# THE RULE IS CLEAR: FIRST-IN-TIME COURT OF APPEALS DECISIONS PREVAIL OVER LATER CONFLICTING INTRACIRCUIT PANEL DECISIONS

The most recent *Cobell* Court of Appeals opinion filed November 15, 2005 ("*Cobell XVII*") contains statements of position that are in conflict with earlier *Cobell* rulings made by other panels in the D.C. Circuit. The rule in the D.C. Circuit is clear that to the extent there is intracircuit conflict, the first-in-time opinions prevail over subsequent decisions. *See e.g.*, *Independent Community Bankers of America v. Board of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999); *see also, e.g.*, *In re Cheney*, 334 F.3d 1096, 1107 (D.C. Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2576 (2004), *subsequent opinion*, *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005).

Plaintiffs-Beneficiaries provide the attached two charts showing the issues where the earlier decisions in *Cobell VI*, *Cobell XII*, and *Cobell XIII* prevail over the conflicting November 15, 2005, *Cobell XVII* opinion.

# COMPARATIVE CONFLICTS IN COBELL DECISIONS[1]

## Agency Deference

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* | *Cobell XVII (2005)* |
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| • "***Chevron* deference is not applicable in this case.**" (p. 1101).<br><br>• The "departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." (p. 1101).<br><br>• "[T]he Secretary cannot now try to "escape h[er] role as trustee by donning the mantle of administrator to claim that courts must defer to h[er] expertise and delegated authority." (p.1099 ).<br><br>• T-Ds are not afforded traditional agency latitude "to select any reasonable option," since "stricter standards apply to federal agencies when administrating Indian programs." (p. 1099). | • "[T]he narrower judicial powers appropriate under the APA do not apply." (p. 257).<br><br>• The *Cobell VI* Court made it clear that "[T]he Secretary cannot now try to "escape h[er] role as trustee by donning the mantle of administrator to claim that courts must defer to h[er] expertise and delegated authority." (p. 257). | • "*Lujan* and *Southern Utah* is complicated here by the availability of common law trust precepts to flesh out the statutory mandates, and … at least partially limit the deference that we would normally owe the defendants as interpreters" of the 1994 Act. (p. 473).<br><br>• "The availability of the common law of trusts cannot fully neutralize the limits placed by the APA and the Court's *Lujan* and *Southern Utah* decisions." (p. 473). | • "**[T]he district court owed substantial deference to Interior's plan.**" (p. 10).<br><br>• "The choices at issue required both subject-matter expertise and judgment about allocation of scarce resources, classic reasons for deference to administrators." (p. 10).<br><br>• "Instead of deferring to Interior's judgment about how best to execute the historical accounting, the district court set out, in great detail, how Interior must go about the job." (p. 12).<br><br>• Since the district court's ban on statistical sampling reflected no deference to T-Ds' expertise or to their judgment regarding the allocation of scarce resources, the district court abused its discretion by including the provision in the injunction. (p. 15). |

[1] First-in-time principles dictate that in the event of intracircuit conflict, the earlier-filed decisions control.

## Duty to Account

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* | *Cobell XVII (2005)* |
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| • **"Therefore, the 1994 Act reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets."** (p. 1102).<br><br>• The 1994 Act makes clear that T-Ds must account for *all* funds, "irrespective of when they were deposited" and "All funds means *all funds*." (p. 1102).<br><br>• The 1994 Act "reaffirmed and clarified preexisting duties; it did not create them." (p. 1100).<br><br>• The 1994 Act "did not define and limit the extent of appellants' obligations." (p. 1100).<br><br>• The 1994 Act "did not alter the nature or scope of the fiduciary duties owed by the government to IIM trust beneficiaries" but rather "created additional means to ensure that the obligations would be carried out." (p. 1100). | • As to T-Ds' fiduciary obligation to account, the *Cobell VI* Court "did not limit the district court's authority to exercise its discretion as a court of equity in fashioning a remedy to right a century-old wrong ..." (p. 257). | • If Pub. L. No. 108-108 "actually delays conclusion of the accounting (which it may not, as Congress may provide a simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more), the ordinary trust principles referred to above will automatically give the plaintiffs compensation for the delay." (p. 468). | • **The 1994 Act "clearly reaffirms the requirement that the Secretary complete an accounting.**" (p. 7). |

