IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al. Plaintiffs, v. DIRK KEMPTHORNE, Secretary of the Interior, et al. Defendants.	)	Case No. 1:96CV01285 (Judge Robertson)

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE JUNE 2008 TRIAL
ON PLAINTIFFS' RESTITUTION AND DISGORGEMENT CLAIMS

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PROPOSED FINDINGS OF FACT

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF ESTABLISHING BY A PREPONDERANCE OF THE EVIDENCE THAT FUNDS THAT SHOULD HAVE BEEN DISBURSED TO INDIVIDUAL IIM ACCOUNT HOLDERS WERE NOT

1. Plaintiffs filed their Complaint on June 10, 1996 (Dkt. No. 1), seeking an accounting under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994 Act). The Complaint contains no claim for equitable restitution or disgorgement. In an opinion issued on January 30, 2008, the Court decided that, as a matter of law, the accounting found by the Court to be required under the 1994 Act, and demanded in Plaintiffs' Complaint, is impossible. Cobell v. Kempthorne, 532 F. Supp. 2d 37, 102 (D.D.C. 2008) (Cobell XX).[1] On March 5, 2008, the Court directed Plaintiffs to file a paper setting forth, in detail, their claim for any alternative relief. March 5, 2008 Status Conference Tr. 40:3-6 ("The plaintiffs have two weeks from now to file what I will call a written claim for equitable disgorgement in reasonable detail setting forth what they think they're entitled to and on the basis of what evidence, broadly stated.").

2. On March 19, 2008, Plaintiffs filed their Memorandum in Support of Equitable Restitution and Disgorgement (Dkt. No. 3515). Defendants filed a response on April 9, 2008 (Dkt. No. 3519), setting forth the legal and factual reasons that Plaintiffs' equitable claim must fail. Plaintiffs filed a Reply on April 21, 2008 (Dkt. No. 3523). Plaintiffs did not seek to amend their Complaint to add their new claim.

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[1] Defendants respectfully disagree with that decision.

3. On May 2, 2008, the Court issued a Pretrial Order (Dkt. No. 3526), describing Plaintiffs' new claim as one for restitution of (1) "funds that were received in the IIM trust, do not appear to have been disbursed to beneficiaries, and are not explained by the government's accounting efforts"; (2) "plus an amount that represents the benefit reaped by the government from the use of those funds." Pretrial Order at 1. Plaintiffs bear the burden of establishing the fact and the amount of any such benefit. See Pretrial Order at 1-2.

4. Plaintiffs' restitution claim rests on the mistaken premise that all money that went into the IIM System constituted IIM trust funds that were required to be disbursed to Individual IIM account holders. From this mistaken premise, they then erroneously conclude that all they need to establish is that the amount of money collected into the IIM System is greater than the amount disbursed to Individual IIM account holders – and that this balance, minus the reported closing balance, should go to Plaintiffs.

A. Defendants Have Established How Money Has Flowed Through the IIM System

5. The evidence adduced at trial demonstrates that substantial sums of money collected into the IIM System are never intended for Individual IIM account holders. The IIM System comprises both Individual IIM accounts and many non-Individual accounts.

6. Michelle Herman, who testified at the October 2007 evidentiary hearing, testified at this trial. Tr. 453:14-751:12 (Herman). She is a Managing Director of FTI Consulting, Inc. (FTI), one of the contractors the Office of Historical Trust Accounting (OHTA) has engaged to assist with its historical accounting efforts. Tr. 454:7-10 (Herman).

7. Ms. Herman has devoted most of her professional career to the examination and study of Indian trust records and the Department of the Interior's ("Interior's") bookkeeping practices, historically. Tr. 455:7-10 (Herman). She has worked on numerous projects involving the IIM accounts and transactions for more than eleven years, since January 1997. Tr. 455:11-13 (Herman).

8. Ms. Herman's major projects have included:

   a. gathering IRMS data and working on restoration of missing Electronic Ledger Era data from back-up tapes and paper records;

   b. locating records relating to the five named Plaintiffs and a stipulated list of their ancestors as part of what has become known as the Paragraph 19 document effort;

   c. assisting OHTA with development of its historical accounting plan;

   d. developing and designing the Accounting Reconciliation Tool (ART), which Ms. Herman demonstrated in court last October;

   e. reconciling 6,000 transactions as part of the Litigation Support Accounting analysis;

   f. overseeing the testing of 119 million IIM transactions from the Electronic Ledger Era as part of FTI's enormous Data Completeness Validation (DCV) project, about which Ms. Herman testified extensively last October;

   g. participating in the pilot project for the Land-to-Dollars analysis; and

   h. examining the overall throughput of dollars flowing into and out of the IIM System, as part of this litigation.

   Tr. 455:22-461:6 (Herman).

9. At last October's hearing, Ms. Herman presented testimony about a table in the Administrative Record, AR-171, which provided a rough estimate of throughput of funds coming into and flowing out of the IIM System between 1909 and 2005. Cobell XX, 532 F. Supp. 2d at 83-84. Although she did not work on early versions of this table, she has worked on its refinement. Id.

10. For this hearing, Ms. Herman prepared an update to the table in AR-171 that further refines these historical estimates of IIM money flows. She worked to gather additional historical account documents, Tr. 462:12-24 (Herman), and to collect more aggregate data, Tr. 463:3-12 (Herman).

11. Ms. Herman's main focus was on explaining the distinction between total collections of funds into the IIM System and total credits into Individual IIM accounts. Tr. 500:19-502:12 (Herman).

1. Electronic Ledger Era Evidence Shows the Flow of Funds

12. Ms. Herman's investigation led to a historical examination of the flow of funds through the IIM System. Due to time limitations, Tr. 470:22-471:10 (Herman), she relied primarily on the historical accounting data set with which she had worked the most and which was readily available for further analysis: IRMS and TFAS account transactions from 1985 to 2000. Tr. 464:13-17 (Herman). She looked at all monies that came into IRMS (and later, TFAS) regardless of source. Tr. 465:1-5 (Herman). She examined the funds collected into the IIM System, where money moved within the system, and where it got disbursed. Tr. 464:18-20 (Herman).

13. Ms. Herman's examination of historical funds flows indicates that a large proportion of funds flowing into the IIM System are tribal funds and other monies that are never destined for the IIM accounts of individual account holders. Tr. 487:23-488:10 (Herman).

14. Based upon her eleven years of study of the IIM System, Ms. Herman developed a schematic diagram to summarize the funds flows she identified, which she presented at trial as DX-370. Tr. 465:13-20 (Herman).

15. In addition to her historical accounting reconciliation and DCV work, Ms. Herman also drew on her work on an OHTA project that focused on reducing the amount of funds held in Special Deposit Accounts (SDAs). Tr. 466:10-25 (Herman).

16. Ms. Herman also reviewed Paper Ledger Era records from the 1940s, Commissioner of Indian Affairs reports from the early 1900s, records from the 1970s, as well as Paper Ledger Era accounting work. Tr. 467:1-8 (Herman). One example was a 1939 report of field audit of IIM money performed at the Winnebego Agency. DX-485; Tr. 467:19-468:4 (Herman).

17. DX-370 provides an illustration of the historical flow of funds as detected by Ms. Herman. The diagram illustrates fund flows over the entire period of 1887 to 2007. Tr. 470:11-17 (Herman).

18. The color diagram has three basic sections: the left section (green in color) illustrates the inflow of collections; the middle (blue) section represents the movement of funds within the IIM System; and the right (gray) section shows how funds are disbursed out of the IIM System. Tr. 469:2-14 (Herman).

