IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' PROPOSED CONCLUSIONS OF LAW

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JURISDICTION

I. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFFS' CLAIM TO ENFORCE TRUST DUTIES.

To bring 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)).

Subject Matter Jurisdiction

In this case, 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.

Sovereign Immunity Waiver

Governmental immunity of the United States is waived by 5 U.S.C. § 702. *See Schnapper v. Foley*, 667 F.2d 102, 108 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). "[S]ection 702 retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief." *Id.* The Court of Appeals previously has concluded that sovereign immunity has been waived and this Court has jurisdiction over plaintiffs' accounting claim. *Cobell v. Norton*, 240 F.3d 1081, 1094 (D.C. Cir. 2001) ("*Cobell VI*").

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. "The 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 is the rule in Indian trust cases. *See Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. the Bd. of Oil and Gas Conservation of the State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (hereinafter "*Fort Peck*") ("'[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 provide any restriction to suits 'under' the APA."' (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23:19, at 195 (2d ed. 1983)). Accordingly, defendants' immunity is waived to enforce plaintiffs' statutorily-rooted trust claims.

Cause of Action

Plaintiffs' principal cause of action is provided by the statutes and treaties that established and govern the IIM Trust, which both expressly and impliedly provide the fiduciary duties owed. When a beneficiary seeks redress from a breaching trustee, 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). *See also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 286-87 (D.C. Cir. 1993) ("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"). This is not a foreign concept in this litigation. This Court has 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. Babbitt, 91 F. Supp. 2d 1, 29-30 (D.D.C. 1999) (emphasis added) ("*Cobell V*").

Mitchell II recognized the right of action to enforce statutorily-rooted (but not necessarily expressly-stated) trust duties. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) ("*Mitchell II*"). 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:

> [g]iven 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). It is "[t]he right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *Id*. The cause of action is "a fundamental incident" of the trust relationship between the United States and Indian beneficiaries. *Id.* Here, there is no dispute that there exists a trust relationship in the *Mitchell II* sense; thus, 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. *See* 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 is the rule in this Circuit. *See, e.g, Crawford v. La Boucherie Bernard Ltd.,* 815 F.2d 117, 120 (D.C. Cir. 1987), *cert.*

denied, 484 U.S. 943 (1987) ("Trust law contemplates the use of broad and flexible equitable remedies as a 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). *See also Cobell VI*, 240 F.3d at 1101 ("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.").

II. ALTERNATIVELY, THIS COURT HAS JURISDICTION UNDER THE APA TO GRANT PLAINTIFFS' RELIEF BECAUSE DEFENDANTS UNREASONABLY HAVE DELAYED THE DISCHARGE OF THEIR DUTIES AND THERE IS FINAL AGENCY ACTION.

In *Cobell VI*, the Court of Appeals affirmed that jurisdiction exists under 5 U.S.C. § 706(1) in that the Interior defendants had "unreasonably delayed the discharge of their fiduciary obligations," 240 F.3d at 1097, such that this Court could "compel agency action 'unlawfully withheld or unreasonably denied.'" *Id.* at 1095 (quoting 5 U.S.C. § 706(1)). The Court of Appeals agreed that this Court could maintain continuing jurisdiction, despite the remand to defendants, "to ensure its instructions are followed." *Id.* at 1109.

In addition, jurisdiction exists under the APA, where, as here, there is "final agency action." The Supreme Court has set forth a two-step test for assessing whether an agency's particular decision or conduct constitutes "final agency action" under the APA. *See Bennett v. Spear*, 520 U.S 154, 178 (1997). Under that test, in order for an agency decision to be final, (1) the action "must mark the consummation of the agency's decisionmaking process;" and (2) the action must be one by which the parties "rights or

obligations have been determined" or from which legal consequences will flow. *Id.* (citation and quotations omitted). *See also John Doe v. D.E.A.*, 484 F.3d 561, 566 (D.C. Cir. 2007).

As to the first prong of *Bennett*, the proper inquiry is "whether the agency has completed its decisionmaking process," *Franklin v. Mass*, 505 U.S. 788, 797 (1992), or, as this Circuit has put it, "whether the agency views its deliberative process as sufficiently final to demand compliance with its announced position." *Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430, 436 (D.C. Cir. 1986). *See also Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

As to the second step, the question is "whether [the agency's position] has a 'direct and immediate effect . . . on the day-to-day business' of the parties challenging the action." *Ciba-Geigy*, 801 F.2d at 436 (citations omitted). The agency action must have "legal consequences" – as opposed to merely practical consequences, or purely economic ones, for the complaining party. *Center for Auto Safety v. NHTSA*, 452 F.3d 798, 811 (D.C. Cir. 2006).

Decisions to exclude certain beneficiaries from the accounting and decisions made to truncate the accounting meet both prongs of the *Bennett* test and, thus, constitute final agency action. First, Interior defendants have completed their decision-making process. As explained by James Cason, Associate Deputy Secretary of the Department of Interior, the decision was made "to use the . . . 2007 Historical Accounting Plan to perform the historical accounting required by the American Indian Trust Fund Management Reform Act of 1994," and he expressly approved it for Interior's "ongoing efforts to complete the historical accounting which the courts have held is required by the

1994 Act." AR-565 at 33-02-02. Moreover, the Plan has direct legal consequences. Innumerable beneficiaries will not receive an accounting. *See generally* Findings Part III. And the relatively few beneficiaries who receive a HSA, will be provided meaningless information. *Id.* at ¶¶ 139-40, 175, 177-93. At the same time, it purports to terminate any further accounting responsibility upon mailing of such defective HSAs. *Id.* at ¶¶ 329-38. These and other immediate *legal* consequences are of great significance. Put another way, there is hardly anything more "final" to a beneficiary than a trustee's decision *not* to render an accounting. In this case, a fraction of the plaintiff class are to receive a HSA according to the 2007 Plan; hundreds of thousands of beneficiaries, or more, will receive nothing.

BURDEN OF PROOF

III. THE BURDEN OF PROOF IS DETERMINED BY TRUST LAW.

When "construing the trust duties" owed by Interior defendants, this court looks not to the APA, but to trust law. *Cobell v. Kempthorne*, 455 F.3d 301, 304 (D.C. Cir. 2006) ("*Cobell XVIII*"). Interior defendants are subject to "traditional fiduciary duties unless Congress has un-equivocally expressed an intent to the contrary." *Id.* (quoting *Cobell VI*, 240 F.3d at 1098). Further, defendants' conduct must meet the ordinary standards of a fiduciary, not the minimalist standards of administrative law. *Cobell XVIII*, 455 F.3d at 304. The common law of trusts is the sole reference to "determine the precise contours of the government's responsibilities." *Id.* at 307.

IV. UNDER TRUST LAW, THE BURDEN IS ON INTERIOR DEFENDANTS, AS TRUSTEE-DELEGATES, TO PROVE AN ADEQUATE ACCOUNTING.

Generally, "[t]he obligation of a trustee to provide an accounting is a fundamental principle governing the subject of trust administration." *White Mountain Apache Tribe of Ariz. v. United States*, 26 Cl. Ct. 446, 448. Thus,

> [t]he trustee is under a duty to furnish the beneficiary on demand all information regarding the trust and its execution which may be useful to the beneficiary in protecting its rights, and to give to the beneficiary facts which the trustee knows or ought to know would be important to the beneficiary.

Id. (citation omitted).

In a trust accounting, the initial burden is on the plaintiff seeking the accounting to show (1) the existence of a trust relationship or analogous fiduciary relationship and (2) the beneficiary's entitlement to an accounting. *See* 1A C.J.S. *Accounting* § 44 (2007); *Kennedy v. Miller*, 582 N.E.2d 200, 205 (Ill. App. Ct. 1991). Plaintiffs satisfied this burden eight years ago. *See generally Cobell V*, 91 F. Supp. 2d 1.

Where, as here, the *prima facie* showing has been made, the trustee has the burden "to prove the proper disposition of the property, and that the fiduciary has performed the trust in a proper manner." 1A C.J.S. *Accounting* § 44 (2007). Carrying this burden requires the trustee (1) to prove that each and every transaction or expenditure entered into was justified, (2) "to prove that its actions had conformed to every standard of duty," and (3) "to establish not only the fair dealing but the proper degree of prudence and care" in connection with each transaction. *See Bryan v. Security Trust Co.*, 176 S.W.2d 104, 109 (Ky. Ct. App. 1943).

The trustees' accounting burden includes three subsidiary obligations

First, the trustee's accounting must "settle and adjudicate the financial condition of the trust up to the date of the account." *Markus v. Markus*, 119 N.E.2d 415, 418 (Mass. 1954). This consists of the obligation to "state with mathematical certainty the balance which the trustee holds in trust" including: (1) the duty to itemize each item of property that came into the trustee's possession during the management of the trust, and (2) the duty to "show the various items that [a]re included as making up the account." *Id.; see also In re McCabe's Estate*, 220 P.2d 614, 616 (Cal. Dist. Ct. App. 1950) ("Trustees are . . . under the duty to prove every item of their account by satisfactory evidence." (internal quotations and citations omitted)). The accounting must be sufficiently clear and definite so as to permit the court to ascertain a "definite and specific figure" to which the beneficiaries are entitled. *Markus*, 119 N.E.2d at 418.

Second, the trustee must justify any expenditures and explain how those expenditures were proper and for the benefit of the trust beneficiaries. *See Bravo v. Sauter*, 727 So.2d 1103, 1107 (Fla. Dist. Ct. App. 1999) (the trustee had the "burden of proving that she had incurred miscellaneous expenses for stamps, mailings, faxes, telephone calls, and travel, as well as maintenance expenses . . . and that she had incurred such expenses on behalf of the trust"); *see also Johnson v. Clark*, 518 F.2d 246, 253 (10th Cir. 1975) (the trustee's burden is "to justify his account and to show the propriety of his expenditure").

Third, the trustee must demonstrate that he or she acted with "reasonable skill and judgment" in connection with the management of the trust. *See In re Davenport*, 104 N.Y.S.2d 433, 436-37 (1951); 90A C.J.S. *Accounting* § 640 (stating that the trustee in an

accounting must "show the exercise of reasonable skill, prudence, and judgment, as in the making of investments[,] . . . [and] that the diminution in value of trust assets did not result from the trustee's fault or neglect").

V. ALL DOUBTS IN THE ACCOUNTING ARE RESOLVED IN FAVOR OF THE BENEFICIARY.

Where the trustee fails to sufficiently explain each transaction or categorize each item making up the trust corpus, all doubts are resolved in favor of the trust beneficiaries and against the trustee. *See Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981) ("If the . . . trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary."); *see also Kennedy*, 582 N.E.2d at 205 ("Any doubts created by errors or omissions in the accounting are resolved against the party producing it."); *Bravo*, 727 So.2d at 1107 (The failure to make "a clear, distinct, and accurate" accounting requires that doubts be resolved against the trustee.). Consequently, if the trustee fails to "render a proper account," the consequences of that failure fall on the trustee. *Akin v. Warner*, 63 N.E.2d 566, 570 (Mass. 1945); *Markus*, 119 N.E.2d at 418 ("If unable to account he must stand the loss.").

