

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEZ PERCE TRIBE, et al.,	:	Civil Action Nos.
	:	
Plaintiffs	:	06-2239, 02-276, 04-900,
	:	04-901, 04-1126, 05-2491,
	:	05-2492, 05-2493, 05-2495,
	:	05-2496, 06-1897, 06-1898,
	:	06-1899, 06-1902, 06-2161,
v.	:	06-2162, 06-2163, 06-2206,
	:	06-2212, 06-2236, 06-2240,
	:	06-2241, 06-2245
	:	
	:	
DIRK KEMPTHORNE, et al,	:	Thursday, July 24, 2008
	:	
Defendants	:	10:00 a.m.
.	:

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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by computer-aided transcription.

1 MS. RUDOLPH: Good morning, Your Honor. Maureen
2 Rudolph on behalf of the defendants. I'll be arguing the motion
3 for class certification on behalf of the defendants.

4 THE COURT: All right.

5 MR. AUSTIN: Good morning, Judge. My name is
6 Bill Austin, I'll be arguing the preservation motion later this
7 morning.

8 THE COURT: All right.

9 MR. REGAN: Good morning, Your Honor. Kevin Regan for
10 the defendants, and I'm going to be arguing the government's
11 opposition to the record retention order.

12 THE COURT: Enough. That's seven lawyers. All right.
13 That's a morning's worth.

14 The first motion to be heard is the government's motion
15 to dismiss filed in eight of these cases. And I gather I'll
16 hear from Mr. Martin on that motion and from Messrs. Harper and
17 Gordon on the plaintiffs' side.

18 Mr. Martin?

19 MR. MARTIN: Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. MARTIN: I would like to reserve 10 minutes of the
22 half-hour the court has allotted for rebuttal, if I might.

23 THE COURT: All right.

24 MR. MARTIN: The Court's first question to us in these
25 cases was how the cases differ from *Cobell*. And I think --

1 THE COURT: I'm still asking that question.

2 MR. MARTIN: And I think that's very pertinent to the
3 issues that have been raised in the government's motion here.
4 It goes to both the jurisdiction of the court as well as the
5 merits questions that are starting to be presented here in the
6 government's motions, particularly with regard to the accounting
7 duty.

8 In significant respects, and in predominant respects, I
9 would submit, the tribal cases are very different than *Cobell*.
10 All but one of the cases include tribal claims in the Court of
11 Federal Claims under the Tucker Act. The Pechanga Band of
12 Luiseno Indians is the only one that did not file a parallel
13 suit for damages in the Court of Federal Claims.

14 And at least two of the tribes' claims have
15 subsequently been dismissed by the Court of Federal Claims based
16 on 28 U.S.C. 1500, and we've cited the court to several of those
17 decisions.

18 But it's based on primarily the finding that the tribes
19 have made overlapping claims, identical in many respects, and
20 overlapping requests for relief, particularly money damages
21 claims, in both courts. And those are express findings from the
22 Court of Federal Claims.

23 And we think that that is persuasive here, because --

24 THE COURT: Which two have been dismissed in the Court
25 of Federal Claims?

1 MR. MARTIN: The Tohono O'Odham Nation claims as well
2 as the Passamaquoddy tribe claims.

3 THE COURT: All right.

4 MR. MARTIN: The Court of Federal Claims in two of the
5 other cases has denied the government's motion to dismiss based
6 on the reasoning in those two cases, and we can supply those
7 particular cites to the court if it's requested.

8 THE COURT: Which ones have been denied?

9 MR. MARTIN: The Ak-Chin tribe case, and we've cited
10 the court to that in our case as well, as well as the Salt River
11 Pima-Maricopa tribe, which the motion was denied in a decision
12 by Judge Baskir of that court.

13 THE COURT: All right.

14 MR. MARTIN: Another point that distinguishes the
15 tribal claims here is it's undisputed as a fact that the
16 Interior Department produced reconciliation reports and provided
17 those to tribes in 1996, and included a significant amount of
18 process around those reports a little over 10 years ago.

19 And so the very fact of those reports and those -- and
20 that action, which I'll discuss at greater length later, is a
21 key distinguishing feature. Because, as the court may well have
22 delved into, that was a significant point of departure for the
23 Interior Department in the treatment of tribal accounts versus
24 the individual Indian accounts, which were not covered by the
25 reconciliation project and were not addressed by the specific

1 language of Section 304.

2 THE COURT: There's a deliberate statutory plan for the
3 Indian tribes to come in and contest them or not contest them.
4 What happened in that regard?

5 MR. MARTIN: The 1994 Act prescribed a deadline for
6 reporting to Congress, and it gave the Interior Department
7 approximately a year from enactment of the '94 Act to report
8 back to Congress. So within that year, the Interior Department
9 provided the reports to tribes, it held multi-tribal regional
10 conferences to explain their reports, it had one-on-one
11 briefings with tribes to answer their questions.

12 Ultimately tribes were requested to return attestation
13 forms, as required by Section 304. And as the government
14 recited in our remand motion, for these particular tribes the
15 results were mixed. The majority of the tribes of the entire 30
16 sum pending before this court did not actually return the
17 attestation statements. And that was duly reported to Congress,
18 and Congress also received the reports from the Interior
19 Department stating the reconciled account balances as derived by
20 Interior based on the body of work it had performed.

21 Subsequent to the reporting to Congress, Congress held
22 several hearings at which the special trustee at that point in
23 time testified, at which the Commissioner of Indian Affairs, the
24 Assistant Secretary of Indian Affairs testified. Ultimately the
25 Interior Department proposed legislation which involved

1 crediting accounts for certain of the results of the TRP
2 reports, and a process to address other claims which might not
3 be fully fleshed out by the reconciliation reports, and that is
4 to resolve the particular disputes which tribes were requested
5 to identify after reviewing the TRP reports.

6 Ultimately, I think it's fair to say the process has
7 not fully resolved all the claims, obviously. That's an obvious
8 statement. Because I think it's apparent now that the issues
9 are very complex. The TRP reports and the tribes don't address
10 all the issues that should or could have been addressed, and
11 even that which is addressed in the TRP is very complicated in
12 terms of the actual raw accounting material. You're talking
13 about thousands of transactions, billions of dollars worth of
14 transactions and throughput in the accounts, different pro forma
15 accounting analyses of the characteristics of the transactions.

16 But Interior's proposed legislation for a certain
17 amount of money and a certain process was heard before Congress,
18 but Congress took no action and did not enact it. I believe
19 there was a second proposal put forth by other members of
20 Congress that also did not go anywhere.

21 So it's fair to say that Congress has received the
22 results and Congress hasn't acted. And I think that that's very
23 important here for the court in understanding its role in
24 interjecting itself into the particular controversy that
25 Congress asked to be brought back to it.

1 I think ultimately our point is that it would be
2 illogical for this court to conclude that Congress intended and
3 warranted judicial oversight and judicial -- an injunction to
4 provide the accounting, to review the accounting, as the
5 plaintiffs request a common law chancellor to sit, and to award
6 the types of monies that the plaintiffs have claimed, which
7 although they're not expressly quantified in papers that I've
8 seen before the court, I would venture a guess dwarf the claim
9 in *Cobell*.

10 And so I think the sheer number of the claims and the
11 sheer amount of the claims cuts against the inference that
12 plaintiffs would have this court draw, that Congress intended
13 this court to take control over the controversy and resolve it.
14 Rather, it was placed with Congress.

15 And furthermore, Congress has enacted the Court of
16 Federal Claims, the Tucker Acts, specific legislation that
17 actually governs the process and the rules by which the United
18 States pays money to any number of claimants, including a
19 particularly rich history and well developed case law of the
20 circumstances in which it's appropriate to provide compensation
21 to Indian tribes for breach of trust claims. Which is exactly
22 the sort of claims plaintiffs have made here, and they've relied
23 on exactly the same precedent that they would in the Court of
24 Federal Claims, the *Mitchell II* case and its progeny.

25 So in sum, that is the process and that's the status of

1 the process. And there have been other attempts, and ultimately
2 I think it's fair to say that Congress might well be happy with
3 the results as they're proceeding. Because as the *Cobell* Court
4 of Appeals has noticed -- well, let me --

5 THE COURT: Congress might well be happy. Well...

6 MR. MARTIN: Let me state that proposition more
7 precisely, if I might.

8 The Court of Appeals in *Cobell* has noted that the
9 common law doesn't map directly onto the context here. You have
10 a unique trust. And ordinarily the costs of accounting and the
11 costs of trust administration are borne by the beneficiary, and
12 so, as we've described to this court and as various of the
13 plaintiff tribes have described to the court, the settlement
14 processes that are ongoing include that very bargaining over
15 what to include in order to resolve the particular disputes.

16 And so it is that particular dispute resolution
17 process, that particular tribe specific government-to-government
18 bargaining that is fair to say. And it's also the Tucker Act
19 claims. The Tucker Act claims also force each side to get very
20 specific about their self-interest and what information is
21 important.

22 I think that presents a stark contrast to the
23 accounting claims that plaintiffs have advanced here, where they
24 seek this court to review every single activity the federal
25 government trustee has ever engaged in, and review it not for a

1 limited purpose, but for the purpose of an ordinary common law
2 accounting review, which is to establish the trustee's liability
3 once and for all as to all matters reported.

4 And it is that common law accounting which includes the
5 compensatory relief claims, includes and embraces all possible
6 claims that are beyond this court's jurisdiction. So that's the
7 contrast I would draw.

8 THE COURT: The problem I'm having with your argument,
9 Mr. Martin, is that as you explain, and you are explaining
10 beautifully, the complexity of this process and what has
11 happened over the years since the 1994 Act, and the back and
12 forth between the parties on what kind of an accounting they
13 want, you are at least in my mind obscuring the motion to
14 dismiss argument, which I understand to be this is only an APA
15 case -- the plaintiffs insist that it's not an APA case, but it
16 is only APA case because there has been a final agency action
17 and the final agency action is the accounting.

18 Now, the plaintiffs say, wait a minute, you can't have
19 that both ways. You said in the last round of briefing you want
20 to make a plan for an accounting.

21 So I know the question will sound simplistic to your
22 ears, but remember whose ears you're talking to. Has there been
23 an accounting or not?

24 MR. MARTIN: Your Honor, I think whether there's been
25 an accounting is a legal conclusion. As the government's answer

1 points out and as our attempt to describe the remand plan point
2 out, the government has engaged in numerous actions, as it were.
3 It has produced the TRP. That was produced pursuant to a
4 particular statute that's called for its compulsion.

5 And if plaintiffs' claim is whether the TRP satisfies
6 the duties that called for it to be produced, that's a fair
7 question that this court could review. And some of the eight
8 tribes' complaints here do lean further in that direction.

9 But the common law accounting that plaintiffs have
10 pled - and they haven't actually tied it to any particular
11 statutory duties - is a much broader beast. It's actually more
12 of a remedy, I might suggest, and it doesn't define the
13 government's duties.

14 You know, one of the merits questions we have here is
15 that Section 304 of the 1994 Act actually controls the
16 accounting due. The term is mentioned in the statute. It's
17 also tied to the notion of a reconciliation, and the limited
18 purpose of the reconciliation is to derive the accurate opening
19 balances and to determine whether tribes have particular
20 controversies which may be the subject of further action
21 elsewhere.

22 But we think the term "accounting" has a limited term,
23 and the government's remand motion I don't think is intended
24 with that at all. Given Section 304, given the process that's
25 called for by that, I think the Interior Department was candid

1 in saying it might need to reconsider whether there was a way to
2 meet all the tribes' objections; hence the nature for a plan.
3 It's not an individualized remand that we had sought at that
4 point, and it was in the nature of reconsideration.

5 So the government has taken certain actions, and as the
6 court might review the transcript that's been cited to by the
7 plaintiffs, the remand was also to try to focus the final agency
8 action for the court. And we asked for a certain period of
9 time; the court denied it.

10 But in that period of time, as the court directed and
11 suggested, the government and the defendants ought to figure out
12 what it is they plan to do here. And the government's view is
13 put forth in the motion to dismiss. In the litigation and in
14 this court's jurisdiction, there are very limited questions
15 which are within this court's power to review, and one of those
16 is whether the government's actions under Section 304 comply
17 with Section 304, or any other duties that the plaintiffs might
18 assert attach to that.

19 But there are a multitude of agency actions, as it
20 were, that could be presented for review. And, for example,
21 subsequent to the 1994 Act, the Interior Department has produced
22 periodic statements of performance, quarterly or monthly reports
23 of account transactions, and those could be the subject for
24 review potentially if plaintiffs chose to challenge them. And
25 so the remand was an attempt to try to pull that together.

1 And so here I think you see the government saying,
2 well, if this is going proceed by litigation, this court has a
3 particularly limited role pursuant to the many arguments we've
4 made as to how it is limited.

5 I see my time has gone on here, and I have barely
6 scratched the surface of the issues that are presented.

7 THE COURT: Well, go ahead and dig a little more. But
8 at some point in the next five minutes I wonder if you can give
9 me a quick answer to the question of why you have moved to
10 dismiss these eight claims and not the other 29 that are before
11 me.

12 MR. MARTIN: Well, I'll answer that directly.

13 Simply because these are the tribes that have, to our
14 mind, indicated the desire to litigate the legal questions
15 presented. And it is really not much more complicated than
16 that.

17 THE COURT: The others are all in various stages of
18 discussion, I gather, with the government?

19 MR. MARTIN: Correct, Your Honor. As the many status
20 reports report, we continue to seek to try to answer the tribes'
21 questions informally. But should tribes press the issue and
22 bring the matters before this court, we think that there are
23 some specific limitations that favor the government and counsel
24 that this court should not weigh into those questions, and in
25 fact direct the cases to the money damages court, the Court of

1 Federal Claims.

2 THE COURT: Okay. I'll stop bothering you. Go ahead
3 and give me the best you've got.

4 MR. MARTIN: I would like to continue pointing out some
5 of the differences with *Cobell*, because this seems to be a very
6 important question here. We've also pointed out tribes are
7 different because Congress has treated tribes differently
8 through the years. There's the Indian Claims Commission Act.
9 And as distinct from our argument under the '94 Act and
10 Section 304, we think the Indian Claims Commission Act precludes
11 review here.

12 So that's in the nature of an alternative argument, but
13 we think it does begin to frame the issues should the litigation
14 proceed here. And that is a jurisdictional question presented
15 appropriately at this point.

16 This case is also different than *Cobell* because we are
17 here more than 10 years later, the case law has developed
18 differently in significant ways, and so this court ought not to
19 follow the development of the *Cobell* decisions. And I'll point
20 out several of those here.

21 First of all, one of the first questions presented to
22 the court is whether the plaintiffs have a statutory cause of
23 action outside of the APA. And without delving into the
24 arguments in the brief, we think that's controlled by the
25 *Sandoval* case and not by *Mitchell II*. And the plaintiffs'

1 reference to *Mitchell II* in fact does nothing more than indicate
2 the money-mandating nature of their claims, which is not before
3 this court.

4 We think that the *Norton vs. Southern Utah Wilderness*
5 *Alliance*, a Supreme Court case, is also very important in
6 framing and distinguishing the claims that this court could take
7 control and jurisdiction over, and it's limited to a mandamus
8 type proceeding that is very different from the way the *Cobell*
9 case developed prior to the decision in *SUWA*.