## Scope of Accounting

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* | *Cobell XVII (2005)* |
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| • **The 1994 Act makes clear that T-Ds must account for *all* funds, "irrespective of when they were deposited" and "All funds means *all funds***." (p. 1102).<br><br>• "Appellants never explain how one can give a *fair and accurate ac*counting of *all* accounts without first reconciling the accounts, taking into account past deposits, withdrawals, and accruals." (p. 1102).<br><br>• "It is black-letter trust law that '[a]n accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception.'" (p. 1103).<br><br>• The government's duty to provide a complete historical accounting imposes obligations on those who administer the IIM trust lands and funds to maintain and complete existing records, recover missing records where possible, and obtain adequate computer systems. (p. 1106-7). | • "It is indisputable that the Secretary has current and prospective trust management duties that necessitate maintaining secure IT systems in order to render accurate accountings now and in the future." (p. 256-57). | • If Pub. L. No. 108-108 "actually delays conclusion of the accounting (which it may not, as Congress may provide a simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more), the ordinary trust principles referred to above will automatically give the plaintiffs compensation for the delay." (p. 468). | • **"While Congress in the 1994 Act plainly faulted the United States' management …the Act's general language doesn't support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost."** (p. 8).<br><br>• "Congress's post-1994 appropriations fall equally short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite." (p. 8-9).<br><br>• "Thus neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." (p. 10). |

## Fiduciary Trust Case

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* |
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| • "There is no doubt that the federal government has a long standing fiduciary obligation to IIM trust beneficiaries." (p. 1098).<br><br>• Since Interior is a fiduciary, then the Secretary's actions "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." (p. 1104).<br><br>• "[T]he Secretary cannot now try to "escape h[er] role as trustee by donning the mantle of administrator to claim that courts must defer to h[er] expertise and delegated authority." (p. 1099).<br><br>• T-Ds are not afforded traditional agency latitude "to select any reasonable option," since "stricter standards apply to federal agencies when administrating Indian programs." (p. 1099).<br><br>• "This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises | • The district court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." (p. 257-58) (citing *Cobell VI*.).<br><br>• The *Cobell VI* Court made it clear that "[T]he Secretary cannot now try to "escape h[er] role as trustee by donning the mantle of administrator to claim that courts must defer to h[er] expertise and delegated authority." (p. 257).<br><br>• Restricting the district court to traditional APA remedies would ignore the salient considerations (i.e., Indians and trusts) of this case. (p. 258). | • "[T]hese statutory mandates compel an inference of enforceable fiduciary duties." (p. 471).<br><br>• "Thus the trust duties that in *Cobell VI* we said the 1994 Act reaffirmed … are the fully enforceable variety found in *Mitchell II* and *White Mountain Apache Tribe*." (p. 471).<br>• "As trust income beneficiaries are typically entitled to income from trust assets for the entire period of their entitlement to income, and for imputed yields for any period of delay in paying over income or principal … we do not see … how the accounting delay allowed by Pub. L. No. 108-108 could deprive them of interest or any comparable returns." (p. 468). |

| *Cobell XVII (2005)* |
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| • Since the IIM trust differs from ordinary private trust, "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities." (p. 8).<br><br>• "The choices at issue required both subject-matter expertise and judgment about allocation of scarce resources, classic reasons for deference to administrators." (p. 10). |

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| not from ordinary exegesis, but ‘from principles of equitable obligations and normative rules of behavior,’ applicable to the trust relationship between the United States and the Native American people.” (p. 1101). | | | | |