This rule applies equally in Indian trust cases. *See Blackfeet & Gros Ventre Tribes v. United States*, 32 Ind. Cl. Comm. 65 (1973).[1] Explaining the *Blackfeet*

[1] Ordinarily the Court of Federal Claims does not have jurisdiction to provide a true equitable accounting pursuant to the Tucker Act. *See, e.g., Osage Nation v. United States*, 57 Fed. Cl. 392, 393 n.2 (2003) ("this court does not have jurisdiction over claims for a pre-liability accounting and for declaratory relief"). That court is a court of severely curtailed equity jurisdiction. *See, e.g., Klamath & Modoc Tribes & Yahooskin Bank of Snake Indians v. United States*, 174 Ct. Cl. 483, *3 (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. . . . Our general jurisdiction under the Tucker Act does not include actions in equity"). There is one exception to this general rule. The Indian Claims Commission Act permitted tribes, but not individual Indians, to bring

approach, the court in *White Mountain Apache Tribe*, 26 Cl. Ct. at 449, stated that the "defendant go[es] forward and present[s] its report, explaining the methodology behind the preparation of the report. Next, the [beneficiary] set[s] forth its exceptions, and defendant [i]s obligated to show that the disbursements [a]re sustainable." The burden of proof remains on the defendant as trustee. *See id.* at 449-50. In *Minnesota Chippewa Tribe v. United States*, similarly, the Court held:

> The burden is on the defendant to make a proper accounting. Thus, for a particular item to be exceptionable, the test is not whether the report shows it to be improper; *it is enough if the report fails affirmatively to show that it was proper*. When the plaintiff makes his exception, it then becomes incumbent upon the Government to satisfy the Commission as to the legality of the challenged item.

14 Cl. Ct. 116, 121 (1987) (quoting *Blackfeet & Gros Ventre Tribes*, 32 Ind. Cl. Comm. at 85); *see also id.* ("The defendant's duty in accounting cases is to reveal what it did with the plaintiff's money." (quotations and internal citations omitted)).[2]

VI. TO THE EXTENT PLAINTIFFS' HAVE THE BURDEN TO PROVE THAT DEFENDANTS' ACCOUNTING IS INADEQUATE, PLAINTIFFS HAVE MET THAT BURDEN.

Interior defendants suggest that this Court should apply "traditional" APA procedures and utilize a standard never applied to any accounting case – either under the common law or as applied to Indian trusts – placing the burden of proof on plaintiffs to show their Plan was not "arbitrary [and] capricious." *Defendants' Bench Memorandum Regarding Issues Presented in April 20, 2007 Memorandum Order* filed May 30, 2007 ("*Bench Mem.*") [Dkt. No. 3332] at 5-6. However, application of such standard is

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certain limited "accounting" cases. The case law discussed in this section is derived from such ICCA cases.

[2] This approach is comparable to that described by this Court in *Cobell V* with the government "bringing forward its proof on IIM trust balances and plaintiffs making exceptions to that proof." 91 F. Supp. 2d at 31.

inconsistent with *Cobell XVIII's* pronouncement that it is the law of trusts that determines the contours of Interior defendants' responsibilities. 455 F.3d at 307. And, it is in direct contravention of *Cobell VI*, which confirms that "'the Secretary is obligated to act as a fiduciary … his actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.'" 240 F.3d at 1099 (quoting *Jicarilla Apache Tribe v. Supron Energy Corp*., 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion as modified en banc*, 782 F.2d 855 (10th Cir. 1986)).

Nevertheless, even assuming Interior defendants' suggestion as to the burden of proof is correct, that burden is met here. Because of exclusions contained in the 2007 Plan and defendants' failure to take necessary actions required for a proper and adequate accounting, plaintiffs have demonstrated that as a matter of law defendants will not provide an adequate accounting. *See generally* Plaintiffs' Proposed Findings of Fact ("Findings") at Parts II and III.

DEFENDANTS ARE NOT ENTITLED TO DEFERENCE

VII. INTERIOR DEFENDANTS ARE OWED NO DEFERENCE IN THEIR INTERPRETATION OF THE 1994 ACT OR ANY OTHER STATUTORY PROVISION.

Interior defendants are not entitled to deference normally accorded an agency's interpretation of an ambiguous statute entrusted to it for administration under *Chevron U.S.A. Inc v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Cobell XVIII*, 455 F.3d at 304. Interior defendants' statutory obligations must be construed "liberally in favor of the Indians," and should such responsibilities be ambiguous, they

must be "interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

VIII. AN ACCOUNTING PLAN DESIGNED TO MINIMIZE DEFENDANTS' LIABILITY IS ENTITLED TO NO DEFERENCE.

Defendants are entitled to no deference for an additional reason. The positions staked out by defendants regarding their duty to account are principally litigation positions, intended to aid in their defense of this action and limit their liability. The limited reconciliation work completed to date has been conducted pursuant to the "Litigation Support Accounting" Project, or "LSA." Findings at ¶¶ 168-173. The accounting duty, which is inherent in the nature of the trust relationship, itself, must be discharged in the best interests of the trust beneficiaries. The LSA, by definition, is incompatible with that duty. *Cobell VI*, 240 F.3d at 1103; Findings at ¶ 564. A "litigation support" or defense strategy or device to limit the trustee's liability is in the best interest of the trustee, not the beneficiary. As such it is a breach of the duty to account. This Court owes no deference to defendants who have designed and implemented a reconciliation plan to limit their liability in this litigation in clear disregard, and in breach, of their declared fiduciary duty to account for all trust funds.

The Supreme Court has made plain that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) ("agency 'litigating positions' are not entitled to deference"). That is precisely the circumstance here. Defendants rely exclusively on a process they themselves concede is "litigation support" accounting, not a fiduciary accounting that would result in the establishment of

accurate account balances and an accounting of all funds for each member of the class. *See, e.g.*, Findings at ¶¶ 426, 589 & 593.

RECONCILIATION PROCESS

IX. INTERIOR DEFENDANTS HAVE FAILED TO CARRY THEIR BURDEN THAT THE RECONCILIATION PROCESS IS ADEQUATE.

Interior defendants have the burden of establishing that their "reconciliation process" is adequate. As explained in *In re McCabe's Estate*, 220 P.2d at 616, 618, "[t]rustees are … under the duty to prove every item of their account by 'satisfactory evidence;' the burden of proof is on them and not on the beneficiary." (citation omitted). *See also Red Lake Band v. United States*, 17 Cl. Ct. 362, 369, 370-71 (1989) ("It is the Government's duty to account for those disbursements by documenting them," and listing "backup documents that would normally have formed the support for an accounting," including "vouchers, invoices, bills, receipts, memoranda, or other documents."); *In re Strickler's Estate*, 47 A.2d 134, 135 (Pa. 1946) ("Where a fiduciary claims credit for disbursements made by him the burden rests upon the fiduciary to justify them. Proper vouchers or equivalent proof must be produced in support of such credits. Accountant's unsupported testimony is generally insufficient."). Since the trustee is under an obligation to maintain documents and the "duty rest[s] upon the trustees to account," "the burden [i]s upon [the trustee] or their sureties to establish the correctness thereof" and "to satisfy the court that the administration of the trust was in accordance with the provisions of the trust instrument and the honor and integrity of a fiduciary." *Chisholm v. House*, 183 F.2d 698, 703 (10th Cir. 1950). *See also In re McCabe's Estate*, 220 P.2d at 618 (explaining that all "doubt arising from their failure to keep proper records, or from the

nature of the proof they produce, must be resolved against" the trustee because it is the trustee's obligation to ensure "such charges are established by 'satisfactory evidence.'").

Where, as here, the trustee has failed to carry its burden of establishing appropriate verification and validation of the Trust transactions, "[u]nder established principles of trust law," then "the benefit of the doubt is to be given to the beneficiary." *Rainbolt v. Johnson,* 669 F.2d 767, 769 (D.C. Cir. 1981). *See also* 2A William A. Fratcher, SCOTT ON TRUSTS § 172 (4th Ed. 1987) ("If the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor.") (footnote omitted).

These trust law principles apply with equal vigor in this case. In *Cobell VI*, the Court ruled that Interior defendants' trust obligations "are largely defined in traditional equitable terms" and, thus, fulfilling such duties must meet the "stringent standards demanded of a fiduciary." 240 F.3d at 1099. *Accord Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (government conduct to be "judged by the most exacting fiduciary standards"). This Circuit further instructed that "unless Congress has unequivocally expressed an intent to the contrary," this Court "must infer that Congress intended to impose on trustees traditional fiduciary duties" and that the conduct of the trustee must meet traditional standards. *Cobell VI*, 240 F.3d at 1100, 1099 (citations and internal quotations omitted). *Accord Fort Peck*, 792 F.2d at 794 ("Courts judging the actions of federal officials taken pursuant to their trust relationship with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries."); *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (Ct. Cl. 1981) ("Where a trust relationship between

Indians and the Government is established, the Government's actions normally are judged according to standards established in traditional trust law doctrine."). *See also Nevada v. United States*, 463 U.S. 110, 142 (1983) ("[W]here only the relationship between the Government and the [Indians] is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States.").

Defendants have failed to meet their burden of establishing that their so-called "reconciliation process" will adequately verify account balances, related transactions, and other items. Findings at ¶¶ 248-324. For certain types of transactions, it is clear that the "reconciliation process" is manifestly inadequate to satisfy their accounting duty. *Id.* ¶ 251. For all others, they have not proffered any evidence to carry their burden. For example, while defendants put forward their ASM, they did not provide the workpapers to enable this Court to evaluate whether the processes used are sufficient to verify the accuracy of "reconciled" transactions. *Id.* ¶ 255, 256. Defendants did not provide an explanation and the Administrative Record is silent with respect to the so-called "alternative procedures" employed in the so-called reconciliation process. *Id.* ¶¶ 317, 521. In addition, despite acknowledged internal control and accounting deficiencies, defendants failed to identify and acquire third party documentation. *Id.* ¶¶ 252, 257, 258, 511, 512. Defendants have not carried their burden of establishing that their reconciliation satisfy their accounting duty; without such verification, the accounting cannot be deemed adequate.

TEMPORAL SCOPE OF THE PRE-EXISTING ACCOUNTING DUTY

X. IT IS THE PROVINCE OF THIS COURT, SITTING IN EQUITY, TO DETERMINE THE NATURE AND SCOPE OF DEFENDANTS' ACCOUNTING OBLIGATION.

Defendants argue that they have authority to determine the nature and scope of their accounting obligation. They do not. It is this Court's role to determine what the law is, which necessarily includes a determination of the nature and scope of the accounting duty and whether defendants' have satisfied that duty. *See, e.g., Rainbolt*, 669 F.2d at 769 (court determined the accounting was inadequate); *Frett v. Benjamin*, 187 F.2d 898, 900 (3d Cir. 1951) (describing the province of the trial court to determine "the adequacy of an accounting made by the defendants"); *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1299 (11th Cir. 2006) ("fiduciary duty includes an obligation to provide this Court . . . with an adequate accounting"); *Osage Tribe of Indians of Oklahoma v. U.S.*, 68 Fed. Cl. 322, 334 (2005) (court adjudged that Department of Interior had not provided an adequate or "meaningful" accounting); *In re H. King & Associates*, 295 B.R. 246, 272 (Bankr. N.D. Ill. 2003) (describing how "[a]fter the accounting is filed" there is a need "to determine the adequacy of the accounting"). As the Supreme Court made plain in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), "[t]he extent of the duties … of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney." *Id.* at 112 (internal quotations and citations omitted) (emphasis added by Court).

XI. THE NATURE AND SCOPE OF THE ACCOUNTING DUTY IS NOT DEFINED BY THE 1994 ACT SINCE IT PREEXISTED AND WAS NOT ALTERED OR LIMITED BY THE ACT.

