. Restitution Is Proper Under A (b)(2) Certification.

While Rules 23(b)(1) and (2) are silent as to the recovery of monetary relief, the Advisory Committee notes provide (b)(2) “does not extend to cases in which

²⁷ See, e.g., Jun. 2008 PX-65 at 9 ¶41 (1954) [A09448-49] (disbursements from 73% of IIM accounts not authorized; *id.* at 10 ¶44 (1954) [A09449] (lack of evidence of withdrawal requests made it impossible to “make a satisfactory audit of withdrawals from IIM accounts”); *id.* at 21 ¶112 (1956) [A09460] (disbursements made without authorization); *id.* at 21 ¶115 (1957) [A09460-61] (noting total absence of disbursement documentation); *id.* at 23 ¶127 (1957) [A09462-63] (“no authority could be found” for a number of disbursements); *id.* at 36 ¶216 (1981) [A09475] (disbursements to 173 unauthorized persons); *id.* at 42 ¶242 (1985) [A09481] (49% of disbursements not authorized); *id.* at 47 ¶270 (1988) [A09486] (no support for disbursements); *id.* at 58 ¶339 (1996) [A09497] (accountants note material non-compliance issue on disbursements); *id.* at 61 ¶346 (1997-1998) [A09500] (accountants noting unauthorized disbursements).

²⁸ See, e.g., *id.* at 14 ¶67 (1955) [A09453] (unauthorized transfers of “large sums” to tribal accounts); *id.* at 57 ¶332 (1995) [A09496] (unauthorized transfers of 850,000 to tribe from IIM Trust).

the appropriate final relief relates *exclusively or predominantly to money damages.*” Fed. R. Civ. P. 23(b)(2) (1966)(emphasis added). *See also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006). Restitution is not “money damages.”

Equitable restitution is distinct from money damages and does not raise the same concerns in a (b)(2) certification. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998); *see also Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894, 899 (7th Cir. 1999); 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 4:14 p. 73 (4th ed. 2002). District courts in this Circuit are in accord. *See Lightfoot v. District of Columbia*, 246 F.R.D. 326, 343 (D.D.C. 2007); *Coleman v. Pension Ben. Guar. Corp.*, 196 F.R.D. 193, 199 (D.D.C. 2000).

Moreover, this Court held that monetary relief is permissible on a class-wide basis in actions certified under Rule 23(b)(1) or (b)(2) where “monetary relief does not predominate.” *Eubanks*, 110 F.3d at 92. However, neither the Supreme Court nor this Court has determined when monetary relief predominates. *See Richards*, 453 F.3d at 531 n.8. Two approaches have been adopted in making this inquiry. *Compare Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir. 2001), *with Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).

a. The Court’s Award Satisfies The Ad Hoc Balancing Test.

In *Robinson*, the Second Circuit established two standards to determine whether monetary relief predominates: Whether “(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” 267 F.3d at 164.

Applying the *Robinson* test here, monetary relief does not predominate. The first prong is satisfied as “even in the absence of possible monetary recovery, reasonable plaintiffs would bring th[is] suit to obtain the injunctive or declaratory relief sought.” *Robinson*, 267 F.3d at 164. Plaintiffs brought this action without knowing whether they were entitled to equitable monetary relief. *See* Compl. at 12, ¶24 [GA-000012]. (“The representative plaintiffs . . . do not know, and have no way of ascertaining . . . the true state of their accounts....”). Equally important, from the outset, plaintiffs have pursued meaningful reform of a broken trust management system. Finally, plaintiffs obtained declaratory relief, which the court characterized as a “stunning victory . . . on behalf of the 300,000-plus Indian beneficiaries of the IIM trust” that would make reform of the IIM Trust “a reality rather than a dream.” *Cobell V*, 91 F. Supp. 2d at 57. *See also Cobell XXI*, 569 F.