## Role of Common Law of Trusts

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* |
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| • **The general "contours" of the government's obligations may be defined by statute, but the interstices must be filled by general trust law.** (p. 1101).<br><br>• "While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined by traditional equitable terms." (p. 1099).<br><br>• "Much as the Supreme Court has regularly turned to the Restatement and other authorities to construe trust responsibilities, it is appropriate for the district court to consult similar sources." (p. 1099). | • The Court reaffirmed *Cobell VI* in stating "[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms." (p. 257). | • "*Lujan* and *Southern Utah* is complicated here by the availability of common law trust precepts to flesh out the statutory mandates, and … at least partially limit the deference that we would normally owe the defendants as interpreters" of the 1994 Act. (p. 473).<br><br>• "[O]nce a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." (p. 472).<br><br>• "The government accepts and even endorses our observation that interpretation of statutory terms is informed by common law trust principles…" (p. 473).<br><br>• "The availability of the common law of trusts cannot fully neutralize the limits placed by the APA and the Court's *Lujan* and *Southern Utah* decisions." (p. 473). |

| *Cobell XVII (2005)* |
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| • "**[U]nder the APA the court may to a degree use the common law of trusts as a filler of gaps left by the statute, but in doing so it may not assume a fictional plaintiff class trust of beneficiaries completely and uniformly free of bars or limitations that the common law may provide**." (p. 15).<br><br>• Since the IIM trust differs from ordinary private trust, "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities." (p. 8).<br><br>• "Here, the district court invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain. It thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" (p. 10) (citing *SUWA*). |

## Broad District Court Discretion

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* |
|---|---|---|
| • "Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." (p. 1108).<br><br>• The destruction of documents and loss of information necessary to conduct an historical accounting "combined with the longstanding inability or unwillingness of government officials to discharge their fiduciary obligations excuse court oversight that might be excessive in an ordinary case." (p. 1109).<br><br>• While the district court's remedies, including agency reporting requirements, may be in excess of that which would be minimally required to discharge fiduciary duties, they are not disproportionate to the government's breach. (p. 1109). | • The district court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." (p. 257-58) (citing *Cobell VI*.).<br><br>• Restricting the district court to traditional APA remedies would ignore the salient considerations (i.e., Indians and trusts) of this case. (p. 258).<br><br>• As to T-Ds' fiduciary obligation to account, the *Cobell VI* Court "did not limit the district court's authority to exercise its discretion as a court of equity in fashioning a remedy to right a century-old wrong ..." (p. 257). | • "To the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate, as we held was the case in *Cobell VI* for the government's failure to provide a statutorily required accounting." (p. 478). |

| *Cobell XVII (2005)* |
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| • The district court owed substantial deference to Interior's plan. (p. 10).<br><br>• "Here, the district court invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain. It thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" (p. 10) (citing *SUWA*)<br><br>• "Instead of deferring to Interior's judgment about how best to execute the historical accounting, the district court set out, in great detail, how Interior must go about the job." (p. 12).<br><br>• Since the district court's ban on statistical sampling reflected no deference to T-Ds' expertise or to their judgment regarding the allocation of scarce resources, the district court abused its discretion by including the provision in the injunction. (p. 15). |

## Cost of Accounting

| *Cobell VI (2001)* | *Cobell XII (2004)* | *Cobell XIII (2004)* |
|---|---|---|
| • "[**N]either a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay …" and an absolving of fiduciary obligations.** (p. 1097). | | |

| *Cobell XVII (2005)* |
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| • **"Congress's post-1994 appropriations fall equally short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite."** (p. 8-9).<br><br>• "Where a trustee has by misconduct or negligence made a proper accounting more difficult, the trustee may be charged for the accounting's cost, and no precept of common law constrains the cost of such an accounting…" (p. 8).<br><br>• The district court completely disregarded information about the costs of its injunction. (p. 12). |

# FIRST-IN-TIME DECISIONS PREVAIL IF THERE IS INTRACIRCUIT CONFLICT

## Trust Law and APA Deference

***(First-in-Time 2001 & 2004 Decisions)***
***COBELL VI, XII, XIII***

- "Chevron deference is not applicable in this case." (*Cobell VI*) (p. 1101).
- "This departure from the *Chevron* norm arises from the fact that the rule of liberally construing statutes to the benefit of the Indians arises not from ordinary exegesis, but 'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the United States and the Native American people." (*Cobell VI*) (p. 1101).
- "While the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined by traditional equitable terms." (*Cobell VI*) (p. 1099).
- T-Ds are not afforded traditional agency latitude "to select any reasonable option," since "stricter standards apply to federal agencies when administrating Indian programs." (*Cobell VI*) (p. 1099).
- Since Interior is a fiduciary, then the Secretary's actions "must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." (*Cobell VI*) (p. 1104).