This Court and the Court of Appeals have rejected the notion that the 1994 Act defines the nature and scope of the accounting. Defendants' principal contention in seeking to overturn *Cobell V* was that their accounting duty was created and, thereby, "defined by the 1994 Act." *Cobell VI*, 240 F.3d at 1100. The Court of Appeals disagreed, explaining that "[t]he fundamental problem with appellants' claims is the premise that their duties are solely defined by the 1994 Act." *Id.* "The Indian Trust Fund Management Reform Act *reaffirmed and clarified preexisting duties; it did not create them*. It further sought to remedy the government's long-standing failure to discharge its trust obligations; *it did not define and limit the extent of appellants' obligations*." *Id.* (emphasis added).

Cobell VI also rejected defendants' contention that the 1994 Act changed the nature and scope of the accounting duty:

> Enactment of the [1994 Act] *did not alter the nature or scope of the fiduciary duties owed* by the government to IIM trust beneficiaries. Rather, by its very terms the 1994 Act identified a *portion* of the government's specific obligations and created additional means to ensure that the obligations would be carried out.

Id. (emphasis added). "[T]he 1994 Act plainly reaffirm[ed] the government's *preexisting duty to provide an accounting* to IIM trust beneficiaries," since "such an obligation inheres in the trust relationship itself." *Id.* at 1103 (emphasis added). *See also id.* at 1102 (holding that "the 1994 Act reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting"). Put simply, "[n]othing in the 1994 Act, nor

any other federal statute, acts to limit or alter this right [to a complete accounting]." *Id.* at 1104.

Defendants read much into a snippet from *Cobell XVII* that "[t]he most relevant statute for ascertaining the defendants' duty to provide a historical accounting is the 1994 Act." *Cobell v. Norton*, ("*Cobell XVII*") 428 F.3d 1070, 1074 (D.C. Cir. 2005). That the 1994 Act is relevant to the accounting duty is neither in dispute nor the issue. As *Cobell VI* explained, "the 1994 Act identified a *portion* of the government's specific obligations and created additional means to ensure that the obligations would be carried out." 240 F.3d at 1100 (emphasis added). The point is that the 1994 Act is not the exhaustive or exclusive source of defendants' accounting duty. *Id.* at 1101 ("Rather than exhaust the list of duties owed by the federal government to IIM trust beneficiaries, the 1994 Act clarified and augmented aspects of the government's preexisting obligations to facilitate their fulfillment.").

The Court of Appeals' most recent decision in *Cobell XVIII* further clarifies that defendants' position is fundamentally untenable. There, the Court of Appeals explained that the central holdings in *Cobell VI* stand. 455 F.3d at 304, 307. More specifically for present purposes, *Cobell XVIII* confirmed that "the 1994 Act, which reaffirmed Interior's duty to provide an accounting, *did not prescribe the scope of the accounting*." *Cobell XVIII*, 455 F.3d at 306 (emphasis added).

XII. DEFENDANTS MUST PROVIDE AN ACCOUNTING OF ALL FUNDS TO EACH BENEFICIARY WHOSE ACCOUNTS DEFENDANTS CLOSED BEFORE OCTOBER 25, 1994.

Despite the clear mandate of *Cobell VI*, defendants are impermissibly denying an accounting to any beneficiary whose account or accounts were closed by Defendants

prior to October 25, 1994. However, as discussed above at Conclusion XI, this Court and the Court of Appeals have rejected the notion that the accounting is defined by the 1994 Act. Indeed, "[n]othing in the 1994 Act, nor any other federal statute, acts to limit or alter this right [to a complete accounting]." *Cobell VI*, 240 F.3d at 1104. *See also Cobell v. Norton*, 283 F. Supp. 2d 66, 173 n.55 (D.D.C. 2003) ("*Cobell X*"), *rev'd on other grounds* 428 F.3d 1070 (D.C. Cir. 2005). Congress reaffirmed and codified the accounting duty as early as 1899[3] and most recently reaffirmed it with enactment of the 1994 Act, which was specifically passed "*because* Interior had abused the 'considerable deference' that already had been given to it by Congress for over a century." *Cobell V*, 91 F. Supp. 2d at 46 (emphasis in original).

XIII. DEFENDANTS MUST PROVIDE AN ACCOUNTING OF ALL FUNDS, INCLUDING FUNDS PRIOR TO 1938.

Defendants are not providing an accounting for all funds prior to June 24, 1938. Their exclusion rests on a flawed interpretation of the 1994 Act that requires defendants to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are *deposited or invested pursuant to the Act of June 24, 1938.*" 25 U.S.C. § 4011(a) (emphasis added).

First, the 1994 Act does not limit the nature and scope of defendants' accounting duty or otherwise limit that duty. *See supra Conclusion* at XI. Similarly, language regarding the 1938 Act should not be construed as a limit on the duty to account. As *Cobell VI* clarified, "the government's preexisting duty to provide an accounting to IIM

[3] *See* Ch. 545, 30 Stat. 495 (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.").

trust beneficiaries. . . i*nheres in the trust relationship itself*." 240 F.3d at 1103 (emphasis added). Therefore,

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

Cobell X, 283 F. Supp. 2d at 173 (second emphasis added).

Second, Indian Canons of Construction do not permit an interpretation of the 1994 Act as limiting the pre-existing accounting right. As the Supreme Court instructed in *Blackfeet Tribe of Indians*, 471 U.S. at 766, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *See also Cobell VI*, 240 F.3d at 1101. Interpreting the reference to the 1938 Act in the 1994 Act as limiting the accounting obligation would be decidedly adverse and, thus, do violence to this longstanding rule of statutory construction. This rule applies equally to statutory interpretations by an administrative agency acting as trustee, as ordinary *Chevron* deference does not apply. *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 n. 8 (D.C. Cir. 1988); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58-59 (D.C. Cir. 1991); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997).

Third, the seminal Indian trust case *Mitchell II*, 463 U.S. at 224-25 held, *inter alia*, that where, as here, statutes and regulations confer on the federal government elaborate control over Individual Indian Trust assets, a full and complete trust is created

with all attendant fiduciary duties. Even in the absence of statutes and regulations, when the government exercises elaborate control over individual Indian land, a full and complete trust with attendant fiduciary duties arises. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 470-71 (2003). As an incident of creating the trust, "[c]ourts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocally expressed an intent to the contrary.'" *Cobell VI*, 240 F.3d at 1099.

Since at least the late 19th Century, as defendants' own expert concedes, the government has exercised elaborate and comprehensive control over individual Indian trust assets and trust funds. *See* Findings at ¶¶ 549, 552-54. Such control is further evidenced by the statutes and regulations enacted shortly after the General Allotment Act that confer on the federal government broad powers to act as trustee with respect to managing and accounting for Indian trust assets, including trust funds. *See Appendix of Historical Statutes and Regulations* (listing 120 separate statutes and regulations providing the government with comprehensive control over trust lands, assets and funds). The following is a handful of the more than 120 pre-1938 statutes and regulations that provide the government control by law:

- An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Three, and for other Purposes, Ch. 832, 31 Stat. 1058 (1901) (authorizing the Secretary of the Interior to grant rights of way for telephone or telegraph lines across "any lands which have been allotted in

severalty to any individual Indian under any law or treaty" and allowing the Secretary to determine the compensation due);

- An Act Authorizing the Secretary of the Interior to Grant Right of Way for Pipe Lines through Indian Lands, Ch. 505, 33 Stat. 65 (1904) (authorizing the Secretary of the Interior to grant rights of way for oil and gas pipe lines across "any lands which have been allotted in severalty to any individual Indian under any law or treaty" and allowing the Secretary to determine the compensation due);
- An Act to Provide for Allotment of Land in Severalty to United Peorias and Miamies in Indian Territory, and for other Purposes, Ch. 422, 25 Stat. 1013 (1889) (governing the leasing of allotted lands);
- An Act to Amend and Further Extend the Benefits of the Act Approved February Eight, Eighteen Hundred and Eight Seven, Entitled "An Act to Provide for the Allotment of Land in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States Over the Indians, and for other Purposes," Ch. 383, 26 Stat. 794 (1891) (governing the leasing of allotted lands);
- An Act for the Protection of the People of the Indian Territory, and for other Purposes, Ch. 517, 30 Stat. 495 (1898) (*inter alia*, governing the leasing of allotted land).

Accord findings at ¶¶ 552-53. *See also Cobell VI*, 240 F.3d at 1087 ("[In 1934, t]he federal government retained control of lands already allotted but not yet fee-patented, and

thereby *retained its fiduciary obligations* to administer the trust lands and funds arising therefrom for the benefit of individual Indian beneficiaries." (emphasis added)).

Defendants began to allot Indian lands by treaty at least by the mid-1800's. *See, e.g.*, Treaty with the Confederated Ottoes and Missourias, 1854, 10 Stat. 1038; Treaty with the Omahas, 1854, 10 Stat. 1043; Treaty with the Shawnees, 1854, 10 Stat. 1053; Treaty with the Wyandotts, 1855, 10 Stat. 1159; Treaty with the Chippewas of the Mississippi, and the Pillager and Lake Winibigoshish Bands of Chippewas, 1863, 12 Stat. 1249; Treaty with the Red Lake and Pembina Bands of Chippewas, 1864, 13 Stat. 689. Allotment typically was at the discretion of the federal government, and, in some cases, land or payments due "incompetent" Indians would be withheld and "disposed of by the President, in that manner deemed by him best calculated to promote their interests." Treaty with the Shawnees at Art. 8. *See also* Delos S. Otis, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Pruca ed., Univ. of Okla. Press 1973). With the passage of the General Allotment Act (the "Dawes Act"), 25 U.S.C. § 348, in 1887, a policy of mandatory allotment was adopted by Congress. Today, there are eleven million acres of Individual Indian Trust land. Control has been exercised by the government over Individual Indian Trust lands since the 1800's. Findings at ¶¶ 552-554.

XIV. NEITHER THE STATUTE OF LIMITATIONS NOR LACHES LIMITS TEMPORALLY THE ACCOUNTING.

Plaintiffs' claims and remedies in this litigation are not barred or limited by the statute of limitations or laches. *Cobell v. Norton*, 260 F. Supp. 2d 98, 105 (D.D.C. 2003). In 2003, defendants moved for summary judgment, asserting both limitations and laches and contending their accounting need only begin in 1984. This Court, relying on the law of this Circuit, applied traditional trust law principles, *Loudner v. United States*, 108 F.3d

896 (8th Cir. 1997), *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973), and a host of similar decisions in other circuits in denying defendants' motion. The Court explained that:

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

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

This is the rule of decision with respect to statute of limitations questions and it is "well-established in recognized treatises on trust law." *Id.* It is also the law of this Circuit. *See Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963) ("in order to start the statute of limitations running against an express trust, there must be a clear and continuing repudiation of the right to trust benefits"). Since defendants have conceded "they ha[d] neither repudiated the existence of the IIM trust nor repudiated plaintiffs' right to enjoy the benefits of the trust," prior to the filing of this action in equity, *Cobell*, 260 F. Supp. 2d at 108, the statute of limitations did not begun to run and the accounting is not temporally limited.

NATURE AND SCOPE OF ACCOUNTING DUTY

XV. DEFENDANTS ARE CHARGED WITH THE SAME TRUST DUTIES AS PRIVATE TRUSTEES. IMPLIED TRUST DUTIES ARE EQUALLY ENFORCEABLE AGAINST DEFENDANTS.

