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The Indian Trust Fund Litigation: An Overview of *Cobell v. Kempthorne*

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Summary

On August 7, 2008, the U.S. District Court for the District of Columbia issued an opinion awarding $455.6 million in restitution to the plaintiffs in *Cobell v. Kempthorne*. The litigation has been before the courts since 1996. The dispute involves the federal government's alleged mismanagement of accounts held in trust for individual Indians. Central to this dispute is the duty of the Department of the Interior (DOI) to provide a historical accounting of the accounts. This duty has proven very difficult to fulfill, however, for a variety of reasons.

In January 2008, the trial court reached the conclusion that DOI was unable to produce the required accounting and scheduled an evidentiary hearing on an appropriate remedy. That remedy, according to the August 7, 2008, ruling, is $455.6 million in restitution. The sum differed greatly from what the plaintiffs had sought — approximately $47 billion. In its ruling, the court rejected the plaintiffs' methodology of computing the amount owed to the trust beneficiaries and their additional claims for "benefit to the government" for funds not credited to the accounts of the beneficiaries. The court left for future determination the question of how the award is to be distributed among the members of the plaintiff class.

The purpose of this report is to provide a brief background of the history leading up to the litigation, a review of the issues that have proven so difficult for the judiciary to resolve, and a brief description of the method used by the trial court to determine the amount of the restitution. The report will be updated as warranted by judicial decisions or legislative intervention.

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Background

On August 7, 2008, the U.S. District Court for the District of Columbia issued an opinion awarding $455.6 million in restitution to the plaintiffs in *Cobell v. Kempthorne*.[1] Individual Indian trust funds are the focal point of this case which has been litigated since 1996.[2] Individual Indian trust funds, as distinguished from tribal trust funds, are monies which the federal government holds for the benefit of individual Indians. The conflict in the case traces to the federal government's trust responsibility with respect to American Indians. The Supreme Court first formulated the concept of the federal government as trustee for Indian tribes in 1831, likening the relationship to that of "a ward to its guardian."[3] In the capacity of trustee, the United States holds title to much of Indian tribal land and land allotted to individual Indians. Receipts from leases, timber sales, or mineral royalties are paid to the federal government for disbursement to the appropriate Indian property owners. Flowing from the federal trusteeship of Indian lands and mineral resources are fiduciary responsibilities on the part of the United States to manage Indian monies and assets which have been derived from these lands and are held in trust.[4]

The case is premised on statutory duties imposed upon the federal agencies handling Indian monies as well as on the existence of property rights in funds and assets held in trust for Indians. The courts have recognized broad powers of Congress with respect to Indian affairs legislation and Indian property, but have also recognized that Indian property may not be taken for a public purpose without just compensation.[5] This case is not a claim for just compensation; it is a claim for an accounting by the trustee for receipts and disbursements representing the trust corpus held for the benefit of individual Indians.

The *Cobell* litigation sprang out of the federal government's trust responsibility with respect to three groups of money accounts held in trust for individual Indian

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[1] *Cobell v. Kempthorne*, ___ F. Supp. 2d ___ (No. 96-1285 (JR)), 2008 WL 3155157 (D.D.C. August 7, 2008) (hereinafter, *Cobell* restitution award opinion).

[2] Both the Department of Justice website [http://www.usdoj.gov/civil/cases/cobell/] and the *Cobell* plaintiffs' website [http://www.indiantrust.com/index.cfm] include documents and opinions filed in the case.

[3] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[4] *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F. 2d 981, 987 (Ct. Cl. 1980)).

[5] See, e.g., *United States v. Sioux Nation*, 448 U.S. 371 (1980).

beneficiaries. These accounts are commonly referred to as the Individual Indian Money (IIM) accounts. They include (1) Land-based Accounts — established to receive revenues derived from the approximately 11 million acres held in trust by the U.S. for individual Indians;[6] (2) Special Deposit Accounts (SDAs) — intended to be temporary accounts to hold funds that could not be immediately credited to the proper IIM account holder; (3) Judgment and Per Capita Accounts — established to receive funds form tribal distributions of litigation settlements and tribal revenues.[7] Congress has delegated to the Secretary of the Interior and the Secretary of the Treasury its responsibilities as trustee with regard to the IIM accounts.[8] The Bureau of Indian Affairs (BIA) has general responsibility for trust land management and income collection.[9]

Most transactions involving IIM accounts require BIA approval.[10] One of BIA's most important duties in this regard is managing IIM funds derived from income-producing activities on allotment land, including grazing leases, timber leases, timber sales, oil and gas production, mineral production, and rights-of-way. The Office of Trust Fund Management (OTFM) is responsible for BIA's fiduciary duty to keep accurate financial records of these activities. OTFM also shares the banking aspect of DOI's trust responsibility with the Treasury Department. OTFM and BIA officers collect payments and deposit them into a local bank where there is a Treasury General Account.[11] The Treasury Department maintains a single "IIM account" for all IIM funds, rather than individual accounts, while OTFM is responsible for maintaining accounting records for the individual funds.[12] Treasury also invests the funds at the direction of the Department of the Interior (DOI).[13]