**PREVAIL OVER**

## Trust Law and APA Deference

***(Last 2005 Decision)***
***COBELL XVII***

- "[T]he district court owed substantial deference to Interior's plan." (*Cobell XVII*) (p. 10).
- "The choices at issue required both subject-matter expertise and judgment about allocation of scare resources, classic reasons for deference to administrators." (*Cobell XVII*) (p. 10).
- "Instead of deferring to Interior's judgment about how best to execute the historical accounting, the district court set out, in great detail, how Interior must go about the job." (*Cobell XVII*) (p. 12).
- "Here, the district court invoked the common law of trusts and quite bluntly treated the character of the accounting as its domain. It thus erroneously displaced Interior as the actor with primary responsibility for 'work[ing] out compliance with the broad statutory mandate.'" (*Cobell XVII*) (p. 10) (citing *SUWA*).

## Trust Law and APA Deference

***(First-in-Time 2001 & 2004 Decisions)***
***COBELL VI, XII, XIII***

- "[T]he Secretary cannot now try to "escape h[er] role as trustee by donning the mantle of administrator to claim that courts must defer to h[er] expertise and delegated authority." (*Cobell VI* p. 1099 ) (*Cobell XII*) (p. 257).
- The district court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because of the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties." (*Cobell XII*) (p. 257-58).
- Common law trust concepts complicate conventional APA deference to Interior's interpretations of the 1994 Act. (*Cobell XIII*) (p. 473).
- "[O]nce a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation." (*Cobell XIII*) (p. 472).
- "The government accepts and even endorses our observation that interpretation of statutory terms is informed by common law trust principles…" (*Cobell XIII*) (p. 473).

**PREVAIL OVER**

## Trust Law and APA Deference

***(Last 2005 Decision)***
***COBELL XVII***

- Since the IIM trust differs from ordinary private trust, "the common law of trusts doesn't offer a clear path for resolving statutory ambiguities." (*Cobell XVII*) (p. 8).
- "[U]nder the APA the court may to a degree use the common law of trusts as a filler of gaps left by the statute, but in doing so it may not assume a fictional plaintiff class trust of beneficiaries completely and uniformly free of bars or limitations that the common law may provide." (*Cobell XVII*) (p. 15).

## Scope/Cost of Accounting

***(First-in-Time 2001 & 2004 Decisions)***
***COBELL VI, XII, XIII***

- The "1994 Act reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust fund assets."(*Cobell VI*) (p. 1102).
- The 1994 Act makes clear that T-Ds must account for *all* funds, "irrespective of when they were deposited" and "All funds means *all funds*."(*Cobell VI*) (p. 1102).
- "[N]either a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay …" and an absolving of fiduciary obligations.(*Cobell VI*) (p. 1097).

**PREVAIL OVER**

## Scope/Cost of Accounting

***(Last 2005 Decision)***
***COBELL XVII***

- The 1994 Act "clearly reaffirms the requirement that the Secretary complete an accounting." (p. 7).
- "While Congress in the 1994 Act plainly faulted the United States' management …the Act's general language doesn't support the inherently implausible inference that it intended to order the best imaginable accounting without regard to cost." (*Cobell XVII*) (p. 8).
- "Congress's post-1994 appropriations fall equally short of supporting a mandate to indulge in cost-unlimited accounting – in fact, they suggest quite the opposite." (*Cobell XVII*) (p. 8-9).
- "Thus neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." (*Cobell XVII*) (p. 10).