10 We think also that the *Twombly* case has bearing here on
11 what plaintiffs are required to do as an affirmative obligation
12 to frame their claims to proceed. *Twombly* talks about the facts
13 that need to be alleged in order to proceed past the threshold
14 stage. And the focus on facts is important here, because an
15 agency action is a fact. Plaintiffs ought to specify that.
16 Plaintiffs ought to specify the wrongful conduct that's at issue
17 as well.

18 The court can look at a statement of performance
19 produced by Interior that includes many transactions. That
20 money has been handled for a number of different purposes. I'll
21 just mention one example. The Pechanga tribe has alleged claims
22 of investment mismanagement. An administrative record, which
23 would be very important here, might well address how the account
24 statement was prepared in terms of discharging an account
25 reporting duty, but it might not shed light on the wholly

1 different agency action of the investment functions.

2 And so framing this case for review I think goes back
3 to *Twombly*, and is very important to focus the issues going
4 forward.

5 Also, the federal circuit case law since the *Cobell*
6 decisions have come out is very important in focusing this
7 court's analysis on the line between impermissible money damages
8 and compensatory relief on the one hand, and the specific relief
9 that's permitted in this court. And the *Suburban Mortgage* case
10 and the *Con Ed* case and the *Christopher Village* case I think
11 represent the federal circuit's attempt to elucidate the line
12 and the analysis that this court is supposed to look at the true
13 nature of the claims, the ultimate remedy that plaintiffs seek.

14 And that's another important distinction. Because at
15 this threshold point in these cases, the court is looking at the
16 claims as plaintiffs have framed them; that's in contrast to
17 *Cobell*, where the court struck the objectionable portions of the
18 *Cobell* plaintiffs' claims and limited it to an APA case for
19 certain undue delay under a certain statutory obligation.

20 THE COURT: Back for a moment to the federal circuit.
21 Has the dismissal of the Tohono O'Odham Nation and the
22 Passamaquoddy tribe case been appealed to the federal circuit?
23 Where does that stand?

24 MR. MARTIN: The Tohono O'Odham Nation case has been
25 appealed to the federal circuit. The government as respondent

1 is about to file its responding brief any day now.

2 I'm not aware of the procedural posture of the other
3 case. I don't believe the 60 days for plaintiffs to appeal has
4 run yet.

5 THE COURT: A decision not imminent, in any event?

6 MR. MARTIN: No.

7 Another important distinction here is the tribes'
8 allegations, including the lands and non-monetary assets in
9 their unitary accounting theory. Plaintiffs, in contrast to
10 *Cobell*, would broaden the accounting duty, and I think it's that
11 broadening, to include -- it's almost a network theory.
12 Plaintiffs say, well, there's a multitude of statutes - and of
13 course they don't actually specify or engage in statutory
14 construction of any of them - but there's a network, and from
15 that network and the penumbra there emanates one unitary
16 accounting duty, which I think cuts against the court's
17 recognition of that particular right on a jurisdictional basis
18 and also as a matter of the duty itself.

19 Some of the efforts to distinguish these cases from
20 *Cobell* are not availing, I think, and I'll run through three of
21 them quickly. There's no ground to take this case outside of
22 the APA for all the reasons we state, and we could dwell on
23 those for quite awhile. The implied statutory cause of action
24 that they assert here is no different from the common law claim
25 that this court previously dismissed in *Cobell*.

1 I would also point out that the Indian Claims
2 Commission Act has a particular legal effect. And plaintiffs'
3 response to that is to litigate the Appropriations Act that this
4 court in *Cobell* has also previously addressed and found that
5 does not revive stale claims dealing with a different type of
6 claims, because obviously the Indian Claims Commission Act
7 didn't apply to the plaintiffs in *Cobell*.

8 And thirdly, it's this expansion to include every
9 single asset for all time periods that is fatal to plaintiffs'
10 claims. There is just not a specific statutory basis for that,
11 particularly when you look at the purposes of 304.

12 And so plaintiffs' reliance on *Cobell VI* for most of
13 their argument is ultimately unavailing, because we have a
14 specific statute that controls here, and it's prior to some of
15 the case law I've discussed that limits this court's review and
16 limits this court's ability to supplement the plain statement of
17 the statutes.

18 And so with that, Your Honor, at the risk of -- well, I
19 would rather not risk testing your patience, and I'll reserve
20 some time for rebuttal and addressing questions that may come
21 up.

22 THE COURT: Okay. Thank you, Mr. Martin. Mr. Harper?

23 MR. HARPER: Your Honor, good morning again.

24 THE COURT: Good morning.

25 MR. HARPER: Before we begin, I would like to draw the

1 court's attention to the fact that the Honorable Delia Carlyle,
2 Chairwoman of the Ak-Chin Indian Community, is here with us
3 today.

4 THE COURT: Welcome to her.

5 MR. HARPER: Your Honor, the resolutions of the issues
6 before this court that we are arguing today could not be more
7 critical to the tribal communities involved in these cases. The
8 consequence of your decision will have ramifications far beyond
9 this case.

10 Specifically, plaintiffs have pled and seek recognition
11 that they have similar rights to any other trust beneficiary in
12 any other case, that the fact that there is a trust in existence
13 today, a *Mitchell II* type trust with a trustee, a beneficiary,
14 and a corpus, gives rise to all the available remedies, duties,
15 obligations, and rights of a trust relationship. That is the
16 import of *Mitchell II*.

17 In this court, actually in the DC Circuit in the
18 *Beckett* case, the court held, and I'll just read the quote if I
19 could: "Just as an intended third party beneficiary may sue to
20 enforce a contract, it is equally fundamental that the
21 beneficiary of a trust may maintain a suit to compel the trustee
22 to perform duties as trustee or redress of breach of trust. It
23 is as an incident of the trust relationship that you have a
24 right to go to court and enforce the trust."

25 And that is true in every court of equity in this

1 country and that is true for every trust beneficiary and every
2 trustee.

3 The government points out that they're in a different
4 place, they stand in a different footing because they're the
5 government. And I would submit to you the only distinction that
6 that raises is whether or not there's an immunity of the
7 government's waiver.

8 And here we have such broad immunity waiver in
9 Section 702 of the Administrative Procedures Act. And it is
10 settled law in this circuit, as the government readily conceded
11 in the *Cobell* case a couple of months ago, that it is law of
12 this circuit that that waiver of immunity applies to APA and
13 non-APA claims.

14 So we have a right of action that emerges from the
15 trust relationship, we have jurisdiction, and we have the waiver
16 of immunity. Those are the three necessary antecedent things
17 that one needs to bring an action of this nature.

18 All we are asking here is that no longer will there be
19 a situation where a trust beneficiary cannot go to court and
20 enforce his rights like any other trust beneficiary. We have
21 had a long history in these matters of mismanagement and abuse.
22 There's report after report that documents them, both for the
23 Individual Indian Trust and for these Tribal Trusts.

24 And part of the problem are these limitations that have
25 been argued. And all too often we get caught up on, is this

1 this kind of action or that kind of action, as opposed to
2 enforcing the trust duties. And they matter. They matter to
3 these communities. If the Ak-Chin Indian Community, for
4 example, cannot go and enforce its rights to acquire trust
5 records from its trustee, then it is left trying to guard
6 against third parties, far to its detriment, because it does not
7 have access to that information.

8 And so we would argue that with that duty and other
9 duties, this trust can be enforced in this court.

10 THE COURT: Where does the Ak-Chin records matter
11 stand, by the way? You have been before me just for the Ak-Chin
12 just on those questions of the records that are outside that
13 road and so forth. Where does that matter stand?

14 MR. HARPER: Well, Your Honor, as you'll recall, back
15 in February of this year we were to proceed in an informal basis
16 to determine if we could acquire those documents. And the court
17 left open the opportunity for us to start a process where we
18 would request the specific information and the court would then
19 consider enforcement of that.

20 We haven't triggered that because we're still trying to
21 get the material. I think in due course here there may very
22 well be a need to come back to the court and seek further relief
23 on that in a less informal way.

24 THE COURT: Okay.

25 MR. HARPER: Your Honor, I'll talk about five areas.

1 The first is about this non-APA claim; the second I'll talk
2 about the APA claims; the third I will address the government's
3 contention that some of our claims are nothing more than money
4 damages actions; fourth, I will discuss the statute of
5 limitations issue raised with respect to the Indian Claims
6 Commission Act; and finally, a short discussion on trust assets
7 and why they must be accounted for as well.

8 As mentioned, there are three requirements to bring an
9 action against the government. You must have subject matter
10 jurisdiction, you must have a waiver of immunity, and you must
11 have a cause of action. Settled law in this circuit and others.
12 We have subject matter jurisdiction pursuant to 1331 as a
13 federal question; we have a waiver of immunity under
14 Section 702. I will discuss the money damages issues a little
15 bit later in my argument. And finally, we have a cause of
16 action.

17 Both in the *Beckett* case and in many other cases, a
18 trust beneficiary, once there is an existence of a trust
19 relationship, it naturally follows that they can enforce that
20 trust in a court of equity. Indeed, trusts are creatures of
21 equity generally enforced. It is hornbook law that they're
22 generally enforced in courts of equity.

23 The government would like to limit our remedies only
24 under the Tucker Act. There is nothing in law that even
25 remotely suggests that. In fact, it remotely suggests the

1 contrary. If you look at the restatement section 199, it quite
2 expressly provides that normally the remedies provided to a
3 trust beneficiary are those that arise under equity, not under
4 legal relief such as damages.

5 Your Honor, the cause of action here is also a direct
6 consequence of the *Mitchell II* decision. As recognized in
7 *Cobell VI*, the fact that that was money damages and this is
8 equitable relief makes no difference. There the court held that
9 if you have a trust relationship, not the bare trust found in
10 *Mitchell I*, but the actual trust found in *Mitchell II*, then
11 arises from that all the incidences of a trust relationship, and
12 one has a money damages claim and one has similarly, we would
13 argue a forteriori, a claim in equity.

14 Your Honor, more critical still, and a case that
15 completely answers the government's contentions to the contrary,
16 is the *White Mountain Apache* case from 2003. As you will
17 recall, Your Honor, in that case there was a trust established
18 by statute. And I would like to just take a moment to read the
19 statute, because the government has this notion embedded in
20 their briefs, both in their initial brief and in their reply,
21 which was filed at 8:30 last night so I didn't really have time
22 to study the brief, but one thing caught my attention.

23 On page five of the brief it says, "Under *Mitchell II*,
24 there must be a specific duty separately set forth in one of the
25 statutes or regulations." In essence they suggest that you have

1 to have a duty that is express in statute to enforce that duty.

2 That is plainly wrong. That wasn't -- there was no
3 express duty in *Mitchell II*, and there certainly wasn't in *White*
4 *Mountain Apache*.

5 Let me read for you for a moment the statute involved
6 in *White Mountain Apache*. The former Ford Apache military
7 reservation would be, quote, "held by the United States in trust
8 for the White Mountain Apache tribe subject to the right of the
9 Secretary of Interior to use part of that land and improvements
10 for administrative or school purposes for as long as they are
11 needed for that purpose."

12 Based on that language, the United States Supreme Court
13 said, we must read that there was an intent to create a
14 *Mitchell II* type trust, and thereby give rise to, for this case,
15 a duty to preserve the trust corpus. In the breach thereof, you
16 could seek money damages in the court.

17 I would submit that if you can seek money damages in a
18 court based on that language of creating a trust, certainly
19 where you have a statute that expressly provides that the United
20 States shall account for all funds for Indian tribes, that you
21 similarly can bring an action in this court to enforce that
22 trust duty.

23 The government's argument that you need an express
24 statutory duty was expressly rejected by the Supreme Court.
25 Quote, "While it is true that the 1960 Act does not expressly

1 subject the government to duties of management and conservation,
2 the fact that the property occupied by the United States is
3 expressly subject to a trust supports a fair inference that the
4 obligation to preserve the property improvements are incumbent
5 of the United States as trustee. This is so because elementary
6 trust law, after all, confirms the common sense assumption that
7 a fiduciary actually administering trust property may not allow
8 it to fall into ruin."

9 Again, once you have the trust relationship, similar to
10 *Amax Coal Company*, similar to *Mitchell*, similar to the *Beckett*
11 case in this circuit, and in case after case, once you have that
12 trust relationship, and if you find an appropriate waiver of
13 immunity, you can of course enforce that in this court with its
14 broad equitable powers, as recognized in, among other places,
15 *Grupo Mexicano*.

16 THE COURT: What are you going to get in the Court of
17 Federal Claims that you're not going to get here, or vice versa?

18 MR. HARPER: Your Honor, here what we're going to get
19 is a broad equitable accounting, to which the Court of Federal
20 Claims does not have jurisdiction. And what that means is, is
21 we want our trustee, as all of the trustees have to, to come
22 forward with specific information so we can ascertain whether or
23 not they have carried out their trust duties. We can't achieve
24 that under the Tucker Act in the Court of Federal Claims.

25 Now, that may very well lead to other kinds of actions.

1 It could lead to us enforcing -- say if we learned that there is
2 a right-of-way across our land that has expired. We could then
3 enforce that action against a third party, or we could seek that
4 our trustee do so through seeking injunctive relief in this
5 court.

6 None of those would have anything to do with the Court
7 of Federal Claims. There are many things that can arise once
8 you learn of the information, once you possess the documentation
9 necessary, the trust records that belong to our clients, the
10 beneficiaries of this trust. Those trust records are our
11 clients' information, and all we're saying is that information,
12 along with the accounting that details exactly how our trustee
13 has managed that property through the life of this trust, is an
14 absolutely foundational aspect of trust law and enforceable in
15 this court.

16 In contra distinction, the Court of Federal Claims, as
17 the government readily conceded in oral argument, is about a
18 very narrow kind of accounting. What they do there is you
19 cannot -- and it's been held and reaffirmed numerous times, you
20 cannot seek the kind of general accounting we seek here.

21 What you could seek is once you've identified a
22 specific duty that was specifically breached, then they can
23 account for the damages for that duty. The objective of that
24 accounting is not to tell the beneficiary what has happened with
25 their property, as here; the objective of that accounting is to

1 figure out how much money is owed.

2 So it's fundamentally different in that respect, and
3 it's far narrower. So there's nothing in that court with
4 respect to the accounting that we can obtain here in this court
5 as a court of equity with broad equitable authority.

6 In addition, there are certain items that we have
7 identified, such as damages claims for failure to properly
8 invest trust funds. Now, that is something that we don't
9 believe we would be able to seek in this court. We don't
10 believe -- we do believe we can seek that as a damages action in
11 the Court of Federal Claims.

12 So it's important -- Congress has decided to divide up,
13 as in no other place, between equity and law, basically, for
14 purposes of suing the United States. And so the only way we can
15 get full relief and enforce both our remedies available in
16 equity and our remedies available through money damages is to
17 bring actions in both courts, as we have done so.

18 Your Honor, in addition, the government raises two
19 issues with respect to the non-APA claims. The first is that
20 what we're really seeking is what they term a common law action.
21 Well, that's nothing more than saying we need an express cause
22 of action in the statutes, which was rejected by *Beckett*, which
23 was rejected in *White Mountain Apache*, and was rejected in
24 *Mitchell*, *Beckett* being guiding precedent in this circuit.

25 We're not seeking a common law claim. That suggests

1 that the claim we seek is one that is untethered from any
2 statutory authority. That is simply not the case here. We have
3 identified a series of statutes that create a trust
4 relationship, a la *Mitchell II* - a trustee, a beneficiary, and a
5 corpus - and the incidents that arise from that is enforcement
6 of those trust duties here.

