

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

ELOUISE PEPION COBELL, et al.,)
on their own behalf and on behalf of)
all persons similarly situated,)
)
Plaintiffs,)
)
vs.)
)
DIRK KEMPTHORNE, Secretary of)
the Interior, et al.,)
)
Defendants.)

**Case No. 96CV1285
(Judge Robertson)**

**PLAINTIFFS’ MEMORANDUM REGARDING THE
SCOPE OF THE OCTOBER 10, 2007 TRIAL**

I. INTRODUCTION

This is the second of two companion briefs requested by this Court in the May 14, 2007 prehearing conference. *Tr. May 14, 2007 Status Conf. at 70:20-25*. The brief plaintiffs filed earlier this week addressed the scope of the required accounting and the large number of class members and transactions being excluded by defendants from that accounting. *See Plaintiffs’ Brief Regarding the Nature and Scope of the Historical Accounting and Exclusions from Defendants’ Historical Accounting Plan* dated May 29, 2007 [Dkt. No. 3331] (“Exclusions Brief”). This brief primarily addresses the question proposed by this Court in the *Memorandum Order*, dated April 20, 2007 [Dkt No. 3312], at 4: “What further relief, if any, should be ordered?”

On January 6, 2003, defendants filed their latest historical accounting plan.¹ There, they represent that implementation of their plan would take five years and estimated that it would cost \$335 million. Four and one-half years later, defendants' plan has been almost fully funded; yet, in a very practical sense, trustee-delegates are no closer to fulfilling their fiduciary duty.² As such, and for many other reasons, defendants have not cured and are not curing their breaches of trust. In the event this Court finds that defendants cannot or will not render an adequate accounting, the principal outstanding issue is what remedies are available to plaintiffs. As will be addressed herein, this Court has the full panoply of equitable powers at its disposal to provide complete relief on the matters before this Court, including the authority to order further equitable relief in the form of a correction and restatement of plaintiffs' trust balances through restitution and disgorgement.

In connection with the October trial, plaintiffs submit the following questions as subparts to the remedies question:

¹ Plaintiffs refer to this as the "latest" plan since it was preceded by at least seven other plans filed with this Court that purported to address the breaches of trust found by this Court. [1] Special Trustee's Strategic Plan [filed as Plaintiffs' Exhibit 4, Trial 1.0]; [2] 1998 High Level Implementation Plan [Dkt. No. 124]; [3] 2000 High Level Implementation Plan [Dkt. No. 438]; [4] 2002 Report to Congress on Historical Accounting of Individual Indian Money Accounts [Dkt. No. 1365]; [5] EDS "Roadmap" trust reform plan [Dkt. No. 990]; [6] Fiduciary Obligations Compliance Plan [Dkt. No. 1707]; and, [7] the To-Be trust reform plan (also called the "Fiduciary Trust Model") [Dkt. No. 2882]. Each of these plans purported to correct the trust data and remedy material flaws in defendants' trust management systems in order to facilitate the historical accounting. Unfortunately, none of these plans remedied the breaches found, much less provided the framework for an adequate accounting.

² Plaintiffs are mindful of the "historical statements of account" filed with this Court regarding judgment and per capita funds referenced in the second issue for the October hearing. However, these statements, even in the most favorable light, do not approach an adequate accounting for the few beneficiaries and few transactions covered by such statements. Plaintiffs have set forth what an adequate accounting and report to beneficiaries would entail as defined by this Court and the Court of Appeals in their Exclusions Brief and will not revisit that here. *Id.* at 3-19.

- (1) How much of the beneficiaries' trust income was deposited into the trust?³
- (2) How much of the trust funds can defendants establish have been properly paid to individual Indian trust beneficiaries?
- (3) To the extent that the individual Indian trust fund balances are understated, where is this money?
- (4) Have trustee-delegates benefited from the understatement of plaintiffs' trust balances?
- (5) If trustee-delegates have benefited from such understatement, what is the benefit conferred and how is it measured?
- (6) Does this Court have the equitable authority to restate trust balances so that they accurately reflect the trust funds that should stand to the credit of the beneficiary class?
- (7) In what manner and to what extent shall the balances be restated?

These questions are significant. This brief addresses key issues which arise out of this Court's consideration of the remedies.

II. SUMMARY OF ARGUMENT

At all times relevant to these proceedings, Defendants have been obligated, as trustee-delegates, to provide a complete accounting to individual Indian trust beneficiaries because the government has exercised control over plaintiffs' trust assets. *See, e.g., Cobell v. Norton*, 240

³ Defendants have represented for years both to this Court and the Court of Appeals that thirteen billion dollars was collected by Treasury from the trust's inception through 2000. *See* Cason Declaration at 3 [attached as Exhibit A to Dkt. No. 2367]. Associate Deputy Secretary, James Cason, testified that "Interior estimates that approximately \$13 billion has flowed into these IIM accounts (since 1887) . . . as of December 31, 2000." *Id.* The doctrine of judicial estoppel prevents defendants from now disavowing this admission. *See Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). *See also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (reaffirming the significance of the doctrine of judicial estoppel and applying it to prevent the State of New Hampshire from contradicting a position previously taken in a consent decree).

F.3d 1081, 1087 (D.C. Cir. 2001) (“*Cobell VI*”) (“The federal government retained control of lands . . . and thereby retained its fiduciary obligations. . . .”). See also *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (“*Mitchell II*”). Congress reaffirmed and codified that duty in 1899⁴ and most recently reaffirmed it with enactment of the Indian Trust Management Reform Act of 1994, Pub. L. No. 103-412 (1994) (the “Trust Reform Act”).

On December 21, 1999, over six years ago, this Court held that “a century is, at best, a ‘long time’ for plaintiffs to wait,” for their accounting, *id.* at 47, and that defendants had “unreasonably delayed” in preparation of the “fundamental plans” that must be initiated if an accounting is ever to be performed. *Id.* On February 23, 2001, the Court of Appeals agreed, holding that “[e]ven assuming [] that the 1994 Act effectively reset the clock for a finding of unreasonable delay, [Interior’s] ‘reasonable time to discharge’ its fiduciary obligations ‘has expired.’” *Cobell VI*, 240 F.3d at 1095 (D.C. Cir. 2001) (quoting *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 48 (D.D.C. 1999) (“*Cobell V*”). In other words, as of 1999, the delay was not merely “unreasonable” or “undue,” but “unconscionable.” *Id.* at 1096. Accordingly, the Court of Appeals concluded that “absent court intervention, discharge of the government’s fiduciary obligations may be far off.” *Id.*

Unfortunately, today, the accounting is highly unlikely, and, at best, remains “far off.” Since *Cobell VI*, this Court has continued to find unreasonable delay on the part of defendants. See *Cobell v. Norton*, 226 F. Supp. 2d 1, 151 (D.D.C. 2002) (“*Cobell VII*”) (“the Court finds that even assuming the clock was reset after the Phase I trial ruling was issued in December of 1999, the reasonable time for the defendants to develop a plan to perform a historical accounting

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

project and to develop a plan to enable them to discharge their fiduciary obligations properly has expired”), *rev’d on other grounds, Cobell v. Norton* (“*Cobell VIII*”), 334 F.3d 1128 (D.C. Cir. 2003). As this Court recently noted, defendants acknowledge that “completion of [the] accounting is nowhere in sight.” Order of January 16, 2007 at 1 [Dkt. No. 3283]. In addition, defendants refuse to render an accounting of “[a]ll funds’ . . . irrespective of when they were deposited,” as ordered by this Court and the Court of Appeals, *see Cobell VI*, 240 F.3d at 1102, choosing instead to limit the scope of their accounting and the scope of the class. In truth, as defendants have previously conceded, they are unable to fulfill their fiduciary duty to render the declared accounting due to the loss and systemic destruction of critical trust records.⁵

This Court is not relegated to the role of a spectator while defendants spend decades “working on” an accounting they are neither able nor willing to render. This is particularly true here where “the consequences of further agency delay are potentially quite severe,” as “the interests at stake are . . . [the] personal interests in [the] life and health” of the Indian beneficiaries, themselves. *Cobell VI*, 240 F.3d at 1097 (*quoting Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1156 (D.C. Cir. 1983)). Yet, that is essentially the position the defendants take, arguing that the APA shields them from judicial intervention and the Court is powerless to rectify their continuing breaches of trust, *see* Tr. Dec. 20, 2006 Status Conf. at 30:7-

⁵ *See Defendants’ Memorandum of Points and Authorities in Response to Plaintiffs’ Motion for Class Certification* dated January 21, 1997 [Dkt. No. 24] (“*Defs’ Class Cert. Memo*”) at 17 (recognizing the “patent futility” of attempting to perform an accounting for each IIM account as “critical records no longer exist”); *Defendants’ Memorandum in Support of Defendants’ Motion for Protective Order and for Rule 16 Pre-Trial Conference* dated February 2, 1998 [Dkt. No. 66] at 2 (“As a result of missing records, it is not feasible to perform a full accounting of the IIM accounts pursuant to Generally Accepted Accounting Principles for all IIM accounts.”).