19. The identification of collections flowing into the IIM System in DX-370 corresponds to the various categories of collections listed on AR-171 and its update, DX-371. Tr. 471:18:472:1 (Herman).

a. Collections Originate From Many Sources

20. Ms. Herman's analysis breaks down collections on DX-370, AR-171 and DX-371 generally as follows:

a. Interest (Column B on AR-171 and DX-371) includes interest received on IIM funds that was credited as an interest receipt. Tr. 472:5-24 (Herman). Some interest, however, remains in the "Other Receipts" category (Column F on AR-171 and DX-371) because some interest receipts were simply posted as "miscellaneous" receipts. Tr. 472:13-24 (Herman).

b. Osage Quarterly Annuity (Column C on AR-171 and DX-371) includes only the portion of Osage headright payments that actually flowed into the IIM System. Tr. 473:3-21 (Herman). Ms. Herman testified that "[y]ou would need to create another funds flow [diagram] to represent" the rest of the Osage payments that get paid to recipients from the tribal trust, which do not flow into the IIM System. Tr. 473:25-474:1 (Herman). The Osage headright money derives from tribal mineral interests and not allotted lands of individuals; consequently, many headright revenues are paid out directly from tribal accounts to the interest holders, 2007 Tr. 658:16-23 (Herman), and that money never enters the IIM System. The amount of headright payments that transfer into IIM accounts are

typically for minors and adults who are deemed to be incompetent. 2007 Tr. 659:12-16 (Herman).

c. Judgment/Per Capita (Column D on AR-171 and DX-371) includes such funds where they could be identified as such. On AR-171, for example, there are figures going back to 1986. There are similar funds in earlier periods, but the system did not differentiate them as Judgment or Per Capita funds then, and so such funds from earlier periods are included in "Other Receipts" (Column F). Tr. 474:2-16 (Herman).

d. Tribal IIM (Column E on AR-171 and DX-371) includes tribal funds denominated as such in the Electronic Ledger Era (together with estimated percentages of total collections in earlier periods). Tr. 474:25-475:5 (Herman). (Tribal IIM accounts existed where tribes used the IIM System for convenience as a way to use the IIM System's checking accounts. See Cobell XX, 532 F. Supp. 2d at 84.). Ms. Herman also found tens of millions of dollars of tribal funds in the system during the 1985-2000 era besides the tribal money specifically denominated as "Tribal IIM." Tr. 475:6-10 (Herman). These additional collections of tribal monies would be included in "Other Receipts" (Column F of AR-171 and DX-371). Tr. 475:13 (Herman).

e. "Other Receipts" is a catchall category for all collections. Tr. 475:14-25 (Herman). The category includes all revenue from allotted lands, as well as such disparate items as bid deposits and revenue from a school play, and, as noted

above, for certain periods, Interest, Judgment/Per Capita and Tribal IIM funds. Tr. 476:1-12 (Herman).

b. Movement of Funds Within the IIM System: Special Deposit Accounts, Tribal and Other Administrative Accounts

21. The middle section of DX-370 consists of two boxes, an upper box labeled as non-Individual and a lower box, labeled to represent Individual IIM accounts. Tr. 477:8-18 (Herman).

22. Non-Individual money is money that is not held for a specific individual and may not ultimately be transferred to an Individual IIM account. Tr. 478:11-19 (Herman).

23. The non-Individual accounts include Special Deposit, Tribal IIM, and Other Administrative accounts. Tr. 477:19-23 (Herman). Other Administrative accounts can be of various types, such as accounts for interest, escrows, and government fees. Tr. 478:1-10 (Herman). (There may be transfers of funds among these non-Individual accounts, such as when range payment collections for various range accounts at a particular agency are credited into one Special Deposit account in order to facilitate distribution. Tr. 478:20-479:7 (Herman); see also DX-480 at 2 ("transfer to an administrative account")).

24. The Individual IIM accounts consist of trust accounts bearing the name of a specific individual account holder. Tr. 479:15-480:7 (Herman). (Ms. Herman also observed internal transfers of funds among the Individual accounts, and identified a probate transfer and land sale transaction as typical examples. Tr. 480:8-17 (Herman)).

25. Other internal transfers occur when money is deposited from a non-Individual account (e.g., an SDA or Tribal account) into an Individual IIM account (represented by an arrow

from the top blue box down to the bottom blue box on DX-370). Tr. 480:18-481:10 (Herman).

c. Many Funds Are Never Intended For Deposit In Any Individual IIM Account

26. The right third of DX-370 represents disbursements of funds out of the IIM System. Ms. Herman estimated there have been $13.7 billion in disbursements from 1887-2007. Tr. 484:4-8, 487:13-22 (Herman). As with the collections side, Ms. Herman concentrated her analysis on the 1985-2000 period, Tr. 484:9-15 (Herman), and did not have time to study even the post-2000 era in close detail, Tr. 484:16-19 (Herman).

27. Ms. Herman classified disbursements into four types, based on her investigation of the historical accounting records. Tr. 517:8-22 (Herman).

28. On Ms. Herman's diagram, DX-370, the categories of disbursement type are represented by gray boxes stacked along the right third of her chart:

a. Third Parties, which include sundry disbursements such as the return of bid deposits to "an unsuccessful bidder; return of bonds, for instance upon completion of a lease; payment of administrative fees to the government for managing the lease." Tr. 485:13-24; 517:25-518:14 (Herman).

b. Tribal Trust includes all transfers from any non-Individual account to a Tribal Trust account, which Ms. Herman described as "a significant amount of money." Tr. 485:25-486:6 (Herman).

c. Stakeholders is the category Ms. Herman used to describe disbursements made directly from a non-Individual account to a person in connection with a

Judgment/Per Capita distribution or proceeds from a land sale, all without touching any Individual IIM account. Tr. 486:7-487:4; 518:15-25 (Herman).

d. The IIM Beneficiaries category includes all disbursements made from an Individual IIM account to a beneficiary or on behalf of a beneficiary. Tr. 487:5-12 (Herman).

29. In Ms. Herman's examination of funds flows, she considered the ultimate destination of the funds in assessing whether the money was non-Individual or Individual. Tr. 488:11-22 (Herman). She determined that many credits to accounts in the IIM System are to non-Individual accounts. Tr. 488:3-10 (Herman). Some of this money is never destined for deposit into any Individual IIM accounts. Tr. 487:23-488:5 (Herman).

d. Electronic Ledger Era Examples

30. Ms. Herman presented ten examples of different non-Individual funds flows in the IIM System. The first seven examples drew on the millions of IRMS transactions Ms. Herman has studied from the 1985-2000 time frame. Each example had a related exhibit consisting of data extracts Ms. Herman had collected from IRMS data, Ms. Herman's notes regarding her study of each transaction, and supporting accounting records. Tr. 502:16-18 (Herman).

31. DX-474 was an example of $5.2 million leaving the IIM System from an SDA account, Tr. 503:5-507:2 (Herman), identified as belonging to the Colville Tribe, and being disbursed to a third party, Colville Industries Insurance, Tr. 505:18-506:20 (Herman). This example illustrated how tribal money might appear in the IIM System without being

in a designated Tribal IIM (or "T") account, with a disbursement going outside the system to a corporate third party. Tr. 506:11-23 (Herman).

32. DX-475 illustrated a collection of $43.5 million into an "Other Administrative" non-Individual account (here, a Per Capita account), with the money then divided up and portions sent to different recipients. Tr. 507:8-510:3 (Herman). Of the $43.5 million collected, $7.8 million was deposited into Individual IIM accounts, Tr. 508:11-12 (Herman), while $27.5 million was disbursed to recipients directly, without any deposits into an Individual IIM account, Tr. 508:24-509:7; 501:2-3 (Herman).

33. DX-477 provides an example of $11.2 million in Tribal IIM money disbursed out of the system, while only a portion is deposited into Individual IIM accounts. Here, about $5.9 million is transferred into Individual IIM accounts, while $5.19 million is paid directly out of the system by checks cut from the Tribal IIM account. Tr. 512:13-514:10 (Herman).

34. DX-478 illustrates disbursements from a Tribal IIM account (belonging to the Rosebud Sioux Tribe) of what appears to be money for certain employee salaries. Tr. 510:7-512:11 (Herman).

35. DX-479 is an example of Tribal IIM account money being disbursed to a stakeholder. Tr. 514:18-516:23 (Herman). The "T" reference in the account number denotes Tribal IIM. Tr. 515:1-4 (Herman). The supporting documentation reveals the money is a payment from a tribe to an individual as part of a land purchase by the tribe. Tr. 515:10-13 (Herman). The payment does not go into an Individual IIM account but is made directly to the selling party. Tr. 516:1-24 (Herman).