Supp. 2d at 223. The first prong is satisfied.²⁹ The second prong is likewise satisfied as declaratory relief sought and obtained is “both reasonably necessary and appropriate....” *Robinson*, 267 F.3d at 164. *See Cobell*, 91 F. Supp. 2d at 58 (declaring duty to account).³⁰

b. The “Incidental” Test Is Met.

The Fifth Circuit in *Allison* established an alternative test: A monetary recovery “predominates” in class actions certified under 23(b)(2), “unless it is incidental to requested injunctive or declaratory relief.” 151 F.3d at 415. Equitable monetary relief is incidental when it flows “directly from liability to the class *as a whole*” because no individual calculations are necessary, or any necessary calculations are objective. *Id.*

The declaratory relief in this case determined, among other things, that defendants are in breach of their fiduciary duty to account to the class as a whole. Necessarily, all equitable monetary relief is incidental to that finding.

Equitable monetary relief here is “capable of computation by means of objective standards and [is] not dependent in any significant way on the intangible,

²⁹ Defendants’ history of gross mismanagement provides further support for awarding the class equitable monetary relief. *See Robinson*, 267 F.3d at 164 (adopting an ad hoc approach to determining whether (b)(2) certification is appropriate even in cases involving money damages).

³⁰ The predominance of the monetary relief is not determined by the restitutionary amount. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 451 (N.D. Cal. 1994).

subjective differences of each class member's circumstances.” *Allison*, 151 F.3d at 415. The IIM Trust is a commingled trust, and, in the absence of a complete and accurate accounting, no member of the class can know the amount to which he is entitled. Any equitable monetary relief is based not on an individual plaintiff’s loss but the defendants’ aggregate gain, “more in the nature of a group remedy.” *Id.*; *see also In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005) (Posner, J.).

2. Notice And Opt-Out Rights Are Not Problematic.

As the relief awarded is equitable and necessarily benefits the class as a whole, measuring harm to an individual is irrelevant. Therefore, notice and opt-out rights in this 23(b)(1) and (2) action are unnecessary. Even if the concerns raised by defendants exist, Rule 23 provides the court with “the procedural flexibility” to modify the class certification order³¹ and provide notice and opt-out rights. *See Eubanks*, 110 F.3d at 95; *Thomas v. Albright*, 139 F.3d 227, 234 (D.C. Cir. 1998). Likewise, any concern regarding distribution of Osage funds, *see* Defs. Br. at 69-70, can be addressed at the distribution phase.³²

³¹ The court retained jurisdiction to modify the certification order. *See* 2/4/97 Order Certifying Class Action, at 3 [Dkt. No. 27][GA-00030].

³² To support their position on opt-outs defendants rely on a letter from Eddie Jacobs. The letter is not in the record below and may not be considered on appeal. *Morgan*, 328 F.3d at 654 n. 8.

IV. THE DISTRICT COURT ERRED IN NOT AWARDING INTEREST.

The government has an explicit statutory obligation and trust duty to pay interest on individual Indian trust funds pursuant to two distinct statutes: the Act of September 11, 1841, ch. 25, 5 Stat. 465 (1841) (the “1841 Act”) and the Trust Reform Act.

Accordingly, the district court in clear error held Congress has “not waive[d] immunity to a claim for interest that might have been earned on funds that were not invested.” *Cobell XXI*, 569 F. Supp. 2d at 247. Plaintiffs explained that: beneficiaries’ claims for interest fall within §4012, Pls.’ Br. at 12-14, which is within §702’s waiver of immunity, *id.* at 11-12; restitution is not an impermissible payment of interest, *id.* at 14-16; the no-interest rule is inapplicable as the government has assumed the status of a private trustee, *id.* at 16-17; the government regularly pays compound interest on IIM funds, *id.* at 17; the government’s breaches of trust militate in favor of an award of compound interest, *id.* at 17-18; and this Court has broad equitable authority to order the payment of interest, *id.* at 19-20. Defendants declined to respond to these arguments, Defs.’ Br. at 66-68, choosing instead to contend that plaintiffs failed to satisfy §4012, *id.* at 66-67, and that plaintiffs misplace reliance on the Act of 1941, *id.* at 68. Nor could the government support the district court’s disregard of explicit statutory

interest mandates given settled principles of statutory construction adopted by this Court and restated by the Supreme Court in *Carciari, supra* at 5.