Unless Congress unequivocally states an intent to the contrary, defendants have the same duties as other trustees. *Cobell VI*, 240 F.3d at 1099 ("While the government's obligations are rooted in and outlined by the relevant statutes and treaties," the duties are "traditional fiduciary duties," each of which is enforceable against the defendants "unless

Congress has unequivocally expressed an intent to the contrary."). *See also White Mountain Apache*, 537 U.S. at 475; *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (government conduct to be "judged by the most exacting fiduciary standards"); *United States v. Mason*, 412 U.S. 391 (1973) (government owes ordinary trust obligations including duty of care); *Nevada v. United States*, 463 U.S. 110, 142 (1983) ("[W]here only a relationship between the Government and the [Indians] is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects, adequately describe the duty of the United States."). Moreover, "[c]ourts judging the actions of federal officials taken pursuant to their trust relationships with the Indians therefore should apply the same trust principles that govern the conduct of private fiduciaries." *See, e.g., Fort Peck*, 792 F.2d at 794; *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d at 990 ("Where a trust relationship between Indians and the Government is established, the Government's actions normally are judged according to standards established in traditional trust law doctrine.").

Such duties are "defined in traditional equitable terms." *Cobell VI*, 240 F.3d at 1099. The Court explained that by their nature, trust instruments – here the statutes and treaties that establish and govern the trust relationship – do not expressly state each and every applicable fiduciary duty; "many of the duties and powers are *implied.*" *Id.* (emphasis added). To be sure, enforceable trust duties must find "root[s]" in statutes and other federal law – *i.e.*, "the substantive laws creating those obligations." *Id.* at 1098 (quotations and citations omitted). But, "[t]his does not mean that the failure to specify

the precise nature of the fiduciary obligation or to enumerate the trustee's duties absolves the government of its responsibilities." *Id.* at 1099 (emphasis added).

The Supreme Court's decision in *White Mountain Apache Tribe* confirmed that implied duties are equally enforceable. There, the central issue was whether the "1960 Act" placing "Fort Apache" in trust status could be read "to *infer* a[n enforceable] fiduciary duty" to preserve Fort Apache. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003) (emphasis added). The Court readily acknowledged that the "1960 Act *does not* … *expressly* subject the Government to duties of management and conservation" or *expressly* impose the duty to preserve and maintain trust assets. *Id.* at 475 (emphasis added). Nevertheless, because the 1960 Act did create a trust relationship, the government is, by implication, subject to the "common-law dut[y] of a trustee … to preserve and maintain trust assets." *Id.* (citations and quotations omitted). *See also Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) (citing *White Mountain Apache* for the conclusion that to determine whether a fiduciary duty is applicable, the court must "look to trust law to find ... a particular common law duty" and then determine if it is "implied" (*i.e.*, not expressly stated) in the statutory scheme) ("*Cobell XIII*").

XVI. TO DISCHARGE THEIR ACCOUNTING DUTY, DEFENDANTS MUST ACCOUNT FOR "ALL FUNDS" AND ESTABLISH ACCURATE ACCOUNT BALANCES.

This Court has ruled that defendants must provide an adequate accounting of "all money" held in the IIM Trust. *Cobell V*, 91 F. Supp. 2d at 58. That this Court directed defendants to account for "all funds" is settled: "Congress directed that the Secretary of the Interior account for all funds. The court cannot put a finer point on it than that." *Id.* at 41; *see also Cobell X*, 283 F. Supp. 2d at 173 ("Interior must perform an accounting of

all funds deposited or invested in the IIM trust fund since the passage of the General Allotment Act in 1887." (emphasis in original)).

Cobell VI affirmed that defendants must account for "*all funds*" in "*all* accounts," and including without limitation *all* "past deposits, withdrawals, and accruals." 240 F.3d at 1102 (emphasis in original). Otherwise, it would not be possible to achieve one of the principle purposes of the accounting, the establishment of "an accurate account balance" for each beneficiary. *Id.*

XVII. DEFENDANTS MUST RENDER AN ADEQUATE HISTORICAL ACCOUNTING TO EACH PRESENT AND FORMER INDIVIDUAL INDIAN TRUST BENEFICIARY.

The scope of the class in this litigation was determined by this Court on February 4, 1997. [Dkt. No. 27] The *Order Certifying Class Action* found that the "class of present and former beneficiaries … number[s] in excess of 300,000." *Id.* at 1. Further, and most directly on point, the "plaintiff class consist[s] of present *and former* beneficiaries" of the IIM Trust. *Id.* at 2-3 (emphasis added); *see also* Findings at ¶¶ 462-64 (Special Trustee Swimmer and Interior experts concede necessity of including beneficiaries in the accounting). The order does not limit the class to accounts posted to defendants' woeful trust management systems. *Order Certifying Class Action* at 1. Nor would such a distinction make any sense, because defendants could then simply evade their trust obligation by deciding not to place funds in a designated "account" for each member of the class. *Cf. Mitchell II*, 463 U.S. at 228 ("It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed.").

The Court of Appeals has noted that defendants, at least in 2001, could not identify the number of trust accounts that it had a fiduciary obligation to "administer and protect." *Cobell VI*, 240 F.3d at 1089. This situation remains unchanged, even now. Findings at ¶¶ 163, 195, 211-214, 225, 244. Nevertheless, the record reflects that as many as 41% of all recorded accounts *within the temporal limits of the accounting plan* (*i.e.*, open on or after October 25, 1994 through December 31, 2000) are excluded from the 2007 Plan. Findings at ¶¶ 213-214. As such, a significant number of beneficiaries will not receive an HSA under the 2007 Plan. Findings at ¶ 195; *id.* at 13-14, 17-23 (trust data, including ownership information, is missing from the defendants' trust systems); *id.* at 244 ("speculative to guess how many accounts there have been"); *id.* at ¶¶ 261-267; 360-366; 407-408 (other problems with trust systems, including ownership systems). Tellingly, while it is clear that most of the beneficiaries will not receive an accounting of any sort, even at this late date defendants have not revealed and proffered any evidence regarding the number of beneficiaries who will be denied the accounting they are due as a result of defendants' exclusions.

XVIII. THE 2007 PLAN WILL NOT RESULT IN A FAIR AND ACCURATE HISTORICAL ACCOUNTING .

Defendants represent that the HSA, the product of the "reconciliation" exercise, will report to each beneficiary his or her transaction history, a listing of all transactions posted to his or her account, and "Interior's conclusions" regarding the accuracy and completeness of the list of transactions posted to IRMS or TFAS. Findings at ¶ 174. However, for the accounting to be adequate, "the accounting must be sufficient to serve the purposes for which a trust accounting is typically conducted." *Cobell VI*, 240 F.3d at 1103. Such purposes include the determination of accurate balances and the disclosure of

"sufficient information for the beneficiary readily to ascertain whether the trust has been faithfully carried out" to enable the beneficiary to enforce his or her rights under the trust. *Id*. (citation and quotation omitted); *see also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959) (describing the purpose of the accounting). To meet these objectives, in addition to an accounting of all deposits, withdrawals and accruals, "[a]n accounting necessarily requires a *full disclosure and description of each item of property constituting the corpus of the trust* at its inception." *Cobell VI*, 240 F.3d at 1103 (alteration in original) (emphasis added) (internal quotations and citations omitted). At a bare minimum, in addition to the accounting of all funds, there must be an identification and full description of all allotments and a validation of the accuracy and completeness of all land ownership records in order to determine whether that the purported allocation of trust income is correct. *See id.* As this Court held in *Cobell X*, 283 F. Supp. 2d at 175-76: "[B]lack-letter trust law mandates that an accounting include a full disclosure and description of each item of property constituting the corpus of the trust at its inception [and, thus,] Interior's historical accounting must include such a full disclosure and description." *See also Cobell VI* at 1103 ("defining accounting as 'the report of *all items of property, income, and expenses*' prepared by the trustee for the beneficiary" (emphasis added)) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)). Verification further requires providing "'supporting documentation that is adequate to demonstrate that each listed transaction actually took place.'" *Cobell XVII*, 428 F.3d at 1077 (quoting *Cobell X*, 283 F. Supp. 2d at 183-84).

Trust cases, which have examined the nature and scope of an adequate accounting, are in accord. *See, e.g., Kelly v. Sassower*, 382 N.Y.S.2d 88, 89 (N.Y. App.

Div. 1976) ("[I]nter alia, a proper accounting, should state in clear and understandable terms the nature and value of the trust corpus when received; any realized increases or decreases on principal; any income received; any disbursements and distributions to beneficiaries; any commissions paid; and the amount and location of any balance on hand."); *State ex rel. King v. Harvey*, 214 So. 2d 817, 819 (Miss. 1968) ("An accounting is by definition a detailed statement of the debits and credits between parties arising out of … a fiduciary relation.") (citation omitted); *Rothschild v. Village of Calumet Park*, 262 Ill. App. 96, 104, 1931 WL 3041 (1931) ("Where a trust relation exists between parties, the *cestui que trust* is entitled to a complete accounting from the trustee, in which all data in the trustee's accounts, which it is his duty to keep, should be furnished. . . . An accounting is a statement of receipts and payments by a trustee concerning the estate intrusted [sic] to his care, the detailed statement of its administration while in his hands, what has been received and from what sources, and the balance, if any, remaining.") (citation and quotation omitted).

Here, despite defendants' retention of multiple public accounting firms and the expenditure of hundreds of millions of dollars, no accountants will provide an opinion or assurance regarding the accuracy of any beneficiary's account balance. Findings at ¶ 175. The HSAs, for the relatively few beneficiaries who will receive them, would not contain sufficient information to permit them to ascertain the extent to which the trustee has faithfully carried out its fiduciary duties and, thus, would not, and could not, achieve a principal objective of the accounting – full disclosure to enable beneficiaries to protect their interests. Indeed, the limitations of the 2007 Plan are so significant that they render the HSAs meaningless. *Id.* at ¶¶ 175-193; 421-434; 454.

XIX. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY ARE SAMPLING TRANSACTIONS, NOT ACCOUNTS.

The problems with defendants' use of sampling in the 2007 Plan are manifold. Findings at ¶¶ 276-315, 416-420. The record indicates that had defendants sampled accounts, the error rate would have been much higher – *i.e.*, the number of accounts with at least one error would have been much higher than the 1 percent error rate defendants assume is present in the Individual Indian Trust systems. *Id.* at ¶¶ 286, 420. Put another way, the likelihood of any trust account having an incorrect balance as a result of transactional error rises to approximately 75%. *Id.* at ¶ 286. In addition, because of systematic destruction of trust data (the transactional data is known to be materially incomplete), no judgments can be made about transactions that were not available to be sampled. *Id.* at ¶¶ 417-419. As such, because of the selection of an inappropriate sampling unit and pervasive problems with missing transactional data, the HSAs will provide meaningless information to the beneficiaries.

XX. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEIR DECISION TO EXCLUDE FROM THE ACCOUNTING THE RECONCILIATION OF ACCOUNT BALANCES IS CONTRARY TO THE LAW OF THIS CASE.

There is no dispute that account balances are unreliable; defendants and their external auditors have long recognized this problem. Findings at ¶¶ 421-422. Defendants likewise recognize that they have a fiduciary duty to ensure that balances are accurately stated; and they have admitted this repeatedly. *Id.* at ¶¶ 423-424; 428-430. Nevertheless, the 2007 Plan does not provide for the reconciliation of account balances, including the opening balance of any individual Indian trust account. *Id.* at ¶¶ 425-427; 431-434.

The Court of Appeals in this case was clear: "Appellants never explain how one can give a *fair* and *accurate* accounting of *all* accounts without first reconciling the accounts, taking into account past deposits, withdrawals, and accruals. Indeed, the government's own expert acknowledged that one could not determine an accurate account balance without confirming historical account balances." *Cobell VI*, 240 F.3d at 1102 (emphasis in original).