36. DX-480, a timber revenue transaction from the Portland Area, is an illustration of a $5.6 million disbursement from an SDA out of the IIM System to the Tribal Trust. Tr. 521:20-524:19 (Herman). This is another example of substantial tribal money that was not in a Tribal IIM account. Tr. 523:9-12 (Herman).

a. Of the $5.6 million in the SDA, $4.46 million is transferred to three different tribal trust accounts. Tr. 524:6-19 (Herman).

b. About $563,000 is transferred to another administrative account to satisfy a statutory reforestation fee. Tr. 523:13-18 (Herman).

c. Only $609,000 is deposited into Individual IIM accounts by the tribe. Tr. 523:20-24 (Herman).

d. Most of the money comprising this transaction – the $4.46 million moved to the Tribal Trust – is effected not by check but by a bookkeeping entry. Such transactions are identified by a "BB" code in the paperwork. Tr. 521:4-522:2 (Herman).

37. DX-481 is an example of $8.8 million in a Tribal IIM account moving to the Tribal Trust for the Warm Springs Tribe. Tr. 525:20-526:5, 528:19-529:14 (Herman).

2. Paper Ledger Era Evidence Confirms the Flow of Funds

38. Ms. Herman also presented examples from the Paper Ledger Era that confirmed her understanding of fund flows in the IIM System. One example, DX-485, was a letter report on a field audit conducted at the Winnebego Agency in 1939. Tr. 529:15-531:16, 532:12-20 (Herman). The audit reports on tribal money as well as that belonging to individual Indians, and it makes the following observation about account practices: "All

tribal funds are taken up on official receipts and deposited to the credit of the tribes in the Individual Indian Money." Tr. 531:6-12; DX-485 at 2-3.

39. In another audit report done in 1941 for the same agency, DX-486, the audit indicates that the IIM balance was $71,358.37, Tr. 533:9-20 (Herman), of which $40,069.43 (or 56%) belonged to individuals Indians, Tr. 533:25-534:2 (Herman). This same 1941 audit also documents disbursements made to third parties, just as Ms. Herman found in the Electronic Ledger Era. Tr. 534:8-13 (Herman).

40. DX-491 was an example of a collection from the Paper Ledger Era, in 1978, leading to a disbursement in the Electronic Ledger Era. The collection was the receipt into an administrative account of a $3,000 deposit to secure performance of a lease. The deposit money was returned with interest in 2006. Tr. 534:20-536:15.

41. Without the ready ability or time to separate out all these non-Individual transactions, Ms. Herman and her team focused on measuring Total Collections and Total Disbursements, as reflected in her flow of funds diagram, DX-370. Tr. 500:19-502:15 (Herman).

42. As described in detail below, Dr. Angel's historical work confirms Ms. Herman's testimony. Tr. 799:13-805:18 (Angel).

3. DX-365 Is Not Relevant

43. Ms. Herman did not use the tables in DX-365, which had been offered at last October's hearing in an attempt to address accounting coverage. 2007 Tr. 1113:9-15 (Haspel). (Ms. Herman did not prepare that document. Tr. 491:23-24 (Herman)).

44. DX-365's total collections figure overstates the amounts relating to Individual IIM accounts because it does not filter out all the non-Individual money that Ms. Herman identified within the system. Tr. 491:3-16 (Herman). Total collections in DX-365 do exclude the earlier AR-171 estimate for Tribal IIM accounts, but it does not deduct for other large sums of tribal money Ms. Herman found in the system, and other non-Individual money, such as bid deposits, administrative fees, and the like. Tr. 490:16-491:2 (Herman).

45. Due to the presence of these other funds in the DX-365 total collections figures, the total collections number is not comparable to the estimated credits to Individual IIM accounts figure at the bottom part of DX-365. Tr. 491:17-24 (Herman).

46. DX-365 is irrelevant, in any event, because Plaintiffs did not rely on DX-365 for any part of their case-in-chief.

B. <u>The Term "IIM System" Is Not "A Construct Of The Government's Case"</u>

47. The term "IIM system" is not "a construct of the government's case," Tr. 1710:12-13 (the Court, quoting Plaintiffs' counsel) nor was Ms. Herman the first to use it. Tr. 1710:22-23 (the Court). Even a simple search of the documents cited in PX-65, Plaintiffs' "Compendium," reveals eighteen uses of "IIM system," in ten documents, the earliest in 1972.

PX 65 Item #	Document	PDF Page #	Reference
209	1972 Office of Survey and Review (OSR) Report	2	"authority to operate its IIM system"
231	1984 OIG Report	6	"(IIM) accounting system"
231	1984 OIG Report	7	"IIM subsystem"

239 (2d bullet)	1985 OIG Report Re Ft. Peck Agency	7	"the IIM system is fulfilling"
239 (2d bullet)	1985 OIG Report Re Ft. Peck Agency	7	"the IIM system is administered"
240	1985 OIG Report Re Olympic Peninsula Agency	12	"a new IIM system"
240	1985 OIG Report Re Olympic Peninsula Agency	12	"nature of the IIM system"
240	1985 OIG Report Re Olympic Peninsula Agency	15	"the prior IIM system"
256	1986 OIG Report	4	"BIA operates the IIM system"
275	1989 Arthur Anderson Audit	45	"reflected in the IIM system"
275	1989 Arthur Anderson Audit	45	"the IIM system does not provide"
327-328	1996 Griffin & Associates Audit	13	"accounting system know as the IIM system"
327-328	1996 Griffin & Associates Audit	43	"in the IIM system"
327-328	1996 Griffin & Associates Audit	45	"within the IIM system"
331	1997 Griffin & Associates Audit	42	"IIM system data"
346	2000 Griffin & Associates Audit	56	"transferred from the IIM system to the appropriate Tribal account"
346	2000 Griffin & Associates Audit	67	"reference codes within the IIM system"
353	1999 Griffin & Associates Audit	42	"IIM subsidiary system"

While we have not located the term "IIM system" in earlier years, the "system" was referred to as early as 1909. PX-65, Item 2 at PDF 83 (Interior FY 1909 Report) ("the installation of a new system of accounting for individual Indian moneys . . . .").

48. In particular, the 1972 Office of Survey and Review (OSR) Report was critical of the use of "the IIM system" as a depositary for tribal funds. See PX-65, Item 209 (United States Department of Interior, Office of Survey and Review, Audit Operations, Review of Individual Indian Money Accounts, August 1972), at NORCMAP_00003535 to 00003536. For the seven Agencies and Area Offices examined in the report, accounts maintained for the benefit of tribes or tribal organizations constituted 40% of the total balance in the IIM System for these locations as of December 31, 1971. Id.

49. The 1986 OIG Report noted that "[t]he IIM system is used by BIA to distribute funds received for Indians, to help Indians needing a fiscal custodian to manage their money, to hold funds deposited for a special purpose, and to provide certain financial services to tribal organizations." PX-65, Item 256 (Office of the Inspector General, Audit Report, Review of Individual Indian Money Accounts Administered by the Bureau of Indian Affairs (Consolidated Report), March 1986), at PDF p. 4 (document p. 1). The OIG Report noted that "the IIM system" consists of both Individual Indian accounts and non-Individual Indian accounts. Id. at PDF p. 4-5 (document p. 1-2); see also PX-65, Item 239-B (U.S. Department of the Interior, Office of Inspector General, Draft Report, Review of Individual Indian Money Accounts Administered by Fort Peck Agency, September 1985), at PDF p. 7-8 (document p. 2-3) ("The IIM system as administered by the Agency consists of five types of accounts").

50. The 2000 Audit Report from Griffin & Associates notes that funds deposited into SDAs on behalf of tribes are "subsequently transferred from the IIM system to the appropriate Tribal account." AR-635, at 66-7-0056.