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[6] These accounts trace their beginnings to the federal government's allotment program of the late 19th and early 20th centuries. Under this program, the Secretary of the Department of the Interior (DOI) was authorized to allot portions of reservation land to individual Indians. Title would remain with the United States in trust for a number of years, after which it would pass to the individual allottees free from all encumbrances. The allotment policy resulted in large amounts of land passing into non-Indian ownership, and Congress abandoned the policy in 1934, extending indefinitely the trust periods of allotments that had not yet passed into fee ownership. Many of these properties remain in trust to this day. See Felix F. Cohen, *Handbook of Federal Indian Law* § 1.04 (2005 ed.).

[7] *Id.* at § 5.03[3][a], n. 138.

[8] 25 U.S.C. § 161a(a).

[9] See, e.g., the federal timber management statutes, at 25 U.S.C. §§ 406-407, 466.

[10] See *Cobell v. Babbitt*, 91 F.Supp.2d 1, 9 (D.D.C. 1999), *afff'd*, 240 F. 3d 1081 (D.C. Cir. 2001).

[11] *Id.*, at 9-10.

[12] *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001). When OTFM issues a check to an IIM trust beneficiary, the amount is deducted from the individual fund, even though the money remains in the Treasury's general account. As a result, the beneficiary loses any interest that would accrue between issuance and cashing of the check, a time lapse that "may be short in the private sector, [but] can be much longer in the IIM trust context because OTFM often has incorrect addresses for the recipients." *Cobell v. Norton*, 91 F. Supp.2d 1, 12 (D.D.C. 1999).

[13] *Cobell v. Norton*, 240 F. 3d 1081, 1088-1089.

The federal government — as holder of these accounts in trust for the Indian beneficiaries — has fiduciary obligations to administer the trust lands and funds arising from them for the benefit of the beneficiaries. The federal government has stipulated, however, that it does not know the exact number of IIM trust accounts that it is supposed to administer; nor does DOI know the correct balances for each IIM account.[14] DOI concedes that it is currently unable to provide an accurate accounting for a majority of IIM trust beneficiaries.[15] The Treasury Department also has problems with trust fund management procedures. First, in conformity with federal law, the Treasury Department allows the destruction of documents over six years and seven months old, and makes no effort to ensure that documents related to accounting for IIM accounts are preserved.[16] In addition, there can be a time lapse between the deposit of funds with the Treasury Department and the investment of those funds.[17] There can also be a time lapse between the issuance of a check and when the payee presents the check, resulting in lost interest.[18]

Congressional oversight committees became concerned with IIM mismanagement in the late 1980s and began holding oversight hearings regarding the IIM accounts in 1988. Four years later, the House Committee on Government Operations produced a report highly critical of the Interior Department.[19] In 1994, Congress enacted the Indian Trust Fund Management Reform Act (the Reform Act),[20] recognizing the federal government's pre-existing trust responsibilities and further identifying some of the Interior Secretary's trust fund responsibilities, such as providing adequate accounting for trust fund balances; providing adequate controls over receipts and disbursements; providing accurate and timely reconciliations; preparing and supplying periodic statements of account performance and balances to account holders; and establishing consistent, written policies and procedures for trust fund management.[21] Significantly, the original House bill (H.R. 1846) would have made the accounting duty prospective only. When another similar bill was introduced to take H.R. 1846's place, that provision was left out. This new bill became the Reform Act, and the courts interpreting it in the *Cobell* litigation have determined that DOI owes a historical accounting duty going back to the act of June 24, 1938.[22] As the D.C. Circuit Court of Appeals stated, "The 1994 Act identified

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[14] *Id.*, at 1089.

[15] *Id.*

[16] See *Id., at* 1092.

[17] *Id.*

[18] *Id.*

[19] *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.Rept. 102-499 (1992). Largely in response to this report, BIA contracted with Arthur Anderson & Co. to audit and reconcile a sampling of 17,000 IIM accounts, which the company was unable to accomplish due to inadequate records.

[20] P.L. 103-412 (25 U.S.C. 4001 et seq.).

[21] 25 U.S.C. § 162a(d).