XXI. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY HAVE DISREGARDED OUT-OF-BALANCE CONDITIONS AMONG THEIR VARIOUS TRUST MANAGEMENT SYSTEMS.

There is a long-standing out-of-balance condition between and among defendants' (Interior's and Treasury's) trust systems, at least back to 1971. Findings at ¶¶ 435-440. Defendants recognize that reconciling systems is an important control activity. *Id.* at ¶ 441. The existence of an out-of-balance condition evidences a significant problem, but does not reveal the nature and scope of that problem. *Id*. at ¶ 439.

This particular out-of-balance condition reflects "leakage" of trust funds out of the system, and other errors, and it directly and adversely impacts current accountholders since it has the practical effect of reducing the trust assets in the investment pool and the income those assets earn. *Id*. at ¶¶ 437-439. This out-of-balance condition remains un-reconciled today. *Id*. at ¶ 440. Interior's trust expert has opined that reconciling this out-of-balance condition is essential since it "may impair the accuracy of account statements." *Id*. at ¶ 445. Despite the acknowledged importance of reconciling defendants' various trust systems, there is no plan to do so in the 2007 Plan. *Id*. at ¶¶ 442-444.

XXII. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY HAVE EXCLUDED ASSETS FROM STATEMENTS OF ACCOUNT.

Interior defendants' accountants, trust counsel, consulting experts, and representatives, in addition to Secretary Babbitt himself, all have conceded that an accounting of the underlying trust assets should be included in the historical accounting. Findings at ¶ 447-450. The 2003 Plan called for the accounting to provide a statement of the land held as December 30, 2000, but that element has now been deleted in the 2007 Plan. AR-566 at 33-03-28.

Though section 102 of the 1994 Act expressly mentions only an accounting for "funds," 25 U.S.C. § 4011(a), the scope of Interior's duty to account is not limited by the terms of the 1994 Act. *Supra* at Conclusion XI. As the Court of Appeals explained:

> It is black-letter trust law that "[a]n accounting necessarily requires a *full disclosure and description of each item of property* constituting the corpus of the trust at its inception." *Engelsmann v. Holekamp,* 402 S.W.2d 382, 391 (Mo.1966); *see also Black's Law Dictionary* (7th ed. 1999) (defining accounting as "the report of all items of property, income, and expenses" prepared by the trustee for the beneficiary).

Cobell VI, 240 F.3d at 1103 (emphasis added).

As a result, Interior's historical accounting, to be considered adequately, must include a full disclosure and description of all property held in trust for each beneficiary. *See Ak Chin,* 667 F.2d at 1003 ("The Government has no obligation to administer Indian assets (other than money) for profit, but if it has undertaken to do so, it must account. Where the Government has used reservation land itself, or permitted third parties such use, or has permitted trust assets to be exploited for nontrust purposes, accounting is required."); *Cobell X,* 283 F. Supp. 2d at 175-6 ("Inasmuch as black-letter trust law mandates that an accounting include a full disclosure and description of each item of

property constituting the corpus of the trust at its inception, Interior's historical accounting must include such a full disclosure and description.").

Interior, nevertheless, argues that the corpus of the trust consists only of funds and does not include the allotted lands themselves. [Dkt. No. 3339 at 32]. Interior's sole support for this argument is language in *Cobell XII*'s introductory description of the background of this case: "The trust corpus consists of the revenues derived from land that was carved out of preexisting Indian reservations under the 1887 Act." *Cobell v. Norton ("Cobell XII")*, 391 F.3d 251, 254 (D.C. Cir. 2004) (citing *Cobell VI*, 240 F.3d at 1068-88). There is nothing to indicate that the Court of Appeals intended this language to be the full description of the trust corpus. The Court of Appeals' reference in the quoted language to *Cobell VI* shows that the Court was not trying to reverse anything stated in that earlier decision, which included language (quoted above) to the effect that Interior had to account for the property in trust.

Nevertheless, the United States Supreme Court has clearly stated that the allotted lands are the trust corpus. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*") (observing that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).") (citing RESTATEMENT (SECOND) OF TRUSTS § 2).

This Court's description in *Cobell X* is directly on point:

> *The allotted lands themselves are the "trust corpus"* or "trust assets" or "trust property," which are held in trust by the United States. Not only does the IIM trust contain these lands, they are an indispensable element of the trust. These lands generate income, which Interior (as trustee-

> delegate) must distribute to the IIM beneficiaries. The IIM accounts are the means by which this income is distributed to the beneficiaries. In short, the monies deposited into the IIM accounts represent the *income* generated by the allotted lands held in trust by the United States, not the *corpus*, which is made up of the lands themselves.

Cobell X, 283 F. Supp. 2d at 177 (italics in original) (emphasis added).

XXIII. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR FUNDS HELD IN SPECIAL DEPOSIT ACCOUNTS.

Special deposit accounts ("SDAs") are administrative accounts opened by the trustee-delegates to hold a beneficiary's trust funds until they are allocated to the beneficiary's IIM account(s). Findings at ¶¶ 455-458. These accounts have historically been severely mismanaged, leading one external auditor to describe the SDA's absence of controls or proper documentation as "an almost hopeless tangle." *Id.* at ¶ 459. Defendants' database contractor similarly noted the historical "leakage" of trust funds from the SDAs at the time hundreds of millions of dollars in trust funds were held in SDAs. *Id.* at ¶ 460.

The 2007 Plan states that defendants no longer will include the reconciliation of SDAs within the scope of defendants' accounting, notwithstanding that defendants' contractors, accountants, and trust experts all acknowledge that the SDAs must be reconciled to establish accurate account balances. *Id.* at ¶ 461. Defendants' failure to account for all funds held in SDAs will not, and cannot, result in an accounting of all funds and will not result in the establishment of accurate account balances.

XXIV. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR THE FUNDS OF BENEFICIARIES NOW DECEASED.

Interior defendants' decision in the 2007 Plan to exclude the funds of deceased beneficiaries is a continuing breach of their declared duty to account for "*all funds*, irrespective of when they were deposited." *Cobell VI*, 240 F.3d at 1102. As such, the 2007 Plan is in conflict with the *Class Certification Order* [Dkt No. 27], which includes all "present and former beneficiaries" in the plaintiff class. Findings at ¶¶ 462, 473. The accounting must include all funds of deceased beneficiaries, and the failure to account for such funds is in conflict with the accounting declared by this Court.

XXV. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR INTERIOR PROBATED ASSETS.

There is no legal or factual support for Interior defendants' position that accounts are settled, or that an accounting is provided, through the probate process. Findings at ¶¶ 467-470. The only possible support in the Administrative Record for this position consists of two letters from an attorney Interior defendants hired to provide advice on trust law. AR-618 at 64-08-01 and AR-614 at 64-04-01. However, that attorney did not provide a detailed analysis of Interior's probate process and incorrectly "assumed" that Interior's probate process provides an accounting of the estate assets, when it does not. AR-618 at 64-08-03. *See also* Findings at ¶¶ 467-469; *Estate of Ervin Lyle Waits,* 2001 WL 254024 (I.B.I.A. Feb. 28, 2001).

Interior's associate deputy secretary, James Cason, admitted that the probate process does not involve an accounting of the deceased beneficiary's estate. Findings at ¶ 471. Interior's probate process does not settle accounts and does not include an

accounting of all funds to which the deceased was entitled. Findings at ¶¶ 467-472. To provide an adequate accounting to the plaintiff class, opening balances must be reconciled, which necessarily requires the reconciliation of, and accounting for, all past deposits, withdrawals, and accruals in predecessor accounts. *Cobell VI*, 240 F.3d at 1102; *Cobell X*, 283 F. Supp. 2d at 174-175; Findings at ¶¶ 473-477.

XXVI. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT INCLUDE CADASTRAL SURVEYS IN THE ACCOUNTING.

Cadastral surveys confirm the size, boundaries and location of IIM trust land. Findings at ¶ 478. It is undisputed that errors exist in the surveys currently in existence. Findings at ¶ 479. Therefore, to render an adequate accounting, defendants must use accurate surveys for the land because if the boundaries are in error, income allocations will be in error. Findings at ¶ 483. There is nothing in the Administrative Record to support Interior defendants' decision not to have cadastral surveys performed to correct the erroneous land descriptions that currently exist in Interior's system. *Id.*

XXVII. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR TRUST FUNDS ADMINISTERED BY TRIBES PURSUANT TO COMPACT OR CONTRACT.

An adequate accounting must include the funds managed by compacting/contracting tribes utilizing their own record systems. The relevant statute expressly provides that the Secretary's trust responsibility is not diminished when tribes administer trust assets or funds pursuant to compact, contract or cooperative agreements. *See* 25 U.S.C. § 458cc(b)(9) mandating "[e]ach funding agreement shall … *prohibit the Secretary from waiving, modifying, or diminishing in any way* the trust responsibility of the United States with respect to Indian tribes *and individual Indians* that exists under

treaties, Executive orders, and other laws." (emphasis added); 25 U.S.C. § 458ff(b) reaffirming that "[n]othing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments." Tribes operate as agents for Interior and all responsibility for management of the trust remains in the trustee. Findings at ¶ 492.

Defendants have repeatedly conceded that they must account for assets managed by tribes. Findings at ¶¶ 486-490. Yet, defendants have refused to do so.

XXVIII. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR DIRECT PAY TRANSACTIONS AND LEASES.

Direct pay revenues are trust funds for which defendants must account. *See, e.g.*, *Cobell XII*, 391 F.3d at 254 ("The trust corpus consists of the *revenues* derived from land that was carved out of preexisting Indian reservations under the 1887 Act.") (emphasis added) (citing *Cobell VI*, 240 F.3d at 1068-88). In managing trust lands, the Secretary has, at times, negotiated with third parties for the direct payment of rents, royalties, and other revenue to beneficiaries. *See* 25 C.F.R. §§ 161, 166 (leases of allotted lands for grazing); 25 C.F.R. § 162 (leases of allotted land for agriculture); 25 C.F.R. § 163 (leases of allotted land for timber rights); 25 C.F.R. §§ 212, 213, 214, 215 (providing for leasing of allotted lands for mining). These regulations require that direct pay contracts contain language stating that:

> Nothing contained in this lease shall operate to delay or prevent a termination of *Federal trust responsibilities* with respect to the land by the issuance of a fee patent or otherwise during the term of the lease; however, such termination shall not serve to abrogate the lease. The owners of the land and the lessee and his surety or sureties shall be notified of any such change in the status of the land.

See 25 C.F.R. § 162.604 (emphasis added).

Regulations promulgated for subsurface leases similarly establish a broad, comprehensive set of controls reflecting the Secretary's pervasive control:

> Rents and royalties paid . . . [directly to lessors] on producing leases shall be supported by statements, acceptable to the Secretary or his duly authorized representative, to be transmitted to the Supervisor, in duplicate, covering each lease, identified by contract number and lease number. Such statements shall show the specific items of rents or royalties for which remittances are made, and identify each remittance by the remittance number, date, amount, and name of each payee.
>
> Rents paid [directly to lessors] on nonproducing leases . . . shall be supported by a statement, acceptable to the Area Director, to be transmitted to the Area Director covering each lease, identified by contract number and lease number. Each remittance shall be identified by the remittance number, date, amount, name of each payee, and dates of mailing or remittances. Date of mailing, or, if remittance is sent by registered mail, the date of registration receipts covering remittances mailed, shall be considered as date of payment.

See 25 C.F.R. § 213.18 (1994).