C. Plaintiffs Have Ignored The Historical Flow of Funds and Failed to Prove That Money in the IIM System That Should Have Been Posted To Individual IIM Accounts Was Not Accounted For, or Was Withheld From Plaintiffs

51. Plaintiffs presented no evidence showing how much, if any, money collected into the IIM System that was owed to Individual IIM account holders was not accounted for by Defendants. None of Plaintiffs' witnesses presented factual information to the Court that addressed this issue. Instead, two of Plaintiffs' fact witnesses, Ms. Mona Infield and Mr. Ray Ziler, addressed only the purported unreliability of the data. See Tr. 176:17-180:1 (Infield testimony and discussion between counsel and the Court); Tr. 156:14-159:5 (discussion between counsel and the Court after Ziler testimony). Plaintiffs' third fact witness, Mr. James Miller, conceded that he had no knowledge of actual data or actual amounts of money. Tr. 218:23-219:4, 222:25-223:2 (Miller).

52. Plaintiffs' expert witnesses also could not, and did not, offer any factual evidence addressing the amount of money in the IIM System, if any, that was not accounted for by Defendants. Mr. Pallais, like Plaintiffs' two fact witnesses, addressed only the purported unreliability of the data. See Tr. 445:25-447:24 (Pallais). Professor Laycock and Professor Cornell both testified that they could not offer any opinion regarding the facts of the case or the validity of the dollar amounts presented by Plaintiffs. Tr. 75:17-76:1 (Laycock); Tr. 324:3-24, 327:24-328:7 (Cornell). Finally, Plaintiffs' rebuttal witness, Dr. Palmer, offered no facts to show how much, if any, money collected into the IIM System was not accounted for by Defendants. See Tr. 1542:13-20 (Palmer).

53. Plaintiffs presented no evidence showing that any money collected into the IIM System that was owed to Individual IIM account holders was withheld from them. Instead, as

established above, three of Plaintiffs' witnesses testified only about the purported unreliability of data, Tr. 176:17-180:1 (Infield); Tr. 156:14-159:5 (Ziler); Tr. 445:25-447:24 (Pallais), while the remaining four witnesses did not possess any first-hand knowledge about this issue. Tr. 75:17-76:1 (Laycock); Tr. 324:3-24, 327:24-328:7 (Cornell); Tr. 1542:13-20 (Palmer); Tr. 218:23-219:4 (Miller).

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF ESTABLISHING A "REASONABLE APPROXIMATION" OF AN AMOUNT TO BE DISGORGED

54. Professor Cornell was Plaintiffs' lone witness in their case-in-chief who offered testimony about any measurement of the "reasonable approximation" of the amount they claim should be disgorged. He confirmed that he was testifying about a methodology for determining an amount to be disgorged but acknowledged that further work was required before he could testify about the precise measure of the government's benefit. Tr. 324:9-21 (Cornell).

55. Professor Cornell explained, "I can develop a model, which I have done, but I'm going to need help from the Court and from both parties to make sure that the most accurate figures go in there." Tr. 346:14-16 (Cornell).

A. Plaintiffs' Models Are Fatally Flawed Because They Include as Collections into the IIM System Money Not Intended for Individual IIM Accounts and Exclude That Money from Disbursements Out of the IIM System

1. Plaintiffs Improperly Address Tribal Monies in the IIM System

a. Plaintiffs' Models Treat As Collections All Tribal Money, Including But Not Limited To "Tribal IIM"

56. Professor Cornell improperly included "unallotted" tribal revenues in his calculation of "Corrected Revenues" for IIM account holders for the years 1915-1920. Tr. 349:23-351:11 (Cornell) (discussing PX-50).

57. With regard to so-called Tribal IIM collections, Professor Cornell stated that his model "doesn't break it out." Tr. 352:1-13 (Cornell).

58. When asked if his calculation of "Corrected Revenues" was overstated to the extent it included Tribal IIM, Professor Cornell conceded, "That sounds correct, but again, sitting here under oath I wouldn't want to say for sure." Tr. 352:14-18 (Cornell).

59. Plaintiffs' rebuttal expert, Dr. Palmer, agreed that Professor's Cornell's model erroneously included tribal revenues for unallotted lands and attempted to remove them from the model presented in Plaintiffs' rebuttal case. Tr. 1449:19-1450:8 (Palmer).

60. Plaintiffs' rebuttal model failed to exclude Tribal IIM amounts from its calculation of "Corrected Revenues." Tr. 1472:15-1473:1 (Palmer); 1551:18-20 (Palmer); 1554:10-18 (Palmer).

61. Dr. Palmer was aware that Defendants quantified Tribal IIM as totaling $1.513 billion, based upon AR-171 and Defendants' April 9, 2008 Brief. Tr. 1551:21-1552:25 (Palmer).

62. Despite the recognition by this Court in its January, 2007 decision, Cobell XX, 532 F. Supp. 2d at 85, that large amounts of Tribal IIM funds were present in the IIM System, Plaintiffs' evidence made no effort to address those non-Individual IIM funds.

b. Dr. Angel's Calculation of the Percentage of "Tribal IIM" Within the IIM System Is a Reasonable Calculation

63. Contrary to Plaintiffs' assertions, Dr. Angel's estimate of 10% to 15% of Tribal IIM in the IIM System over a fifty-one year period is not a "guess," Tr. 1669:19-20, but is instead a reasoned estimate based on intensive historical research. Dr. Angel's estimate of Tribal IIM in the IIM System between 1934 and 1985, Tr. 799:6-8 (Angel), was based on Morgan Angel's review of a variety of documents collected over years. Tr. 842:7 (Angel). These documents include audit reports, "accountings of tribal individual Indian monies," settled account packages, reports to Congress, an OSR audit, correspondence, and "reports that showed how much money the United States government lent to tribal enterprises from the period 1934-1949." Tr. 842:7-22 (Angel).

64. Plaintiffs' only counter-evidence consisted of reports for only three agencies spanning just one year, 1985. Tr. 847:18-850:16 (Angel). These select documents indicate a Tribal IIM proportion of 1% to 2% of total funds for those three agencies during this brief period. They do not reflect the breadth and depth of Morgan Angel's research. The record is replete with examples of Tribal IIM percentages consistent with, and in some cases higher than, Dr. Angel's 10% to 15% estimate. For example, the December 15, 1952 House Report, DX-26, shows a nation-wide IIM tribal figure of 21%. DX 26-00002 ("Grand total, all states and Alaska": "Tribal funds" divided by sum of "Individual funds," "Tribal funds," and "Special deposits.") When assessed by tribe,

Tribal IIM ranges from 0.55% of total IIM, DX-26-00006 (Klamath Reservation) to 68%, DX 26-0007 (Utah and Ouray Reservation).

65. Other record evidence similarly demonstrates high percentages of Tribal IIM existing at numerous times across various locations. For example, the audit reports discussed by Dr. Angel show Tribal IIM as 22% at Winnebago in 1939, 44% at Winnebago in 1941, and 13% at Consolidated Chippewa in 1940. Tr. 801:7-805:3 (Angel); DX 485-00001-00003 (sum of three balances on pages 2 and 3 divided by total on page 1); DX-486-00001 (sum of credit funds, tribal funds, cemetery funds divided by IIM balance); DX 487-00003-00004 (Rehabilitation and Tribal Corporation total on page 4 divided by IIM total on page 3).

66. As Dr. Angel testified, the 1972 OSR report plainly reveals Tribal IIM as "about 40 percent" of total IIM for seven agency locations. Tr. 819:4-820:7 (Angel); DX-76-00012 (this same page is contained in reference # 209, PDF page 3, of Plaintiffs' "Compendium," PX-65-00035). Although declining greatly in subsequent years, Tribal IIM numbers derived from IRMS data for 1986-1988 show Tribal IIM percentages of 23% for 1986, 19% for 1987, and 26% for 1988. DX-371-00001 (column E divided by column G).

67. Along with the report contained in Plaintiffs' Compendium referenced in the paragraph above, the 1988 OIG report contained in the Compendium also reveals Tribal IIM percentages consistent with Dr. Angel's estimate. For 1986 in the Billings Area Office, Tribal IIM was 18% under "Subsidiary Totals" and 23% under "General Ledger Totals." PX-65-00049, reference # 209, PDF page 16 ("Tribal accounts" divided by "Total").

68. Therefore, far from a "guess," or a figure closer to 1% to 2%, Dr. Angel's 10% to 15% estimate of Tribal IIM for 1934-1985 is a reasonable calculation based on extensive research and supported by the record.