A. Congress Authorized Interest On IIM.

Neither the explicit retroactive provision of the Trust Reform Act nor the prospective authorization in the Act of 1841 mandates interest on tribal trust funds.³³ In 1994, Congress omitted tribes from statutory text confirming the duty to pay interest to individual Indian trust beneficiaries, and in 1880 Congress enacted legislation excluding tribal trust funds from “all other funds held in trust” entitled to interest under the 1841 statute. Act of Apr. 1, 1880 ch. 41, 21 Stat. 70 (1880) (“Act of 1880”) (excluding “*all sums now held* by him [Treasurer of the United States], *or which may be received* by him, as Secretary of the Interior and *trustee of various Indian tribes*”) (emphasis added)); S. Rep. No. 46-186, at 3 (1880) [A14183] (Interior Secretary letter confirming the Act of 1841 governs Indian trust funds). The 1880 enactment did not terminate the 1841 authorization to pay interest on individual Indian funds.

³³ Moreover, in 1946, Congress enacted the Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (codified at 28 U.S.C. §1505, 25 U.S.C. § 70 *et seq.*) (omitted from §70 on termination of Commission on Sept. 30, 1978), enabling tribes to resolve claims but limiting remedies to damages and conferring exclusive jurisdiction on the claims court. Congress established no process to resolve claims of individual Indians.

B. Reliance On *Mescalero Apache* Is Misplaced.

Defendants cannot justify the district court's misreading of *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975). Defs.' Br. at 68. *Mescalero Apache* is a tribal damages case that does not implicate individual Indian trust funds, consider plaintiffs' entitlement to interest, or determine a district court's equitable authority to fashion monetary relief. The three specified enactments considered by the *Mescalero Apache* court — given the 1880 tribal exclusion from the Act of 1841 — govern the single fund established for that *tribe*. *Id.* at 1311-14; Pls.' Br. at 18. Here, the duty to pay interest is explicit and independent of statutory interest obligations to tribes.

C. Rules Of Statutory Construction Confirm The Duty To Pay Interest.

Standard principles of statutory construction are not applied in Indian law cases. *See Muscogee (Creek) Nation v. Hodel* ("*Muscogee Nation*"), 851 F.2d 1439, 1444 (D.C. Cir. 1988). Therefore, statutes are construed in favor of Indians and to the extent there is a gap or ambiguity in their text, it is construed to their benefit. *See supra* at 5.

Because this is an Indian case and a trust case, *Cobell XVIII*, 455 F.3d at 305, and statutes and remedies in this appeal are rooted in trust law, standard principles of statutory construction are inapplicable. Nonetheless, if they are applied, they would not alter the result. For example, the retroactive statutory

interest entitlement set forth in the Trust Reform Act is explicit and in conformity with *Bowen*. As such, it is authorized in accordance with *Library of Congress v. Shaw*, 478 U.S. 310 (1986).

1. Context.

Context confirms the textual clarity of the statute; no ambiguity or gap must be filled by interpretation. The 1994 Act is a remedial trust statute and §4012 is remedial interest authorization for individual Indians. *See, e.g., Cobell VI*, 240 F.3d at 1100. The government’s long-standing failure to pay interest on entrusted funds will not be remedied if its pre-existing duty is nullified. *Id.* at 1100 (“the 1994 Act . . . created additional means to ensure that the [government’s] obligations would be carried out”). That is why Congress mandated interest “retroactive to the date that the Secretary began investing individual Indian monies on a regular basis.” 25 U.S.C. § 4012. The retroactive interest remedy may be the only means, not simply an “*additional means* to ensure that the [longstanding trust] obligations are carried out.” *Cobell VI*, 240 F.3d at 1100.