7 In addition, in trying to distinguish *Mitchell II* in
8 *White Mountain Apache*, the government makes a very curious
9 argument that it's really the Tucker Act that provides them, in
10 *Mitchell II* and *White Mountain Apache*, the cause of action.
11 Well, that's just plainly wrong.

12 In *Fisher*, for example - and there's numerous cases of
13 this ilk - the federal circuit held, quote, "The Tucker Act does
14 not create a substantive cause of action," end quote. So that
15 can't possibly be the distinguishing feature for *Mitchell* and
16 *White Mountain Apache*.

17 If I could turn for a moment, Your Honor, to the APA
18 cases. And I want to make clear that our principal cause of
19 action, at least for the four tribal plaintiffs that I
20 represent, Your Honor, our principal cause of action is the
21 non-APA claim to enforce the trust duties. This is, in my
22 estimation, an alternative grounds for review, and that is
23 that --

24 THE COURT: Of course you're not looking for any money
25 here?

1 MR. HARPER: No, Your Honor, we're not looking for
2 money damages, certainly. And certainly at this stage we're not
3 looking for money at all, we're looking for our accounting.

4 THE COURT: Why can't you get the same information by
5 discovery in the court of claims?

6 MR. HARPER: Because the discovery itself would only be
7 limited to those claims -- they have to be tied to the actual
8 damage claims. The Ak-Chin case is a perfect example. We want
9 information that has nothing to do with money damages. They
10 could have acted perfectly as a trustee and not breached any
11 trust responsibility; we still need that information in order to
12 protect our rights.

13 So that's why it is distinguishable. We want
14 information in this court, information so that the tribes can
15 act in making decisions about their property. And it's a
16 fundamental right of a beneficiary, because they own that
17 information.

18 THE COURT: Well, all right. Go ahead.

19 MR. HARPER: Your Honor, 706(1), *Cobell VI* really
20 forecloses the government's argument regarding 706(1). There
21 the court held that they unreasonably delayed the providing of
22 the accounting, and that just because it's a fairly significant
23 length of time, the fact that the United States Congress ordered
24 them to do an accounting in express terms meant - and even if it
25 were implied - that they had to provide that accounting.

1 Now, their argument seems to be on a couple of
2 different points. First they say the *SUWA* case, the *Southern*
3 *Utah* case, overturned *Cobell VI*. Well, that's a pretty
4 extraordinary argument, since this court and the Court of
5 Appeals has on numerous occasions post *SUWA* evaluated *SUWA*,
6 evaluated *Cobell VI* in light of *SUWA*, and still affirmed the
7 basic tenets of *Cobell VI*.

8 Most recently in the *Cobell XVIII* decision, this court
9 will recall that in *Cobell XVIII* there was a lot of discussion
10 about how *Cobell VI* was reconcilable with later decisions,
11 namely *Cobell XIII* and *Cobell XVII*, and in so doing, plainly saw
12 and reaffirmed the basic principles of *Cobell VI*.

13 *SUWA* really does not say anything different than
14 *Cobell VI*. In fact, *SUWA* cites and discusses the exact same
15 argument the government makes today relying on *SUWA*, but they
16 relied there on the *Lujan* case. And the Court of Appeals there
17 said, you need either a final agency action or you need action
18 unreasonably delayed. Now, they say this, quote, unquote, "all
19 encompassing accounting" is not the kind of narrow action that
20 you need to be reviewable. Well, that's just not the case.
21 What you need is a right under statutory law, whether implied or
22 express, and you're seeking to enforce that specific right.

23 *SUWA* was very different. It was basically an entire
24 program under a statute that required that the department there
25 involved had to manage the forests in a particular way. They

1 said, well, that's not sufficient. You can't seek broad
2 programmatic change. That's for Congress and the administrative
3 agency. Here, this is very different. We have a trust duty
4 involved, we have a duty to account express in the statute.

5 The next argument is about Section 304, which is
6 similarly bizarre, because the principal duty that is in the
7 1994 Act is Section 102 which says you have to account for all
8 funds.

9 Now, as I understand the government's argument, it is
10 somehow that Congress didn't really mean to put Indian tribes in
11 102 because they put it in 304. Now, those two elements, 102
12 and 304, are very, very different. Section 102 is a
13 reaffirmation of the duty to account. You have to account for
14 all funds. In 304, all it says is that you have to report
15 certain information to the Congress. Reporting information to
16 the Congress and having to do an accounting are two very
17 different things.

18 304 does require that you have done an accounting,
19 implicitly. It doesn't say that expressly. I think you could
20 say that implicitly. But they haven't done that accounting, and
21 that's the whole point. We seek review of that, the undue delay
22 of their accounting.

23 And this court asked the defendant's counsel, have you
24 done an accounting. A very simple question, and I don't think
25 we heard an answer to that question. Are they purporting that

1 the -- are they now purporting that the Arthur Andersen reports
2 are the accounting, which they six months ago said were not
3 accountings? If that's the case, then I think the weight of
4 authority and the factual record is that it's not an accounting,
5 comes nowhere close to that.

6 Nor, Your Honor, is it a fair argument that -- and this
7 is just an additional reason to reject their argument regarding
8 706(1). Nor is it a reasonable argument to suggest that the
9 1994 Act is the act that fully defines the accounting duty. In
10 fact, in *Cobell VI* it says that -- it held that the duty was
11 preexisting, that it was not altered, not limited, and not
12 modified, and certainly was not created by the 1994 Act, that
13 that was a preexisting duty to account. And we're seeking to
14 enforce that duty in this court.

15 THE COURT: How do you see this case playing out, any
16 one of these cases playing out? Suppose I deny the motion to
17 dismiss. Are we going to go through the same exercise that
18 we've gone through in the *Cobell* case?

19 MR. HARPER: I don't think that's necessary, Your
20 Honor. I think that the court interpreted the complaint in the
21 *Cobell* case to be an APA action, and it got us into I think this
22 hybrid APA trust case place, and I think because of that, it
23 created a lot of argument between the parties about whether it's
24 an APA case or it's a trust law case, and so what are the powers
25 of the court and is there discovery or is there not discovery.

1 And if you look at the record in *Cobell*, the 3,600 documents
2 filed, much of it is a debate about how do you deal with this
3 notion of a hybrid case.

4 What we are suggesting is there is a much more
5 straightforward way to deal with these kinds of cases, and that
6 is in a non-APA cause of action, saving a lot of judicial
7 resources to deal with it as any court would do, as the court
8 did in the *Beckett* case or any other trust case. You allow for
9 the beneficiary to learn information, to seek the kind of
10 information so that it can test the accounting at the same time
11 that the trustee is performing the accounting, and then at some
12 point they produce their accounting report, and with the
13 information acquired through discovery, the beneficiary can test
14 that accounting and determine whether or not it is sufficient to
15 carry out the fiduciary duty.

16 Seems to me that that's the most reasonable, the most
17 cost effective, and certainly saves the judicial resources that
18 were expended in the *Cobell* case.

19 THE COURT: All you're saying is we don't have as many
20 trips to the Court of Appeals and we don't have to worry about
21 computers and contempt. But other than that, it is the same
22 exercise, is it not, discovery and depositions and long trials
23 and...

24 MR. HARPER: I think there are some similarities, to be
25 sure, and there needs to be an evaluation of the accounting

1 provided and the plaintiffs need to have an opportunity to
2 discover information that are within the possession of the
3 government so that they can test that accounting.

4 So to that extent, yes, I would agree.

5 THE COURT: And let me anticipate some discussion I
6 think we're going to have when we get to the class certification
7 motion. But how is that done, tribe by tribe or sort of
8 everybody in the same tank?

9 MR. HARPER: Your Honor, I think it has to be done
10 tribe by tribe. I think there's -- to a certain extent there
11 may be ways -- as this court has already done with the motion to
12 remand, for example, certainly with the preservation order,
13 there are ways to deal with things in an omnibus fashion. And I
14 think certainly speaking for myself and my clients, we would
15 have no objections to those kinds of tools, to the extent that
16 they save judicial resources. And we think that there may be
17 ways to deal with it more effectively that way.

18 It's also not like the *Cobell* case in another important
19 respect. The *Cobell* case dealt with a class of, both parties
20 agree, at least 300,000 individuals; plaintiffs say over
21 500,000, defendants say 280. But in any respect, a lot of
22 people, a lot of trust accounts, a lot of time, a lot of
23 resources, some smaller accounts, some much larger accounts.

24 Here we're dealing with a much more finite universe of
25 transactions, a much more finite universe of assets, and they're

1 owned by specific beneficiaries. And the leases, for example,
2 tend to be on larger land bases.

3 So I think the sort of notion that because *Cobell* took
4 as long as it did, I think that there's answers to that, and one
5 of those answers is do we want to get into that sort of hybrid
6 case or is there another jurisdictional avenue. And the other
7 jurisdictional avenue is the non-APA.

8 THE COURT: Okay. Let's call this a non-APA breach of
9 trust case. Okay? What do you say to Mr. Martin's assertion
10 that in trust accounting, it's the trust assets that pay for the
11 accounting?

12 MR. HARPER: Well, Your Honor, two things. The first
13 is that while it is true that the trustee can utilize funds of
14 the trust to do the accounting, it is also true, and it is
15 hornbook law, that where they have failed to do the accounting
16 for an extended period of time, and because of that failure has
17 made the cost of the accounting go significantly upward, that
18 they bear the cost of the accounting.

19 We think that is the situation in this circumstance.
20 Irrespective -- the question is whether or not trust law
21 provides the answer, and trust law in that circumstance does
22 provide the answer. Because when a breaching trustee fails to
23 do an accounting, and because of that increases the costs, they
24 have to pay for the accounting. And that's settled law. So
25 that would be my first answer.

1 The second answer is that if Congress asks them to do
2 the accounting and Congress said that -- we are in full
3 agreement with this general principle, that when a trust is
4 created, unless Congress unequivocally expresses an intent to
5 the contrary, you have the traditional rules of trust. However,
6 if Congress does express an intent to the contrary, then you go
7 with that different expression.

8 Here, Congress has made a different expression in the
9 sense that they have asked this trustee to bear the cost of the
10 accounting. And rightfully so, based on my first principle,
11 because it's perfectly consistent with trust law, the normal
12 trust rules.

13 So we would argue that either under a trust law rubric
14 or a departure from trust law based on Congressional intent,
15 which is right down the middle of the plate for *Amax Coal*
16 *Company*, same as *Cobell VI*, all the decisions, including *Mason*
17 and *Mitchell II*, then those normal duties and normal standards
18 apply.

19 THE COURT: Mr. Harper, I don't know how many tribal
20 cases there are pending overall. I know there are 37 of them
21 pending before me. Many of them are riding two rails, one here
22 and one in the Court of Claims. And there are others in the
23 Court of Claims that are not before me and there are others in
24 other federal courts that are not before me. I think a couple
25 in Oklahoma.

1 What distinguishes your eight cases from the rest of
2 those, and why, if you care to tell me, are you not engaged in
3 the same discussions with the government that the other tribes
4 apparently are?

5 MR. HARPER: Well, Your Honor, all I can do is answer
6 for the four clients I represent. We are open to trying to
7 resolve these cases with the government. We have said that to
8 them repeatedly. We're always open for discussions.

9 But what we've learned in the *Cobell* case, for example,
10 is that if you're not also prepared to litigate the cases, then
11 those discussions will go on ad infinitum, that proceeding in
12 the litigation incentivizes coming to the table in a good faith
13 way. And that is a necessary antecedent to getting a matter
14 resolved.

15 So it's our belief that we do have to pursue these in
16 litigation. Hope springs eternal that we may be able to resolve
17 these cases with the government, acquire the information that we
18 need to acquire. As Your Honor is well aware, we talked about
19 it a little earlier, the Ak-Chin matter, we were open to the
20 idea to try to resolve that in an informal manner once it was
21 established -- and that's a perfect example, because there we
22 had requested the documents for eight months. They provided
23 nothing. As soon as this court had a hearing, they started
24 providing documents because there was litigation pending had
25 they not.

1 And we suggest that if we're going to pursue a
2 resolution in a good faith manner and have the government come
3 to the table in a good faith manner, we have to pursue the
4 litigation as well. Always open to resolving the case
5 otherwise.

6 THE COURT: Okay.

7 MR. HARPER: Your Honor, we also have an argument
8 that -- this is also the Arthur Andersen reports are not
9 accountings, and therefore under 706(2) we also have a cause of
10 action. I think we'll rest on our briefs on that question.

11 I'll just say a couple of things with respect to the
12 issue of whether or not the waiver of immunity applies and
13 whether or not this is a money damages claim.

14 First of all, we have a claim here for an omnibus
15 accounting, an accounting of our trust assets from our trustee
16 to which we have a right to, as we discussed earlier. And that
17 has nothing to do with money damages. The end of that need not
18 ever be money damages. There are so many things that can derive
19 from the accounting. It is informational in nature. So first
20 and foremost, any notion that just because we seek an accounting
21 somehow inexorably leads to money damages is just plain wrong
22 and has been rejected in the *Cobell* case.

23 The second issue is whether or not at this stage we
24 should address the questions of potential additional relief such
25 as -- equitable relief such as restitution or disgorgement.

1 Your Honor, we need not address those matters at this point.
2 This is at a motion to dismiss stage. We think that those are
3 only properly addressed after the accounting is provided, if the
4 accounting can be provided.

5 And we don't know what the situation will be later on
6 and what appropriate equitable relief may be sought and would be
7 appropriate in these circumstances, so we say that it's far
8 premature to address those issues at this motion to dismiss
9 stage.

10 Finally, to the extent that we seek restitution, and I
11 won't belabor the point, we think that's plainly distinguishable
12 from money damages, as this circuit has held in the *Crocker*
13 case, among others.

14 I would just like to talk about two other matters very
15 briefly. The next is the alleged bar for pre-'46 claims based
16 on the statute of limitations of the Indian Claims Commission
17 Act. That has been resolved on two occasions by the Court of
18 Federal Claims in the *Shoshone* case and the *Osage* case, and in
19 both instances the court said that the language of the statute,
20 "Notwithstanding any other provision of law, the statute of
21 limitations shall not commence to run on any claim," that that
22 language makes clear that it's irrespective of any other
23 potential limitation.

24 "Notwithstanding any other provision of law" was
25 interpreted in this district to mean, quote: "The phrase

1 notwithstanding any other provision of law or a variation
2 thereof means exactly that. It is unambiguous and effectively
3 supersedes all previous law."

4 So to the extent that the Indian Claims Commission Act
5 set up a statute of limitation by which point the tribes had to
6 bring claims, the appropriations waiver of statute of
7 limitations takes that off the table in express terms.

8 Finally, the government makes an argument that we're
9 not entitled to an accounting of our trust assets. And again,
10 it is hornbook law that the trust beneficiary can come into
11 court and seek an accounting not only of their funds but of
12 their trust assets. As an incident of the creation of the trust
13 you have to be able to learn not only the funds under the
14 management, but also the underlying resources.

15 I think the government suggests those underlying
16 resources are not really a corpus of the trust. At least in
17 their opening brief they suggest that. Well, that's plainly
18 been rejected by both *White Mountain Apache* and *Mitchell II* that
19 identifies the lands as the corpus of the trust. And with the
20 corpus of the trust, you must account, and they failed to do
21 that as well.