2. Plaintiffs Improperly Include All Osage Annuitant Money As Individual IIM Account Holder Funds

69. When Professor Cornell began his analysis, he admittedly "didn't know anything about any revenues earned by the Osage tribe." Tr. 332:5-10 (Cornell).

70. Professor Cornell erroneously believed that Columns C and D of PX-41 represented two different measures of the same activity. Tr. 334:3-6 (Cornell).

71. Professor Cornell agreed that if Osage monies were disbursed directly from a tribal account to individual headright owners, without passing through an IIM trust account, those funds should not have been included in his calculation of the amount to be disgorged. Tr. 334:7-23 (Cornell).

72. Professor Cornell estimated that if his model improperly included Osage headright collections that never entered IIM trust accounts, the impact was approximately 20% of $58 billion, or in excess of $11 billion. Tr. 334:24-335:21 (Cornell).

73. Plaintiffs' rebuttal model used straight-line interpolation to estimate the number of headright shares between 1880 and 1906. Tr. 1555:14-22 (Palmer).

74. Plaintiffs' rebuttal model erroneously used an estimate of 1,708 headright shares for 1889, rather than using the actual reported population total of 1,496. Tr. 1556:9-1557:13 (Palmer); DX-484.

75. Dr. Palmer testified that if Plaintiffs' rebuttal model could have used the reported Osage population for the 1889 headright share amount and that "if there's better information, obviously I'm happy to use it and incorporate it." Tr. 1557:9-16 (Palmer).

76. Dr. Palmer agreed that Plaintiffs' rebuttal model overstated Osage revenues because of the use of the estimate for headright shares in 1889. Tr. 1558:2-4 (Palmer).

77. Dr. Palmer did not remember reviewing source documents related to payments from the Osage tribal account to Individual IIM account holders and to headright shareowners. Tr. 1559:20-1560:6 (Palmer); DX-372 at 2025-2054.

78. Dr. Palmer had no understanding as to why Osage payments were made out of the Osage tribal account. Tr. 1560:23-1561:6 (Palmer); DX-372 at 2026.

79. Dr. Palmer did not know what was meant by "TRIBAL NON-SCHEDULED CHECK REQUEST," which appeared on a form in DX-372. Tr. 1561:16-22 (Palmer); DX-372 at 2028.

80. Dr. Palmer did not know what was meant by "ACCOUNT NO.: PL 7386706," which appeared next to "ACCOUNT NAME: OSAGE TRIBE" on the TRIBAL NON-SCHEDULED CHECK REQUEST form in DX-372. Tr. 1561:23-25 (Palmer); DX-372 at 2028; Tr. 1564:6-12 (Palmer).

81. Dr. Palmer understood that the references to "6039" appearing on the "INTRA BUREAU CASH TRANSACTION AUTHORIZATION" form in DX-372 referred to IIM accounts. Tr. 1562:11-17 (Palmer); DX-372 at 2029.

82. Dr. Palmer confirmed that when the TRIBAL NON-SCHEDULED CHECK REQUEST form was used to initiate payments from the Osage Tribal account to "Various

Annuitants," there was no reference to "IIM Trust," the "6039" account, or individual IIM account holders on any of the pages related to that transaction. Tr. 1563:8-1564:5 (Palmer); DX-372 at 2030-33.

83. Dr. Palmer did recognize, however, that transactions resulting in payments from the Osage Tribe account to headright owners resulted from "debits out of the Tribal account." Tr. 1565:14-1566:5 (Palmer); DX-372 at 2026, 2030.

84. Dr. Palmer agreed that the total of payments from the Osage Tribal account to IIM account holders for fiscal year 2001, supported by documents in DX-372, equaled the $12.04 million amount shown for 2001 in the "Osage, Gov't Calculated" column in Plaintiffs' rebuttal model. Tr. 1567:24-1568:16 (Palmer); DX-372 at 2025-54; PX-189-A.

85. Dr. Palmer did not remember reviewing the documents related to the March 2000 Osage payment which were attached to Defendants' April 9, 2008 Brief. Tr. 1569:3-14 (Palmer); DX-372 at 2005-11.

86. Dr. Palmer did not know what was meant by "PUBLIC VOUCHER," which appeared on a form related to payments to "various annuitants" in DX-372. Tr. 1570:1-8 (Palmer); DX-372 at 2011. Dr. Palmer did not know whether a "PUBLIC VOUCHER" resulted in the issuance of checks. Tr. 1570:4-8 (Palmer); DX-372 at 2011.

87. Plaintiffs' rebuttal model included all Osage headright payments, reduced by 1.25% for the Osage Tribe's purported interest, but still failed to distinguish between payments made from the Osage Tribal account into the IIM System, such as for deposit into IIM

trust accounts, and payments made directly from the Osage Tribal account to headright owners (annuitants). Tr. 1571:24-1573:16 (Palmer); Tr. 1574:4-21 (Palmer).

88. Dr. Palmer agreed that the documents reviewed in DX-372 showed some of the Osage headright monies not flowing through the IIM trust accounts. Tr. 1576:10-1577:12 (Palmer).

89. Dr. Palmer agreed that if Osage headright payments were made directly to annuitants from the Osage Tribal account, without going into the IIM trust accounts, those amounts should have been excluded from Plaintiffs' rebuttal model. Tr. 1577:13-16 (Palmer); see PX-189-A (Columns C and D).

90. If Plaintiffs' rebuttal model were revised by removing their calculations for "Osage, Corrected" (PX-189-A, Column D) and adding "Osage, Gov't Calculated" (PX-189-A, Column C), Plaintiffs' calculation of "Corrected Revenues" would be reduced. Tr. 1595:6-15 (Palmer); PX-189-A.

91. Because Plaintiffs' rebuttal model erroneously included their calculation of all headright payments (reduced by 1.25%), rather than collections paid only to IIM account holders, Plaintiffs' rebuttal model overstates "Corrected Revenues" by the difference between Columns C and D in PX-189-A, i.e., $1,483.73 million less $664.24 million, which is $819.49 million in nominal dollars. PX-189-A.

3. Plaintiffs Improperly Account For Money Intended for Third Parties

92. With regard to his model's treatment of collections and disbursements related to unsuccessful bid deposits, Professor Cornell stated that he did not know what amounts

represented returned deposits and that his model was "off by whatever the return to the unsuccessful bidders." Tr. 355:6-19 (Cornell).

93. In response to the Court's inquiry about bid deposits returned to unsuccessful bidders in 1910, as reflected in DX-33, Professor Cornell explained that it was "a third of the disbursements, not a third of the revenues, but it would take a big chunk out of [the difference between 100% and the disbursement rate] . . . ." Tr. 355:20-24 (Cornell) (discussing DX-33).

94. As Dr. Angel made clear, the historical record demonstrates that the IIM System contained more funds than just Individual IIM funds. As explained by Dr. Angel, the concept of "buckets" refers to "money that entered the IIM [S]ystem but were not disbursed to or . . . did not go to IIM accountholders [sic]." Tr. 799:13-15 (Angel). In extensive detail, Dr. Angel provided examples of funds that entered the IIM System but were not meant for disbursement to IIM account holders. Tr. 799:19-805:18 (Angel). These examples included returned bids, DX 32-00007; DX 33-00002, tribal, revolving and rehabilitation funds, DX 485-00001-5, travel funds, cemetery funds and student activity funds, DX 486-00001-3, and even Civilian Conservation Corps wages, DX 487-00004; Tr. 805:15-24 (Angel). From his historian's viewpoint, all these examples led Dr. Angel to conclude that "monies went into the IIM [S]ystem that did not go to the individual Indian accountholder [sic]." Tr. 805:8-10 (Angel).

B. Plaintiffs' Rebuttal Model Is Fatally Flawed Because It Inflates Collections by Adopting Adjustments to Record Data Without Factual Foundation

95. Plaintiffs' rebuttal model inflates the collections data reported by Morgan Angel for 1923-1949 by dividing the reported amounts by 77%. Tr. 1578:24-1579:5 (Palmer); PX-189-A (footnote 1).