The first step in assessing plaintiffs’ claim is to determine whether statutory text is plain and unambiguous, *see Carcieri*, 129 S.Ct. at 1063, in which case it must be applied in accordance with its terms. *See Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The government conceded it has undertaken a “reconciliation of individual Indian money accounts,”³⁴ but that the reconciliation process “has not revealed any significant failures.” Defs.’ Br. at 67 (citation omitted).³⁵ Having conducted a reconciliation process, and presented its results at trial, a claim of \$455.6 million was identified, triggering the operative provision of §4012(1). Defendants “shall make payments to an individual Indian in full satisfaction of any claim . . . for interest on amounts deposited or invested . . . retroactive to the date that the Secretary began investing individual Indian monies on a regular basis.” §4012(1). Here, what is relevant is that plaintiffs’ claims have been identified from a reconciliation process, not that the process is sufficient to discharge the Secretary’s accounting duty. *See Mitchell II*, 463 U.S. at 227.

³⁴ Jun. 2008 Tr. 6/9/08 A.M. (Defendants’ Opening Argument) 34:1-2 [A12046] (“reconciled by the research and the statistical analysis performed to date.”)(emphasis added). *See United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986)(“[A] clear and unambiguous admission of fact made by a party’s attorney in an opening statement in a civil or criminal case is binding upon the party.”); *see also Hall v. Wal-Mart Stores E., LP*, 447 F. Supp. 2d 604, 608 (W.D. Va. 2006). Plaintiffs mis-referenced Dkt. No. 3519 at 6 for this in their opening brief. Plfs.’ Br. at 13.

³⁵ This is expected where, as here, the district court found “significant limitations” in trustee-delegates’ interest recalculation tests. *Cobell XX*, 532 F. Supp. 2d at 71. Jeff Zippin, OHTA’s Deputy Director, the official most responsible for defendants’ interest recalculation effort, is in accord, *id.*, as is Interior’s trust expert, Bank of America: “Interior’s approach ‘is of minimal value if the actual balance on which the interest is calculated [is] believed [as it is] to be inaccurate.’” *Id.* (citation omitted).

2. “Deposited Or Invested” Means Deposited *Or* Invested.

Congress repeatedly used the same disjunctive phrase “deposited or invested” in the re-codification of accounting duties that it used in its re-codification of plaintiffs’ entitlement to interest. The term “or,” in §4012 and elsewhere in the Act, confirms a “choice between *alternative* things, states, or courses;” Webster’s Third New International Dictionary 1585 (3d ed. 1993) (emphasis added). *See also* Black’s Law Dictionary 1095 (6th ed. 1990)(defining “or” to mean “[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things”).

Had Congress wanted to limit retroactive interest to funds that were “deposited *and* invested,” it would have done so explicitly. *See, e.g., Chao v. Day*, 436 F.3d 234, 236 (D.C. Cir. 2006); *see also Garcia v. United States*, 469 U.S. 70, 73 (1984). Congress did not to use that term in §4012. Nor did Congress provide an option to choose between “and” and “or.” Therefore, the court’s conclusion that §4012 does not authorize retroactive interest “on funds that were not invested” is plain error.

3. IIM Has Been Invested Regularly From The Trust’s Inception.

The court also erred by limiting retroactive interest to that which has been “earned” on invested funds. *Cobell XXI*, 569 F. Supp. 2d at 247. That term is not in §4012 or elsewhere in the statute and courts may not so engraft language onto a

statute to limit its scope. *See, e.g., Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring); *see also Carcieri*, 129 S.Ct. at 1063. What Congress authorized is interest retroactive to the date the Secretary's investment practices were established as "regular," not casual, not occasional. Government officials and experts confirmed that IIM has been invested "regular[ly]" since the inception of the trust, or at least soon thereafter. *See, e.g., Jun. 2008 Tr. 6/17/08 A.M. 909:3-11 (Angel)[A12705]; 6/17/08 P.M. 1093:14-21[A12832], 1110:18-1111:4[A12837]; 6/18/08 A.M. 1138:18-1139:5 (Kehoe) [A12877-878].*

D. Plaintiffs' Trust Funds Accrue Compound Interest.

Congress did not limit plaintiffs' compound interest entitlement notwithstanding that it explicitly limited tribes to simple interest on their trust funds. *See, e.g., Act of February 12, 1929, ch. 178, 45 Stat. 1164.* Neither the texts of the Trust Reform Act nor the Act of 1841 provides such limitation. Here, a statutory obligation and trust duty to pay compound interest is conceded by the government and confirmed by its practices on a regular basis. Plfs.' Br. at 17.