8; 32:13-33:23,⁶ regardless of whether they are willing or able to render the accounting. *Def's Bench Mem.* at 4.

Contrary to defendants' position, this is principally an Indian trust case, not an action grounded in the Administrative Procedure Act ("APA"). *Cobell v. Norton*, 455 F.3d 301, 304-05 (D.C. Cir. 2006) ("*Cobell XVIII*"), (reiterating that in this case "the narrow judicial powers appropriate under the APA do not apply"), *cert. denied*, 127 S.Ct. 1875 (2007). However, whatever body of law this Court considers, trust law or the APA, the result is the same – this Court has the authority now to rectify defendants' breaches of trust, enjoin violations of law, and fashion appropriate equitable relief. Under trust law, this Court has broad inherent equitable powers to provide plaintiffs whatever remedy is necessary to protect their interests, restore their funds, correct inaccurate trust balances and deter continuing breaches of trust. *See, e.g.*, III SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988). Alternatively, under the APA this Court has the power to order appropriate equitable relief where the agency, as here, has unreasonably delayed remedying its breach, is unable to grant complete relief, has disregarded the remand instructions of this Court, or where any continued delay would unduly prejudice plaintiffs' interests. *See, e.g., Bente v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992).

As this Court held in *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 41 (D.D.C. 1998) ("*Cobell I*"), an accounting would result in a correction and restatement of account balances for the plaintiff class. This accounting must include all funds since the inception of the trust, whether those funds are held by Interior or its employees and agents, Treasury, contracting and compacting tribes, fiscal agents, or agent banks. Defendants admit they have collected thirteen billion dollars

⁶ *See also Defendants' Bench Memorandum Regarding Issues Presented in April 20, 2007 Memorandum Order* dated May 11, 2007 [Dkt. No. 3322] ("*Def's Bench Mem.*") at 2 (urging this Court to "restrict its judicial oversight to monitoring progress through periodic reports").

in trust revenue. It is their burden to account to plaintiffs and this Court for those funds, the securities purchased with such funds, as well as the compound interest that has accrued. The continuing undue delay should be construed as powerful evidence that the declared accounting cannot or will not be rendered. Accordingly, this Court, sitting as a court of equity, may provide plaintiffs equitable restitution for defendants' breaches of trust and order defendants to "disgorge gains received from the improper use of [trust property] or entitlements." 1 DAN B. DOBBS, LAW OF REMEDIES § 4.3(5) at 610 (2d ed. 1993).

The burden lies upon defendants to establish how much of the thirteen billion dollars collected and deposited in trust has been paid to each member of the plaintiff class. RESTATEMENT (SECOND) OF AGENCY § 399, comment e ("In an action for accounting, the agent has the burden of proving that he paid to the principal or otherwise properly disposed of the money or other thing to which he is proved to have received for the principal."). Any uncertainty about what has been paid having been caused by defendants' own conduct, all doubts must be resolved in favor of plaintiffs. See *Westinghouse Elec. & Mfg. Co. v. Wagner Elec. And Mfg. Co.*, 225 U.S. 604, 621-22 (1912) ("The rule of law and equity is strict and severe on such occasion. . . . All the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it.") (quoting *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108) (alteration in original). Only then can the plaintiffs' trust balances be corrected and restated and defendants' continuing breaches of trust be deterred.

**III. THIS COURT HAS THE AUTHORITY TO FASHION NECESSARY
EQUITABLE RELIEF, INCLUDING A MONETARY AWARD.**

Defendants continue to dispute the jurisdiction of this Court, and wrongly argue that this is an action primarily under the APA,⁷ insisting this Court has limited authority, despite the conclusions of this Court expressly to the contrary. *Cobell I*, 30 F. Supp. 2d at 33 (“The defendants seek from the beginning to constrain the plaintiffs’ claims to the APA, but such a characterization simply does not comport with the facts alleged and the allegations set forth in the Complaint.”). Accordingly, a discussion of the jurisdictional authority of this Court is necessary.

It is well-settled that when bringing an action against the United States or its officials, three requirements must be satisfied: (1) “subject matter jurisdiction” (2) “waiver of sovereign immunity” and (3) the existence of a “cause of action.” *See, e.g., United American, Inc. v. N.B.C.-U.S.A. Housing, Inc. Twenty Seven*, 400 F. Supp. 2d 59, 61 (D.D.C. 2005) (“In any suit in which the United States is a defendant, there must be a cause of action, subject matter jurisdiction, and a waiver of sovereign immunity.”) (*quoting Presidential Gardens Assocs. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999)). *See also V S Ltd. v. Dep’t of Housing and Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000). It is uncontested that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, as the claims here arise under the Constitution, statutes and laws of the United States, being based on rights founded on the federal common law of Indian trust management and reconfirmed most recently by the Trust Reform Act. *See Cobell I*, 30 F. Supp. 2d at 31. Defendants, however, continue to focus on the doctrine of sovereign

⁷ *See Defs’ Bench Mem.* at 4-9 (arguing that the upcoming proceeding should conform with the “normal process” under the APA and that plaintiffs are not entitled to discovery).

immunity and the nature of the cause of actions alleged. Defendants' arguments warrant a further discussion of these jurisdictional requirements.

A. Defendants Have Waived Sovereign Immunity

1. Under 5 U.S.C. § 702, defendants have waived sovereign immunity as to all actions in equity.

It is axiomatic that the United States may not be sued without its consent. *See Minnesota v. United States*, 305 U.S. 382, 388 (1939). Accordingly, a plaintiff must point to an applicable waiver of the government's immunity from suit to bring an action against it. Here, section 702 provides that waiver. *See Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981). It provides, in pertinent part:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States....

5 U.S.C. § 702 (1976). This Circuit held in *Schnapper* that, “[t]he legislative history of this provision could not be more lucid. It states that this language was intended ‘to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a Federal officer ...’ S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976).”⁸ *Id.* at 107. “Section 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief.” *Id.* at 108. There is no such statute here. Accordingly, the Court of Appeals has previously concluded that sovereign immunity has been waived and this Court has jurisdiction over plaintiffs’ accounting claim. *Cobell VI*, 240 F.3d at 1094.

⁸ *See* S. Rep. No. 966, 94th Cong., 2d Sess., at 7-8 (“[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity....”).

Importantly, although the waiver of immunity is housed in the APA, the government’s general waiver of sovereign immunity by its terms is not limited to APA claims as “[t]he APA’s waiver of sovereign immunity applies to any suit whether under the APA or not.” *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (emphasis added); *see also Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984). This has been held in the Indian trust context as well. *See Assinboine & Sioux Tribes of the Fort Peck Indian Reservation v. The Board of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (“[A]bolition of sovereign immunity in § 702 is not limited to suits ‘under the Administrative Procedure Act’; the abolition applies to every ‘action in a court of the United States seeking relief other than money damages’ No words of § 702 and no words of the legislative history provides any restriction to suits ‘under’ the APA.”) (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:19, at 195 (2d ed. 1984)). *See also Cobell I*, 30 F.3d at 31 (“The § 702 waiver of sovereign immunity in actions seeking relief other than money damages against the government also applies to claims brought outside the purview of the APA, such as some of the claims involved in the case at bar”). As we demonstrate below, plaintiffs’ principal claims are grounded in trust law – the statutes and regulations related to the IIM trust and fiduciary duties express and implied. *Mitchell II*, 463 U.S. at 216. This is a claim against trustee-delegates by their beneficiaries to enforce unconditional trust obligations.