[22] *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out."[23]

The Litigation

In 1996, a group of IIM account holders filed a class action suit to compel performance of trust obligations, alleging that the Secretaries of the Interior and the Treasury — as delegatees of the federal government's trust responsibilities — had breached the fiduciary duties owed to plaintiffs by mismanaging the IIM accounts.[24] Two years later, the district court judge bifurcated the trial into two phases, with Phase 1 to focus on reforming the management and accounting of the IIM trust funds, and Phase 2 to address the historical accounting of those accounts.[25] In 1999, United States District Judge Royce C. Lamberth issued a ruling as to Phase 1, holding that the Treasury and Interior Secretaries had breached their fiduciary duties to the IIM account holders.[26] The transition to Phase 2 has proven increasingly difficult, however because the defendants have been unable to submit — in forms acceptable to the court — plans for reforming the account-management system and for providing a historical accounting.[27]

Providing the far-reaching accounting required in the *Cobell* litigation is a difficult task on a number of levels. The plaintiffs argue that an accurate accounting is impossible, due to lack of records. Two issues, however, have proven particularly difficult for DOI in performing this task. The first of these issues is the fractionation of interests in many of the allotment lands. These interests have been fractionated over the years as they have been divided among the heirs of the original allottees, increasing exponentially with each generation and leading to incredibly small interests that are difficult to track. DOI estimates that there are currently over 1.4 million fractional interests of 2% or less involving 58,000 tracts of land.[28] No matter

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[23] *Id.*, at 1100.

[24] For a discussion of the history of the case, *see Id.*, at 1092-1093 (D.C. Cir. 2001).

[25] *Id.*

[26] *Cobell v. Babbitt*, 91 F.Supp.2d 1 (D.D.C. 1999), *aff'd*, 240 F.3d 1081 (D.C. Cir. 2001).

[27] *Cobell v. Norton*, 226 F.Supp.2d 1, 162 (D.D.C. 2002). Finding a workable method to provide the historical accounting has proven extremely difficult. Adding to that difficulty is the fact that the litigation has become increasingly acrimonious. See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives*, 108th Cong. 1st Sess. 50 (2003) (statement of John Berry, Chairman, Quapaw Tribe). During the course of the litigation, Judge Lamberth issued contempt orders against, among others, former Treasury Secretary Robert Rubin, former DOI Secretary Bruce Babbitt, and former DOI Secretary Gale Norton (the D.C. Circuit later overturned the contempt order against Secretary Norton).

[28] See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives* 9 (statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior). For a description of the various accountings that DOI has attempted, (continued...)

how small the revenue generated by the interest (DOI cites some interests as being so small that they generate less than one cent per year), DOI is required to account for them.[29] While DOI has stated that it can perform a transaction-by-transaction accounting of the judgment and per capita accounts and the SDAs, the problems presented by the land-based accounts have proven very difficult to resolve. DOI has argued that it should be able to use statistical sampling with respect to some of these accounts.

The second difficult question is how far back a historical accounting should reach. At various points in the litigation, the different parties have argued for an accounting of transactions as far back as 1887 (date of the Allotment Act), 1938 (date of the Indian Reorganization Act), and 1994 (date of the Reform Act). Resolving this problem would likely encompass a choice between what is fair and what is possible. One could have very different answers to these two questions, mainly because, as the litigation so far has shown, DOI and Treasury records relating to the IIM accounts are at best incomplete.

In January 2003, DOI provided a new historical accounting plan to Judge Lamberth that would cover all accounts open as of October 25, 1994, when the Reform Act was enacted. After reviewing DOI's plan, Judge Lamberth in September 2003 issued a controversial structural injunction giving the court broad oversight authority to ensure that (1) DOI carries out the accounting (the court adopted what is essentially a modified version of DOI's historical accounting plan, but did not allow DOI to use statistical sampling with respect to the land-based accounts); and (2) DOI reforms its system for managing the IIM accounts. Judge Lamberth also appointed a monitor to ensure compliance with the injunction order.[30]

One month later Congress passed an appropriations rider stating that "nothing in [the Reform Act] or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the [IIM] Trust" until 2005 or when Congress more clearly delineates DOI's accounting obligations under the Reform Act.[31] Congress took this action in direct response to Judge Lamberth's structural injunction order, stating that compliance could cost upwards of $6 billion and that diverting that amount of resources could be "devastating to Indian country."[32] Two subsequent appropriation bills have limited the funds available to DOI for the historical accounting to $58 million for FY2005 and FY2006.[33]

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[28] (...continued)
including the historical accounting for the named plaintiffs in *Cobell*, see *Id*., at 12-13.

[29] DOI is also required to provide trust services to the owners of such interests, including title records, lease management, and probate. *See Id.*

[30] *Cobell v. Norton*, 283 F.Supp.2d 66, 225 (D.D.C. 2003).

[31] P.L. 108-108 (117 Stat. 1263).

[32] See H.Rept. 108-330, at 117 (October 28, 2003).

[33] P.L 108-447 (118 Stat. 2809) and P.L. 109-54 (119 Stat. 499).