96. Although Dr. Palmer chose to use the 77% figure appearing in DX-365 to adjust the collections for 1923-1949, he expressed little knowledge or understanding of the number. For example, he could not explain the meaning of the caption "Proven by Transaction Reconciliation Testing and Interest Recalculation" appearing on that exhibit. Tr. 1580:10-17 (Palmer).

97. Although Dr. Palmer chose to use the 77% figure appearing in DX-365 to adjust the collections for 1923-1949, he could not explain the meaning of the caption "Proven by DCV Only" appearing on that exhibit. Tr. 1580:18-20 (Palmer).

98. Although Dr. Palmer chose to use the 77% figure appearing in DX-365 to adjust the collections for 1923-1949, he could not explain the meaning of the caption "Proven Coverage" appearing at the top of that exhibit. Tr. 1581:1-6 (Palmer).

99. Dr. Palmer's use of the 77% figure in DX-365 was based on his equating that exhibit's reference to "Estimated Credits Into IIM Accounts" with the conclusion that the collections for 1923-1949 were understated. Tr:1581:7-23 (Palmer).

100. Although Dr. Palmer adjusted the 1923-1949 collections data based upon Dr. Angel's testimony that receipts were understated, Dr. Palmer did not adjust the 1923-1949 disbursements data for those years, even though Dr. Angel had testified to the understatement of both receipts and disbursements. Tr. 1585:12-1586:24 (Palmer).

101. Dr. Palmer confirmed that Plaintiffs' rebuttal model only adjusted 1923-1949 collections upward and did not adjust upward disbursements for 1923-1949. Tr. 1587:21-23 (Palmer); Tr. 1591:20-1593:1 (Palmer).

102. Because Plaintiffs' rebuttal model increased collections for 1923-1949 but did not adjust disbursements, the model's "Corrected Revenues" were increased by $169.9 million. Tr. 1593:3-1594:6 (Palmer); PX-189-D (Column K (1923-1949) less Column I (1923-1949)).

C. Plaintiffs' Models Are Fatally Flawed Because They Calculate Disbursement Rates Contrary to the Historical Record

1. Plaintiffs' Models Apply Improper Adjustments

103. Professor Cornell was not aware of the PACER system for electronic payments and erroneously believed that Electronic Funds Transfers (EFT) and Automated Clearinghouse (ACH) payments were included in the Check Payment Reconciliation System (CP&R) data he utilized. Tr. 349:8-16 (Cornell).

104. Professor Cornell conceded that if the CP&R data did not include electronic transfers, his model's disbursement rate "might be" artificially low and that "until [he] looked at the actual data and understood it, . . . [he] couldn't rule out that possibility." Tr. 349:17-22 (Cornell).

105. Professor Cornell's model included all Osage headright collections in his "Corrected Revenues" amounts but erroneously understated disbursements because he assumed that all disbursements to headright owners were made by checks included with the CP&R data for Treasury Disbursing Symbol 4844. Tr. 347:21-348:19 (Cornell).

106. Professor Cornell was not familiar with journal entries that transferred funds from the IIM System to Tribal Trust accounts. Tr. 352:19-353:8, 17-19 (Cornell); DX-480.

107. When asked if his calculation of a disbursement rate would have failed to capture journal entries, because they were not in the CP&R data, he stated, "I believe that's correct, but I'd have to understand it more fully to be sure." Tr. 353:20-25 (Cornell).

108. Unlike the model presented during Plaintiffs' case-in-chief, Attachment C to Plaintiffs' rebuttal model included electronic funds transfer data in its calculation of a disbursement rate. Tr. 1612:21-1613:7 (Palmer); PX-189-C.

109. Ms. Herman testified that most tribal money moves via bookkeeping transfers denoted as "BB" transfers. Tr. 570:1-6 (Herman).

110. Dr. Palmer recognized that the "INTRA BUREAU CASH TRANSACTION AUTHORIZATION" form related to Osage Account disbursements to IIM beneficiaries was a "BB" form, which he understood to be "transfers." Tr. 1566:16-22 (Palmer); DX-372 at 2029.

111. Dr. Palmer did not know whether BB transfers resulted in check disbursements. Tr. 1566:23-25 (Palmer); 1629:8-1630-10; DX-372 at 2029; DX-480 at 9.

112. Dr. Palmer agreed that if BB transfers did not result in check disbursements, they would not have been included in the CP&R data. Tr. 1567:1-5 (Palmer).

113. Dr. Palmer reviewed DX-238, which Interior's Office of the Special Trustee (OST) prepared in August 2004 to reconcile check disbursements and financial statement information, as a step in his attempt to understand CP&R and PACER data. Tr. 1625:20-1626:4 (Palmer); DX-238.

114. In the case of DX-238, BB transfers represented 21.7% of total disbursements, which Dr. Palmer confirmed "are not in our disbursements number." 1636:19-1637:13 (Palmer); DX-238.

115. In the course of developing the disbursement rates in Plaintiffs' rebuttal model, Dr. Palmer did not consider the October 16, 2007 testimony of Rob Winter with regard to BB transfers, see, e.g., 2007 Tr. 888:12-15 (Winter) (noting DX-238 reference to $73 million in "transfers out of the IIM trust fund to tribal trusts"). Tr. 1627:11-1628:24 (Palmer).

116. Dr. Palmer gave inconsistent testimony about what Ms. Herman said about how tribal disbursements from the IIM System were processed. At first, he testified that he understood Ms. Herman's testimony to be "that BB transfers were not disbursements, so I did not include them." Tr. 1628:23-1629:3 (Palmer). Later, Dr. Palmer remembered Ms. Herman's testimony about bookkeeping transfers but said that "[t]here was confusion to what disbursements were" and confirmed that his disbursement calculation only included "EFTs and CP&R checks." Tr. 1633:4-13 (Palmer).

117. Ms. Herman testified, however, that her calculation of total disbursements "include[d] things that are bookkeeping transfers as well as checks and other electronic transfers." Tr. 570:1-6 (Herman).

118. Professor Cornell's model, presented during Plaintiffs' case-in-chief, assumed that for all years other than 1988-2002, the amount disbursed in a given year was always equal to 69.82% of the amount the model calculated for "Corrected Revenues" and that 30.08% of the Corrected Revenues amount was never disbursed. PX-41; Tr. 340:13-341:11 (Cornell).

119. Professor Cornell admitted that although he "literally couldn't tell . . . one way or the other" whether it was reasonable to assume that thirty cents of every dollar collected for beneficiaries was never disbursed, it was an assumption in his model. Tr. 341:12-19 (Cornell).

120. The sole basis for Professor Cornell's conclusion that thirty cents of every dollar collected for beneficiaries was never distributed was Plaintiffs' analysis of the CP&R data. Tr. 341:17-342:14 (Cornell); PX-56.

121. As was the case with Professor Cornell's model, Plaintiffs' rebuttal model applies calculated disbursement rates – 1887-1907, 1912-1922, 1945, 1950-1954, 1956-1971 – and assumes that amounts not disbursed in the years of collection were never disbursed. Tr. 1605:1-1608:9 (Palmer); PX-189-A.

122. Dr. Palmer could not say whether a BB transfer of funds from "14X6039" to Tribal accounts constituted a portion of the 23% difference reflected in DX-365. Tr. 1631:1-1632:13 (Palmer); DX-480 at 9.

123. Dr. Palmer could not say whether a BB transfer of funds from a Tribal account to a Tribe represented a transfer of Tribal IIM money out of the IIM System. Tr. 1634:21-1636:12 (Palmer); DX-481.

124. In response to questioning from the Court, Dr. Palmer confirmed that Plaintiffs' rebuttal model only considered disbursements to individuals and that it did not consider third-party payments and Tribal IIM monies and transfers. Tr. 1633:17-1634:4 (Palmer).

125. In response to questioning from the Court, Dr. Palmer conceded that he was not sure about all elements of collections within the IIM System. Tr. 1634:5-12 (Palmer).