If Congress wanted to define interest as simple interest it would have done so explicitly – *i.e.*, as it did in the Act of 1929. Further, the fact that "interest" generally may be susceptible to alternative meanings – simple or compound – does not cause it to be ambiguous where, as here, indisputable record evidence in these

proceedings and regular practices confirm that compound interest accrues on individual Indian funds. *See Carcier*, 129 S.Ct. at 1065-66. To the extent there is any ambiguity, it must be construed to the benefit of the Indian plaintiffs. *See supra* at 5.

Measuring restitution by principal and interest that has accrued is also in accordance with the Act of 1841, originally and as currently codified, and is appropriate where, as here, the mandated and declared accounting is impossible or otherwise inadequate to identify all items of the trust. *See, e.g., Parker v. First Reliance Std. Life Ins. Co.*, 368 F.3d 999, 1009 (8th Cir. 2004)(holding “[i]nterest is, in many respects, the only way to account for this gain and therefore is an appropriate measure”); *see also Peterson v. Crown Fin. Corp.*, 661 F.2d 287, 296-298 (3d. Cir. 1981); 1 Dan B. Dobbs, *LAW OF REMEDIES* § 3.6(2) at 344 (emphasis added)(concluding the “disgorgement of ... *interest* ... may be necessary to force complete restitution”).

E. Principles Of Trust Law Apply To The Government As Trustee.

Defendants address neither the merits of beneficiaries’ arguments, Plfs.’ Opening Br. at 20-34, regarding the application of traditional equitable principles and presumptions, nor controlling precedents, all of which mandate application of

the most exacting fiduciary standards.³⁶ Defs.’ Br. at 60-62. Instead, defendants unsuccessfully attempt to distinguish two controlling trust decisions made by this Court and relied upon by plaintiffs – *Corporation Audit Co. v. Cafritz* and *Rainbolt v. Johnson*, 669 F.2d 767 (D.C. Cir. 1981).

They cite to no authority that *Cafritz* and *Rainbolt* do not apply to individual Indian trust beneficiaries. Nor do they cite to any authority supporting their belief that *Cafritz* and *Rainbolt*, or any other case, including *Mitchell II*, *Cobell VI*, and *Van Auken*, do not apply to the government as trustee for individual Indian trust beneficiaries. In accord with *Mitchell II* and *Cobell VI*, this Court is bound to apply the most exacting fiduciary standards.³⁷

V. LACHES AND LIMITATIONS DO NOT BAR PLAINTIFFS’ CLAIMS.

Defendants, in a footnote, mention laches and limitations principles, suggesting that those issues have been “left open by the district court.” Defs.’

³⁶ See *Mitchell II*, 463 U.S. at 225 (traditional trust duties and ordinary incidents of trusteeship apply to the government as trustee of the IIM Trust); see also *Richardson v. Van Auken*, 5 App. D.C. 209, 215, 1895 WL 11769, at *3 (D.C. Cir. Jan. 21, 1895); *Cobell VI*, 240 F.3d at 1099 (The federal government, as trustee, is judged by “the most exacting fiduciary standards”).

³⁷ The closest defendants come to responding to beneficiaries’ arguments regarding application of traditional equitable presumptions involves their discussion of the plaintiffs’ model presented at trial. Defs.’ Br. at 58-60. However, plaintiffs ask only that this Court confirm that no law has been enacted that limits the fiduciary duty the government owes to the plaintiff class and that no law has been enacted nullifying the trustee’s duty to document and justify each disbursement from the IIM Trust in accordance with *Cobell VI*, 240 F.3d at 1102.