On December 10, 2004, the D.C. Circuit issued an opinion striking down almost all of Judge Lamberth's injunction.[34] The court first held that, pursuant to Congress's directive contained in the aforementioned appropriations rider, DOI could not be compelled to perform any historical accounting. The court noted, however, that the directive would sunset on December 31, 2004, and the judges pointed out that they could not "address the issues that would be relevant if the district court [after December 31, 2004] reissued those provisions [compelling a historical accounting]."[35] The court next largely overturned Judge Lamberth's injunction as to DOI's systemic reform. Looking to Supreme Court precedent, the D.C. Circuit held that judicial review under the Administrative Procedure Act (APA) is limited to *specific* agency actions, and that such review cannot be extended to "claims of broad programmatic failure."[36] The court held that Judge Lamberth, in issuing his injunction, had impermissibly wandered into this latter area, which is more properly reserved for executive or legislative action. While the D.C. Circuit upheld Judge Lamberth's requirement that DOI submit a plan laying out how it will come into compliance with its fiduciary obligations, the court found that the other elements of Lamberth's order (e.g., the appointment of a monitor, the listing of and compliance with tribal laws) were not tied to specific findings of wrongdoing and suggested greater, and unlawful, judicial intrusion into agency discretion.

On February 23, 2005, Judge Lamberth — noting that the deadline contained in the appropriations rider had passed — issued another structural injunction with respect to the historical accounting.[37] Once again, he adopted a modified version of DOI's historical accounting plan, but prohibited the use of statistical sampling and required an accounting going back to the Allotment Act of 1887. He refused to stay the order pending appeal, citing the plaintiffs' nine-year wait and "a delay directed by Congress in a bizarre and futile attempt at legislating a settlement in this case."[38] On November 15, 2005,[39] the D.C. Circuit vacated Judge Lamberth's injunction and historical accounting order and directed that, on remand, the district court, in evaluating DOI's plan for a statistical sampling to accomplish the accounting, should not ignore the general language of the Reform Act and subsequent congressional limitations on funding, suggesting that the Reform Act should not be seen as mandating "the best available accounting without regard to cost."[40]

On July 11, 2006, the court of appeals found the district court to have abused its discretion in ordering DOI to disconnect from the Internet many of its computer

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[34] *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004).

[35] *Id.*, at 468.

[36] *Id.*, at 472.

[37] *Cobell v. Norton*, 337 F.Supp.2d 298 (D.D.C. 2005).

[38] *Id.*

[39] *Cobell v. Norton*, 428 F. 3d 1070 (D.C. Cir. 2005).

[40] *Id.*, at 1075.

systems,[41] ordered the district court to vacate an order requiring DOI to include in any communication to class members a warning that information provided about trust matters might be unreliable, and removed Judge Lamberth from the case for bias[42] in accusing DOI of present-day racism. While the appellate court recognized that Judge Lamberth's opinion did not reflect an animosity toward DOI, independent of the developments in the case, it concluded that the language of the opinion combined with the court's actions might give rise to a public impression that justice could not be done in the case.

On January 30, 2008,[43] Judge James Robertson, assigned to the case in December 2006, found DOI unable to remedy its breach of fiduciary duty and ordered a hearing to develop a process for determining an appropriate remedy. He rejected DOI's historical accounting plan not because of its use of statistical sampling methodology, but on the basis of finding its scope legally inadequate in terms of years and accounts or funds to be covered.

The Latest Decision

The August 7, 2008,[44] decision addresses both substantive issues — how to treat plaintiffs' claim for restitution for funds not credited or disbursed to individual Indian beneficiaries and how to deal with their claim for "benefits to the government" with respect to such funds. It also addresses jurisdictional issues — whether sovereign immunity bars the court's consideration of a remedy and whether a monetary remedy is available under any federal statute. Critically, because an award of restitution relies on the equitable power of the court, the opinion grapples with the question of how to apply equitable principles to this unique case.

The Restitution Issue

Having recognized on January 30, 2008,[45] that what had been the central effort in the case over the years, the development of an accounting, had failed, Judge Robertson held an evidentiary proceeding on the issue of remedy. On August 7,

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[41] *Cobell v. Kempthorne*, 455 F. 3d 301 (D.C. Cir. 2006).

[42] *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). Bias was seen in Judge Lamberth's language in *Cobell v. Norton*, 229 F.R.D. 5 (D.D.C. 2005), such as the following quoted by the appellate court: "'Alas, our 'modern' Interior department [sic.] has time and again demonstrated that it is a dinosaur — the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago as the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.'"

[43] *Cobell v. Kempthorne*, 532 F. Supp.2d 37 (D.D.C. 2008).

[44] *Cobell* restitution award decision.