2. Defendants’ waiver of sovereign immunity extends to equitable remedies, including monetary relief.

Section 702 waives the sovereign immunity of the United States and its officers where the relief requested is other than “money damages.” 5 U.S.C. §702. The phrase “money damages” was included in a 1976 amendment to § 702, and was intended to broaden – not restrict - the district court’s jurisdiction. *Esch v. Yeutter*, 876 F.2d 976, 981 (D.C. Cir. 1989).

Importantly, “money damages” is not synonymous with “monetary relief.” *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988). An action at law for “money damages” is “intended to provide a victim with monetary compensation for an injury to his person, property or reputation.” *Id.* at 893. In contrast, where an equitable action seeks specific relief,⁹ including “the recovery of specific property or monies,” *id.* (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)), it is not damages as it does not compensate for loss. *See also Cobell v. Norton*, 260 F. Supp. 2d 98, 107 (D.D.C. 2003) (citing *Bowen* and noting the distinction between an action for “money damages” and an action in equity for recovery of “specific monies”). “The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as ‘money damages.’” *Bowen*, 487 U.S. at 893. *See also Anselmo v. King*, 902 F. Supp. 273, 275 (D.D.C. 1995). Indeed, in using the phrase “money damages” in §702, Congress “authorize[d] equitable suits for specific monetary relief.” *Bowen*, 487 U.S. at 899-900. *See also M.K. v. Tenet*, 99 F. Supp. 2d 12, 24 (D.D.C. 2000) (“the exclusion of damage claims from the APA’s waiver of sovereign immunity does not exclude equitable claims for specific monetary relief.”) (emphasis added).

Accordingly, in *Bowen*, the Supreme Court rejected the argument that the State of Massachusetts was not entitled to contest in federal district court the denial by the Secretary of Health and Human Services of reimbursement for certain Medicaid expenses, merely because a judgment would result in recovery of monetary relief. Relying on this Circuit’s opinion in *Maryland Dep’t of Human Resources v. Dep’t of Health and Human Services*, 763 F.2d 1441 (D.C. Cir. 1985), the Supreme Court explained that while “[d]amages are given to the plaintiff to

⁹ “Specific relief” is defined as the “restor[ation] to the plaintiff [of] that to which it was entitled from the beginning.” *See America’s Community Bankers v. Federal Deposit Ins. Corp.*, 200 F.3d 822, 829 (D.C. Cir. 2000)

substitute for a suffered loss . . . specific remedies are . . . [an] attempt to give the plaintiff the very thing to which he [is] entitled.” *Bowen*, 487 U.S. at 895 (internal quotations and citations omitted) (emphasis in original). As Massachusetts was seeking funds to which it was statutorily entitled and not compensation for losses, the action could proceed in the district court. *See also School Committee of Burlington v. Dep’t of Educ. of Massachusetts*, 471 U.S. 359, 370-71 (1985) (holding reimbursement to parents for educational costs was not “damages” as it only required the defendant “pay expenses that it should have paid all along and would have borne in the first instance . . .”). Therefore, under *Bowen*, sovereign immunity is waived under § 702 where the plaintiff seeks “the very thing which it has been deprived of,” even where it “happen[s] to be the payment of money.” *Esch*, 876 F.2d at 981.

The principles set forth in *Bowen* have been faithfully followed and reinforced in decisions of this Circuit. In *America’s Community Bankers*, *supra* note 9, this Circuit held an action instituted in this Court by a trade association of banks and savings and loans to obtain a refund of improper assessments by the government against its members was not barred by the “money damages” provision of § 702, the association only seeking recovery of those funds “which rightfully belonged to [its] member institutions in the first place.” 200 F.3d at 830. In *Alabama v. Bowsher*, 734 F. Supp. 525 (D.D.C. 1990), *aff’d sub nom. Arizona v. Bowsher*, 935 F.2d 332 (D.C. Cir.), *cert. denied*, 502 U.S. 981 (1991), twenty-three states asserted claims against the Secretary of the Treasury for recovery of unclaimed monies held in Treasury trust accounts. The jurisdiction of the district court was upheld under § 702. This Court concluded that it could not “imagine any claim for monies which could be more equitable in nature than the instant case where the plaintiffs are seeking specific monies within the unclaimed monies accounts which they claim they are entitled to under their state law.” *Id.* at 533 n.10.

In *Fletcher v. United States*, 2005 WL 3551108 (10th Cir. December 29, 2005), the Tenth Circuit held the district court had jurisdiction over claims by the Osage Indians that the government had breached its trust responsibilities under the Osage Allotment Act of 1906, Pub. L. No. 59-321, 34 Stat. 539 by, among other things, delivering mineral royalties to non-members of the tribe. Relying on *Bowen*, *Fletcher* rejected Interior’s defense that the relief sought was “money damages” under section 702. Instead, because the Osage sought to enforce “a statutory duty to pay them money, specifically royalties from oil and gas production to which they are entitled pursuant to the 1906 statute,” the section 702 waiver applied. *Id.* at *5 796. *See also Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993) (district court had jurisdiction to order the return of money unlawfully withheld from airlines pursuant to improper audits as the “district court’s order that these funds be paid over to their rightful owner [was] in no way an order for the payment of ‘money damages.’”); *United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000) (district court had jurisdiction over action to recover the value of currency improperly forfeited as the plaintiff sought “restitution of the very thing to which he claim[ed] an entitlement, not damages in substitution for a loss”) (internal quotation and citation omitted); *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 478-79 (2d Cir. 1995) (action by surety company to recover payments made by government to debtor in violation of its subrogation rights was not barred by section 702 where plaintiff sought to compel a legal obligation and not recovery of damages). *Accord Zellous v. Broadhead Assocs.*, 906 F.2d 94, 98 (3d Cir. 1990); *Linea Area Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034, 1043-44 (2d Cir. 1995); *Bronston v. Kemp*, 722 F. Supp. 372, 378 (S.D. Ohio 1989).

The right to recover specific relief in the form of a monetary award under section 702 applies to governmental obligations created by statute and informed common law. *Aetna*

Casualty & Surety Co., 71 F.3d at 479 (finding *Bowen* applied both to duties “prescribed by statute” as well as those “arising under some other rule of law”). *See also Cobell VI*, 240 F.3d at 1094 (holding the fact that “plaintiffs rely upon common law trust principles in pursuit of their claims is immaterial” on the issue of jurisdiction under §702).¹⁰

B. Plaintiffs have Properly Stated a Cause of Action for Breach of Defendants’ Duties as Trustee.

Plaintiffs’ principal cause of action is provided by the statutes that created and govern the IIM Trust which both expressly and impliedly establish the fiduciary duties owed. When a beneficiary seeks redress from a breaching trustee, it is axiomatic that district courts, as “[c]ourts of equity[,] have original inherent jurisdiction to decree and enforce trusts and to do whatever is necessary to preserve them from destruction.” *Village of Brookfield v. Pentis*, 101 F.2d 516, 520-21 (7th Cir. 1939). This is far from a foreign concept in this litigation and indeed comports with an essential holding in *Cobell V* and affirmed by the Court of Appeals in *Cobell VI*. Specifically, this Court held that:

Plaintiffs’ actionable rights in this case stem from and are shaped by three bodies of law. . . . First, as a matter of litigating against the government, plaintiffs may enforce rights granted to them by statute under the provisions of the APA. . . . Second, to the extent that certain governmental actions cannot be reviewed under the APA, then plaintiffs may seek non-statutory review. . . . Third, plaintiffs may rely upon the rights effectively given to them by the Supreme Court in *Mitchell II*.

Cobell V, 91 F. Supp. 2d at 29-30 (emphasis added).