126. The following exchange occurred between the Court and Dr. Palmer:

> THE COURT: As I understood Ms. Herman's testimony, these BB fund transfers have to be deducted from total receipts if you're going to understand disbursements correctly. And you're telling me you're not deducting it.
>
> THE WITNESS: If we could identify them in receipts, then they would be deducted, because we're not including them in disbursements.
> . . .
>
> THE COURT: That may be where the 34 percent comes in.

Tr. 1634:13-23 (Palmer); see PX-189-C (134.1% ratio).

127. Plaintiffs' rebuttal model materially understates the calculated disbursement rates applied to 1945, 1950-1954, and 1956-1971 in PX-189-F. Those disbursement rates are based on calculations made in PX-189-C, which produced misleadingly low ratios because they included Osage collections for all headright owners (reduced by 1.25%), regardless of whether the payments were made to Individual IIM account holders or directly to headright owners. Tr. 1595:6-1596:17 (Palmer).

128. Plaintiffs' rebuttal model adjusted 1955 disbursements downward, using Dr. Palmer's analysis on Attachment C, even though Dr. Palmer testified that he could not quantify the impact of internal control weaknesses identified in a Comptroller General's Audit Report for the years ended June 30, 1952 and June 30, 1953. Tr. 1479:2-1480:3 (Palmer); 1598:8-1599:17 (Palmer); 1600:22-1601:7 (Palmer); 1602:5-9 (Palmer); PX-181.

129. As a result of the adjustments made in Plaintiffs' rebuttal model, Dr. Palmer noted that there were "not many instances" in which disbursements exceeded collections during a fiscal year, even though the data reported by Defendants' witnesses, Ms. Herman and Dr. Angel, revealed that disbursements exceeded collections in one-third of the years. Tr.

1543:24-1544:4 (Palmer); 1544:15-19 (Palmer); 1609:16-1610:22 (Palmer) (discussing DX-461 data).

2. Plaintiffs' Rebuttal Model Improperly Adjusts CP&R Data Downward Based upon a Flawed Analysis of Paid Check Amounts, Further Skewing Their Disbursement Rates

130. Plaintiffs' rebuttal model adjusts CP&R data for 1988-2002 downward based upon Dr. Palmer's analysis of Fiscal Year 1999 data and his resulting conclusion that only 93.68% of check amounts ultimately are paid. PX-189-C (Columns B, C, and note 5).

131. Plaintiffs' rebuttal model adds their reduced CP&R amounts to Dr. Palmer's calculations of Electronic Funds Transfers to determine Plaintiffs' calculation of total disbursements for 1988-2002. PX-189-C (Columns D and E).

132. Plaintiffs' rebuttal model calculates an average disbursement rate for the period of 1988-2002 by dividing the reduced total disbursements amount by Plaintiffs' calculation of "Corrected Revenues." PX-189-C (Column G).

133. Because Plaintiffs' rebuttal model applies the downward adjustment to CP&R data, the 74.45% disbursement rate calculated for 1988-2002 is lower than it would have been if Plaintiffs had not adjusted the CP&R data for those years.

134. Plaintiffs' rebuttal model applies the 74.45% disbursement rate to Plaintiffs' "Corrected Revenues" calculations for 1956-1971, thereby producing a reduced disbursements calculation based, in part, upon Dr. Palmer's conclusion that CP&R data for 1988-2002 required a downward adjustment. PX-189-F (Columns F, G, and H for 1956-1971).

135. Plaintiffs' rebuttal model uses a blended disbursement rate of 75.91% based, in part, on the downward adjusted 74.45% calculation for 1988-2002, to calculate Plaintiffs'

estimates of disbursements for 1945 and 1950-1954. PX-189-F (PX-189-F (Columns F, G, and H for 1945 and 1950-1954).

136. In reaching his conclusion that only 93.68% of checks issued were actually paid, Dr. Palmer "didn't focus" on evidence adduced at the October 2007 hearing that demonstrated that Treasury recredited uncashed checks to Interior and that Interior recredited uncashed check amounts to IIM accounts. Tr. 1622:9-24 (Palmer).

137. In reaching his conclusion that only 93.68% of checks issued were actually paid, Dr. Palmer was unaware of evidence adduced at the October 2007 hearing regarding the Data Completeness Validation (DCV) findings as to recrediting of uncashed checks. Tr. 1624:9-17 (Palmer).

138. OST disburses funds to IIM Individual account holders in three basic ways: by check, ACH ("Automated Clearinghouse"), or direct deposit (by EFT/electronic funds transfer). 2007 Tr. 872:20-873:7 (Winter); see DX-239.

139. From January 1991 through December 2005, Interior issued 6,574,534 checks totaling approximately $2.8 billion to payees under its Agency Location Code (ALC) 4844. DX-275; 2007 Tr. 1301:5-1302:23 (Cymbor). This information is contained within the CP&R system. 2007 Tr. 1301:19-22 (Cymbor).

140. Dr. Palmer relied on DX-238 to gain an understanding of CP&R and PACER data. Tr. 1625:20-1626:4 (Palmer).

141. According to DX-238, in Fiscal Year 1999, checks totaling $175,544,960.19 were issued, of which $364,462.89 were subsequently cancelled. DX-238.

142. In contrast to Dr. Palmer's analysis, the data on DX-238 indicates that 99.98% of check amounts ultimately were paid because only 0.2%, i.e., $364,462.89 out of $175,544,960.19, were cancelled and recredited. DX-238.

143. Dr. Palmer's flawed application of his check disbursement calculation is revealed by his 1999 estimate of $173,213,684 in "CP&R Disbursements (Adjusted)," PX-189C (Column C), which understates by $2.33 million the net check disbursements of $175,180,497.30 established by DX-238. DX-238 at 1 ("CHECKS-4844" - "CANCEL CHECKS").

144. Dr. Palmer's total disbursements calculation for 2003 of $143.50 million, PX-189A (Column F), understates by over $49 million the total disbursements of $192.526 million established by OST's study analysis of 2003 disbursements, DX-236 at 1; 2007 Tr. 891:23-893:21 (Winter).

a. Plaintiffs' Rates Are Refuted By the Results of the Treasury Check Study

145. On May 31, 2000, Treasury issued a Study of Check Negotiation Practices for Office of Trust Funds Management-Issued Checks, DX-242 ("Check Study"). Among other things, the Check Study established that for a twelve-month period from September 1998 through August 1999, the Office of Trust Funds Management (OTFM) issued 325,731 IIM checks, DX-242 at 7, 12 ("all 325,731 IIM checks issued"); 2007 Tr. 885:4-12 (Winter), with a total value of $177,481,567.93, DX-242 at 16.

146. Treasury studied a "representative sample" of 3,255 IIM checks, which was 1% of the total number of checks issued. DX-242 at 3, 12-13. Because no processing data was available for 511 checks, they were removed from the sample. DX-242 at 13. Treasury

removed one check because it lacked "sufficient information to continue research." DX-242 at 13. Another 16 checks had been voided by Interior. DX-242 at 13. Treasury also found that 27 checks had not been cashed: 15 were subject to cancellation due to limited payability, meaning they had not been presented for payment for at least 12 months after the date of issuance, DX-242 at 13 & n.13; and 12 were "uncashed checks" that had been outstanding for an average of 311.3 days as of March 15, 2000, DX-242 at 17.

147. Treasury noted that the dollar total for the outstanding items (the 15 checks canceled for limited payability and 12 uncashed checks) "of $2,119.20 seems insignificant at 0.17% of the dollar value of the 2,700 [cashed] checks in the adjusted sample that [totaled] $1,227,013.64." DX-242 at 17. The 27 outstanding items would represent 1% of the 2,700 checks in the sample that were cashed. If these percentages were extrapolated to the total 325,731 IIM checks issued with a value of $177,481,567.93, the "outstanding items" would represent approximately 3,257 checks with a value of $301,718.67.

b. Plaintiffs' Rates Are Refuted by the Reconciliation of Checks and Total Disbursements for FY1999

148. In August 2004, OST performed a reconciliation to address possible inconsistencies between the $177 million in check disbursements noted in the Check Study, DX-242, and the approximately $336 million in IIM disbursements reported in OST's FY1999 financial statements. 2007 Tr. 884:5-22, 885:14-24 (Winter); see DX-238 at 1 ("Disbursement Activity" table referencing $336,637,000 "FIN STMT" total).