22 Finally, there is no exhaustion of remedies requirement
23 in this matter. There's nothing in the regulations that would
24 allow us to get this information regarding our trust assets in
25 any other way. All you can do in the regulations is get a title

1 status report, which is functionally useless in most
2 circumstances. So there's no administrative remedies to exhaust
3 in that manner.

4 Your Honor, in closing, let me just reiterate that we
5 have identified, in our view, a clear cause of action arising as
6 an incident of the creation of the trust relationship, and we
7 are seeking to enforce our trust duties owed to us by our
8 trustee. There need be fewer impediments for Indian tribes and
9 individual Indians to seek redress in courts if we are going to
10 have an accountable trustee, because, if not, then we are
11 basically left to the whims of that trustee. And that's no
12 trust relationship at all.

13 If Your Honor has no more further questions...

14 THE COURT: If the Ak-Chin were here only looking for
15 the records that would permit them to deal appropriately with
16 the people who want to pour asphalt across their land, you would
17 have a cause of action for that under your theory because that
18 is the tribe suing the trustee for information?

19 MR. HARPER: The duty to provide information, Your
20 Honor, is a standard trust duty, and so we would be enforcing
21 that trust duty.

22 The duty doesn't mean any information whatsoever, what
23 it means is duty -- you have to make a showing that that
24 information is necessary for you to protect yourself or you have
25 to have requested it. Those are the standards.

1 But yes, we could bring an action. Any trust
2 beneficiary would be able to bring an action to enforce that
3 trust duty.

4 THE COURT: In federal court?

5 MR. HARPER: The *Beckett* case suggests so, yes.
6 Because the *Beckett* case says, again, that -- in that case they
7 sought to enforce the accounting duty. There was nothing that
8 said there's an accounting duty, but they said as an incident of
9 the trust, you have a duty to account.

10 The name escapes me right now, but there is a
11 7th Circuit decision that talks about how courts of equity -
12 i.e., the Federal District Court - have original inherent
13 jurisdiction to enforce trusts. That's well settled principle
14 in trust law.

15 THE COURT: And you don't need the APA at all for that
16 case?

17 MR. HARPER: We don't need the APA except for the
18 waiver of immunity in Section 702. But that's settled law in
19 this circuit, that that waiver of immunity is for APA and
20 non-APA cases, so that's to the extent that we need the APA for
21 that cause of action.

22 THE COURT: All right, Mr. Harper. Thank you very
23 much.

24 Mr. Gordon, I think you've got a few minutes of the
25 allocated time.

1 MR. GORDON: Your Honor asked has there been an
2 accounting. The answer to that clearly has been that there has
3 not been an accounting. That's the entire predicate of my
4 client's claims, and I believe of Mr. Harper's clients' claims.
5 We haven't had an accounting; we're entitled to one, and we
6 would like it.

7 In that sense, this case is no different than *Cobell*.
8 Speaking for myself and my clients, we do not regard the APA
9 claim as subsidiary to the non-APA claim. We're happy to go
10 under either, but we think that this case -- these cases are
11 functionally indistinguishable from *Cobell*. Section 304 of the
12 '94 Act does not supplant the accounting requirement.

13 Now, the court has asked a couple of other questions.
14 I'm sorry, let me turn to one other point first, and that is the
15 court has asked questions about the interplay between these
16 cases and the Court of Federal Claims, and in particular about
17 monetary relief. Our clients, the Colorado River Indian Tribes
18 and the Pechanga Band, have been very clear that they're not
19 seeking monetary relief in this court. And Pechanga doesn't
20 even have a case pending over in the Court of Federal Claims, so
21 this is not a back door Court of Federal Claims action.

22 But there is a clear distinction between what's sought.
23 When I file suit on behalf of Colorado River Indian Tribes in
24 the Court of Federal Claims, as we've done, as the court well
25 knows from years in private practice, you have to believe that

1 you have a cause of action, you have to have a good faith
2 belief, you have to have enough information to support that, and
3 you hone your case and focus your case to the claims. You may
4 think you have broader claims, but you focus it on the ones that
5 you think will be easiest to prove and will be cost effective.
6 And it's no different when you walk into the Court of Federal
7 Claims.

8 Now, it's amazing for the government to say that's your
9 only -- as a trust beneficiary, your only relief is the Court of
10 Federal Claims. Because in order to go there, you have to
11 understand that you've been shortchanged in the first place.
12 But how can you understand that until you've gotten your
13 accounting? Some things are so glaringly obvious, as when
14 Fort Apache falls into disrepair, that you can do it, but day in
15 and day out you can't.

16 And so I won't repeat the things that Mr. Harper has
17 said, but I think that they are right on the money. This court
18 has the authority, as the Court of Federal Claims does not, to
19 require the government to face up to its first and most
20 fundamental duty, which is to tell the tribes what it's done
21 with their money and their assets. And then, if it turns out
22 that there's been mismanagement, there's a remedy in the Court
23 of Federal Claims.

24 You know, one would hope that it wouldn't be necessary
25 to get over there. One would hope that the government, when all

1 of this becomes apparent, steps forward and gives the tribes the
2 monies that they're owed. But I'm not holding my breath.

3 The court asked how will this case play out. Another
4 practical question, and if you don't mind, I would like to take
5 a bit of a shot at that, too.

6 THE COURT: Go ahead.

7 MR. GORDON: You know, whether we're under -- not under
8 the APA or under the APA, there's very practical questions here
9 that this court has already thought long and hard about in
10 *Cobell*. And I agree completely that you've got in one sense a
11 much smaller universe when you're talking 37 tribes than you do
12 when you're talking several hundred thousand individual
13 plaintiffs. And another practical difference is that frankly I
14 think there's reason to believe that BIA records are better with
15 respect to tribal assets in some ways than they are with respect
16 to individuals.

17 But there's still going to be very practical limits in
18 terms of the records that are available and what is ultimately
19 going to be able to be done. And if there's an accounting
20 obligation that extends back 100 or 150 years, at some point
21 there's going to be gaps in the records.

22 So ultimately when the court says, under whichever
23 theory, to the government, you know, you owe these tribes an
24 accounting and I'm going to require you to give it to them,
25 there's going to have to be some practical back and forth with

1 the government about what it is that they can do and what it is
2 that they can't do.

3 Now, that hasn't played out fully yet in *Cobell*, and it
4 certainly hasn't played out in this case because we're at the
5 opening stages. But you'll have that same practical problem.
6 As Mr. Harper correctly points out, you know, as you go along
7 there's the possibility for resolution, for settlement. And
8 that may happen. It certainly in my experience won't happen
9 until the government has its feet held to the fire. And I don't
10 think that those practical issues can be avoided, because they
11 will always be there at the end of the day. And the only way
12 they get avoided is if Congress intervenes and imposes a
13 legislative solution.

14 I do think that that also informs the court's question
15 about whether the case proceeds tribe by tribe or in an omnibus
16 fashion. I think that the duty to account clearly is an omnibus
17 issue. In terms of the practical issues about what can the
18 government do and what can it not do, that may be tribe by
19 tribe. Because there's no reason to believe that a
20 one-size-fits-all accounting will be practical here with the
21 tribes. They have different assets, the records have been held
22 by different offices as things have gone along.

23 But in any event, Your Honor, to close, at this stage,
24 the motion to dismiss stage, there is no basis to dismiss the
25 tribes' claims or to tell the government anything other than

1 that this suit needs to proceed.

2 If the court has any questions that it would like me to
3 take a shot at, I would be happy. Otherwise, Your Honor, I will
4 sit down.

5 THE COURT: Well, I don't need for you to sit down,
6 Mr. Gordon, but I don't have any more questions. Thank you very
7 much.

8 Mr. Martin?

9 MR. MARTIN: Several different points to make here in
10 rebuttal, the first going to the discovery in the Ak-Chin case
11 and the other cases. I would point out that the request that
12 we've talked about with Your Honor in the prior status
13 conference was a request for realty records, and our brief talks
14 about how those are covered by the Bureau of Indian Affairs
15 regulations because they again are the land manager.

16 But it's also important to look at the reference to
17 25 CFR Part II, and that describes an informal and adaptable
18 process for tribes to request most anything, and to pursue
19 inaction and a lack of response by the Bureau of Indian Affairs
20 on that. And that's illustrated by the *Casanova* case that we've
21 cited in our reply brief, which is a very recent case from the
22 District of Arizona regarding approval of assignments of tribal
23 land to tribal members for home site purposes, I believe.

24 But that illustrates that there are procedures and
25 mechanisms, and the ordinary relationship between a court and a

1 federal agency applies here. We think the exhaustion point is
2 specifically required, because the discussion here today I think
3 has illustrated the ways in which plaintiffs would have the
4 court take control over the day-to-day management. And so I
5 would point you to Part II in particular.

6 I would also make the point that in the Ak-Chin case
7 and in an essentially identical discovery request in the
8 Salt River case, those two cases in the Court of Federal Claims
9 have opened general discovery without motion practice, without
10 limitations. And I would say that the discovery sought there is
11 truly and actually duplicative of the specific requests that
12 Ak-Chin has brought here as their singular example to drive the
13 case.

14 In the Salt River case, the court there has provided
15 one year of open discovery; in the Ak-Chin case there's been no
16 limit, it's just the parties are proceeding. And at some later
17 point the government's own request and the court's own request
18 is that plaintiffs will have a preliminary period in which to
19 develop their claims, you know, past the complaint-filing stage
20 and the Rule 11 requirements, but there will be a year in which
21 to work up their claims.

22 So I'll admit that -- or I would point out that
23 plaintiffs' counsel's point about that truly limiting the
24 discovery is no limit at all, given what is actually happening
25 in those cases in actual ongoing parallel litigation.

1 I would also return to the court's question, have we
2 done an accounting, have the defendants done an accounting. And
3 the answer is yes. The Interior Department has done the
4 accounting required by the settlor of the trust, and whatever
5 duties existed prior to the '94 Act were altered by
6 Section 304, unlike the *Cobell* case.

7 I think Section 304 -- I'll dwell on that again for a
8 moment, because it's Congress' clear statement of the
9 obligation. And it operates really on two levels. We've
10 pointed out the statutory construction analysis and the canons
11 of statutory construction that apply there, but I think when we
12 talk about trust law, there's the principle also that the
13 ordinary black letter laws are default and they are routinely
14 and ordinarily ousted by the more specific instructions of the
15 settlor.

16 And that is exactly what has happened here. Congress
17 has considered cost issues, considered practicality issues. The
18 legislative history leading to the '94 Act on this particular
19 point is particularly rich about the reports the Interior
20 Department made, the separate analyses of the GAO about what was
21 possible and what was not possible. So the very concerns that
22 plaintiffs' counsel have alluded to about the bargaining and the
23 need to focus on what's practical, Congress addressed those,
24 Congress considered those, and Congress has specifically set
25 that. And I think that that really functions even in the

1 non-APA and the common law setting as ousting the ordinary rules
2 that plaintiffs would have you apply here.

3 So we're not arguing that there's no duty to account,
4 but only that the terms of that accounting have been set by the
5 settlor, Congress, and that the court lacks the power to compel
6 a different accounting. So I would want to emphasize that point
7 because it's critical here.

8 THE COURT: Hold it. The APA consequence of your
9 argument that an accounting has been done is to relegate the
10 plaintiffs to judicial review of final agency action, is it not?
11 Or do you think I don't even have jurisdiction to do that?

12 MR. MARTIN: Under a properly detailed complaint, this
13 court could review the reconciliation reports for compliance
14 with applicable law under 706(2).

15 THE COURT: And hypothetically determine that what the
16 government says is an accounting is not an accounting. Then
17 what?

18 MR. MARTIN: Well, I think, Your Honor, that may
19 present a central merits question, which is actually advanced
20 here in this motion as well, and that is, for what purpose would
21 the court review the reconciliation report? What specific
22 requirements apply to it? And I think there is where the
23 parties have a specific controversy about what the law requires
24 and the sources of the duties that control the accounting.

25 And the government would rest on the specific details

1 of Section 304, and would point to that as ousting the common
2 law duties. We would point to that as being the more specific
3 construction. As to what Congress intended for these particular
4 tribes and these particular accounts, that was not at all
5 addressed for the plaintiffs in the *Cobell* case in the
6 individual Indian account context.

7 THE COURT: All right. So I could theoretically -- and
8 this is all just hypothetical. But I could theoretically review
9 what the government says is an accounting under an APA claim and
10 find that the government -- that it's final agency action.
11 Right?

12 MR. MARTIN: Yes.

13 THE COURT: And then the APA test is, is it arbitrary
14 or capricious or otherwise not in conformance with law. So I
15 test it against what you say is the settlor's requirement under
16 304, and then at the end of that exercise I say, nope, I don't
17 think that's an accounting. Now what?

18 MR. MARTIN: Well, Your Honor, the government's
19 position at that point would be --

20 THE COURT: Court of Appeals.

21 MR. MARTIN: Assuming arguendo, assuming we get to that
22 point - and obviously I would concede nothing on that point -
23 but the truism is that this court's role is to lay bare the
24 error in remand, the error of law and to remand, as the court's
25 order denying our remand request actually makes clear.

1 THE COURT: Okay.

2 MR. MARTIN: But there would be a question about how
3 far you go. And that is an important one that the
4 administrative record, for example, for the reconciliation
5 project would address most particularly, how accurate balances
6 were derived. I think that there's no warrant under law to go
7 further than that and inquire into the propriety of the
8 underlying transactions - for example, the natural resource
9 management, whether the government properly managed the
10 royalties generated by particular leases - that manifest
11 themselves in transactions on the ledger.

12 So there is a very important line-drawing exercise in
13 this court's review on that.

14 THE COURT: Now, not to put too fine a point on this
15 next question, but again hypothetically, suppose I grant your
16 motion to dismiss. What happens to the other 29 cases that are
17 in negotiation?

18 MR. MARTIN: I would anticipate that the negotiations
19 would continue.

20 THE COURT: It would certainly shift the balance of
21 power, wouldn't it?

22 MR. MARTIN: Well, Your Honor, to the extent that the
23 government's view is that these claims are properly brought
24 under the Tucker Act, and to some degree for the money-mandating
25 claims within them, and to the extent there's already an

1 appropriations act which has construed to embrace certain of the
2 claims for losses to or mismanagement of trust funds, it might
3 not affect the balance of bargaining power, as your statement
4 might suggest.

5 THE COURT: All right, sir. Anything else?

6 MR. MARTIN: A few points. I need to address the
7 plaintiffs' description about how the *Mitchell* case applies
8 here. I think, as our reply brief points out, plaintiffs
9 basically admit that they don't meet the *Sandoval* test. The
10 word has not crossed their lips once in their briefing or their
11 oral argument. So I think it's conceded that they don't meet
12 that particular duty.

13 So they've hung their hat on *Mitchell* and this other
14 pre-*Sandoval* precedent. And they've missed the first step of
15 *Mitchell*, which is to focus on a specific statutory prescription
16 that establishes specific duties, fiduciary or otherwise.

17 But I would also point out one important legal issue,
18 and that is that *Mitchell II*, when it gets to the second step,
19 should the court infer a remedy -- there's a two-step analysis
20 under both, is there a right and is there a remedy. On the
21 second step, is there a remedy, that's where the common law
22 comes in under the Tucker Act jurisprudence, and that's where
23 the very fact that Congress has, in the Tucker Act, specified
24 the remedy.