¹⁰ To the extent that the award includes monies not in the government’s possession, such funds are likewise not money damages under section 702. *See, e.g., America’s Community Bankers*, 200 F.3d at 830 (“[t]hat the [defendant] no longer possesses the precise funds collected is not determinative” when analyzing jurisdiction under section 702); *Aetna Casualty & Surety Co.*, 71 F.3d at 479 (holding the fact the government had mistakenly paid the subject funds to a third party did not convert the plaintiffs’ claim to one for recovery of damages); *Minor*, 228 F.3d at 355 (“that the government obviously cannot restore to [the plaintiff] the specific currency that was seized does not transform the motion into an action at law”).

Mitchell II recognized the right of action to enforce statutorily-rooted (but not necessarily expressly-stated) trust duties. 463 U.S. at 216. The question before the Supreme Court in *Mitchell II* was whether the plaintiff had a right of action against the United States as trustee for breaches of trust even though no statute expressly granted a cause of action. The Supreme Court ruled that such a right of action to obtain traditionally available remedies for the violation of the rights of the beneficiaries is inherent in the creation of the trust:

Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See RESTATEMENT (SECOND) OF THE LAW OF TRUSTS §§ 205-212 (1959); G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 862 (2d ed. 1965); 3 A. SCOTT, THE LAW OF TRUSTS § 205 (3d ed.1967).

Mitchell II, 463 U.S. at 226 (1983) (emphasis added). The “right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust,” *Mitchell II* further explained, is “a fundamental incident” of the “trust relationship between the United States and an Indian” *Id.*

In essence, *Mitchell II* stands for the unremarkable proposition that remedies typically available to other beneficiaries in breach of trust cases are also available to Indian beneficiaries in this case. *Cf. Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 166 (1803) (Marshall, C.J.) (“[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”). Of course, it is beyond peradventure that trusts are “creatures of equity” and “their terms ... enforced by the Chancellor.” *Whitt v. Goodyear Tire & Rubber Co.*, 676 F. Supp. 1119, 1127 (N.D. Ala. 1987). *See also Bryan v. Welch*, 74 F.2d 964, 970 (10th Cir. 1935) (“A court of equity has exclusive jurisdiction over trusts.”); *In re Lorax Corp.*, 307 B.R. 560, 565 n.11 (N.D. Tex. 2004) (“it is well established that

a trust is a creature of equity”). As a leading treatise on trusts provides: “Equity is primarily responsible for the protection of rights arising under trusts and will provide the beneficiary with whatever remedy is necessary to protect him” G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 861 at 3-4 (Rev. 2d ed. 1995).

Since *Cobell VI* confirmed the existence of a trust relationship here, it “naturally follows” – as it did in *Mitchell II* – that a right of action which is commonly available to all other trust beneficiaries is also available to the plaintiff class. Here, plaintiffs’ claim is for an accounting and other appropriate equitable relief. These are settled remedies that are available, in equity, to an aggrieved trust beneficiary. See, e.g., *Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 487 (1966) (“It is fundamental that an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting.”); *RESTATEMENT (SECOND) OF THE LAW OF TRUSTS* § 197 (Except for certain limited damages claims, “the remedies of the beneficiary against the trustee are exclusively equitable.”).

This Circuit’s decision in *Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280 (D.C. Cir. 1993) is directly on point regarding the enforceable rights of a trust beneficiary. In *Beckett*, a trust was created pursuant to a consent decree in a previous federal court proceeding and beneficiaries brought suit to enforce the terms of the trust. 995 F.2d at 286. The Court of Appeals, after reviewing the terms of the decree, held that a “trust was indeed created” and “[j]ust as an intended third party beneficiary may sue to enforce a contract, it is equally fundamental that the beneficiary of a trust may maintain a suit to compel the trustee to perform his duties as trustee or to redress a breach of trust.” *Id.* at 286, 287 (citing *RESTATEMENT, SECOND* § 199 (1959)). See also *Crawford v. La Boucherie Bernard Ltd.*, 815 F.2d 117, 120 (D.C. Cir.1987) (“Trust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches

of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust.") (citation omitted).

In sum, since equity jurisdiction is ordinarily invoked to enforce trusts, using the legal analytical framework established in *Mitchell II*, it naturally follows that plaintiffs may maintain a cause of action to obtain equitable relief quite apart from any right of action otherwise grounded in an ordinary APA review of agency action. Indeed, this legal principle was settled in *Cobell VI*: “While *Mitchell II* involved a claim for damages, nothing in that decision or other Indian cases would imply that appellants are not entitled to declaratory or injunctive relief. Such remedies are the traditional ones for violations of trust duties.” 240 F.3d at 1101. The Phase II Trial is an accounting trial – a matter traditionally heard by the Chancellor in Equity, the capacity in which this Court sits.

IV. DUE TO THE DEFENDANTS’ DESTRUCTION OF CRITICAL TRUST RECORDS AND THE UNTRUSTWORTHY NATURE OF ELECTRONIC RECORDS, DEFENDANTS WILL NOT BE ABLE TO RENDER THE ACCOUNTING DECLARED BY THIS COURT.

In order to render their historical accounting, defendants must rely on trust records, both hard copy and electronic. Given that those records are destroyed, missing and unreliable, the accounting cannot not be rendered. The nature and scope of the systemic spoliation, as well as the unreliability of the extant data, is extraordinary and cannot be adequately addressed in this memorandum. Accordingly, plaintiffs suggest that spoliation and unreliability be addressed by motion in conjunction with adverse inferences and issue and other evidentiary preclusions.

Briefly, it is important to note that defendants concede that, due to their systemic spoliation of hard copy trust records, any accounting mandated by this Court would be pointless. *See Defs’ Class Cert. Memo* at 17. They long ago “recogni[zed] ... the patent futility” of

attempting to perform an accounting for each IIM account as “critical records no longer exist ...” *Id.* (emphasis added). *See also Cobell VI*, 240 F.3d at 1097 (“Documents necessary for a proper accounting and reconciliation have been lost or destroyed.”).

Defendants’ electronic records fare no better. On December 17, 2001, defendants acknowledged “significant deficiencies in the security of information technology systems protecting individual Indian trust data,” *Consent Order Regarding Information Technology Security*, [Dkt. No. 1063] (“*Consent Order*”) at 4, and on February 6, 2002, the Secretary of Interior confirmed that “departmental information technology security measures associated with Indian trust data lack integrity and are not adequate to protect trust data or to comply with Office of Management and Budget requirements.” *Indian Trust Fund Accounts: Oversight Hearing Before the H. Comm. on Resources*, 107th Cong. 8 (2002) (statement of Gail Norton, Secretary, Interior Dept.). The absence of security controls on defendants’ IT systems was confirmed in this Court’s fatal findings after a lengthy hearing, which findings defendants did not challenge on appeal. *See Cobell XVIII*, 455 F.3d at 308. Electronic data contained on such untrustworthy systems is not admissible and cannot be used as a basis for an accounting of plaintiffs’ trust funds. *See* 36 C.F.R. § 1234.26 (2005).

V. THIS COURT, AS A COURT OF EQUITY, HAS SUBSTANTIAL DISCRETION TO ENFORCE THE TRUST AND ORDER THE EQUITABLE RELIEF REQUESTED.

A. This Court is Authorized to Provide the Relief Requested by Plaintiffs

This Court has broad inherent equitable powers. *See, e.g., Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 749 (D.C. Cir. 1995). As the Supreme Court has noted, “the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of

Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73).” *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) (internal quotation and citation omitted). This included wholesale adoption of the equity jurisprudence of the law of trusts. *See* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 6 (Rev. 2d ed. 1995) (“Just as the thirteen original states adopted substantially the entire common law of England, so they took over with little change the English system of equity jurisprudence, a part of which was the system of trusts.”). Trust are principally enforced in equity. G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 861 at 3-4 (Rev. 2d ed. 1995) states: “Equity is primarily responsible for the protection of rights arising under trusts and will provide the beneficiary with whatever remedy is necessary to protect him and recompense him for the loss” *Accord* III SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988) (“A court of equity, having jurisdiction over the administration of trusts, will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests....”). *See also First Fiduciary Corp. v. Office of Commissioner of Banks*, 684 N.E.2d 1, 2 n.2 (Mass. App. Ct. 1997) (“there is a long history of equitable supervision of trusts and trustees by courts, which, at the behest of beneficiaries, routinely compel trustees to perform duties, enjoin breaches of trust, compel redress of breaches of trust, remove faithless trustees, and appoint receivers to administer trust property.”).