Direct pay transactions and leases are negotiated, supervised, and enforced by the government. Findings at ¶ 502; *see also id.* at ¶¶ 498-499 (discussing comprehensive control over direct pay transactions and leases); *id*. at ¶¶ 504-505 (reciting this Court's *Cobell X* opinion's extensive findings regarding direct pay). Defendants and their attorneys have long recognized their fiduciary duty to supervise and enforce direct pay lease obligations and transactions related thereto. *Id.* at ¶ 500; *see also, id.* at ¶ 501 (Arthur Andersen recommending reforms be made to the management of direct pay transactions and leases). Indeed, their trust law expert opined that "the [withdrawn] asset continues to be treated as a part of the trust corpus, and some level of trustee duties will apply, [n]otwithstanding that it has *escaped the management control of the fiduciary*." *Cobell X*, 283 F. Supp. 2d at 177; *see also* Findings at ¶ 498 (Cason concedes that "direct pay funds," are trust assets).

This Court has held that "'[i]t is settled beyond debate, of course, that the direct income from a trust allotment partakes of the character of the corpus of the allotment itself and is subject to all the authorities and responsibilities of the trust undertaking relating to the allotment itself.'" *Cobell X*, 283 F. Supp. 2d at 178 (quoting *Lease of Restricted Land - Federal Supervision Over Rentals Payable Directly to Lessor*, 72 Interior Dec. 83 (Feb. 17, 1965), *available at* 1965 WL 12755 (citing *Squire v. Capoeman*, 351 U.S. 1 (1956))). Further, this Court has found that defendants exercise comprehensive control over direct pay transactions and leases. *Cobell X*, 283 F. Supp. 2d at 179-80, noting the findings in *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), where allottees "had collectively entered into a direct pay lease for the use of their land as a commercial golf course pursuant to 25 U.S.C. § 415(a)." *Cobell X*, 283 F. Supp. 2d at 178-79. This Court further held that in *Brown* the trustee-delegates had found "control or supervision" in the *Mitchell II* sense and explained:

> It is plain that the allottees do not control the leasing of their lands. First, they can only grant those leases of which the Secretary approves. Second, they can grant leases only on terms and forms that the Secretary dictates. Third, an allottee cannot cancel a lease without the Secretary's prior approval under 25 C.F.R. § 162.14. Fourth, the Secretary can cancel a lease without the allottee-lessor's consent . . . . Nor may the Secretary's power be considered a mere oversight power, inasmuch as its exercise is a necessary prerequisite to the execution of a valid and binding lease. Oversight power is an after-the-fact power to review transactions that have been negotiated and executed by others. The Secretary's approval power over leases, by contrast, must be exercised *before* any valid leasing transaction can occur. *Brown*, 86 F.3d at 1561-62 (emphasis in original) (internal citations omitted).
>
> [B]y virtue of the control they place in the hands of the Secretary, section 415(a) and the implementing regulations of part 162 impose upon the government a fiduciary duty in the commercial leasing context. *Id.* at 1563.

Cobell X, 283 F. Supp. 2d at 179 (quoting *Brown*). Taking into account these congressionally imposed and regulatory duties, together with the long-standing and well-established trust relationship between the government and the Indians, the United States owes a fiduciary duty to render an accounting of all funds to direct pay beneficiaries. *See Fort Peck,* 792 F.2d at 794 (courts judging the actions of federal officials taken pursuant to their trust relationships with Indians should apply the same trust principles that govern the conduct of private fiduciaries); *see also Jicarilla Apache,* 728 F.2d at 1563-65 (statutes and regulations contain such explicit duties that it is clear Congress intended Secretary to act as trustee in managing leases for the Indians).

XXIX. DEFENDANTS CANNOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY HAVE FAILED TO COLLECT THIRD PARTY DOCUMENTS AS MANDATED BY THIS COURT.

The failure by Interior defendants to preserve and collect third party records, and to include the routine collection of such documents in the 2007 Plan, is a continuing breach of the trust duties declared by this Court and the Court of Appeals. *Cobell V*, 91 F. Supp. 2d at 50; *Cobell VI*, 240 F.3d at 1106; Findings at ¶¶ 509-510. Interior's records are either destroyed or unreliable. *See, e.g.*, Findings at ¶¶ 512-513.

XXX. DEFENDANTS CANNOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT VERIFY TRUST DATA AT MMS.

By way of the Accounting Standards Manual referenced in the 2007 Plan, Interior defendants have decided not to verify the information provided by MMS and to simply accept that information as being accurate. Findings at ¶ 515. This is an unreasonable assumption since the MMS audit process is inadequate, insufficient and fraudulent.

Findings at ¶¶ 515-530. In addition, MMS is known to have unreliable production and revenue data. *Id.*

XXXI. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR ADMINISTRATIVE FEES.

Interior defendants' failure to account for the administrative fees charged to the trust is unreasonable and a continuing breach of their declared duty to account for all funds. *Cobell VI*, 240 F.3d at 1102; *See* RESTATEMENT (THIRD) OF TRUSTS, § 83(b).

XXXII. DEFENDANTS WILL NOT DISCHARGE THEIR DECLARED DUTY TO ACCOUNT BECAUSE THEY WILL NOT ACCOUNT FOR *YOUPEE* ESCHEATED INTERESTS AND THE INCOME DERIVED THEREFROM.

The United States Supreme Court twice has held unconstitutional statutes that provided for escheatment of certain IIM trust assets to Indian tribes without compensation. *See Hodel v. Irving*, 481 U.S. 704, 716-18 (1987); *see also Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997). These unconstitutionally escheated interests, commonly called *Youpee* interests, and the revenue derived from them, will not be included in the accounting planned by defendants. Findings at ¶ 542.

Interior defendants have repeatedly conceded that they must account for such interests and the revenue derived from them. Findings at ¶ 543. Interior defendants have now re-interpreted the Supreme Court's decisions to construe them as applying prospectively only. Findings at ¶ 544. There is no support in the cases for such an interpretation. Since the escheatment pursuant to the statute constituted an unconstitutional taking, the transfers were necessarily illegal *ab initio*. *See Hodel*, 481 U.S. at 716-18; *see also Youpee*, 519 U.S. at 243-245. Defendants' failure to restore the escheatments and related funds breaches at least three clear trust duties: (1) the duty to

take reasonable steps to take and keep control of the trust property; (2) the duty to preserve the trust property; and (3) the duty to enforce claims held in the trust. RESTATEMENT (SECOND) OF TRUSTS §§ 175-178. This same type of argument by Interior – that its failure to fulfill its fiduciary trust duties precludes a particular remedy sought by the beneficiaries – was flatly rejected by the United States Supreme Court in *Mitchell II*, where the Court stated: "It would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed." 463 U.S. at 227.

COST OF THE ACCOUNTING

XXXIII. THE COST OF THE ACCOUNTING MAY NOT BE USED TO JUSTIFY AN INCOMPLETE OR INADEQUATE ACCOUNTING.

Defendants' obligation to render an adequate accounting of all funds to each member of the class "inheres in the trust relationship itself" and nothing in any federal statute limits or alters that right. *Cobell VI*, 240 F.3d at 1103. Accounting duties may not be limited or excused due to cost. Findings at ¶ 585.

Trust law provides a clear path to resolve issues regarding the cost of performing the historical accounting where, as here, defendants' misconduct and mismanagement of the Individual Indian Trust, including the systemic spoliation of trust records, unconscionable delay, and other malfeasance are the reasons why the cost of the accounting is extremely high. The high cost of the accounting in this case is due to government malfeasance including a "record-keeping system" that the "Interior Department acknowledges" is now and has always been "woefully inadequate." 240 F.3d

at 1092. The findings made in this trial bear out that the high costs are the result of government malfeasance. *See* Findings at ¶¶ 173, 580-82, 585, 594, & 602. It would be contrary to law and fundamentally inequitable to permit defendants to excuse, extinguish or diminish in any manner whatsoever their declared accounting duty simply because additional and unnecessary costs are incurred as a result of their conduct.

The necessity for this action in equity to compel an accounting is caused solely by defendants' gross records mismanagement, misconduct and other breaches of trust, including their undue delay in rendering an accounting of trust funds and other assets that the government owes the plaintiff class. Findings at ¶¶ 31-32, 34, 37, 83, 264, 293-94, 391-92, 459, & 579-582. Defendants *alone* have caused the accounting of all funds to be extremely difficult and costly and, therefore, must bear its full cost because under these circumstances "no precept of common law constrains the cost of such an accounting." *Cobell XVII*, 428 F.3d at 1075 (citing BOGERT § 963, at 459 n. 36); *Cobell VI*, 240 F.3d at 1092 ("The Interior Department acknowledges that …. the current record-keeping system is woefully inadequate."); *id.* at 1096 ("That Congress enacted its own remedial statute [the 1994 Act] to address this unconscionable delay does not mitigate the egregious amount of time plaintiffs have waited for [the accounting]…."); *id.* at 1106 ("[F]ailure to maintain [documents necessary to fulfill the trustee's obligations to trust beneficiaries] is a breach of . . . fiduciary duty."); BOGERT § 971.

It is settled law that "[c]osts and expenses of proceedings for accounting" may be charged to the trustee when the expense is due to "misconduct or negligence." *Haas v. Wishmier's Estate*, 190 N.E. 548, 549 (Ind. Ct. App. 1934)) (citations and quotations omitted); *In re Whitney's Estate*, 11 P.2d 1107 (Cal. Dist. Ct. App. 1932) (trustee charged

with the expense of accounting); *Arrants v. Sweetwater Bank and Trust Co.*, 404 S.W.2d 253, 258 (Tenn. Ct. App. 1965) ("We see no abuse of discretion in the action of the Chancellor requiring the Bank to bear the cost of the Special Master and the court costs incurred in the course of the accounting."). As stated in Corpus Juris Secundum, a trustee is liable for costs of accounting where the trustee "rendered necessary the incurring of such costs and expenses by misconduct or negligence." 90A C.J.S. *Trusts* § 652. *See also Malachowski v. Bank One*, 682 N.E.2d 530 (Ind. 1997) (same); RESTATEMENT (THIRD) OF TRUSTS § 83 cmt. a(1) (2007) ("*Consequences of failure to maintain records.* A trustee who fails to keep proper records is liable for any loss or expense from that failure.") (emphasis in original).

Finally, defendants are mistaken in their notion that this is a "free" trust. Defendants historically, and at all times relevant to these proceedings, have assessed substantial administrative fees for their management of the Individual Indian Trust. Findings at ¶¶ 583-84. Nonetheless, defendants have done little or nothing to create and maintain complete and accurate records or an adequate records management system in compliance with their fiduciary duty to keep clear and accurate accounts. *Cobell VI*, 240 F.3d at 1092-93, 1106, 1108.

ANTICIPATED ADMINISTRATIVE APPEAL PROCESS

XXXIV. IN ACCORDANCE WITH THE CASE MANAGEMENT AUTHORITY OF THIS COURT TO CONTROL THE ORDERLY PROGRESS OF THIS LITIGATION, NO PROPOSED OR FINAL ADMINISTRATIVE PROCEDURE RELATED TO THE ACCOUNTING OR THE ADMINISTRATIVE APPEALS PROCESS SHALL BE SUBMITTED TO ANY INDIVIDUAL INDIAN TRUST BENEFICIARY UNTIL FIRST SUBMITTED TO THIS COURT FOR REVIEW AND APPROVAL.