25 This is a court for money damages, by and large - there

1 are some other limited forms of relief available there - but
2 the very fact that Congress has spoken exactly about the remedy
3 that's available and the limits of that very much supports the
4 fair inference test and actually cuts against importing that
5 into the District Court. Because as plaintiffs acknowledge,
6 there are no limits to the equitable relief under their theory.

7 So the court cannot use the fair inference of a trust
8 to support a remedy. It's not supported in *Sandoval*, and
9 frankly, it's not supported by the logic. Because Congress has
10 required that there be specific statements, and, as we point
11 out, the *Amax Coal* decision, the very fact that duties may be
12 affected by the reading of the common law doesn't affect the
13 contours of the private cause of action, as the Supreme Court
14 has made clear, particularly in interpreting the acts that were
15 at issue in *Amax*. Rather, the court is obligated to assume that
16 the APA provides the right for review.

17 Because here we are talking about Congress' express
18 intent as to remedial schemes and remedial statutes and
19 remedies, and the well established presumption, if there is one,
20 is that the APA is the route. So that, I think, addresses that.

21 The *Beckett* case didn't really involve the United
22 States, did not involve the United States, so that doesn't apply
23 either.

24 One comment about Apache. That decision from the
25 Supreme Court addressed only whether there was the jurisdiction

1 in the Tucker Act. It didn't actually go as far as plaintiffs
2 would assert and specify the exact contours of the duty on the
3 merits. It looked only, as Judge Souter's opinion describes, at
4 whether there was a fair inference at the very threshold
5 jurisdictional stage.

6 And so finally, I take issue finally with the
7 plaintiffs' assertion that this step in their claim can be
8 analyzed in discrete stages and the informational step is the
9 first one. And I think the judge's questioning seized on that.
10 If this first stage is merely informational, well, that really
11 is rather amorphous. The court needs to put a point on that. I
12 mean, how would the court review the provision of information?
13 It really has no standards. And if you take plaintiffs' claim
14 and the logic and the common law that supports it to its end,
15 there needs to be a judgment, and there needs to be a judgment
16 about the quality of the information the trustee has provided.

17 And that's why the two tribes represented by
18 plaintiffs' counsel, Mr. Gordon, really articulate a distinction
19 without a difference. They've sought a common law accounting,
20 and the ordinary expected result of that is a judgment from this
21 court as to whether the government is liable on the acts
22 reported.

23 And so that has necessary monetary implications that
24 far exceed specific relief, that far exceed any -- that actually
25 get into compensation purposes. That's what the common law

1 accounting is about, it's about compensation and making the
2 beneficiary whole, and it's that particular remedy which is not
3 permitted under the APA.

4 So with that, Your Honor, I would rest. Thank you.

5 THE COURT: Thank you, Mr. Martin. Okay. The motion
6 to dismiss is interesting and complex, and I'm going to have to
7 consider it submitted.

8 There is next a motion to certify a plaintiff class. I
9 think Ms. McCoy is going to address that.

10 MS. McCOY: Thank you, Your Honor. Good morning again.
11 Yes, you are correct --

12 THE COURT: Good morning.

13 MS. McCOY: -- I will address that class certification
14 motion. And I know I have 20 minutes, so I would like to at
15 this time ask that I could reserve five minutes of that 20 for
16 rebuttal.

17 THE COURT: Okay.

18 MS. McCOY: And I would also like to say that with us
19 here today are representatives of the Yakama and the Nez Perce
20 tribes, who are two of the 12 named plaintiffs, including
21 Mr. Sam Penny, who is the chairman of the Nez Perce tribe.

22 THE COURT: Mr. Chairman.

23 MS. McCOY: And the other plaintiffs are Mescalero
24 Apache, Tule River, Klamath, Yurok, Hualapai, Cheyenne-Arapaho,
25 Sac and Fox, Pawnee, Santee Sioux, Tlingit & Haida.

1 I wanted to talk today about the definition of the
2 class for which we're seeking certification, I wanted to talk
3 about the Rule 23 requirements that we've met, and I wanted to
4 talk a little bit about opt-out that we've asked for.

5 We've asked for a class, and we can't get this, of
6 course, through negotiated settlement - we need that from this
7 court - a class defined as American Indian and Alaska native
8 tribes who have or who have had trust fund accounts that are or
9 were subject to defendant's trusteeship, who have received or
10 who were eligible to receive Arthur Andersen reports but have
11 not received with the Arthur Andersen reports or otherwise what
12 the statute calls full and complete accountings of their trust
13 funds, and who do not have their own pending actions for an
14 accounting.

15 We seek class certification under Rule 23(b)(2) with
16 opt-out. I'll talk about how we satisfy the Rule 23(a)
17 requirements. We think 23(b)(2) is the most appropriate in this
18 action, which seeks declaratory and injunctive relief,
19 including, as has been alluded to, equitable monetary relief
20 that is not money damages.

21 Defendants are the trustee for the trust fund accounts
22 of all tribes. There's considerable evidence in the reports,
23 the legislative materials, and otherwise that defendants have
24 not fulfilled their most basic fiduciary obligation, which is
25 the duty to account for the trust and provide accountings to the

1 beneficiaries.

2 Accounting in the trust context has a specific meaning.
3 I think that Arthur Andersen, who was at the time they did the
4 project for tribes' accounts, a leading accounting firm in that,
5 and whatever an accounting is in the fiduciary sense, Arthur
6 Andersen knew what it was and knew that it couldn't be done in
7 this instance.

8 So this class would be beneficiaries who are owed
9 accountings seeking those accountings. That is the basic
10 threshold issue raised in this case.

11 On the Rule 23 requirements, numerosity, commonality,
12 typicality, and adequacy; numerosity, we have a
13 defendant-created list of class plaintiffs. The accountholders
14 distribution list lists 310 tribes or accountholders that were
15 provided Arthur Andersen reports by defendant in 1996 and 1997.
16 We start with that list.

17 Plaintiffs have made a reasonable estimate that based
18 on our definition, again excluding tribes that have their own
19 District Court actions for full and complete accountings, and
20 excluding four tribes that have notified us already they want to
21 opt out, we start with 260 tribes as a putative class. The case
22 law in this jurisdiction says all we need is 40. I think it's
23 highly unlikely that that many tribes will opt out.

24 Most of these tribes do not have the resources. We
25 know of the top 50 accountholders that account for about 87,

1 88 percent of the dollar amounts of these tribal trust funds
2 according to the government's records, just over half of those,
3 28, have filed their own cases. But that means that 22 are
4 either named plaintiffs or putative class members. Of those 22,
5 only six have a Court of Federal Claims action. This still
6 leaves us with one-third of the top 50.

7 More importantly, of the non-top 50, the other 200 some
8 tribes, fewer than 20 percent have filed their own actions for
9 accountings. So class certification is really needed to bring
10 in all these tribes for whom the government is the trustee and
11 owes these accountings.

12 And it is commonality, the existence and scope of
13 defendant's fiduciary obligations to account, and whether those
14 fiduciary obligations have been met. That's the common issue,
15 and defendant's common defense, apparently, is that the Arthur
16 Andersen reports, or maybe a handful of Indian Claims Commission
17 actions, maybe a handful of Office of Inspector General reports
18 that have been done over the years, satisfy their obligations.
19 The resolution of that issue will affect all or most of the
20 members of the class, thereby satisfying the commonality
21 requirement.

22 Typicality: We've got the same course of events, same
23 legal theories. The claims for accountings of the 12 named
24 plaintiffs are the same as those of the putative class members,
25 because the law governing the trust fund accounts of all tribes

1 in terms of the fiduciary accounting obligations are the same.
2 And defendants have in fact treated all of the tribes' accounts
3 the same at least for accounting purposes. There can't be
4 anything much more vanilla than the Arthur Andersen project in
5 terms of the way it was developed and applied to all
6 310 accountholders for a 20-year period for which computerized
7 records were available. Before that, we're getting into, as I
8 understand it, the hard copies. That's typicality.

9 Adequacy: 12 named plaintiffs are adequate; every one
10 of them is on that accountholder distribution list, they are all
11 very experienced in litigation, including litigation against the
12 federal government. They vary in membership size, they vary in
13 terms of their land holdings, they vary in terms of the
14 resources underlying -- the trust resources underlying their
15 trust accounts, and they vary in geographic location.

16 THE COURT: And they would be represented by NARF. Is
17 that right?

18 MS. McCOY: That's correct, Your Honor, the Native
19 American Rights Fund. And I think we're well suited to do that.
20 We've been representing already five tribes in their trust
21 actions in both this court and in the Court of Federal Claims
22 now since 1992. And I think we're well suited to this. We have
23 an idea, as Your Honor alluded to, how this case proceeds.

24 Assuming we can get resolution of the threshold issue
25 about the accountings that are owed and that in our view have

1 not been provided, and we get to the then "what do we do," we
2 have some ideas about how there are nevertheless going to be
3 pervasive commonalities in terms of the types of accounts that
4 groups of tribes have, judgment funds versus proceeds of labor;
5 within the proceeds of labor, oil and gas, timber, grazing,
6 surface leases, other issues that defendants have raised in
7 terms of subclasses, including non-recognized tribes, tribes
8 that were terminated and then restored. I think the Native
9 American Rights Fund is well suited to heading those up.

10 THE COURT: What's your response, Ms. McCoy, to the
11 government's sovereignty argument?

12 MS. McCOY: Well, we appreciate the government's
13 understanding of tribal sovereignty, but we think it's being
14 misused in this case against the tribes. Tribes are sovereign,
15 they have immunity from suit, but all sovereigns get sued even
16 though they have immunity from suit. There's nothing magical
17 that says they don't have to go to court, make appearances, file
18 answers, make motions to dismiss, and have a court determine the
19 effect of their sovereignty in each instance.

20 What the government is saying here is that because
21 tribes are sovereign, there's a per se rule against them being
22 plaintiff class members. And that is just illogical. Having
23 this court determine that there's a plaintiff class consisting
24 of sovereigns is no more intrusive - in fact, it's less
25 intrusive - than what happens when sovereigns are sued as

1 defendants even though they have sovereign immunity from suit.
2 Again, once sovereigns are sued, there are specific and multiple
3 judicial procedures that they have to take and follow. They
4 have to --

5 THE COURT: Right. But we're not talking about the
6 sovereigns as defendants here, we're talking about imposing upon
7 sovereigns the result of a class decision, which this would do,
8 and you opt out, what, at the beginning; you don't like the
9 results, you opt out at the end. You're basically requiring
10 sovereigns, sovereign nations, to be subject to the rule of the
11 court in a class action. That's the argument that I understand
12 the government to be making.

13 MS. McCOY: That's correct, Your Honor. And it's no
14 more an affront to the sovereignty of tribes than it is for any
15 sovereign to be sued as a defendant. All this court would be
16 saying is that they're a plaintiff class. There's no express
17 waiver needed. We've proposed the opt-out form because we think
18 that will address the issues.

19 But their sovereignty is not really impacted by them
20 being named as part of a class in this court.

21 THE COURT: Well, let's play this one out, Ms. McCoy.
22 You want a (b)(2) class. A (b)(2) class is maintainable if the
23 party opposing the class - that's the government - has acted or
24 refused to act on grounds that apply generally to the class -
25 we all know what that is, lack of an accounting - so that final

1 injunctive relief or corresponding declaratory relief is
2 appropriate respecting the class as a whole. Okay?

3 MS. McCOY: That's correct.

4 THE COURT: Now, suppose you get a class certification
5 that says, on no account will this ever result in a monetary --
6 in monetary relief, period, full stop, because when you get to
7 money, there's no way you could possibly sort out -- you can't
8 lump all these sovereign tribes together.

9 There are probably -- I don't know what reports were
10 made on these 310 tribes, but my guess is that some of them
11 never got any revenues that were held in trust by the
12 government - or if they did, they were pennies - and others had
13 huge revenues.

14 Where is the commonality in that? How would a monetary
15 award of the nature that everybody is hoping for in *Cobell*
16 possibly apply to a class of tribes?

17 MS. McCOY: Let me see if I can answer that, Your
18 Honor. First of all, the plaintiffs in the class action are not
19 seeking money damages from this court.

20 THE COURT: Everybody says you're not seeking money
21 damages. I understand that.

22 MS. McCOY: They may well be seeking ultimately some
23 form of equitable monetary relief similar to what has happened
24 in the *Cobell* case.

25 The point today is that to even get to that, we need

1 class certification and we need resolution of the fundamental
2 issue about what accountings were owed all of these tribes and
3 whether any of them have been provided accountings. Then, as
4 has been said before this morning, with that information we can
5 begin to shape this case.

6 Because I think what we have here, I always liken it to
7 kind of in the civil rights area; the defendants keep wanting to
8 talk about desegregation plans and school size and things like
9 that. What we don't have and what is really hurting all tribes
10 here is we don't have a ruling that says separate but equal is
11 inherently unequal. We don't have anything that says they owed
12 accountings and they have not provided them. They're in breach
13 of trust; now what are we going to do about it? That's what
14 needs to happen to jump start all of these cases and see what
15 happens.

16 It's kind of like the *Cobell*, the-system-is-broken
17 trial. They went through that, they had to go through that.
18 Based on my experience in these trust fund cases, we are not
19 going to get to the "what do we do about it" until we get a
20 solid ruling that they are in breach of trust for not providing
21 the accountings that they have known and everyone has said are
22 owed to these beneficiaries. They can't even tell us when these
23 accounts opened. Judgment funds are easy. We know when
24 Congress appropriated the money. Proceeds of labor go back to
25 early 1800s.

1 Congress set up the trust relationship here by statute
2 long before the APA, and all of the things that defendants are
3 trying to throw up, and now when we're seeking class
4 certification in this court, they bring up the -- and I know
5 Your Honor has to deal with it too, the what-ifs and the
6 what-about's, and the, "well, this could happen" and the "well
7 this." And I appreciate that Your Honor has had a lot of
8 history with that. But we are never going to get to those, and
9 all of those can't obscure that there are fundamental up front
10 common issues that need to be addressed by this court in order
11 for these claims to be resolved. If we don't jump start that,
12 it's just never going to happen.

13 So that's why we need the class certification. And
14 opt-out I think will take care of those tribes -- I think there
15 are going to be a considerable number of tribes that want to
16 stay in this action just on that one point, and that's what
17 needs to happen here. Out of the 310 --

18 THE COURT: Basically because they want the Native
19 American Rights Fund to pursue their claims for them. I mean,
20 that's basically what we're talking about.

21 MS. McCOY: Well, again, of the top 50 tribes, 28 have
22 filed their own actions. There are hundreds of tribes that do
23 not have the resources to bring the kind of cases, as Your Honor
24 has seen after a year and a half, how hard the government
25 resists these cases and how they try to avoid any judicial

1 declaration and enforcement of their fiduciary obligations. Few
2 tribes -- actually, few tribes can do that.

3 These cases are consuming because the government
4 resists and because the accounts are so old and because so much
5 has happened. These cases are not to be taken lightly in that
6 sense, and I think we are well positioned to represent, and
7 we're also well positioned to come up with commonalities that
8 can move the case forward in a proper manner in court in terms
9 of grouping the tribes together.

10 And that happens all the time, Your Honor, in class
11 actions. A class is certified for the accounting issue;
12 certification can be revisited, modified. This court has a lot
13 of authority to do that.

14 THE COURT: Would you want me to certify this class if
15 I assured you from the get-go that we would never go any farther
16 than answering the question whether or not there's been an
17 accounting? That we will never, ever get to the equitable
18 compensation issue?