Since district courts have broad equitable powers consistent with those of the English courts of chancery and trusts are ordinarily enforced through equity, which affords beneficiaries such remedies as are necessary to protect them, it follows that this Court has inherent equitable authority to enforce the IIM trust. *See, e.g., Village of Brookfield*, 101 F.2d at 520-21 (“Courts of equity have original inherent jurisdiction to decree and enforce trusts and to do whatever is

necessary to preserve them from destruction.”) (emphasis added); *Eaves v. Penn*, 587 F.2d 453, 462 (10th Cir. 1978) (“Traditional trust law provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty.”) (internal citation omitted); BOGERT, at § 973 (“If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident.”) (emphasis added). Moreover, this is consistent with the law of equity recognized outside the trust context. As stated in *Franklin v. Gwinnett County Public Schools*, “if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.” 503 U.S. 60, 69 (1992) *quoted in Cobell VI*, 240 F.3d at 1108.

These are settled legal principles. Cases are legion standing for the proposition that the district courts have broad equitable powers and equity is regularly called upon to provide beneficiaries such remedies as are necessary for the protection of their interests. This Circuit is no exception. Thus, in *Crawford*, 815 F.2d at 120, the court held that “[t]rust law contemplates the use of broad and flexible equitable remedies as means for dealing with breaches of fiduciary duty, and it imposes the obligation upon the courts to use the remedy that is most advantageous to the participants and that will most closely effectuate the purposes of the trust.” *Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280 (D.C. Cir. 1993) is in accord. That case involved a trust created by a federal court consent decree and the question was whether the trust could be enforced in this Court in accordance with the Law of Trusts. The Court held without equivocation that “beneficiaries of a trust ... may sue to enforce the duties owed to them by [the] trustee.” *Id.* at 287. The Court explained, “it is ... fundamental that the beneficiary of a trust may maintain a suit to compel the trustee to perform his duties as trustee or to redress a breach of trust.” *Id.* (citing RESTATEMENT, SECOND § 199).

More specifically, this Circuit has addressed the breadth of the courts' equitable authority where, as here, the trustee cannot account. In *Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981), the Court did not flinch whatsoever from the "established principles of trust law" where "if the ... trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary. Once the accounting is completed, the District Court shall provide such additional relief for plaintiff-appellant as may be appropriate.") (citing BOGERT ON TRUSTS § 962). See also 76 AM JUR 2D, TRUSTS § 506, at 726 (the trustee may be required in a suit for an accounting to show that he faithfully performed his duties, and is liable to whatever remedies may be appropriate if he was unfaithful to the trust); 3 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 199.1 (4th ed. 1988) ("As has been stated, the trustee is under a duty to the beneficiaries to make an accounting with respect to his administration of the trust. The court will specifically enforce this duty, and compel the trustee to render a proper accounting to the court, and thereupon will give such relief, if any, as the beneficiaries may be entitled to receive.").

Here, defendants cannot and will not discharge their duty to account: therefore, it is proper for this Court to exercise its inherent equitable authority and fashion "such relief . . . as the beneficiaries may be entitled to receive." SCOTT § 199.1. Indeed, this Court has an "obligation" to fashion "broad and flexible equitable remedies" to remedy a breach of trust in a manner "most advantageous to the participants." *Crawford*, 815 F.2d at 120. It is incumbent on the Court to provide "whatever remedy is necessary to protect [the beneficiary]," BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 861, in light of defendants' continuing failure, inability and refusal to provide an accurate and complete accounting to each beneficiary.

B. Equitable Restitution is Not Damages

The government admits that through 2000 it has collected \$13 billion in trust revenue, but is unwilling and unable to discharge its duty to account for such funds¹¹ notwithstanding the duty this Court declared on December 21, 1999 and the Court of Appeals affirmed on February 23, 2001. Therefore, defendants remain in breach of trust and equitable restitution is available as a remedy to correct and restate plaintiffs' trust balances. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (Restitution encompasses a decree "ordering the return of that which rightfully belongs to" the plaintiff.).

As plaintiffs often have stated in the eleven years of this litigation, we are not seeking damages in this action in equity to enforce trust duties owed by the government to the plaintiff class. We are well aware of jurisdictional constraints regarding the recovery of damages against the government. We are equally aware of the equitable authority conferred on this Court by the Constitution and Congress, equitable authority that is inherent and broad. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.") *quoted in Cobell VI* at 1108; *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). This Court's powers are available to fashion equitable remedies and

¹¹ *See* Order Certifying the Class, dated February 4, 1997 [Dkt. No. 27]. Notably, while defendants may choose how they will account for "all funds" so long as the method is adequate for the task, it is not within their discretion to limit the scope of the accounting or narrow the scope of the certified class of all former and present trust beneficiaries. As plaintiffs discussed in their Exclusions Brief, the 14X6039 account is the IIM Account at Treasury. Class members have an undivided interest in that account. Trust funds are commingled in that account and are pooled for investment in government securities, which are held in common and for the benefit of the class. No class member has an individual account at Treasury.

decide all relevant matters on the merits that are before it. *See, e.g.*, SCOTT § 199, at 203-04 (4th ed. 1988) (“A court of equity, having jurisdiction over the administration of trusts, will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests....”).

Such relief necessarily includes equitable restitution and disgorgement, remedies that are plainly distinct from damages. *See, e.g.*, *Porter*, 328 U.S. at 402 (“Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from ... damages.”); *SEC v. First City Financial*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (“Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating [the law].”). *Cf. Curtis v. Loether*, 415 U.S. 189, 197 (1974) (describing an award as restitutionary if it would “requir[e] the defendant to disgorge funds wrongfully withheld from the plaintiff”).

As this Court held in *Cobell I*, the accounting decreed by the declaratory judgment would result in the correction and restatement of account balances for the class. *See, e.g.*, 30 F. Supp. 2d at 41 (D.D.C. 1998). *See also, e.g.*, *Rainbolt*, 669 F.2d at 769 (“Once the accounting is completed, the District Court shall provide such additional relief for plaintiff-appellant as may be appropriate.”) (*citing* BOGERT ON TRUSTS § 962); 76 AM JUR 2D, TRUSTS § 506, at 726 (“the trustee may be required in a suit for an accounting to show that he faithfully performed his duties, and is liable to whatever remedies may be appropriate if he was unfaithful to the trust”); SCOTT § 199.1 (4th ed. 1988) (“As has been stated, the trustee is under a duty to the beneficiaries to make an accounting with respect to his administration of the trust. The court will specifically enforce this duty, and compel the trustee to render a proper accounting to the court, and thereupon will give such relief, if any, as the beneficiaries may be entitled to receive.”) (Emphasis added).

By definition, the correction and restatement necessarily includes all trust funds in the possession of defendants, whether such funds are held by the government or its agents in the 14X6039 account, the Treasury General Account (“TGA”), or any other account or investment security that has been acquired by defendants or their agents – fiscal or otherwise – and held for the benefit of the plaintiff class.

For example, plaintiffs here are not seeking compensation for losses they may well have suffered as a result of the government’s failure to protect and manage the trust *corpus* or for its failure to collect, invest, and allocate trust funds derived from the government’s sale or lease of the *corpus* in accordance with its fiduciary duties.¹² Plaintiffs are not seeking damages that result from the failure to protect plaintiffs’ trust assets from ruin, waste, and misappropriation. Nor are we seeking damages for the government’s failure to charge third parties fair market value for oil and gas produced or coal severed and extracted from trust lands. Nor does this action seek damages from the government for allowing third parties to trespass for generations on trust lands under its management and control as power companies and oil and gas companies erected power lines and laid pipelines across trust lands *gratis*. Nor do plaintiffs seek damages for the pollution of ground water and the destruction of crops and livestock caused by cracked or broken pipelines on trust lands. Compensation for any such loss must be addressed on another day and in another court.