Br. at 61, n 7. However, defendants have not properly raised the issue and, thus, have waived it. *See Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 93 n.3 (D.C. Cir. 2002). Notwithstanding, the district court decided these issues six years ago. It explicitly rejected defendants' defenses, holding that neither laches nor limitations principles bar plaintiffs' claims. *See Cobell v. Norton*, 260 F. Supp. 2d 98, 105 (D.D.C. 2003). Moreover, Congress explicitly stayed the tolling of the statute of limitations. *See* 1994 Appropriations Act at 2511.

VI. TRUST FUNDS ARE IMPROPERLY EXCLUDED.

A. Defendants Must Account For All Trust Funds.

Defendants make little effort to defend the district court's exclusion of IIM held in trust but outside an individual Indian's account. *See* Defs.' Br. at 69. The decision excludes not only IIM in tribal accounts, including members of the Osage, but judgment, per capita, and special deposit accounts, as well. *Cobell XXI*, 569 F. Supp. 2d at 235-236.

The accounting mandate of the Trust Reform Act encompasses "*all funds held in trust* by the United States for the benefit of an . . . individual Indian," 25 U.S.C. §4011(a) (emphasis added), in "*all accounts.*" *Cobell VI*, 240 F.3d at 1102. Defendants' regulations confirm the term IIM includes all moneys of individual Indians held in trust, from whatever source derived. *See* Pls' Opening Br. at 35-36.

This is particularly true of IIM in tribal accounts, including those of the Osage. Congress understood IIM are held in tribal accounts. *See* 10/26/89 Hrg. at 38 [A13290]. The district court found Osage revenue in Treasury, though in a tribal account, is IIM. *See Cobell XXI*, 569 F. Supp. 2d at 232 (“The proceeds of the mineral estate were to be held in trust for, and distributed per capita to, individual Osage Indians.”).

Defendants summarily state that the plaintiff class has no claim to individual Osage funds, suggesting that named plaintiffs are not representative of this class. Defs.’ Br. at 70 (some undefined “conflict of interest is apparent”). However, defendants never challenged the district court’s order certifying this class or its findings that the “named plaintiffs[’ claims] . . . are typical of the claims of the Class,” and “have no interests adverse to the other members of the Class.” 2/4/97 Order at 1-2 [GA-000028-29]. Defendants contend further that “plaintiffs would take the district court’s lump sum award and ‘whack it up pro rata.’” Defs.’ Br. at 70. But, defendants are quoting the district court, not counsel for plaintiffs. Plaintiffs are not in accord with that characterization. In any event, matters of distribution are reserved by the district court and are not at issue. *Cobell XXI*, 569 F. Supp. 2d at 253. *See supra* at 42.³⁸

³⁸ Defendants’ remaining arguments, complaining of the aggregation of funds in calculating restitution and the report of their consultant, are addressed elsewhere. *See supra* at 26-27, 36-37.

B. The Osage Tribe's Arguments Should Be Dismissed.

1. The Tribe Lacks Standing.

The Supreme Court in *Summers v. Earth Island Inst.*, ___ U.S. ___, 129 S. Ct. 1142 (2009) reaffirmed strict requirements for Article III standing. It requires an “actual or imminently threatened injury.” *Id.* at 1148. That injury must be “concrete and particularized” and “fairly traceable to the challenged action.” *Id.* at 1149. The tribe does not meet that standard.

The tribe's arguments on standing have no merit. First, it argues that “funds [are] owned by the Osage Nation.” Osage Br. at 19. However, the tribe does not “own” the funds to be distributed. The tribe concedes the distributions belong to individual headright owners. *See Osage Nation's Proposed Findings of Fact and Conclusions of Law* dated July 12, 2008 [Dkt. No. 3551] (“Tribe's Proposed Findings”) at 2 (“[A]ll Osage headright distributions are individual Indian monies”)[A13756]. Moreover, the manner of distribution is not in issue here. *See supra* at 42.