Interior defendants produced at trial no evidence of their administrative appeal process, other than a brief description in the 2007 Plan. Findings at ¶ 342. There is no other discussion of that process in the Administrative Record. The only indication of the nature of that process appears attached to a brief submitted by plaintiffs relating to a prior motion. The burden was on Interior defendants to present evidence of their Plan and they failed to do so.

Moreover, at this point, assuming the proposed administrative appeals process is the same as that attached to plaintiffs' brief, it is only a tentative or proposed appeals process. Accordingly, it is ripe for judicial review if delayed review would cause substantial hardship. *Florida Power & Light Co. v. E.P.A.*, 145 F.3d 1414, 1421 (D.C. Cir. 1998).

The anticipated administrative appeals process would pose substantial hardship on the plaintiffs for a number of reasons:

- The language in the draft rules governing the administrative appeals process has the same effect as language this Court previously found improper when Interior defendants attempted to impose a similar administrative process on 1200 children, elderly and infirm members of the class, in that it extinguishes the right of the plaintiff class to a full and accurate accounting of all funds and interferes with plaintiffs' rights in this litigation. *See Cobell v. Norton*, 212 F.R.D. 14, 16-18 (D.D.C. 2002); Plaintiffs' Opposition to Defendants' Motion to Rescind or, in the Alternative, to Amend the Class Communication Orders and Memorandum in Support Thereof, July 6, 2007 [Dkt. No. 3356] ("Pltffs' Acctg. Admin. Appeals Brief") at 4; Pltffs' Acctg. Admin. Appeals Brief,

Exh. 1 at 24-30 (draft 25 C.F.R. §§ 116.401; 404(b); 405(d); 407; 408(a)-(c); 413(a); 415-416(a)-(d); 418(a); 419(a)-(d)). *See* Findings at ¶¶ 325-330, 353-354.

- The draft rules governing the administrative appeals process would unfairly place the burden of documenting all objections to the HSA on class members themselves and, thereby, interfere with the beneficiaries' right to a full and fair accounting of all funds. Findings at ¶¶ 335, 343. Interior defendants have lost or destroyed critical trust documents in breach of their fiduciary duty but, through their administrative process, they intend to place on the beneficiaries, who have never had access to those documents, the burden of producing documents to support their claim, eviscerating Interior defendants' obligation to provide beneficiaries an accounting. Findings at ¶¶ 335, 350.
- The administrative appeals process denies members of the certified class critical financial resources that otherwise are available to the class in this litigation, without which class members cannot retain effective counsel, accountants, statisticians, and other experts to protect their vested right to a full and fair accounting. Findings at ¶ 348. The denial of such financial resources interferes with the right of the certified class to obtain a full and fair accounting in this litigation. *See* draft 25 C.F.R. § 116.302 (class members "may represent themselves" or they may "be represented by someone else … at [their own] expense.").
- The proposed administrative regulations frustrate a central purpose of Rule 23, the aggregation of individuals who as a class can obtain relief that "cannot

be achieved in any other way." *In re Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988). *See also, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980) (a "significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation"); *id.* ("Where it is not economically feasible to obtain relief" by bringing individual claims, "aggrieved persons may be without any effective redress unless they may employ the class-action device.").

- The administrative appeals process interferes with the attorney-client relationship between class counsel and the certified class, thereby undermining the integrity of this litigation and interfering with the right of each member of the class to a full and fair accounting of his or her trust funds in this litigation. *Cobell v. Norton*, 212 F.R.D. at 17 (quoting 3 NEWBERG ON CLASS ACTIONS §15.18 (3d ed. 1992) ("the attorney for the named plaintiff[s] represents all class members who are otherwise unrepresented by counsel"); *Kleiner v. First Nat'l Bank*, 751 F.2d 1192, 1207 (11th Cir. 1985) ("class counsel represents all class members as soon as a class is certified"); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978) (same), *aff'd*, 444 U.S. 472 (1980). Findings at ¶ 349.
- The administrative appeals process purports to divest this Court of jurisdiction to decide whether defendants have rendered an accounting to each beneficiary of all his or her funds and to decide whether the accounting rendered, in fact, accurately states each beneficiary's account balances. The administrative appeals process confers on the defendant Interior Secretary the authority to

> adjudicate the adequacy of the accounting rendered by Interior defendants. As such it undermines the integrity of this litigation, interferes with the right of each member of the class to a full and fair accounting of all funds in this litigation, and nullifies the February 4, 1997 Order certifying this class action [Dkt. No. 27]. Findings at ¶ 339-341.

This Court need not permit Interior defendants to proceed with an administrative appeals process which would only ensure further delay. *See Muwekma Tribe v. Babbitt*, 153 F. Supp. 2d 42 (D.D.C. 2001) (rejecting Interior's regulations which failed to identify a date for consideration of plaintiff's petition, noting it compelled agency "so that the agency could rectify the past delay, not so that the agency could continue to proceed on an already delayed cause of action"). *See also Frey v. Envt'l Prot. Agency*, 403 F.3d 828, 836 (7th Cir. 2005) (holding the agency could not foreclose judicial review through a regulatory and investigatory process "of indefinite duration"); *Rohan v. Barnhart*, 306 F. Supp. 2d 756, 770 (N.D. Ill. 2004) (rejecting deferral pending agency action where the delay had been "unconscionable" and noting plaintiff need not "wait with the patience of Job for yet another remand"). Nor need this Court defer to a proposed administrative remedy where, as here, the plaintiffs have already been prejudiced by defendants undue delay. *See Southwestern Bell Tel. v. F.C.C.*, 138 F.3d 746, 750 (8th Cir. 1998) (holding deferral to an administrative remedy was not necessary where "further delay would not only be possible but inevitable" and would "render an administrative remedy manifestly inadequate").

THIS COURT SHOULD NOT REMAND THE CASE

XXXV. GIVEN THE RECORD HERE, REMAND IS NOT APPROPRIATE.

Interior defendants argue that although this is not a "typical" agency case, *see Cobell XVIII*, 455 F.3d at 305, traditional APA law shields them from judicial intervention and this Court is powerless to rectify their continuing breaches of trust in delaying the rendering of an accounting. *See Tr. Dec. 20, 2006 Status Conf.* at 30:7-8; 32:13-33:23. *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"). However, this is an Indian trust case and trust law applies. *See Cobell XVIII*, 455 F.3d at 304-05 (holding "the narrower judicial powers appropriate under the APA do not apply") (citation and quotations omitted). What is important to recognize is that 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.

XXXVI. THIS COURT HAS THE EQUITABLE AUTHORITY TO PROVIDE PLAINTIFFS APPROPRIATE RELIEF.

This Court has broad inherent equitable powers to provide plaintiffs whatever remedy is necessary to protect their interests, restore their funds, correct inaccurate trust accounting and deter continuing breaches of trust. *See, e.g.*, 3 SCOTT ON TRUSTS § 199, at 203-04 (4th ed. 1988). *See also 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, 318 (1999) (citation and quotations omitted). This included wholesale adoption of the equity jurisprudence of the law of trusts. *See* GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 14 (6th ed. 1987) ("Just as the colonists of the thirteen original states adopted substantially entire the common law of England, so they took over with little change the English scheme of equity jurisprudence, a part of which was the system of trusts."). Trusts are principally enforced through equity. *See id.* at § 861 at 3-4 ("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 . . . .").

Federal courts have inherent equitable authority to enforce the terms of a trust. *See, e.g., 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."); *Village of Brookfield v. Pentis*, 101 F.2d 516, 520-21 (7th Cir. 1939) ("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)). This Circuit is no exception. *See 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). *See also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 288 (D.C. Cir. 1993).

Under trust law, Interior defendants have only a "reasonable time" to perform an accounting, and that time has long passed. *See* RESTATEMENT (SECOND) OF TRUSTS § 173; *see also Cobell v. Norton*, No. Civ. A. 96-1285(RCL), 2003 WL 21978286, at *6 n.19 (D.D.C. Aug. 20, 2003) (quoting the Restatement); *Dennis v. R.I. Hosp. Trust Nat'l Bank*, 571 F. Supp. 623, 636 (D.R.I. 1983) ("The trustee's duty is, therefore, to account at reasonable times.") Interior defendants have long surpassed a reasonable time to account for trust income and assets.

Under trust law, this Court may provide appropriate equitable relief where Interior defendants, as trustee-delegates, are unable to timely perform an accounting. In *Rainbolt*, 669 F.2d at 769, the Court applied "established principles of trust law," holding that "if the [] trustee has not kept adequate accounts, the benefit of the doubt is to be given to the beneficiary" and "the District Court shall provide such additional relief for plaintiff-appellant as may be appropriate." (citing BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 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."). As this Circuit has admonished, this Court has an "obligation" to use "broad and flexible equitable

remedies" to remedy the breach of trust in a manner "most advantageous to the participants." *Crawford,* 815 F.2d at 120.

XXXVII. UNDER THE APA, REMAND TO AN AGENCY IS NOT PROPER WHERE, AS HERE, THE AGENCY HAS HAD AMPLE OPPORTUNITY TO RESOLVE AN ISSUE AND HAS ENGAGED IN UNDUE DELAY.

Federal agencies acting unlawfully 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). In accordance with that principle, in 1999 this Court remanded this proceeding "for further agency consideration in harmony with the court's holding." *Cobell V*, 91 F. Supp. 2d at 55 n.36 (citation and quotations omitted).

On February 23, 2001, the Court of Appeals held 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 (quoting *Cobell V*, 91 F. Supp. 2d. at 48). The Court of Appeals determined that the consequences of further delay were "potentially quite severe," *id.* at 1097, explaining that as "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." *Id.*

The Court of Appeals determined 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 and that "absent court intervention, discharge of the government's fiduciary obligations may be far off." *Id.* at 1096.

In 2002, this Court reviewed the progress of the Interior defendants in the performance of the accounting ordered three years earlier and 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. . . . That is, *the Court find[s] that the defendants have unreasonably delayed discharging their fiduciary obligations properly, even if the clock only started to run on December 21, 1999*.

Cobell v. Norton ("*Cobell VII*"), 226 F. Supp. 2d 1, 150 (D.D.C. 2002) (emphasis added). This Court concluded that because "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, once again, this Court is in the position of adjudicating whether "the defendants [have] unreasonably delayed the completion of the required accounting." April 20, 2007 Order at 4. [Dkt. No. 3312].

Where, as here, an agency is unable or unwilling to timely provide relief, remand of the issue back to the agency is unnecessary, and the court is permitted to "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) ("[I]f 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 *Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951)); *Benten v. Kessler*, 799 F. Supp. 281, 291 (E.D.N.Y. 1992) ("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.") (citations omitted). Contrary to the suggestion of Interior defendants, this Court is not powerless when faced with defendants' continued delay in the performance of their longstanding fiduciary obligations.

XXXVIII. INTERIOR DEFENDANTS' CONTINUED DELAY IS UNREASONABLE.

The trial record shows that defendants have continued their century-old delay in discharging their duty to account. Set forth below are numerous examples of this delay that supply overwhelming evidence for this Court to make two critical legal conclusions. First, defendants have, as a matter of law, further unreasonably delayed. Second, any further remand would be futile because the conduct of Interior defendants demonstrates that remand will lead to further delay.

- While over the past eight years Interior defendants have submitted multiple plans to this Court promising deadlines for completion of the accounting, findings at ¶¶ 40-76, no deadline has ever been met. The 2003 Accounting Plan was never started, although defendants represented to this Court that it was being implemented and "substantial progress" had been made. Findings at ¶¶ 168-169. While, under the current Plan, Interior defendants promise that

the historical accounting will be completed in 2011, assuming sufficient appropriations, findings at ¶ 161, given the progress to date and the remaining work to be done, it is unlikely any accounting will be done within the lifetime of many of the Indian beneficiaries, if ever.