19 MS. McCOY: Well, I would have to say, Your Honor, yes.
20 But I would have to say it's a qualified yes. Yes, I think
21 that's an important issue, but I think that -- obviously I can't
22 say that -- I mean, I think the accounting and the resolution of
23 that will show that there are more claims, but what I can agree
24 to is that class certification could be revisited after that,
25 once we sort out where we are going to go.

1 THE COURT: All right.

2 MS. McCOY: Have I used up my 15 minutes?

3 THE COURT: I think you have. I think you better save
4 the five.

5 MS. McCOY: I will. Thank you.

6 THE COURT: I'm going to hear from Ms. Rudolph.

7 MS. RUDOLPH: Just checking to see if it was still
8 morning or afternoon, Your Honor.

9 Good morning, my name is Maureen Rudolph and I
10 represent the Department of Interior and the Department of the
11 Treasury here today. I'm going to address the plaintiffs'
12 motion for class certification.

13 There are basically two issues that we see sort of
14 presented here; first and foremost is what is the role of tribal
15 sovereign immunity here with regard to Rule 23; and second,
16 whether the plaintiffs have in fact met the requirements of
17 Rule 23.

18 Just to begin with, I would like to point out that it
19 is our position that the motion to dismiss should be decided
20 first before the motion for class certification. We believe
21 that it's a very different sort of class, as you were just sort
22 of somewhat discussing with Ms. McCoy, whether or not you're
23 talking about a full and complete accounting or if you're
24 talking about a challenge just to the TRP, and that those two
25 things may in fact decide whether or not class certification is

1 in fact appropriate here or not.

2 I'm going to use my time here today to respond to the
3 plaintiffs' oral argument and to their reply brief. We will be
4 resting on our opposition with regard to the arguments that were
5 made in the opening motion of plaintiffs' motion.

6 First with regard to sovereignty, the plaintiffs do not
7 address why -- they don't respond to why Rule 23 and how the
8 federal rule in fact waives tribal sovereign immunity. Instead,
9 in plaintiffs' reply, their main point is that which side of the
10 V they're on matters, whether they're a plaintiff or defendant,
11 and that because this is a plaintiff action, that somehow that
12 means that tribal sovereign immunity does not come into play.
13 They make this point on page five of their reply, footnote three
14 on page six, and page 16.

15 First off, the Supreme Court language is clear, any
16 waiver of tribal sovereign immunity must be unequivocally
17 expressed and it must be strictly construed in favor of the
18 sovereign. There's no basis in case law or the rules for the
19 proposition that that only applies when a tribe would be brought
20 in on the plaintiffs' side. We know -- they also don't address
21 in their reply brief the relationship between Rule 23 and
22 Rule 19, Rule 19 being joinder.

23 Rule 19, we know there is case law out there that
24 specifically says that -- and what is reflected in our
25 opposition, that Rule 19 does not waive tribal sovereign

1 immunity. In fact, Rule 19 specifically mentions joinder of
2 plaintiffs and involuntary plaintiffs, and Rule 19 is read into
3 Rule 23.

4 We believe that, and we do address on pages 12 to 16 of
5 our opposition, that the same analysis should apply to Rule 23
6 as it does to Rule 19, and that a waiver of tribal sovereign
7 immunity is in fact necessary for application of Rule 23 to
8 sovereigns.

9 THE COURT: The notion being that the very
10 requirement -- that even imposing a requirement on a sovereign
11 to opt out trespasses on the sovereignty of the tribe?

12 MS. RUDOLPH: That's absolutely correct, Your Honor.
13 It is our position that an opt-out does not address the issue of
14 sovereignty, and specifically because opt-out is basically a
15 retroactive retraction by the tribe of a decision that has
16 already been made to waive its tribal sovereign immunity and
17 bring it into court. That would be the action that would be
18 taken by certifying a class here; the tribes would come in and
19 then they would have to decide at that point to opt out. Not to
20 make a decision to invoke or waive their tribal sovereign
21 immunity, but simply to take it back. And that does not seem to
22 be what is intended by the rules, nor did Congress expressly
23 waive tribal sovereign immunity as part of Rule 23.

24 Importantly for our purposes here and from the
25 defendant's perspective, and what we've briefed on pages 11 to

1 12 of our opposition, is this issue of res judicata. Which is
2 also relevant, of course, to the opt-out and the sovereignty
3 issue, which is that for all these tribes to be bound, we do
4 believe that they would be necessary -- by any sort of judgment
5 here would need a necessary waiver of their own tribal sovereign
6 immunity.

7 I'm now going to move to the second half of the
8 argument, which is that the Rule 23 requirements are not met
9 here by the plaintiffs. As Ms. McCoy pointed out, there are
10 four factors under Rule 23 that must initially be met. Those
11 are numerosity, commonality, typicality, and the adequacy of
12 representation prong.

13 First and foremost, with regard to numerosity,
14 plaintiffs in their reply talk about that the number of lawsuits
15 will in fact increase here. They then say that -- in footnote
16 six that a lot of these tribes don't have their own resources
17 that would come into the class.

18 It is our position that sovereigns decide whether and
19 where to file suit based on numerous reasons, not just economic
20 ones. For example, the Red Cliff Band of Chippewa is a tribe
21 that would be considered a putative class member. They have
22 filed a previous accounting suit in the 1980's, which is
23 reflected in the case *Federal Band of Chippewa vs. United*
24 *States*, which can be found at 846 Fed 2d 474. It's an
25 8th Circuit case from 1988.

1 The point here being, Your Honor, that tribes know how
2 to sue the federal government, and they have had the resources,
3 and that it's not simply just a matter of economics. Many of
4 the tribes - many being 22 here - have decided to just simply
5 file in the Court of Federal Claims. That is a choice that they
6 made as sovereigns as to what venue they wanted to avail
7 themselves of. They could have filed in DC, chose not to.

8 It doesn't seem as if it should be a decision made by
9 the 12 named plaintiffs here to bring those tribes that decided
10 not to file suit in the DDC into the DDC if they don't want to
11 be here.

12 With regard to their reply brief and commonality, and
13 the oral argument here today, the Nez Perce complaint asks for a
14 full and complete accounting for all times through all periods.
15 In their reply brief and also in their opening motion the
16 plaintiffs focus on the Tribal Reconciliation Project, which
17 you've discussed here with my esteemed colleague Mr. Martin
18 today.

19 With regard to the TRP, you know, the declarations of
20 Kevin Nunes they've submitted focus specifically on the TRP and
21 basically the commonality with regard to the TRP. This also
22 comes back to why we think it's important for the motion to
23 dismiss to be decided first.

24 A full and complete accounting, as the Nez Perce
25 complaint sort of defines it, like I said, it would include all

1 time periods, which also goes to whether or not -- what is the
2 relationship and how do you -- you know, accountings that were
3 received as part of an Indian Claims Commission case, a GAO
4 accounting, how does that in fact factor into a full and
5 complete accounting.

6 If we are left with a situation that what we are
7 looking at is a challenge to the TRP as opposed to a full and
8 complete accounting for all time frames, we're looking at
9 different legal questions.

10 Along those same lines, in terms of different legal
11 questions, and this is where commonality and typicality a lot of
12 times tend to overlap, and obviously in the jurisprudence they
13 do when you're talking about law in fact here, you know, for any
14 type of accounting, one of the first things you look at is a
15 start date. You know, what are we talking about here? Again,
16 that is where perhaps the ICC or a GAO accounting would come
17 into play.

18 Other things that we've pointed out include whether or
19 not a tribe is considered direct pay and receives money directly
20 from a lessee as opposed to it coming into the trust.

21 We would urge this court, in the context of commonality
22 and typicality, to look to the *Pueblo of Zuni v. U.S.* case found
23 at 243 Fed RD 436 in the District of New Mexico. It's a 2007
24 case. In that case in the District of New Mexico, the court was
25 asked to certify a class with regard to Indian Health Service

1 contracts. The court in that case in the District of New Mexico
2 did not certify the class for a few reasons; one of the reasons
3 being that he found -- the judge in that case found that the
4 Indian Health Service contracts were based on the same model,
5 but they had various differences with regard to the final
6 contracts.

7 He also believed because of that that he would have to
8 engage in numerous minitrials in trying to decide final
9 liability and remedy, and that the particular tribes were
10 individually situated, and therefore chose not to certify the
11 class.

12 THE COURT: Was it proposed as a (b)(2) class?

13 MS. RUDOLPH: I believe that case was actually a
14 (b)(3), Your Honor.

15 THE COURT: Sounds like it, doesn't it? Sounds like a
16 manageability ruling.

17 MS. RUDOLPH: Yes, I think that's right.

18 The plaintiffs here in Nez Perce have also asked in the
19 alternative for certification under (b)(3), so we believe that
20 *Pueblo of Zuni* would go to that in response to their motion on
21 that as well.

22 Other responses with regard to typicality, again
23 focusing frankly just solely on the TRP, we would draw Your
24 Honor to the declaration of Greg Chavarria in which he discusses
25 a lot of reasons as to why the TRPs that were received by the

1 tribes are not necessarily typical of each other; even though
2 there was a general framework that was used in doing those
3 tribal reconciliation projects -- Tribal Reconciliation Project
4 reports, that tribes did in fact receive different deliverables.

5 The two attachments -- or two of the attachments to
6 Mr. Chavarria's declaration, Exhibit C and D, one is the TRP of
7 the Yakama tribe, one is the TRP of the Yurok. Looking and
8 comparing those two, you can see the differences in how the
9 ultimate -- the TRPs were carried out for different tribes.

10 With regard to adequate representation, the plaintiffs'
11 reply claims that even though there would be the potential for
12 duplicative relief in the CFC and the DDC, that somehow that
13 that duplicative relief would not conflict. They make that
14 statement on page 10 of their reply brief.

15 I think Your Honor has heard from different counsel
16 today who actually have different positions as to whether or not
17 any such accounting would need to be on a tribe-by-tribe basis
18 or would need to be on an omnibus basis. Mr. Harper gave you
19 one response, Mr. Gordon offered a different position on that
20 same exact issue.

21 Our point here, Your Honor, is that there is the
22 potential for conflict with regard to the cases that are pending
23 in the CFC already, represented by different counsel than NARF,
24 and being brought into the DDC to be represented by NARF. And
25 that frankly, Your Honor, is enough to state that the plaintiffs

1 do not meet the adequacy prong of Rule 23.

2 Same goes for the other examples that we've pointed out
3 in our briefing --

4 THE COURT: Hold it, hold it. I'm not going to quibble
5 with you about the adequacy prong, but it seems to me that
6 argument goes more to commonality and typicality than it does to
7 adequacy of representation. You're not challenging the adequacy
8 of representation. Suppose all these tribes could be
9 represented by the Native American Rights Fund, pretty
10 substantial operation, good lawyers, well funded. That's the
11 kind of thing I look at when I think about adequacy of
12 representation.

13 I don't perceive any conflict, if that's what you're
14 talking about.

15 MS. RUDOLPH: No, Your Honor, we're not challenging the
16 adequacy of NARF to represent different tribes. Our
17 understanding of the case law is that there are two parts to
18 adequacy, as detailed in our opposition, not just the adequacy
19 of potential class counsel, but also the adequacy of the class
20 members to represent the putative class and the potential for
21 any conflicts between the class members, the named class
22 members, and the putative class. And that is what we are
23 getting to on that point, that there is the potential for
24 conflicts between putative class members and named class
25 members.

1 We've also pointed to a few other examples in our
2 opposition as well.

3 Moving to the 23(b)(2), and specifically, Your Honor,
4 in our opposition we point out -- and this is something that is
5 also being considered by Your Honor with regard to the motion to
6 dismiss, which is this idea of monetary relief versus monetary
7 damages.

8 The Nez Perce plaintiffs have requested, as your
9 discussion with Ms. McCoy indicates, adjustments to their
10 account balances. And as Your Honor pointed out, it is our
11 position that at the end of the day, if there were a decision
12 made that somehow money needs to be moved around here, how
13 exactly Your Honor would do that or where the money should go,
14 it seems to us that those -- that the tribes cannot be
15 represented by the same party in making those types of -- that
16 somebody's interest would suffer at the expense of somebody
17 else. So that should not be an appropriate thing to be decided
18 in this type of forum under a class.

19 THE COURT: But you could see a model for -- I mean,
20 the sort of Teamsters model is, I assume, what the plaintiffs
21 have in mind here; first a finding that there hasn't been a
22 proper accounting, and then perhaps tribe-by-tribe hearings as
23 to what the benefit or what remedy if any would accord each
24 tribe. I'm probably putting words in Ms. McCoy's mouth, but
25 I'll bet that's what she's thinking about.

1 MS. RUDOLPH: Your Honor, I think that would be one
2 possibility. We do not think, again based on our other things
3 first and foremost, that the duty to account should be
4 separately certified.

5 However, along those same lines, it does seem to us
6 that if you did go down that path, that at that point in time
7 the tribes would have to be represented individually for --
8 especially for remedy, when we do know that there are, and as is
9 pointed out in our opposition, already known issues between
10 tribes in terms of who claims -- certain disputes between who
11 claims what fund, what tribal account fund.

12 THE COURT: Well, maybe if there were a global --
13 again, very hypothetically, if there were some global award and
14 the question is now everybody gets to fight over it, then I
15 agree that there would have to be separate representation
16 because it would be a limited resource and a number of
17 claimants.

18 But that's a long way in the future, I think.

19 MS. RUDOLPH: That is correct. However, I do think
20 that the Rule 23 analysis does require us to look at those
21 issues and for you to decide whether or not that potential for
22 conflict, and how that would -- that that potential for conflict
23 in the future can in fact defeat class certification.

24 Your Honor, those are all of the points I had that I
25 wanted to respond to with regard to the oral argument and their

1 reply. In short, Your Honor, we do believe that class
2 certification must be denied. If there are no further
3 questions...

4 THE COURT: Thank you, Ms. Rudolph.

5 MS. RUDOLPH: Thank you.

6 THE COURT: Ms. McCoy, if your 23(b)(2) theory only
7 gets you to a ruling, or it's founded on the idea that what the
8 government has done so far, its TRP reports, is not an
9 accounting, doesn't that begin to invoke the argument the
10 government is making on the motion to dismiss about the *SUWA*
11 case and the *Lujan* theory, that what you're really doing is
12 trying to attack a government program and not any specific claim
13 for any specific tribe?

14 MS. McCOY: No, Your Honor. I think it's very clear
15 that the tribes' claims in these cases are based on the
16 government's being their trustee, and they happen to be the
17 government. I know the government is of the view that they're
18 the government and they happen to be the trustee, but we see it
19 that they are the trustee, and they always want to find a way to
20 bring the government side into that.

21 The tribes had no choice. You know, the government
22 will say, well, we're not Merrill Lynch. No, but the tribes
23 didn't have a choice of going to Merrill Lynch. Congress said
24 the government is the trustee, and there's considerable evidence
25 that Congress meant what it said about that.

1 And I realize that they tried to bring in the APA, but
2 again, these trusts were set up long before APA Act, and there's
3 ample jurisdiction in 1331, in the federal question statutes and
4 otherwise that these are breach of trust cases. Because they
5 happen to be the trustee -- I agree with what was said earlier.
6 Because they happen to be the government, the only issue is any
7 immunity from suit. And I think that's addressed in the APA
8 waiver which applies to APA and non-APA. And it's the Nez Perce
9 plaintiff's position that this is first and foremost a non-APA
10 case, it is a breach of trust case.