Second, the tribe's suggestion that a decision may affect legal positions asserted in its litigation in the Court of Claims, Osage Br. at 19, is unfounded. Article III standing is not present where a decision on appeal might be inconsistent with legal positions asserted by a proposed intervenor in other litigation concerning different issues in a different court. *See Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d

525, 530-34 (7th Cir. 1988). Hypothetical injuries do not establish Article III standing. *Summers*, 129 S. Ct. at 1149.

The absence of standing is underscored by inconsistent positions taken by the tribe. It represented to the district court that the funds belonged to individual Osage members. Jun. 2008 6/25/08 P.M. Tr. At 1735:17-22[A13241]. It passed an ordinance holding that proceeds from trust litigation were payable to headright owners. *See* Resolution No. ONCR 08-24, at 2 (April 17, 2008)[A13786]. It argued below that “all headright distributions should be included in the restitution award.” Osage Br. at 20. It asked the court to find that “headright distributions are individual Indian monies . . . [and] such distribution should be tallied . . . as funds the United States should be required to disburse.” Tribe’s Proposed Findings at 2-3 [A13756-57]. Now, it abandons its position below. Osage Br. at 20. A litigant may not assert one position before the district court and a contrary one on appeal. *See United States v. Maldonado-Rivera*, 489 F.3d 60, 68 (1st Cir. 2007).

2. No Jurisdiction Exists Over The Tribe’s Claims.

The tribe’s current position is that Osage revenue in trust is not held for the beneficial use of the tribal members but for the tribe. The district court held otherwise. *Cobell XXI*, 569 F. Supp. 2d at 232.

The tribe was allowed to intervene in the district court under Rule 24(b) for the limited purpose of protecting its alleged interest in mineral revenue. Jun. 2008

Tr. 06/24/08 A.M. 1467:23-1468:15[A13134]. As intervenor, it could appeal adverse findings. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 280-283 (1946). Neither the tribe nor defendants appealed the district court's decision that funds in the Osage account are individual. The tribe as an intervenor on appeal "may join issue only on a matter that has been brought before the Court by another party." *Illinois Bell Tel. v. F.C.C.*, 911 F.2d 776, 786 (D.C. Cir. 1990); *see also Lamprecht v. F.C.C.*, 958 F.2d 382, 389 (D.C. Cir. 1992). Moreover, having been permitted to intervene by the district court, it may not, by seeking to intervene on appeal, circumvent strict time requirements for petitioning this Court to review an issue decided adverse to its current position. *Id.*; *Corroon v. Reeve*, 258 F.3d 86, 91 (2d Cir. 2001).

3. Funds In The Osage Account Are IIM.

The Osage Allotment Act of 1906, Pub. L. No. 59-321, 34 Stat. 539 (June 28, 1906) (the "1906 Act") provides Osage income shall be deposited in Treasury "to the credit of" tribal members. *Id.* at 544. When funds are deposited to the credit of" an Indian, they are held in trust. *Chippewa Cree Tribe of the Rocky Boys Reservation v. United States*, 69 Fed. Cl. 639, 653 (2006). Congress understood the distinction between "members" of the tribe and the tribe.³⁹ If Congress

³⁹ *See* 1906 Act, 34 Stat. at 540 (providing for division of lands belonging to the Osage tribe "among the *members* of said tribe.") (emphasis added). Where

intended the funds to be credited to the tribe, it would have done so explicitly.⁴⁰ This is in clear contrast to §3 of the Act, expressly providing that the mineral estate is reserved to the tribe.⁴¹

In construing the phrase “placed in Treasury to the credit of members of the Osage Tribe,” the tribe focuses on the subsequent phrase, “as other moneys of said tribe are to be deposited under the provisions of this Act,” Osage Br. at 13, claiming this implicitly converts it to tribal money.⁴² In fact, this phrase refers to sections of the 1906 Act that provide for all revenues, including recoveries for claims and proceeds of the sale of tribal land, are, likewise, “placed to the credit of the individual members.” *Id.* at 543 §2, 544 §4.