[45] *Cobell v. Kempthorne*, 532 F. Supp. 2d 37.

2008, he awarded an equitable remedy of $455.6 million in restitution.[46] The figure represents the amount to be restored to plaintiffs as receipts not credited to their accounts. Claims for damages for funds which never were collected or for mismanagement of assets are not included in the figure and were not before the court in *Cobell*.[47] To determine the amount of restitution, the court had to examine the models the parties had set forth for determining the difference between what Treasury had posted as receipts to the IIM account and what had been disbursed to individual accounts or account holders. Information accumulated from the years of attempts at arriving at a satisfactory and reliable means of reconstructing the records at DOI and Treasury aided the court in evaluating the models offered by the parties.

Before calculating the amount of restitution, however, Judge Robertson reviewed some principles drawn from previous decisions in the case. He noted that although the court has broad equitable power to remedy trust nonfeasance, the fact that the defendant is the federal government limits the court's authority to fashion a remedy.[48] He gave at least two reasons for this limitation: (1) the court has to examine its jurisdiction in the case carefully because the federal government's sovereign immunity renders it immune to suits to which it has not consented (i.e., there must be a statute according jurisdiction for the particular issues being litigated), and (2) although common law trust principles are applicable, their application must be viewed and tempered in light of the unique character of the Indian trusts and their trustee. According to the opinion, trust law would require that where the trustee has not kept an account, the trust beneficiary should enjoy the benefit of evidentiary presumptions. Those presumptions must be adjusted when applied "to a 121-year old perpetual trust, managed by civil servants, with rapidly multiplying beneficiaries and a variety of ever-changing assets."[49]

The decision not to accord plaintiffs the full benefit of evidentiary presumptions in their favor led to a major conclusion reached by the court — to apply a modified burden of proof on the government's statistical model for calculating data that it could not produce. DOI had shown that only 77 percent of the monies collected for the IIM system had been posted to IIM accounts. Accepting the government's calculation of receipts but using their own formula for calculating a disbursement rate for each year, the plaintiffs claimed a shortfall of $3.6 billion over 122 years. To this they proposed adding approximately $43.4 billion as "benefit to the government" based on a formula which they had devised that assumed that whatever was not disbursed to the account holders was available for general governmental expenses, relieving the government of a need to issue and pay interest on Treasury bonds.

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[46] *Cobell v. Kempthorne*, ___ F. Supp. 2d ___ (No. 96-1285 (JR)), 2008 WL 3155157 (D.D.C. August 7, 2008) (hereinafter, *Cobell* restitution award decision).

[47] *Id.*, n. 1, at 5. It is possible such claims may be within the jurisdiction of the Court of Federal Claims.

[48] For a brief summary of how the court applied equitable principles, see *infra*, at 12-13.

[49] *Cobell* restitution award decision, slip op., at 4.

The government produced evidence explaining some of the shortfall between receipts and disbursements. A DOI expert, Michele Herman, testified that the discrepancy reflected the fact that not all the funds received into Treasury's IIM account are intended to be credited to individual Indian trust fund accounts. Some, such as tribal trust fund receipts or bid or lease deposits, are to be funneled on a pass-through basis to other recipients.[50] DOI did not have sufficient records to substantiate the full amount of the discrepancy as pass-through funds but presented, through another expert witness, a statistical model as a means of quantifying the actual discrepancy. Had the trust law evidentiary presumption been employed in plaintiff's favor, it is likely that DOI's evidentiary burden would have been greater.[51]

The plaintiffs estimated that $4 billion of the $14 billion posted to the *IIM* account had never been never been credited to the accounts of or disbursed to individual trust beneficiaries. The court rejected this amount both because of what it perceived to be defects in the plaintiffs' method of calculating the shortfall[52] and because no audit conducted during the course of the litigation "states or hints at the disappearance of anything close to 30 percent of trust receipts."[53] The court also noted that "[w]hatever problems have existed in the history of this trust, and however serious the misfeasances and malfeasances of the trustees over 120 years, there has never been evidence of such prodigious pilfering of assets from within the trust system itself."[54]

Having admitted that 23% of IIM receipts had not been posted to IIM accounts and faced with the plaintiffs' charge that approximately $4 billion had not been disbursed to account holders, the government was required to explain the shortfall and put a figure on it. The explanation was essentially that the individual Indian trust beneficiaries were not entitled to all of the funds that Treasury deposited in the IIM account. Some were held there on a pass-through basis. Because of the inadequacies of the recordkeeping and the inability to provide an accounting, the government was unable to provide comprehensive data establishing the quantity of funds that should have been credited to the plaintiffs' accounts. Instead, it provided a complex

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[50] DOI's expert also testified to various means by which bookeeping entries might not be captured as disbursements to individual accounts. The court found the testimony to be persuasive in "explaining the nature of the discrepancy between receipts and postings." *Id.*, slip op., at 28. The testimony, however, did not quantify percentages of "receipts ... for stakeholders, for tribal trusts, and for third parties," but acknowledged that to do so would be "not impossible, but ...time consuming ... and has not been done." *Id.*. slip op., at 28-29.