11 And I was thinking when they mentioned the *Zuni* case,
12 which I'm aware is the most recent effort by tribes to get a
13 class certified, and as Your Honor pointed out, that's an
14 example where it was a (b)(3) -- attempt at (b)(3)
15 certification, and, of course, all the self-determination
16 contracts were entered into with tribes under the Indian
17 Self-Determination Act. And what the court said was, yeah,
18 there's a single statute that governs there, but all the
19 contract negotiations were done separately.

20 This is not a breach of contract case, this is a breach
21 of trust case. And it's very different. There are -- what we
22 have here are multiple beneficiaries suing a common trustee for
23 breach of trust. That is a textbook example of a
24 class-certification-worthy case.

25 They have raised some issues -- I guess I want to touch

1 on they've raised a little bit about conflicts that would
2 preclude some of our named representatives from serving as
3 adequate class representatives. They've also brought up that
4 perhaps in some instances we've been deficient in naming proper
5 representatives for all groups that are represented in the
6 class.

7 I think both of those are curable. I think a lot of
8 theirs conflicts they posit are hypothetical, remote, they're
9 way down the road. And again, there's so much authority of a
10 court to certify a class and then revisit class certification as
11 a class develops. It happens all the time.

12 On the lack of proper representations, I just want to
13 say that the plaintiffs in this case have made a good faith
14 effort to name adequate representatives. The defendant's
15 arguments now that we've been deficient in some areas are based
16 on information that they have and we don't, and we sought and
17 they wouldn't give us, and now they're saying that there's all
18 this information that is needed to define the class reps
19 properly in this case should class certification be granted.

20 And our response to that is this court should then
21 certify the class, order the defendants promptly to produce the
22 information to us that we need, and give us a reasonable
23 opportunity to name adequate representatives.

24 THE COURT: Why can't the Native American Rights Fund,
25 which is a highly respected, well established, nationally known

1 organization, simply get in touch with all those 260 tribes and
2 say, come on, guys, you want to join us?

3 MS. McCOY: Joinder, Your Honor. Because if we're
4 going to go that way, the whole purpose -- I guess we could
5 theoretically do that, but the whole purpose of class
6 certification is to get some efficiency and some judicial
7 economy in that.

8 THE COURT: I sure don't see it as efficient. I see a
9 case involving one tribe metastasizing into a case that involves
10 200 tribes, and the evidence and the records and the discovery
11 and the procedural problems -- I mean, I know we're not talking
12 about (b)(3) management issues, but from the bench you've got to
13 think about management. And I see the management problems of a
14 class action like that as being just *Cobell* revisited. And
15 nobody wants that.

16 MS. McCOY: Well, Your Honor, class certification at
17 the outset will only help. As Your Honor knows, you have 37
18 other cases in addition to the Nez Perce case. If class
19 certification is denied, Your Honor could have 100 or 200 or
20 300.

21 THE COURT: And one or two of them would wind up being
22 prosecuted and tried as a test case, and then everybody would
23 know where they stand.

24 MS. McCOY: That's possible. But we also think that
25 all of the tribes need to be brought in and heard on these

1 important threshold issues and see how things shake out in terms
2 of the matters they've raised down the road.

3 I think again it's just common, when there's a class of
4 beneficiaries who have suffered identical misperformance or
5 breaches of trust by the trustee, that they deserve to be in the
6 class.

7 THE COURT: How many of these 260 tribes are tribes
8 that have existed more than, whatever, 25, 30, 35 years, since
9 more and more tribes and bands became recognized?

10 MS. McCOY: It's my understanding, Your Honor, that
11 since 1978, which is a few years after the Indian
12 Self-Determination Act, there have been about 25 tribes that
13 have been recognized.

14 THE COURT: That's all. That's another subject.
15 That's a subject for another day.

16 MS. McCOY: 16 of them through the administrative
17 process and nine through the legislative -- through Congress,
18 through the legislative process. We have about 110 tribes that
19 were terminated by the government in the 1950s and '60s. Most
20 of those have been restored.

21 There are -- again, we're well aware of these subgroups
22 and we're well aware of the arguments that the government is
23 likely to make against those sovereign tribes.

24 I also think that class certification --

25 THE COURT: You're saying 110 of them were terminated

1 and restored?

2 MS. McCOY: Your Honor, I'm sorry, 110 tribes were
3 terminated. I am less sure of the number that have been
4 restored.

5 THE COURT: But your 260 number includes the restored
6 tribes and the 25 newly recognized tribes?

7 MS. McCOY: Yes, Your Honor, if they are on the
8 accountholders distribution list. And some of those are. Well,
9 for example, a restored tribe that's even a named plaintiff is
10 the Klamath tribe. They were restored in 1986. The Catawba
11 tribe is on the list. They were restored in 1993. The
12 Menominee tribe was restored in 1973. Those are some of the
13 terminated tribes that were restored. Half of the tribes that
14 were terminated are in Oregon alone, 62 of the 110. I'm less
15 certain how many of those have achieved restoration.

16 Of the newly recognized tribes, Mashantucket Pequot,
17 for example, in Connecticut is on the accountholders
18 distribution list. They are one of the ones that has achieved
19 recognition since 1978. Little Shell and Brotherton are on the
20 accountholders distribution list, those tribes who have
21 administrative recognition petitions pending. Miami Tribe is on
22 the list. They have been denied recognition.

23 So there's quite a range there, from what we can see,
24 from that accountholders distribution list.

25 There's also 13 Alaska --

1 THE COURT: You mean TRPs were prepared and sent to
2 tribes whose existence has been denied by BIA? How does that
3 work?

4 MS. McCOY: Well, I think the government could better
5 answer that than we could, Your Honor. Yes, the Miami Nation of
6 Indians' recognition has been denied, and they are on the list.
7 That means they at one point had a trust fund that was subject
8 to defendant's trusteeship.

9 I think the other, of course -- you know, just in
10 closing here on class certification, to go back to some very,
11 very important rules, this court has broad discretion to certify
12 this class and to revisit it as the case goes on. This court
13 must accept as true the allegations in the complaint, resolve
14 uncertainties in favor of the plaintiffs moving for class
15 certification, and we really think that we can bring some
16 efficiency and order to this situation.

17 And I think the other thing is, of course, as we all
18 know, there's some potential statute of limitations issues here.
19 And that's another reason for granting class certification, is
20 to avoid any tribe being left out of this. And I know that when
21 Your Honor considers class certification, the statute of
22 limitations factor is not supposed to mix in on the merits, but
23 to keep that in mind as class certification is being considered.

24 THE COURT: Well, what is the statute of limitations
25 problem, even potentially?

1 MS. McCOY: Well, we don't think there's any statute of
2 limitations problem, because this case was filed on
3 December 28th, 2006. But to the -- it's just one of those --
4 it's just one of those possibilities that class certification
5 could help alleviate, to leave no tribe left out of this mess
6 that we're in.

7 THE COURT: No tribe left behind.

8 MS. McCOY: No tribe left behind, Your Honor. That's
9 our motto.

10 THE COURT: All right. Thank you, Ms. McCoy.

11 MS. McCOY: Thank you, Your Honor.

12 THE COURT: Now I think I'm going to hear from
13 Mr. Austin about the records preservation question.

14 MR. AUSTIN: Yes, Judge. Good afternoon. The court
15 has allocated 10 minutes per side for this third and final
16 argument. I would like to reserve two minutes for rebuttal.

17 THE COURT: Okay.

18 MR. AUSTIN: In moving the court for entry of a
19 document preservation order, our four tribal clients are joined
20 by nearly 30 other tribes. These tribal plaintiffs are unified
21 in seeking a preservation order here because there is a
22 compelling need for such relief.

23 The importance of maintaining and protecting tribal
24 trust records is clear. The government admits as much, that
25 such records are essential to the fulfillment of its duties.

1 And as *Cobell VI* has recognized, the failure to preserve those
2 trust records necessary to conduct an accounting is a clear
3 breach of trust duty.

4 And yet, notwithstanding the government's claims of
5 improvement following decades of neglect, a situation which this
6 court recently described as involving an abysmal record of
7 failing to preserve and protect trust records, what is before
8 the court in support of plaintiffs' motion today establishes
9 that these defendants still have a long way to go to adequately
10 protect plaintiffs' trust documents.

11 Indeed, incidents of destruction and loss of tribal
12 trust records persist to this day, and due to a variety of
13 causes. In 2005, Indian Trust records stored at the National
14 Archives were the target of a half dozen episodes of attempted
15 improper disposal, later determined to be acts of sabotage by a
16 disaffected governmental employee. In 2006, flooding rains and
17 a malfunctioning sprinkler system damaged trust documents in
18 separate incidents.

19 In 2007, 15 boxes of trust records that Treasury had
20 entrusted to a government contractor were destroyed, a loss
21 later blamed on the fact that the employee at the storage
22 facility where the records were held was able to override the
23 hold that had been placed on these materials.

24 And in April of this year, just days before this motion
25 was filed, the government disclosed that nine boxes of trust

1 records delivered to defense counsel for privilege review in a
2 Court of Federal Claims case called Navajo Nation had been found
3 to be mold and water damaged, and there's now an ongoing
4 investigation supervised by the Court of Claims as to whether
5 this latest problem may actually be far more widespread in scope
6 than initially reported.

7 The government's nearly 900 pages of exhibits
8 ostensibly submitted to this court to show how well trustee
9 delegates are now doing when it comes to protecting tribal trust
10 documents in fact demonstrate to the contrary. By the
11 government's own assessment, tribal records at a number of local
12 BIA agencies are records in jeopardy. That's the government's
13 term for the state of things, "records in jeopardy." They're
14 vulnerable to risk of fire, flood, insect infestation, rodents.

15 These materials - again, I'm talking about the
16 government's exhibits - also reveal that the completion of the
17 AIRR facility in Lenexa, Kansas four years ago has not solved
18 the problem. Indeed, the confessed backlog in getting so-called
19 inactive trust records classified, boxed, and shipped to the
20 cave in Lenexa is serious and worsening.

21 This is just a thumbnail sketch of some of the problems
22 that continue to plague the government's retention efforts.
23 These are problems that have come to light. They could well be
24 just the tip of the iceberg. Suffice it to say, the need for
25 the court's intervention and relief is manifest.

1 THE COURT: Well, Mr. Austin, I'm going to ask the
2 question you knew I was going to ask, which is, what do you get
3 out of a record preservation order that you don't get out of the
4 money they're already spending at Lenexa, investigations that
5 are being done, rules about spoliation of documents? I mean,
6 what do you get out of it except an order that you can wave in
7 front of me and say, I want these people held in contempt. You
8 know what I do with contempt.

9 MR. AUSTIN: Your Honor, let me address that question,
10 because that's the point of my argument that I have reached as
11 well. What is it that the plaintiffs' proposed preservation
12 order will do to improve this situation? I mean, what is the
13 value of the relief that we are seeking, when our goal - and we
14 would trust the shared goal of the government - is to protect
15 irreplaceable trust records against further risk of destruction,
16 damage, or loss.

17 Let me start by telling you what this proposed order
18 that we've submitted to the court will not do. It will not
19 dictate specifically the steps to be taken to protect these
20 materials. In fact, it explicitly will leave that to the
21 government to establish mechanisms for ensuring compliance.

22 Now, the defendants claim to have developed retention
23 policies and protocols concerning the preservation of trust
24 records. Fine. The proposed order doesn't conflict with or
25 supplant the defendant's policies and protocols. If anything,

1 it should enhance the effectiveness of such efforts by making
2 sure that the obligation to preserve tribal trust records is
3 clearly conveyed to anybody on the defendant's behalf who is
4 entrusted with such materials.

5 Now let me respond directly to the question the court
6 has raised: What are the provisions in this proposed order
7 designed to accomplish? First, and this is found in
8 Paragraph 1(b) of the proposed order, first, all records
9 relating to the tribe's trust funds and other trust assets are
10 to be preserved. The preservation order entered in the *Cobell*
11 case in August of 1999 imposed the same requirement, and we
12 submit in tribal trust litigation involving an accounting claim,
13 it is critical that at this early stage any documents relating
14 to our clients' trust funds and assets should be protected
15 against destruction or loss. All of those materials, and then
16 some, may be necessary in the end for the government to provide
17 the complete and accurate accounting that these tribal
18 beneficiaries are seeking.

19 In addition and secondly, the proposed order will
20 direct that it be disseminated to government contractors as well
21 as to government personnel. This would appear to address and
22 resolve a significant gap in the defendant's efforts. Their
23 documents, the exhibits they have produced, talk frequently
24 about the need for government contractors to be made aware of
25 the obligation, but at least with respect to the Department of

1 Interior's contractors, the materials don't show what has been
2 done to make certain that the need to preserve these materials
3 has been conveyed to the contractors and that the message has
4 been heeded by them.

5 Again, the *Cobell* preservation order included expressly
6 the requirement that the obligation to preserve records be
7 conveyed to those contractors that are working for Interior and
8 possess trust records, and that is the same kind of relief that
9 we seek here and the protection that would result from entry of
10 the order.

11 Then there is the notification requirement, and to our
12 way of thinking, this may be the most beneficial and significant
13 of all of the provisions of the proposed order. It's found in
14 Paragraph 1(c), and it's the requirement that the court
15 immediately be notified by the government in the event of any
16 instance of destruction or loss of the tribal trust records in
17 violation of the order. We regard this as a critical provision.
18 None of the government's internal directives and policies goes
19 so far as to require notification of the court in such a
20 situation.

21 Hence, this is a major reason why the order we're
22 proposing is so necessary. In the event of an incident of
23 destruction or loss, early notification can make a profound
24 difference. It would give the court the opportunity to look
25 into the matter, to direct the government, where necessary, to

1 investigate further, and perhaps most importantly, to develop a
2 plan for preventing a recurrence of the same problem.

3 Similar notification provisions have been included in
4 each of the seven preservation orders entered in pending Court
5 of Federal Claims cases involving tribal mismanagement
6 allegations.

7 An example of the value of these provisions is what has
8 transpired since the government's April 15th notification that
9 nine boxes of trust documents involved in the Navajo Nation suit
10 pending in the Court of Federal Claims were mold or water
11 damaged. The very next day, April 16th, CFC Judge Allegra
12 issued an order directing the government to explain in detail
13 when and how the damage had occurred, whether other trust
14 records might be similarly threatened, and to propose additional
15 steps to be taken to assure the problem would not occur again.

16 Three months later, the follow-up continues. In a
17 supplemental notice of destruction filed on July 8th, the
18 government has identified seven additional boxes of damaged
19 trust records, and a total of 581 boxes of records are now
20 slated for further testing and possible remediation.

21 To us, this illustrates the clear benefit of the
22 preservation order. If prompt notice is given of compliance
23 concerns, other records in jeopardy may be identified and
24 salvaged due to timely follow-up. As I trust the foregoing
25 overview of terms reveals, the proposed order is constructive in

1 its approach, it's designed to aid in what should be the shared
2 objective of beneficiary and trustee to protect tribal trust
3 records against further damage, destruction, or loss.

4 And we submit the time for the court to act to preserve
5 plaintiffs' trust records is now. Contrary to what the
6 government argues, it is by no means premature to consider this
7 issue, nor must plaintiffs meet the more demanding requirements
8 for a preliminary injunction to obtain the order's entry.