- What Interior defendants have now implemented after eight years is not an accounting plan but, rather, a strategy to reduce liability and provide factual information for ongoing settlement discussions. Findings at ¶¶ 170-172; 236.
- Despite the passage of eight years, no certified public accountant will certify the accuracy of any transaction in any account. Findings at ¶¶ 175, 182, 200, 357b. No effort is being made to verify the accuracy of any transaction. Findings at ¶ 357a. Interior defendants intend to mail HSAs to beneficiaries regardless of whether any transaction is reconciled. Findings at ¶¶ 176, 180. Those HSAs will be incomplete and misleading. Findings at ¶¶ 178-19.
- Interior defendants remain unable to provide a complete list of transactions in any account, making it impossible for a beneficiary to readily assess the accuracy of the recorded account balance. Findings at ¶¶ 184, 419. Transactions that occurred but were not recorded on IRMS or TFAS will be excluded. Findings at ¶¶ 185, 190, 221. Interior defendants still do not know the number of transactions that took place in trust accounts since 1985. Findings at ¶¶ 212, 244.
- Interior defendants remain unable to assess the accuracy of opening and closing balances of accounts. Findings at ¶¶ 224, 421-434. They have made

no efforts to assess whether the opening balances of accounts that do exist on their electronic systems are accurate. Findings at ¶ 362.

- Despite earlier plans to the contrary, the latest accounting plan now excludes the great majority of the plaintiff class. Findings at ¶¶ 194, 462-477, 484-508, 547-570. Even under their current plan, Interior defendants do not know the number of beneficiaries who will receive a HSA. Findings at ¶ 163. They still do not know the number of beneficiaries who have had accounts since 1985. Findings at ¶ 212. Nor have they identified beneficiaries who should have had accounts on their electronic systems, but do not. Findings at ¶¶ 226, 357c. Interior defendants have no mailing address for many of the beneficiaries. Findings at ¶ 325.
- Interior defendants only plan to reconcile 6,599 transactions, all in the electronic era. Findings at ¶¶ 153, 215. They have no intention of looking at transactions in each agency, despite significant differences in how trust funds and trust assets have been managed in each agency. Findings at ¶¶ 155-156, 166.
- There is still no plan to reconcile any transaction in the paper ledger era. Findings at ¶¶ 166, 240. They do not know the number of accounts or beneficiaries in the paper ledger era. Findings at ¶ 244. No data in the paper era have been restored. Findings at ¶ 372.
- Interior defendants will not account for the non-financial assets of the trust and have no intention of doing so. Findings at ¶¶ 164, 181, 446-54.

- While Interior defendants have examined the IRMS and TFAS databases and, to a lesser extent, the LRIS database, they will not examine any of the other systems essential for an accounting of all trust funds, including MMS, RDRS, the ownership module of IRMS, and locally developed ownership systems used at individual agencies. Findings at ¶¶ 19-20, 269-271, 357d. This includes the Osage computers that contain all of the information regarding the substantial collections of oil and gas revenue for individual members of the Osage tribe. Findings at ¶¶ 15-16. Moreover, IRMS and TFAS are incomplete and inaccurate. Findings at ¶¶ 263, 360, 363, 368. To date, Interior defendants have only identified and restored an estimated 7.41% of transactions that were improperly deleted from IRMS. Findings at ¶ 371.
- Interior defendants continue to rely on MMS data they know to be unreliable. Findings at ¶¶ 19, 269.
- Interior defendants rely on LRIS for allotment ownership information in the accounting. Findings at ¶ 373. They know information in LRIS is incomplete and unreliable, and in the past 8 years they have failed to develop an accurate and complete ownership database. Findings at ¶¶ 21-22, 118-134, 267, 407. Additionally, LRIS was never used for distribution of income. Findings at ¶¶ 23, 265. Defendants will not utilize those electronic systems intended for the distribution of trust income.
- Interior defendants remain unable to even design a test to determine if trust funds collected actually entered the trust fund system during the electronic era. Findings at ¶¶ 379, 388, 390.

- Interior defendants have not developed an accounts receivable system, nor do they have no plans to do so. Findings at ¶¶ 24, 574-575.
- Interior defendants have not developed a system for the timely retrieval of trust records. Findings at ¶¶ 147-148, 368. Less than 8% of the boxes of trust records in Lenexa have been scanned. Findings at ¶ 141. Defendants do not have an understanding of the trust records they do have, nor any idea whether those records can support an accounting. Findings at ¶ 149.
- Interior defendants know trust records have been lost or destroyed and know that records are inaccurate. They acknowledge these records are essential to the accounting. Findings at ¶¶ 222, 223, 383. No effort has been undertaken to collect missing records that may be useful in the accounting from third parties. Findings at ¶¶ 295, 509-513. This is true despite the criticisms of this Court regarding Interior defendants' failure to collect third party records eight years ago. Findings at ¶ 509.
- Interior defendants understand that many surveys of Indian land are inaccurate, affecting the allocation of trust income, but they have made no efforts to correct them. Findings at ¶¶ 296-297, 478-483.
- Interior defendants will not resolve longstanding differences between the IIM detailed subsidiary ledger and the general ledger control account. Findings at ¶ 302. And, they will not resolve the longstanding discrepancies between the balances reflected in the OFTM systems and balances held by Treasury. Findings at ¶¶ 303, 435-444.

XXXIX. PERSONAL INTERESTS IN LIFE AND HEALTH ARE AT STAKE; THUS IMMEDIATE ACTION BY THIS COURT IS WARRANTED.

The harm to the "the personal interests in life and health" of the Indian beneficiaries has only increased with the passage of time. *Cobell VI*, 240 F.3d at 1097 (citation and quotations omitted). "Delays 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 (citations, quotations and alterations omitted). This circuit has been intolerant of agency delays where 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) (finding a 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'") (citation and quotations omitted)*; Pub. Citizen Health Research Group v. Brock*, 823 F.2d 626, 627, 629 (D.C. Cir. 1987) (*per curiam*) (finding after six years that "any delay whatever beyond the proposed schedule is unreasonable"); *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") (citation and quotations omitted).

XL. REMAND IS ALSO IMPROPER UNDER THE APA AS INTERIOR DEFENDANTS HAVE FURTHER DELAYED THESE PROCEEDINGS BY IGNORING THE MANDATE OF THIS COURT AND THE COURT OF APPEALS.

Interior defendants have had ample opportunity to correct their own errors and rehabilitate themselves, and where they have not done so, this Court need not remand this

action to them once again. "Deviation from the court's remand order in the subsequent administrative proceeding is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (citation omitted). An agency must comply with an issue-controlling court decision. *See N. Power Co. v. Dept. of Energy*, 128 F.3d 754, 759-60 (D.C. Cir. 1997).

Remand is unnecessary where an agency has had an opportunity to correct its own errors but did not do so, and to remand once again would only further delay necessary relief. *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"); *Marshall v. Lansing*, 839 F.2d 933, 945 (3d Cir.1988) ("When a court has already remanded a case to an administrative agency for failure to explain adequately its decision, and the agency, on remand, again fails to provide a reasoned basis for its conclusions, a reviewing court can set aside the agency's decision . . . ."); *Anselmo v. King*, 902 F. Supp. 273, 276 (D.D.C. 1995) (holding exhaustion of administrative remedies was not necessary where it was alleged the agency had "no intention voluntarily to 'correct its own errors'") (citation and quotations omitted).

Under the APA, remand is not necessary where, as here, the agency is unable to resolve a matter fairly and expeditiously. "[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." *Greene v.*

Babbitt, 943 F. Supp. 1278, 1288 (W.D. Wash. 1996). *See also Muwekma Ohlone Tribe v. Kempthorne*, 452 F. Supp. 2d 105, 123 (D.D.C. 2006) (discussing *Greene*); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1165 (D. Ore. 2002) ("Remand is not required in those unusual cases where the court cannot be confident of an agency's ability to decide a matter fairly.") (citations omitted).

XLI. UNDER THE APA, THIS COURT IS NOT REQUIRED TO REMAND BUT IS EMPOWERED TO ORDER DIRECT RELIEF.

Under the APA, administrative agencies are required to decide issues presented to them within a reasonable time. 5 U.S.C. § 555(b). The APA does not insulate defendants from responsibility for their continuing violations of law. *See Cutler*, 818 F.2d at 898. *See also Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[A]gency 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.") (citation and quotations 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.") (citation omitted); *Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) ("[N]ine 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."); *Env't Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 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."); *Am. Broad. 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."); *cf. In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) ("[M]otion is not necessarily the same thing as progress"). This Court is not required to "abdicate its responsibility to ensure that its instructions are followed." *Cobell VI*, 240 F.3d at 1109.

This Court has the jurisdiction to monitor the defendants' conduct to determine "whether in preparing to do an accounting the Department takes steps so defective that they would necessarily delay rather than accelerate the ultimate provision of an adequate accounting." *Id.* at 1110. "To the extent Interior's malfeasance [in performing the accounting] is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate." *Cobell XIII*, 392 F.3d at 477-78. Accordingly, even under the APA, where, as here, this Court is faced with serious and continued agency delay, which effectively forecloses an effective remedy, it need not sit passively in the hope that defendants some day will decide to discharge the declared accounting duties. *See Greyhound*, 668 F.2d at 1364; *see also Checkosky v. SEC*, 139 F.3d 221, 227 (D.C. Cir. 1998); *Guerrero v. Stone*, 970 F.2d 626, 636 (9th Cir. 1992); *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985); *Benten*, 799 F. Supp. at 291.

XLII. IF INTERIOR DEFENDANTS ARE PERMITTED TO IMPLEMENT THE 2007 PLAN, IT WILL FURTHER DELAY THE RELIEF TO WHICH THE PLAINTIFFS ARE ENTITLED.

Defendants have had over 100 years to fulfill their fiduciary obligations to render an accounting. They have not. In 1899, Congress ordered they do so. They did not. Most recently in 1994, Congress, once again, ordered they do so. Once again, they did not. In 1999, this Court ordered the accounting be commenced. Defendants did nothing.

In 2001, the Court of Appeals affirmed the defendants' accounting obligations. They did not respond. In 2002, this Court, once again, found the defendants were failing to perform their trust obligations. Today, despite the passage of another five years, nothing has changed. Plaintiffs are no closer to receiving the accounting than when defendants were first ordered by Congress to do so in 1899 and by this Court in 1999. There is no reason to remand to the defendants so they may further delay performance of their accounting obligations.

Since the inception of this litigation, Interior defendants have created twelve plans, none of which have been successfully implemented. Findings at ¶¶ 40-76. The latest plan is not a true accounting plan but is acknowledged by Interior defendants to be simply a litigation strategy designed to limit their liability. Findings at ¶¶ 170-172; 236. On this record 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. *Cobell XIII*, 392 F.3d at 478. That the Interior defendants continue to avoid fulfillment of their fiduciary obligations is inescapable and intervention by this Court essential.

In accordance with the case management responsibilities of this Court to ensure the orderly progress of this litigation, *Gulfstream Aerospace Corp. v. Mayacamas, Corp.*, 485 U.S. 271, 279 (1988), this Court should set a date certain for hearing on what other remedies are available, including appropriate equitable relief, to ensure a fair and expeditious resolution of this matter.

Respectfully submitted this 30th day of November, 2007.

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November 30, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Proposed Conclusions of Law was served on the following via facsimile, pursuant to agreement, on this day, November 30, 2007.

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