[51] The plaintiffs criticized the expert's testimony as inadequately demonstrated. The court, however, saw the method as a suitable means of dealing the immensity of the task, noting that the accounts involved 115 million transactions since 1986. *Id.*, n. 8, slip op., at 19.

[52] The basic deficiencies cited by the court are: (1) including as collections sums not destined for the IIM accounts and (2) choosing to accept as accurate historical receipts data while rejecting historical disbursement data. The court characterized the later as "self-serving." *Id.*, slip op. at 17.

[53] *Id.*, slip op., at 16.

[54] *Id.*

statistical model developed by the government's expert witness, Dr. Frederick Scheuren of the National Opinion Research Center at the University of Chicago.

The government's model employed a "multiple imputation" technique to account for the multiplicity of variables imputed to the large range of missing data with respect to the accounts. It involved several complex steps, which are described in the court's opinion.[55] It was able to produce various figures to represent what should be the present balance in the individual Indian trust fund accounts and specify a "confidence rate"[56] with a margin for error identified for each figure given. The court described the result of the statistical analysis as follows:

> The resulting histogram ... shows that the calculated mean would be $583.6 million, which is $159.9 million more than the current stated balance of the trust.... Because there is so much uncertainty in the data, however, the histogram displays a wide variance.... The 95 percent confidence interval is wide enough that it encompasses a zero difference between the calculated and stated balance of the trust, meaning that the current, stated balance could very well be exactly correct.... that variance cuts both ways: [a]t the 95 percent confidence interval, the histogram encompasses $365.7 million ... The 99 percent confidence interval would accommodate a finding of a shortfall of up to $455.6 million.[57]

Judge Robertson found the model offered by the government to be "plausible," "based on the sound and principled use of available data," "methodologically fair and carefully employed," even if it "may not have adequately accounted for just how unreliable the underlying data was."[58] He noted that the government's statistical model conformed with what had been discovered about the trust funds: (1) it admitted that the stated balance was less than what it should be; (2) it found a variance around the mean which coincides "with the one thing that 12 years of this litigation has truly settled, which is that there is still much that is unknown about the trust"[59]; (3) its confidence interval included the current stated value of the trust[60]; and (4) its $455.6 million figure "is best understood as an *admission* that the range of uncertainty about the aggregate IIM trust [data] includes the possibility that the return of $455.6 million is necessary to correct the trust's balance."[61]Although the plaintiffs argued against the use of the model and identified "minor omissions" in it, the court

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[55] *Cobell* restitution award decision, slip op., at 28-33

[56] A "confidence rate" is indicative of the margin for error of each of the figures; a 95 percent confidence rate, for example, includes a five percent margin for error.

[57] *Id.*, slip op., at 34 (citations omitted).

[58] *Id.*, slip op., at 35-37

[59] *Id.*, slip op., at 35.

[60] The value of this, according to Judge Robertson, is that it "reflects the reality that, in the absence of some kind of equitable evidentiary presumption in favor of the plaintiffs, one permissible conclusion from the record would be that the government has not withheld any funds from the plaintiffs' accounts." *Id.*, at 35.

[61] *Id.*, slip op., at 35 (emphasis in original).

found that they "were unable to prove any *bias* that would render it fundamentally unsound."[62]

Not only did Judge Robertson find the model offered by the plaintiffs to be defective, he also criticized their failure to offer specific evidence to discredit the defendant's model. According to his opinion, the plaintiffs' model could not be considered, among other reasons, because it was inconsistent in accepting the government's estimate of receipts, but not of disbursements and reflective of "a super-strong interpretation of the presumption against the breaching trustee that cannot be equitably applied to the trusts at issue here."[63]

Accordingly, Judge Robertson accepted the government's model and provided a certain evidentiary advantage to the plaintiffs by selecting the "maximally conservative"[64] estimate derived from the government's statistical model rather than the 95 percent level, which would be acceptable in a business context, or the 97.5 percent level that the government's expert witness had suggested. He summed up his reasons for this as follows:

> Although it creates a highly conservative estimate — the most conservative possible — it is far less draconian than the presumption that ordinary trust law might apply in the ordinary trust case....After 12 years of contentious litigation, the government can say only that, with 99 percent confidence, it believes that no more than $455,600,000 is missing from the stated balance of the IIM trust. This statement has the character of an admission — by responsible civil servants — that there are limits to what can be confidently stated with respect to the IIM system, and that a history of accounting nonfeasance makes a substantial error plausible. It also represents the product of zealous and determined advocacy on the part of the plaintiffs' counsel, who have fought to vindicate their clients' belief that the government's inattention to its trust duties has had not only historical significance, but real economic significance in the day-to-day lives of individual Indians.[65]