Here, we seek the correction and restatement of trust balances for all present and former individual Indian trust beneficiaries, the disgorgement of trust funds defendants withhold unlawfully from the plaintiff class, and the prevention of future violations of defendants’ trust

¹² It may well be that a complete and accurate accounting of the conduct of the trustee-delegates would disclose pervasive and significant loss attributable to defendants’ breaches of trust and violations of law. That information is necessary for plaintiffs to make informed judgments on how to proceed in that regard.

duties by general deterrence insofar as it makes breaches of trust unprofitable. Because of the systemic spoliation of trust records and the government's refusal to discharge its declared duty to account, the complete and accurate accounting plaintiffs are owed will not be rendered in the collective lifetimes of the plaintiff class, if ever. Therefore, equitable restitution is appropriate and available to: (a) calculate the correction and measure the restatement of trust balances; (b) disgorge all trust funds in the possession of, and unlawfully withheld by, defendants; and (c) deter defendants' continuing breaches of trust. *See, e.g., First City Financial*, 890 F.2d at 1230.

Equitable restitution may provide specific monetary relief through the correction and restatement of plaintiffs' trust balances. As this Circuit made clear in *Crocker*, “[a]n action in restitution can result in the defendant's payment of money. . . . In such a case the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages. Whatever restitution may encompass . . . we clearly may not collapse it into the broader notion of ‘compensation.’” 49 F.3d at 747 (internal citations omitted). Indeed, restitution is the mirror image or direct opposite of damages; restitution is measured by the amount defendants are unjustly enriched, not, as with damages, by the extent of plaintiffs' loss.

Further, and equally important, since declaratory and injunctive relief have utterly failed to convince defendants to discharge their trust duties prudently and in accordance with trust law, meaningful trust reform – the second of the two major components of this action in equity – and the prudent discharge of their trust duties in the future, may be assured only if defendants are compelled to restore that which they have gained in violation of law and in breach of trust. To infer a limitation on relief that would restrict this Court's inherent equitable authority – absent such explicit language in a governing statute -- so as to strip it of the power to enforce the

Individual Indian Trust and divest trustee-delegates of their gains obtained in breach of trust would be unprecedented.

Unlike restitution, damages are substitutionary. *Crocker*, 49 F.3d at 747. Damages compensate plaintiffs for the loss they have suffered as a consequence of defendants' breaches of trust. *See Bowen*, 487 U.S. at 898 ("Damages are given to the plaintiff to *substitute* for a suffered loss . . . specific remedies [are] . . . an attempt to give the plaintiff the very thing to which he [is] entitled." (emphasis original; internal quotations and citations omitted)); *Fletcher*, 2005 WL 3551108 at *5 (holding that Indian Tribe suing Interior for breach and payment of royalties was "a statutory duty to pay them money, specifically royalties from oil and gas production to which they are entitled pursuant to the 1906 statute" and not "money damages"). *Alaska Airlines*, 8 F.3d at 797 ("district court's order that these funds be paid over to their rightful owner [was] in no way an order for the payment of 'money damages'").

In contrast to a damages award, equitable restitution and the corresponding correction and the restatement of the very funds to which plaintiffs are entitled and which unlawfully have been withheld would not make plaintiffs whole. *See Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (describing "restitution . . . in equity" as seeking to "restore to the plaintiff particular funds or property in the defendant's possession"). But, that is a good start after 120 years of mismanagement of the Individual Indian Trust.

Restitution is the traditional or "typical" remedy that is available in equity. Such relief necessarily divests trustees of benefits acquired in breach of trust. As the RESTATEMENT (THIRD) OF RESTITUTION instructs, where a trustee "obtains a benefit" because of a "breach of fiduciary duty," it is "accountable for the benefit so obtained to the person to whom the duty is owed." *Id.* at Section 43. Indeed, "any benefit acquired or retained in violation of a fiduciary duty must be

given to the person to whom the duty is owed.” *Id.* The rationale underlying restitution is that it is unconscionable for trustees to retain profits unlawfully obtained and benefits conferred through their breaches of trust. *Id.* Retention of such profits and benefits constitutes unjust enrichment. *See* 1 D. DOBBS, LAW OF REMEDIES § 4.1(2), at 557 (2d ed. 1993) (“The fundamental substantive basis for restitution is that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff.”).

In the most narrow view of equitable restitution (as distinguished from damages) as it exists today, funds unlawfully withheld and that remain in possession of the breaching trustee squarely are within the scope of equitable restitution and disgorgement. Such funds are not substitutionary monies. Rather, they are plaintiffs’ – not defendants’ – specific funds. That amount is reduced only by that which defendants prove has been paid to the correct trust beneficiaries in the correct amount.

Here, \$13 billion has been collected on behalf of the beneficiary class and are held by Treasury. All such funds are held and commingled in the 14X6039 account at Treasury and other accounts that are maintained at Treasury and its agents. As plaintiffs explained in their Exclusions Brief, at 43-56, the debiting of the 14X6039 account does not mean that payments were made out of the Individual Indian Trust. Such funds remain in the possession of, and continue to be held by, Treasury in the TGA until and unless the check is negotiated, presented for payment, and paid to the beneficiary. Absent such proof, the trust balances must be corrected and restated at \$13 billion.

That said, although equitable restitution does not include compensation for interest that should have been credited and paid to plaintiffs on their funds, it does include, and is measured by, the benefit gained by the government from its reduced cost of servicing the national debt, a

cost which would have increased without defendants' use of plaintiffs' \$13 billion. Simply put, the savings to the government attributable to a reduced national debt is a benefit obtained by defendants solely through their unlawful withholding of plaintiffs' trust funds. Further, funds paid out of the trust to third parties that discharge defendants' debts or other financial obligations are benefits acquired in breach of trust that are also within the restitutional amount and corresponding corrected trust balances. These are not substitutionary funds – they are specific property to which plaintiffs are entitled.

Accordingly, restitution, which is measured by defendants' gains, not plaintiffs' loss, should be reflected in the corrected trust balance.

VI. EVEN IF THE APA GOVERNS IT DOES NOT LIMIT THIS COURT'S ABILITY TO GRANT PLAINTIFFS EQUITABLE RELIEF.

For more than one hundred years, defendants have consistently failed to meet their deadlines or those set by Congress and this Court to rectify their breaches of trust. Further, they argue that this is an action governed by the APA and that this Court has no authority until they say they are prepared to go to trial. Tr. of Dec. 20, 2006 Status Conf. at 32:13-33:23. Defendants' argument is untenable and has already been rejected by both this Court and the Court of Appeals. *See Cobell VII*, 226 F. Supp. 2d at 149 (“[I]t is disingenuous for the defendants to continue to argue – one-hundred years after the IIM trust was established, eight years after Congress enacted the 1994 Act, and nearly three years after this Court issued its Phase I trial decision – that the Court lacks jurisdiction to compel the agency to act”). *Accord Cobell VI*, 240 F.3d at 1099. This Court need not remain idle while defendants continue to unduly delay the rendering of the accounting. *See, e.g., Cobell XIII*, 392 F.3d at 477-78 (“To the extent Interior’s malfeasance [in performing the accounting] is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate.”). *See also Cutler v. Hayes*, 818 F.2d

879, 898 (D.C. Cir. 1987) (“if an agency’s failure to proceed expeditiously will result in harm or substantial nullification of a right conferred by statute, ‘the courts must act to make certain that what can be done is done’”) (quoting *American Broadcasting Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951)). See also *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591-92 (1926) (claimant “is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief”).

Nor must this Court acquiesce in defendants’ refusal to comply with its remand instructions. *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (An agency must faithfully follow the court’s mandate as “[d]eviation from the court’s remand order in the subsequent administrative proceeding is itself legal error, subject to reversal on further judicial review.”).