Next, the tribe focuses on amendments to the 1906 Act, contending they supplant original language. The tribe suggests that which Congress vested in tribal members in 1906, it divested 30 years later.⁴³ Nothing in the amendments changes

Congress uses the same word in the same statute, it usually means the same thing. *PDK Labs*, 362 F.3d at 796.

⁴⁰ *See, e.g.*, Pub. L. No. 724, 45 Stat. 1164 (1929)(providing for interest on funds held in a trust fund “to the credit of an Indian tribe”); 25 U.S.C. §161a(a) and (b) (distinguishing the investment of funds held in trust “to the credit of Indian tribes” and funds held “to the credit of individual Indians.”)

⁴¹ “That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe . . .” 1906 Act, 34 Stat. at 543 §3.

⁴² The 1906 Act does *not* provide that the funds deposited “are to be treated” as tribal. Osage Br. at 13.

⁴³ Such a divestiture of individual Indian interests in favor of a tribe raises substantial constitutional concerns. *See Babbitt v. Youpee*, 519 U.S. 234, 243-45

the framework of the 1906 Act: the mineral estate is tribal and revenue is IIM. *See Big Eagle v. United States*, 300 F.2d 765, 766 (Ct. Cl. 1962).

The tribe refers to the Act of March 3, 1921, §4, 41 Stat. 1249, 1250 that provided for quarterly payments to headright holders. However, that payments are made quarterly means only that the 1921 statute confirms the member's beneficial ownership. *Id.* at § 4.

The tribe focuses on the Act of June 24, 1938, Pub. L. No. 75-711, 52 Stat. 1034, referring to “mineral royalties and bonuses” of the tribe. However, nothing in the 1938 legislation changes the structure of the 1906 Act. The 1938 Act expressly confirms that money held in trust by the government for individual members “shall continue subject to such trusts . . .”, *id.* at 1035 §3, and that those members shall have a “pro rata share” of trust income. *Id.* at 1034.

The tribe's argument that judicial authorities support its new position is likewise misplaced. *West v. Oklahoma Tax Comm'n*, 334 U.S. 717 (1948) and *United States v. Mason*, 412 U.S. 391 (1973) hold to the contrary. Decided after the 1938 amendment, both cases hold Osage revenue is deposited in Treasury to the credit of tribal members, not the tribe. *See West*, 334 U.S. at 718; *Mason*, 412 U.S. at 393; *see also Globe Indem. Co. v. Bruce*, 81 F.2d 143, 150 (10th Cir.

(1997). In interpreting a statute, the court must determine if it may be fairly read to avoid a constitutional question. *See Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring).

1935); *Hampton v. Comm’r*, 31 B.T.A. 853, 856 (1934); *Martin v. AMVEST Osage, Inc.*, 2006 WL 1207709, at *2 n. 4 (N.D. Okla. May 1, 2006); *Big Eagle*, 300 F.2d at 765.

The tribe principally relies on *Taylor v. Tyrien*, 51 F.2d 884 (10th Cir. 1931). However, *Tyrien* concerned a bankruptcy trustee’s efforts, through a headright interest, to “share in the proceeds of *oil in the ground*,” *id.* at 886 (emphasis added), which request was denied as such mineral estate is tribal. Nothing in *Tyrien* supports the tribe’s current position that revenue when deposited in Treasury is tribal, not individual. That the funds belong to individual members is confirmed by the subsequent decision of the Tenth Circuit in *Globe Indemnity*, 81 F.2d at 150.

Accordingly, the tribe’s claims should be dismissed. It has no standing.

CONCLUSION

Based on the foregoing, plaintiffs respectfully pray that this Court deny the relief requested by defendants and grant that relief requested by plaintiffs in their January 21, 2009 brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A), which allows inclusion of 14,000 words, because this brief contains 13,989 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

This brief complies with the requirements of Circuit Rule 32(a)(1) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in fourteen Times New Roman font.

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