The "Benefit to the Government" Issue

The court completely rejected the plaintiffs' request for compensation for "benefit to the government," which the plaintiffs added to their computation of a $3.5 billion difference between what had been received and disbursed. They had arrived at that figure by using the government's original figures for receipts and applying a formula to devise a disbursement rate for each year. They also used a model to compute what they alleged was the "benefit to the government." This consisted of deducting the disbursements they calculated for each year from the government's

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[62] *Id.*, slip op., at 38-39 (emphasis in original).

[63] *Id.*, slip op., at 68.

[64] *Id.*, slip op., at 69-70. According to Judge Robertson, the 99 percent confidence level addresses the fact that there is more uncertainty in the data than the government's expert witness acknowledged, and such a figure "is a legally sound way of crediting obscurities and doubts to the plaintiffs." *Id.*, at 70.

[65] *Id.*, slip op., at 70-71.

calculation of receipts and adding interest at the 10-year bond rate compounded annually. The result was that they estimated that $43.3 billion of "benefit to the government" should be added to the $3.5 billion for a total of $46.8 billion.[66] The court found the plaintiffs' model inaccurate and not substantiated by any evidence that the government had used any of these funds for general expenses.[67] On the other hand, the court found sufficient rebuttal evidence from a government witness for the conclusion that no "benefit to the government" restitution was in order. [68]

Jurisdiction

The court addressed two jurisdictional issues: sovereign immunity — whether there was a statute that authorized the court to hear the suit against the United States — and subject matter jurisdiction — whether there was authority for the court to grant a monetary award. It resolved these issues principally on the basis of the Administrative Procedure Act (APA).[69] Under the doctrine of sovereign immunity, a suit may not be brought against the United States unless a statute authorizes it. The court found no statute which authorizes a federal district court to assess damages against the United States in an action not based on torts and in an amount over $10,000. It, therefore, rejected any claim that the plaintiffs may have as compensation for the government's failure to produce an accounting.[70]

However, the court did find that the APA could be invoked to restore to the plaintiffs sums not credited to or disbursed from their accounts. The APA authorizes an "action in a court of the United States seeking relief other than money damages."[71] The court reviewed Supreme Court jurisprudence on the question of whether restitution of the sort contemplated comes within the meaning of "money damages." It concluded that although the Supreme Court has come close to holding that any award of money constitutes "money damages,"[72] it has recognized that a monetary award is not always to be considered "money damages."[73] This is true particularly when "the non-payment of money ... [is] the very unlawful act of which the agency is accused," rather than "compensation for another harm."[74] The court noted that the

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[66] *Id.*, slip op., at 40-42.

[67] *Id.*, slip op., at 51 -53.

[68] One government witness in rebuttal testified to the fact that Treasury borrowing decisions do not involve consideration of funds outside of the Treasury General Account. *Id.*, at 41.

[69] 5 U.S.C. § 702.

[70] The court noted that non-tort claims for damages in excess of $10,000 are within the exclusive jurisdiction of the Court of Federal Claims. *See*, 28 U.S.C. § § 1346(a)(2) and 28 U.S.C. § 1491(a)(1).

[71] 5 U.S.C. § 702.

[72] *See e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002),

[73] *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

[74] *Cobell* restitution award decision, slip op., at 44-45, citing *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (which read *Bowen* as holding " that Congress employed this

(continued...)

facts of the case fit within this exception: the unlawful act at issue is a violation of a principle of trust law requiring a trustee "to collect trust revenues and allocate them to the beneficiary and not to himself." For that reason, the court ruled that it had jurisdiction to order disgorgement of trust funds not properly allocated and paid to the beneficiaries.[75] It also found that a monetary award as compensation for the government's breach of trust in failing to provide an accounting would be "money damages" and, thus, excluded from its jurisdiction under the APA. The court also concluded that because no "benefit to the government" had been identified, any award for lost interest on funds not credited to plaintiffs would be "compensation" and, thus, excluded from its jurisdiction under the APA as "money damages."[76]

Application of Equitable Principles

Because the court was applying principles based on equity and because of the uniqueness of the case, the court sought a means of drawing upon equitable principles without doing an injustice to either party. The result was that it weighed the government's evidence less strictly than it would have had the case been a run-of-the mill breach of trust case in state court. The court proceeded from the premise that, if the plaintiffs were to benefit from evidentiary presumptions flowing from a breach of trust, "the government — really, the taxpayers — [would be] ... held liable for every transaction not proven by a method that is not legally required and would be irrational to pursue."[77]