A. Defendants Continue To Delay The Accounting Mandated By This Court.

Even if the APA applies, § 706 of the APA provides that a reviewing court “shall compel agency action unlawfully withheld or unreasonably delayed.” See 5 U.S.C. § 706(1). In reviewing an unreasonable delay claim, according to the law of this Circuit, courts must consider several factors:

First, the court should ascertain the length of time that has elapsed since the agency came under a duty to act. . . . Second, the reasonableness of the delay must be judged in the context of the statute which authorizes the agency's action. . . . Third, the court must examine the consequences of the agency's delay. . . . Finally, the court should give due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.

In re International Chemical Workers Union, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (internal quotations and citations omitted). Whether a delay is unreasonable lies in the discretion of this Court. *Cobell VI*, 240 F.3d at 1096; *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999).

Almost seven years ago this Court, in *Cobell V*, applying the four factors in *International Chemical Workers Union*, concluded that the defendants had unduly delayed in performance of the required accounting. 91 F. Supp. 2d at 46-49. Two years later, in *Cobell VI*, the Court of Appeals agreed. 240 F.3d at 1096. It held that it is “beyond question” that defendants had delayed fulfilling their trust obligations. *Id.* That Congress had enacted the Trust Reform Act in 1994 to “address this unconscionable delay d[id] not mitigate the egregious amount of time plaintiffs have waited . . .” *Id.* Furthermore, the Court of Appeals agreed that the consequences of further delay were “potentially quite severe.” *Id.* at 1097. As the Court explained, “[g]iven that many plaintiffs rely upon their IIM trust accounts for their financial well being, the injury from delay could cause irreparable harm to plaintiffs’ interests as IIM trust beneficiaries,” as “the interests at stake are not merely economic interests in [an administrative scheme], but personal interests in life and health.” *Id.* (quoting *Public Citizen Health Research Group v. Aughter*, 702 F.2d 1150, 1156 (D.C. Cir. 1983) (alteration in original)). Finally, while concern for administrative convenience counsels against intervention when an agency is discharging its duties within a reasonable time and in a reasonable manner, the Court of Appeals held that “neither a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay.” *Id.* Accordingly, the Court concluded that the reasonable time for defendants to fulfill their fiduciary obligations had long since passed. *Id.* at 1096.

Consistent with the judicial policy of allowing federal agencies that have acted unlawfully 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), this Court remanded “for further agency consideration in harmony with the court’s holding.” *Cobell V*, 91 F. Supp. 2d at 54 n.36 (quoting *Global Van Lines*, 804 F.2d at 1305

n.95). However, given the “record of agency recalcitrance and resistance to the fulfillment of its legal duties,” this Court retained jurisdiction “to ensure that its instructions [were] followed.” *Cobell VI*, 240 F.3d at 1109.

In its review of the “progress” of defendants in rendering the accounting declared three years earlier, this Court noted that, “[t]he recalcitrance exhibited by the Department of Interior in complying with the orders of this Court is only surpassed by the incompetence that the agency has shown in administering the IIM trust.” *Cobell VII*, 226 F. Supp. 2d at 147. In applying the four factors in *International Chemical Workers Union*, this Court determined that defendants had, once again, engaged in unreasonable delay in performing the required accounting. As this Court explained,

[S]ince this Court issued its Phase I trial ruling the defendants have unnecessarily delayed performing an accounting of the IIM trust accounts, and discharging properly their fiduciary obligations. In the thirty two months since this Court issued its Phase I trial ruling, the defendants have not only failed to develop a final plan for performing a historical accounting of the IIM trust accounts, but they have abandoned as obsolete the Revised HLIP, which was their plan to ultimately enable them to discharge their fiduciary obligations properly. By their continuing failure to provide plaintiffs with an accounting, the defendants compound the already substantial harm that the plaintiffs have endured.

. . . [T]he Court finds that although the tasks charged to the Department are certainly complex, that is not an excuse for the failure by the defendants to develop a plan to perform a historical accounting within the last three years or to discharge their fiduciary duties properly. Indeed, the D.C. Circuit specifically noted that “[w]hat little progress the government has made appears more due to the litigation than diligence in discharging fiduciary obligations.” *Cobell*, 240 F.3d at 1097. This contempt trial and the reports of the Court Monitor and Special Master prove just that. Although the defendants do not appear to take this position, it is important for the Court to note that the same analysis would apply to the fixing the system portion of the case. That is, the Court find (*sic*) that the defendants have unreasonably delayed discharging their fiduciary obligations properly, even if the clock only started to run on December 21, 1999.

Id. at 150. Therefore, this Court concluded that, as “refusing to hear plaintiffs’ claims could unduly prejudice their rights as trust beneficiaries,” it would “not simply remand the matter back to the agency again as it did in December of 1999.” *Id.* at 152.

It has been another five years since *Cobell VII*, and this Court, despite two previous findings of undue delay on the part of defendants, is forced again to adjudicate whether “the defendants [have] unreasonably delayed the completion of the required accounting.” April 20, 2007 Order at 4. Unfortunately, nothing has changed. As they had been at the time of the decision in *Cobell VII*, defendants are still struggling to come up with an effective “Historical Accounting Plan.” See *Notice of Filing of Interior Defendants’ Twenty-Ninth Status Report* dated May 1, 2007 [Dkt. No. 3318] (“*Twenty-Ninth Status Report*”) at 7. Defendants have not prepared an accounting for a single land-based beneficiary. *Id.* at 4; see also Tr. of Dec. 20, 2006 Status Conf. at 32:13 – 33:23. They have not yet addressed accounting records for the pre-electronic era. Tr. of May 14, 2007 Prehrg. Conf. at 51:19-52:18. Instead, they attempt to rely on fictitious “accountings” rendered by the General Accounting Office (“GAO”) from 1921 to 1950. *Twenty-Ninth Status Report* at 3-4. In doing so, they ignore the warning by GAO that it “did not settle other accounts, such as IIM accounts” during that period, see *Legal Opinion of GAO General Counsel Anthony Gamboa* dated April 19, 2002 [Dkt. No. 1267], and the summary judgment order of this Court four years ago, ruling that at no time had GAO conducted an accounting, audit, or settlement of Individual Indian trust accounts.¹³ *Cobell v. Norton*, 260 F. Supp. 2d 110, 131 (D.D.C. 2003).

Moreover, defendants arbitrarily exclude from the accounting the majority of beneficiaries, including those whose accounts were not opened as of October 25, 1994 and

¹³ A complete discussion of this issue is set forth in plaintiffs’ Exclusions Brief at 15-17.

former beneficiaries including predecessors-in-interest, and a large proportion of trust assets, including income reflected in direct pay transactions, transactions prior to June 24, 1938, income from unlawfully escheated interests, and income from assets managed by compacting and contracting tribes.¹⁴ In doing so, they ignore the decree and declaration of this Court that they account for “all money” held in the IIM Trust, *Cobell V*, 91 F. Supp. 2d at 58, and that of the Court of Appeals that they account for “all funds” in “all accounts.” *Cobell VI*, 240 F.3d at 1102. Accordingly, notwithstanding the Court of Appeals’ instruction that the parties work with this Court to expeditiously and fairly resolve this case, it is evident that defendants continue to “delay rather than accelerate the ultimate provision of an adequate accounting,” *Cobell VI*, 240 F.3d at 1110, such that “more intrusive relief” is necessary and warranted. *Cobell XIII*, 392 F.3d at 478.

This Court is not powerless when faced with defendants’ continued delay in discharging their longstanding fiduciary obligations. *See, e.g., Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (“agency inaction may represent agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility”) (quotation and citation omitted); *Sierra Club v. Gorsuch*, 715 F.2d 653, 659 (D.C. Cir. 1983) (“Judicial review of decisions not to regulate must not be frustrated by *blind* acceptance of an agency’s claim that a decision is still under study.”); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (“nine years should be enough time for any agency to decide almost any issue. There comes a point when relegating issues to proceedings that go on without conclusion in any kind of reasonable time frame is tantamount to refusing to address the issues at all and the result is a denial of justice.”); *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1100 (D.C. Cir.

¹⁴ Plaintiffs have fully discussed these excluded beneficiaries and transactions in their Exclusions Brief at 23-42.