9 Rather, this court clearly has the case management authority
10 under Rule 16 to enter the preservation order, and in accordance
11 with its inherent authority to preserve the integrity of the
12 judicial process. That's what the *Pueblo of Laguna* decision
13 we've cited in our materials holds, and it further recognized
14 that a preservation order may issue so long as it is shown to be
15 necessary and is not unduly burdensome. We believe we've fully
16 satisfied both of these requirements in this case.

17 In conclusion, we ask that the proposed preservation
18 order be entered in this litigation forthwith. We also request
19 that the same form of order be entered in the other tribal
20 accounting cases in which tribal plaintiffs have joined with us
21 in seeking this relief. We believe the adoption of the same
22 form of order makes sense administratively. This is truly an
23 instance where consistency is a virtue, where uniformity of
24 provisions should facilitate compliance and minimize the risk of
25 confusion as to what is required.

1 At this point I realize my time is up. Without further
2 questions from the court, I'll yield to counsel.

3 THE COURT: Thank you, Mr. Austin.

4 MR. AUSTIN: Thank you, Judge.

5 THE COURT: Mr. Regan?

6 MR. REGAN: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MR. REGAN: Defendants agree that it's important to
9 protect and preserve trust records. The question is, Your
10 Honor, what's the best way to go about that goal. A record
11 retention order, as Your Honor pointed out, you're not going to
12 get much. A record retention order is unnecessary, it's
13 counterproductive, and it's unduly burdensome.

14 Your Honor, there are several legal standards that
15 courts have applied when determining whether to impose a record
16 retention order, and under all these standards, plaintiffs have
17 failed to meet their burden of proof. They've failed to
18 demonstrate a specific threat to the records of any of the 34
19 tribes involved in this litigation before you. The plaintiffs
20 have failed to demonstrate that the comprehensive record
21 preservation programs that are already in place are going to be
22 ineffective.

23 For example, the Department of Interior, an important
24 theme of the strategy that has been put in place is the movement
25 and centralization of inactive trust records to the American

1 Indian Records Repository in Lenexa, Kansas, which as Your Honor
2 is well aware is a state of the art facility. Plaintiffs'
3 proposed movement restrictions will interfere with the ability
4 of the Department of Interior to transport records to a facility
5 where they can receive superior protection.

6 As the declarations have made clear, for example, the
7 declaration of Ms. Ethel Abata (ph) from the Office of Trust
8 Records, there are a number of considerations that go into a
9 decision to move records to the AIRR and the timing of that
10 movement. Those factors include local weather conditions, they
11 include the availability of manpower and the priorities of
12 different trust records throughout the United States.

13 Your Honor, the record retention order that plaintiffs
14 have proposed, or any record retention order, for that matter,
15 it's going to be destructive rather than constructive, as
16 plaintiffs suggest. It's going to inject the court and the
17 plaintiffs' counsel into the day-to-day business decisions of
18 the defendants.

19 Your Honor, I don't have much time today. We have
20 submitted extensive declarations; according to plaintiffs'
21 counsel it's about 900 pages, and it explains some of the
22 mechanisms that are in place as well as some of the burdens that
23 could be imposed by a record retention order.

24 Does the court have any specific questions?

25 THE COURT: Well, you said -- let's see. You said

1 counterproductive. You said unnecessary, counterproductive, and
2 unduly burdensome. Except for restricting or impeding the
3 movement of documents to Lenexa, how is it counterproductive?

4 MR. REGAN: Your Honor, it imposes specific procedural
5 steps. Contrary to plaintiffs' argument, it requires
6 consultation with plaintiffs' counsel on a number of occasions
7 in a number of different circumstances.

8 In addition, adding another layer of court orders on
9 top of those that are already in place that have been entered in
10 the Court of Federal Claims is going to cause further
11 uncertainty, and uncertainty can lead to delay of appropriate
12 actions being taken to ensure that trust records are
13 appropriately preserved.

14 THE COURT: What is your response, Mr. Regan, to
15 Mr. Austin's point about notification?

16 MR. REGAN: Your Honor, there is a clearly established
17 body of case law involving the consequences of the destruction
18 of evidence and the spoliation doctrine, the adverse inference
19 doctrine.

20 The DC Circuit case *Shepherd Vs. ABC Company* that we
21 cite in our opposition explains some of the consequences for the
22 destruction of evidence and some of the considerations that come
23 into mind when a court is determining how to appropriately
24 address those incidents. And it behooves the defendants to
25 operate with candor and to inform the court, and also to take

1 appropriate measures. If documents are in a threatening
2 situation, it behooves the government to take steps to minimize
3 those risks.

4 And, for example, plaintiffs' counsel referenced the
5 incident involving Navajo documents, which are not a party to
6 this litigation. But in that case defendant is taking the
7 appropriate steps to remediate those documents and ensure that
8 professionals are used to address the consequences of the
9 damage.

10 THE COURT: Okay. Anything else?

11 MR. REGAN: Your Honor, just one further matter.
12 Earlier you asked about the situation regarding Ak-Chin
13 documents, and I'm also counsel in that case.

14 THE COURT: Yeah. Oh, good. We've got you where we
15 want you, then.

16 MR. REGAN: I'm happy to be here, Your Honor.
17 Defendants have continued to work with plaintiff counsel to
18 identify the specific right-of-way documents that they're
19 seeking. However, as the defendants pointed out in their
20 June 30th filing to the court, there's now formal discovery
21 underway in the Ak-Chin's companion case in the Court of Federal
22 Claims in front of Judge Hewitt, and those discovery requests,
23 including interrogatories and requests for production, involve
24 broad categories of documents, including those related to
25 natural resources and the rights-of-way.

1 THE COURT: And so what? So you are diverting your
2 attention to the discovery requests and considering them to be
3 covered by the discovery requests and not by the requests made
4 in this court?

5 MR. REGAN: Your Honor, we're pursuing both
6 simultaneously. And I think that sort of illustrates one of the
7 themes of the issue with the record retention order, is that you
8 have competing levels -- or excuse me, competing layers of
9 specific steps that defendants must comply with.

10 And in response to your question, we are continuing to
11 seek those specific right-of-way documents and we are also
12 endeavoring to respond fully to the formal discovery that has
13 been served.

14 THE COURT: Okay.

15 MR. REGAN: Your Honor, one more point in closing. You
16 asked about how this --

17 THE COURT: I think I am going to have let both
18 Mr. Harper and Mr. Austin reply to this argument. Go ahead.

19 MR. REGAN: Your Honor, just one final point, and that
20 is, you asked how a proposed order could be counterproductive in
21 this case. And essentially the answer is that the proposed
22 order and a number of orders that have already been issued are
23 very overbroad, and complying with these orders diverts
24 substantial resources from the agencies serving the public and
25 serving the specific tribes at issue in this litigation.

1 Thank you, Your Honor.

2 THE COURT: Thank you, sir.

3 MR. AUSTIN: Your Honor, I've got two minutes, I trust,
4 to talk about the preservation issue, and then I would like to,
5 on behalf of Mr. Harper and myself, respond to the Ak-Chin
6 comments that were made just a moment ago.

7 I heard the same words Your Honor took note of, that
8 what we're asking for is unnecessary, unduly burdensome,
9 counterproductive. It is worth noting almost those same words
10 have been used and asserted in response to each and every
11 occasion where in tribal trust cases plaintiffs have requested
12 this kind of relief. And to this point, in each and every
13 instance where the issue has been decided, the courts have opted
14 in favor of protection, of entering the kind of order we seek.

15 I must say, as a lawyer representing a trust
16 beneficiary, it is particularly disheartening to hear counsel
17 complain about those provisions in our proposed order that
18 direct consultation among the parties. If the court has the
19 opportunity to look at those specific provisions, they're about
20 what is appropriate when there's a difficult question as to
21 whether something should be retained or not, whether the
22 mechanisms developed to ensure compliance are deemed to be
23 effective and appropriate. They're all about giving the parties
24 the opportunity to work together to avoid the compliance, the
25 sanctions, the issues down the road that might otherwise occur

1 if they don't talk to each other sooner rather than later.

2 And as I say, it is disheartening to see that kind of
3 provision cited in response to the question, what is
4 counterproductive about this.

5 Counsel says we failed to carry our burden of proof.
6 Your Honor, again, looking at their records, what they show is
7 ongoing failures to properly protect these documents. As an
8 example, let me refer the court's attention to Defendant's
9 Exhibit 40. It is a declaration of a Ms. Martinez on behalf of
10 the Pima BIA agency. It refers to an assessment done by the
11 government in 2005 that identified 35 major deficiencies in the
12 way in which tribal trust records were maintained, every
13 conceivable problem, stored in places that weren't fire
14 resistant, susceptible to damage as a result of leaks,
15 infestation with rodents.

16 As of April 18, 2008, Tab A to the Martinez declaration
17 shows that seven of those problems continue to be unremedied.
18 Under the heading "corrective action," seven major problems
19 remain unrectified. These are the government's materials. We
20 didn't require that they produce these. I'm assuming this was
21 to put their best foot forward, and this is what those documents
22 show. We have clearly satisfied the burden of proof that is
23 necessary to demonstrate that the preservation order we're
24 seeking is necessary.

25 Finally, with respect to the -- just a moment, Your

1 Honor. I'm trying to distill the best argument to respond to
2 given the time limit.

3 THE COURT: Take your time.

4 MR. AUSTIN: Let me turn to the Ak-Chin concern.

5 THE COURT: All right.

6 MR. AUSTIN: As I understand it, Mr. Regan, who I
7 understand has recently inherited this file from predecessor
8 counsel of record, has advised the court that we have now served
9 discovery in the Court of Federal Claims litigation for Ak-Chin
10 that is duplicative, overlapping, and presents a problem with
11 respect to the government's proceeding as this court had
12 directed following the February 2008 hearing.

13 In fact, the discovery that we served specifically
14 directed, in a special notice attached to the first page of each
15 set of our production requests, that made it clear nothing that
16 was being sought and requested in this court was to be provided
17 to us, that we had no intention of creating the sort of problem
18 of duplication and burdensomeness that the court is being told
19 about in this instance.

20 And moreover, Your Honor, with respect to where the
21 informal process that the court directed to be employed stands,
22 we have been advised in correspondence sent by the Department of
23 Justice in May of this year that it looks as if some of the
24 documents may be found somewhere in approximately 3,000 boxes of
25 trust records sitting in Lenexa. That's, to our way of

1 thinking, no way of complying with the obligation, either under
2 the rules that govern the discovery process or the rules that
3 govern the conduct between the trustee and fiduciary to respond
4 or to comply with the government's obligation under trust law
5 principles to furnish information when requested.

6 And this is information, as the court is well aware,
7 that is necessary for our client to protect itself against this
8 circumstance of hypergrowth that it is attempting to deal with.
9 So that as of this day, most of the records that we indicated
10 were so critical to be obtained with respect to alleged and
11 asserted right-of-ways, with respect to more than a half dozen
12 roads and other property interests, remain unprovided. And all
13 the while, all the while things are happening on the reservation
14 that make it absolutely essential that we have an answer to the
15 questions that we've raised with respect to these materials.

16 If the materials in fact don't exist, Judge, then the
17 development that's occurring may well be improper and there may
18 be a basis for our client to say, halt right there, you have no
19 legitimate right to be doing what you're doing. But we're in a
20 position, without these materials, where we don't know yet the
21 answer, and that's not a position that a fiduciary should be put
22 in by its trustee. No way.

23 THE COURT: Well, the issue, the record discovery issue
24 in the Ak-Chin case, I consider it sort of analytically separate
25 from the question we're bringing here, Mr. Austin. I'm

1 interested in that response, but maybe we ought to reconvene the
2 Ak-Chin case at some point and decide where those records are
3 and how we're going to get them.

4 But as it relates to the record preservation order
5 motion, I hear you and I hear your response to what Mr. Regan
6 said, and I think we can move on.

7 MR. AUSTIN: Thank you, Judge.

8 THE COURT: All right. It's almost 1:00 o'clock. I've
9 heard a lot of excellent argument from excellent lawyers on
10 complex motions. I'm not going to rule on all of them -- I'm
11 not going to rule on the motion to dismiss at all today. It is,
12 as I indicated, a very -- I consider it a legally very complex
13 motion that I need to take under consideration, and it is
14 submitted and will be ruled upon as soon as I can get to it.

15 I hope the parties will appreciate that we are sharply
16 focused on finishing up what we have to do in the *Cobell* case,
17 frankly, before we turn to a complex motion like the motion to
18 dismiss. And so it may be a little while before you get the
19 answer to that one.

20 On the class certification motion, I'm going to -- I'm
21 not going to deny it but I'm not going to grant it at this time.
22 I am very interested in, and frankly troubled by, the
23 sovereignty issue, which is a very precise and delicate issue.
24 I understand that there was a previous class action certified by
25 this court some years ago in an Indian case, but I also

1 understand that the sovereignty issue that has been presented by
2 the government may not have been raised or considered in that
3 case. But I've got to go back and study it.

4 And I think the sovereign nation issue, as technical as
5 it is - and it is quite technical - may be dispositive. But
6 even if it were not, I have yet to sort through the question of
7 where you go with a class certification motion if you can't get
8 much past the question of whether the government has provided an
9 adequate accounting when it has issued these TRP reports. I
10 mean, once you get past that, you are into individual
11 tribe-by-tribe accounting, and I'm not sure that a class action
12 helps that problem at all, and I think it may exacerbate it.

13 And so I'm not granting it. I suppose for docket
14 clarity I should deny it, but if I denied it, it would be
15 without prejudice, because I think I can see a situation or two
16 in which class certification might make some sense.

17 But I really would suggest to the Native American
18 Rights Fund that the much simpler way of resolving this matter
19 is to get in touch with those tribes that need representation
20 and say, we'll take you on, we'll do it. Because that's what
21 they're offering to do with a class certification motion anyway.

22 The records preservation order comes down, counsel, to
23 really almost a question of judicial philosophy. I think we
24 have too many rules. I don't like too many rules. I don't like
25 setting up rules for litigation that become new battlegrounds

1 for lawyers to fight on.

2 And just as an illustration, I will disclose to you
3 that some years ago we had an internal debate in this court
4 about whether we should publish rules for civility. Well, to me
5 that's almost a contradiction in terms, because once you publish
6 rules for civility, you've given lawyers something more to fight
7 about.

8 We have plenty of rules for record preservation, I
9 think. We have spoliation rules of evidence, we have -- and
10 certainly all the lawyers involved in this case know that they
11 need to come to court quickly if there's a record destruction
12 problem, because they know they're going to lose the confidence
13 of the court if they don't do it.

14 It does impose another whole level of bureaucracy on
15 both sides of litigation to start setting up reporting
16 mechanisms, and I can just imagine, I can imagine the forms that
17 will be created in the Bureau of Indian Affairs for keeping
18 track of and reporting documents. I mean, it's building -- it's
19 adding to the problem we already have in these cases. These
20 cases make their own weather, and I don't need any more layers
21 of complexity on what has to be done, because it will take
22 everybody a week or two or a month or two to set up the
23 mechanisms to deal with the record preservation order, and we
24 don't need to spend that time on that. The motion for records
25 preservation order is denied.

1 And I think that's all I have to say today. I want to
2 thank counsel once again. I am continually impressed and
3 pleased with the level of lawyering that I see in these cases,
4 and it's such a pleasure that I won't want to welcome you all
5 back the next time we have one of these hearings.

6 We're adjourned for today. Thank you.

7 (Proceedings adjourned at 1:00 p.m.)

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Rebecca Stonestreet, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

SIGNATURE OF COURT REPORTER

DATE