Noting that there was no hard and fast federal trust law to guide the decision other than various precedents indicating that the federal courts could turn to state trust law and general trust law treatises for guidance, Judge Robertson reviewed the history of courts of equity. He determined that a cardinal characteristic of a court sitting in equity is flexibility to fashion a just remedy. He declared that he sought to "seek fairness to both parties."[78] He determined that three elements in this case called for modification of the evidentiary presumption that would have favored the plaintiffs' calculation of how much had not been credited to the beneficiaries: (1) earlier the plaintiffs had "disclaimed" and the Court of Appeals had rejected "a 'gold-

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[74] (...continued)
language to distinguish between specific relief and compensatory, or substitute, relief").

[75] *Cobell*, restitution award decision, slip op., at 45, citing *Restatement (Third) of Trusts* § 84.

[76] *Id.*, slip op., at 57. The court also found that 25 U.S.C. § 4012 is inapplicable. By its terms, it requires "payments to an individual Indian in full satisfaction of any claim of such individual for interest on amounts deposited or invested on behalf of such individual before October 25, 1994, retroactive to the date that the Secretary began investing individual Indian monies." 25 U.S.C. § 4-12. It was found inapplicable because: (1) it does not cover funds not invested and (2) it does not waive the court's $10,000 jurisdictional limit under § 28 U.S.C. § 1491(a)(1).

[77] *Cobell*, restitution award decision, slip op., at 64. Judge Robertson declared that in the January 2007 opinion, the court had not held that an accounting was impossible but that "a meaningful accounting was irrationally expensive." *Id.*, slip op., at 64 (citation omitted).

[78] *Id.*, slip op., at 65.

plated' form of accounting" as " unduly burdensome"[79]; (2) such a presumption would not be fair in light of volume of transactions, duration, geographic scope, and unique nature of the trust at issue; and (3) using the presumption would produce a result that would be "manifestly inaccurate" because the plaintiffs are assuming that all of the funds deposited into the Treasury account were funds for individual Indian account holders.[80]

Weighing those factors, the court determined that the evidence that the government had produced was sufficient to meet the requirements of equity in that its "statistical model allows for the use of the best available data while preserving measures of uncertainty that can be scored to the plaintiffs' benefit in the final analysis."[81]

Future Options

The determination of the amount of restitution to be awarded does not end the case. Not only must the court consider options for distributing the award, there is also the possibility of an appeal of the decision. The half-billion dollar award contrasts with the $7 billion that the Bush Administration was willing to commit to in 2005 for a legislative resolution of *tribal and individual Indian* trust fund issues.[82] It is also almost $27 billion less than what had been recommended by a plaintiffs' group.[83] The plaintiffs may be weighing various options: an appeal of the awards; an action in the Court of Federal Claims for compensation for the failure to provide an accounting and for mismanagement of the funds; or legislation to compensate them and resolve all issues. It might be noted that if plaintiffs choose to bring an appeal of the amount of the award, the government may counter by challenging the rulings resulting in the court's finding authority to order a monetary award without explicit authority in the 1994 Reform Act.

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[79] *Id.*, slip op., at 63-64, citing Tr. of Appellate Oral Argument 40:1-45:25 (September 16, 2005), [Dkt. 3519, Exhibit 1]. The court also noted that in the present case there has been a finding that an accounting would be "irrationally expensive." *Id.*, at 64.

[80] *Id.*, slip op., at 65. To credit plaintiffs with all funds deposited to the Treasury IIM account would produce a windfall, according to the court, and would be contrary to equity. *Id.*, citing *Bollinger & Boyd Barge Serv., Inc. v. The Motor Vessel, Captain Claude Bass*, 576 F. 2d 595, 598 (5th Cir. 1974).

[81] *Cobell* restitution award decision, slip op., at 66. As authority for this conclusion, the court referred to the earlier appellate court ruling which had accepted statistical modeling as a means of analyzing the data; case law on use of the best data; and the trust law principle of resolving doubts in favor of the beneficiary when there has been a breach in the duty to provide an accounting. *Id.*, at 66.

[82] *See* CRS Report RS22343 *Indian Trust Fund Litigation: Legislation to Resolve Accounting Claims in Cobell v. Norton*, at 6.

[83] *Id.*, at 4. This was in the proposal of the Trust Reform and Cobell Settlement Workgroup, organized by National Congress of American Indians President Tex Hall and Inter-Tribal Monitoring Association Monitoring Association Chairman Jim Gray, in its "Principles for Legislation" (June 20, 2005). It is available on the *Cobell* plaintiff's website. [http://www.indiantrust.com/index.cfm?FuseAction=PressReleases.ViewDetail&PressRelease_id=126&Month=6&Year=2005]