1970) (“But when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief.”); *American Broadcasting Co. v. FCC*, 191 F.2d at 501 (“The Commission cannot, by its delay, substantially nullify rights which the Act confers, though it preserves them in form.”). *See also In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (“motion is not necessarily the same thing as progress”).

The harm to the plaintiffs that this Court found in 1999 arising from the defendants’ unconscionable delay in rendering the accounting – a delay which directly affects “the personal interests in life and health” of the Indian beneficiaries – is irreparable and has increased with the passage of time. “[D]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake.” *Cutler*, 818 F.2d at 898. Notably, this Circuit has had little patience with agency delays where, as here, interests in human welfare are present. *See, e.g., Pub. Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (per curiam) (three-year delay unreasonable); *see also In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1149-50 (D.C. Cir. 1992) (per curiam) (concluding after five years, “[t]here is a point when the court must ‘let the agency know, in no uncertain terms, that enough is enough’”) (quoting *Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987); *Oil, Chemical & Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1487 (D.C. Cir. 1985) (facing a delay of over five years in issuing a proposed rule for exposure to radioactive gases, and stating that a “reasonable time may encompass months, occasionally a year or two, but not several years or a decade”).

It has been more than one hundred years since Congress mandated that defendants account for all funds, thirteen years since Congress most recently reaffirmed the duty to account, and almost seven years since this Court decreed the required accounting, but no end is in sight. That defendants continue to delay the discharge of their fiduciary duties is inescapable. That the APA provides the defendants no sanctuary is beyond dispute.

B. This Court May Provide A Judicial Remedy Where Defendants Have Ignored The Mandate Of This Court.

Defendants' continued delay is exacerbated by their refusal to adhere to instructions of this Court and the Court of Appeals regarding the nature and scope of the accounting. Once a court remands an action to an agency, the court retains jurisdiction to ensure compliance with the remand instructions. *See Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939). An agency must faithfully follow the court's mandate as "[d]eviation from the court's remand order in the subsequent administrative proceeding is itself legal error, subject to reversal on further judicial review." *Sullivan*, 490 U.S. at 886. Similarly, an agency must comply with an issue-controlling court decision. *See Northern Power Co. v. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997).

In *Northern Power*, the Court of Appeals found the Department of Energy ("DOE") failed to comply with the mandate of a prior decision, *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). 128 F.3d at 756. In *Indiana Michigan*, the court held that the Nuclear Waste Policy Act unconditionally required the DOE to begin disposing of radioactive waste by January 31, 1998. *Id.* at 755. The DOE, however, notified utilities and state commissions that it would not take the radioactive waste as required by the court. Thus, in *Northern Power*, the court issued a writ of mandamus because the DOE was not abiding by a prior controlling decision of this Court.

In *Cobell VI*, the Court of Appeals affirmed the district court’s remand order, concluding “the 1994 Act reaffirms the government’s preexisting fiduciary duty to perform a complete historical accounting of trust fund assets.” 240 F.3d at 1102. Further, in rejecting the government’s “contention that the Interior Department, and not the court, would have the authority to determine the nature and scope of the accounting[.]” the Court found that the 1994 Act clearly required the defendants to account for “all funds.” *Id.* As set forth above, defendants wholly have disregarded that mandate, refusing to account for all funds for each member of the class as required by *Cobell VI*. Where, as here, an agency will not abide by remand instructions and refuses to “correct its own errors,” deferral by this Court to agency consideration is unnecessary and unwarranted. *See Anselmo*, 902 F. Supp. at 276 (denying a motion to dismiss a complaint for failure to comply with administrative procedures where it was alleged the agency had “no intention voluntarily to ‘correct its own errors.’”).

C. This Court May Provide Equitable Relief Where An Agency Is Unable Or Unwilling To Provide Timely Relief.

Where an agency is unable or unwilling to provide timely relief, remand back to the agency is unnecessary and the court may “adjust its relief to the exigencies of the case.” *Ford Motor*, 305 U.S. at 373; *see also Benten*, 799 F. Supp. at 291 (“In cases where administrative misuse of procedure has delayed relief, the courts have the equitable power to order relief tailored to the situation, not mere remand for agency use of its discretion.”). This is particularly true where, as here, prior remand instructions have been disregarded. *See Greyhound Corp. v. Interstate Commerce Commission*, 668 F.2d 1354, 1364 (D.C. Cir. 1981) (holding there would be “no useful purpose to be served by allowing the Commission another shot at the target”); *Checkosky v. SEC*, 139 F.3d 221, 227 (D.C. Cir. 1998) (“In view of the Commission’s repeated failure to articulate a discernible standard [], the extraordinary duration of these proceedings, and

the apparent unlikelihood of a clear resolution on remand, we conclude that it would be futile to allow the SEC a third ‘shot at the target.’”) (*quoting Greyhound*, 668 F.2d at 1364).

Greene v. Babbitt, 943 F. Supp. 1278 (W.D. Wash. 1996), a case illustrative of a district court’s equitable authority when faced with “lengthy delays and a pattern of serious procedural due process violations,” succinctly stated a programmatic limitation on the remand requirement:

[W]hen agency delays or violations of procedural requirements are so extreme that the court has no confidence in the agency’s ability to decide the matter expeditiously and fairly, it is not obligated to remand. Rather than subjecting the party challenging the agency action to further abuse, it may put an end to the matter by using its equitable powers to fashion an appropriate remedy.

Id. at 1288. *See also Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 123 (D.D.C. 2006). Here, as in *Greene*, defendants’ conduct goes well beyond mere delay. As held in *Cobell v. Norton*, 455 F.3d 317, 333 (D.C. Cir. 2006), *cert. denied*, 127 S.Ct. 1876 (2007), the defendants “deplorable record deserves condemnation in the strongest terms.” “Words like “ignominious” and “incompeten[t]” (the district court’s) and “malfeasance” and “recalcitrance” (ours) are fair and well-supported by the record.” *Id.*

VII. CONCLUSION

Defendants have had over 100 years to discharge their fiduciary duty to account. They have not. In 1899, Congress ordered them to account. They did not. Most recently in 1994, Congress, once again, ordered them to render an accounting. Again, they did not. In 1999, this Court ordered the accounting be commenced. Again, defendants did nothing. In 2001, the Court of Appeals affirmed the defendants’ accounting duties. That meant nothing. In 2002, this Court, once again, found defendants in breach of their trust duties. However, that too meant nothing. In 2003, this Court, by Memorandum Opinion, provided defendants detailed and clear guidance on what constitutes an adequate accounting. That too was ignored. Today, despite the passage of four more years, plaintiffs are no closer to receiving the accounting they are owed than they

were when defendants were first ordered by Congress to do so in 1899 and, one hundred years later, by this Court in 1999. It is now proper for this Court to provide plaintiffs the equitable relief they deserve.

Respectfully submitted,

/s/ Dennis M. Gingold
DENNIS M. GINGOLD
D.C. Bar No. 417748
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
202-824-1448

/s/ Keith Harper
KEITH HARPER
D.C. Bar No. 451956
Kilpatrick Stockton LLP
607 14th Street, N.W.
Washington, D.C. 20005
202-639-4707

DAVID COVENTRY SMITH
N.C. Bar No. 12558
Admitted Pro Hac Vice
Kilpatrick Stockton LLP
1001 West Fourth Street
Winston-Salem, NC 27101-2400
336-607-7392

WILLIAM E. DORRIS
Georgia Bar No. 225987
Admitted Pro Hac Vice
Kilpatrick Stockton LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
404-815-6104

JUSTIN M. GUILDER
VA. Bar No. 72995
Admitted Pro Hac Vice
Kilpatrick Stockton LLP
607 14th Street, N.W.
Washington, D.C. 20005
202-639-4707

Attorneys for Plaintiffs

May 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' MEMORANDUM REGARDING THE SCOPE OF THE OCTOBER 10, 2007 TRIAL was served on the following via facsimile, pursuant to agreement, on this day, May 31, 2007.

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
406.338.7530 (fax)

/s/ Justin Guilder
Justin Guilder