149. OST's reconciliation work showed that for FY1999, a period that is one month different from that used for the Check Study, Interior issued $175 million in IIM checks. 2007 Tr. 886:15-22 (Winter); DX-238 at 1 ("4844 CHECKS" shown in first column of table,

referencing IIM disbursing symbol). The difference between the $175 million in checks and total disbursements of $336 million was due to electronic payments and transfers. 2007 Tr. 886:22-23 (Winter).

150. After correcting for inter- and intra-fund transfers, FY1999 disbursements to Individual IIM account holders actually totaled $202 million, with $175.545 million paid by check and $26.444 million by EFT. These amounts were similar to FY2003 when OST disbursed $192 million, with $129 million by check and $63 million by EFT. DX-236 at 1-2 (Composition of Disbursements tables for FY1999 and FY2003); 2007 Tr. 893:13-894:7 (Winter).

151. The 2004 reconciliation results were also consistent with the Treasury Check Study, DX-242, for the rate and amount of cancelled checks. 2007 Tr. 886:15-887:5 (Winter). The "Disbursement Activity" table for IIM accounts in FY1999 shows cancelled checks as a negative disbursement of $364,462.89, DX-238 at 1, making cancelled checks 0.2% of the total amount of checks issued ($175.544 million). The cancelled check line item includes cancellations due to limited payability (uncashed more than one year after issuance) and returned checks. 2007 Tr. 888:19-25 (Winter). Similarly, the Treasury Check Study found 0.17% checks cancelled or uncashed from a representative sample of checks issued from September 1, 1998 to August 31, 1999, which would translate to approximately $301,000 out of a total of $177 million in issued checks. DX-242 at 16-17.

c. Plaintiffs' Rates Are Refuted by the History of Cancelled Checks

152. Treasury provides OST with "statement of differences" information for its IIM disbursing symbol 4844. 2007 Tr. 863:11-866:9 (Winter); see DX-282. This information allows OST to determine the number of checks that were returned to Treasury and then canceled, because of, for example, a bad address. 2007 Tr. 864:6-15 (Winter). OST then uses this information to credit those checks to the appropriate Individual IIM accounts. 2007 Tr. 864:16-20 (Winter).

153. Treasury also canceled checks pursuant to the Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-86, 101 Stat. 552 (1987). Since 1989, CEBA has required that uncashed IIM checks, like all Treasury-issued checks, be canceled after twelve months. DX-231 at 1. Treasury refers to these cancellations as "limited payability cancellations." 2007 Tr. 1294:16-1295:18 (Cymbor).

154. On a monthly basis, Treasury's Financial Management Service, Check Resolution Division, sends the agency that issued the checks – in this case Interior – the affected funds and relevant information for the canceled checks via the Intragovernmental Payment and Collections System (IPAC). 2007 Tr. 846:19- 24 (Winter); 2007 Tr. 1294:16-1295:18, 1300:15-24 (Cymbor). OST re-credits the appropriate accounts, usually within 30 days. 2007 Tr. 846:25-847:8 (Winter). The IPAC System record reflects the credit back to Interior both by individual check and through a summary total. 2007 Tr. 1310:5-9 (Cymbor).

155. From January 1992 through December 2006, Treasury transferred back to Interior approximately $5.2 million from limited payability cancellations of 46,197 ALC 4844 checks. DX-273; 2007 Tr. 1297:8-1302:24 (Cymbor).

156. These 46,197 cancelled checks represented approximately 0.7% of the approximately 6.5 million ALC 4844 checks that Interior issued from 1992 through 2006, DX-273; DX-275; 2007 Tr. 1300:15-1302:19 (Cymbor), and 61% of them had a value of under $25. DX-275.

157. The $5.2 million in cancelled checks is less than 0.2% of the $2.8 billion total dollar value of checks issued by the BIA during the January 1992 through December 2006 time period. See DX-275.

d. Plaintiffs' Disbursement Rates Are Refuted by the Results of the Mass Cancellation Project

158. This Court made extensive findings of fact concerning the "Mass Cancellation Project" undertaken by BIA in 1992-1993. Cobell XX, 532 F. Supp. 2d at 51-52. The project was necessitated "when Congress passed [CEBA], which provided that, as of October 1, 1989, Treasury checks would be of 'limited payability' and could be cashed for only one year from the date of issuance. Treasury Bulletin No. 90-03, DX-231 at 1, 18; [2007] Tr. 323:17-324:4 (Ramirez)." Id. at 51. "At that time, some 10 million Treasury checks from as early as 1954 remained outstanding; approximately 60,000 of these checks were IIM checks with a combined value of approximately $1.9 million. Mass Cancellation Project, Analysis of Treasury Listing, DX-225 at 8; [2007] Tr. 324:8-328:16 (Ramirez); BIA Office of Trust Funds Management (OTFM) Instructions on Completing Mass Cancellation Project, DX-217 at 1-2." Id. at 51-52.

159. Of 38,554 "non-zero dollar" mass-canceled IIM checks issued in the thirty-five year period from 1954 through 1989, the amount of uncashed checks totaled no more than $1,576,528.45. 2007 Tr. 353:25-357:12 (Ramirez); see DX-220; DX-221 at 2. By comparison, during one week in 1989, BIA disbursed over $1.6 million in IIM checks. 2007 Tr. 288:21-289:17 (Ramirez); DX-218 at 3-4. Using either the government's or the Plaintiffs' estimates of total IIM System receipts – each in excess of $7 billion – for 1954 through 1989, the percentage of uncashed checks accounted for by the Mass Cancellation Project is well below 0.05%. See DX-372; PX-41 at 2-3.

3. Plaintiffs' Rebuttal Model Improperly Adjusts Disbursements by Applying a 134.1 Percent Discount Adjustment Factor to Government Disbursement Data

160. Plaintiffs' rebuttal model generates a ratio to adjust disbursements reported in AR-171 and audit reports for 2003-2007 because Dr. Palmer noted that Defendants' disbursement amounts for 1972-2007 were greater than Plaintiffs' disbursement totals based on checks and electronic funds transfers. Tr. 1613:15-1614:11 (Palmer); Tr. 1614:17-1615:7 (Palmer); PX-189-C.

161. Attachment C to Plaintiffs' rebuttal model treated disbursements data from AR-171 and audit reports for the years 1972-1987 and 2003-2007 as being overstated by a factor of 134.1. PX-189-C; PX-189-F (Columns C and E for 1972-1987 and 2003-2007).

162. The 134.1% ratio developed in Attachment C to Plaintiffs' rebuttal model is derived from only CP&R and PACER data; it did not include other disbursements data, such as BB transfers. PX-134-C (Columns B, C, and D).

163. Dr. Palmer explained that Plaintiffs' decision to apply a 134.1% adjustment to Defendants' disbursement data was "because [Ms. Herman's] numbers were higher, when we had actual information and she didn't." Tr. 1614:3-11 (Palmer). However, when asked to identify what data Ms. Herman used in preparing AR-171, Dr. Palmer repeatedly stated that he did not know what she used for 1972-1985. Tr. 1616:4-1617:7 (Palmer). Dr. Palmer also conceded that Ms. Herman's data for 2003-2007 came from audit reports. Tr. 1617:8-10 (Palmer).

164. Dr. Palmer explained that Plaintiffs' rebuttal model adjusted the disbursements reported in audit reports for 2003-2007 downward by applying the 134.1% ratio in Attachment C. Tr. 1617:22-1618:16 (Palmer).

165. After hearing Dr. Palmer's testimony about how Plaintiffs' rebuttal model ignored tribal transfers and calculated collections and disbursements, the Court observed, "That may be where the 34 percent comes in." Tr. 1633:17-1634:23 (the Court).

4. Plaintiffs Improperly Ignored Available Disbursement Data

166. The model presented during Plaintiffs' case-in-chief utilized a 1927 document published by the Office of Indian Affairs for individual Indian receipts totaling $22,755,197 in 1926, but did not utilize the same document's reported disbursements in 1926 totaling $35,389,899. Tr. 291:9-292:15 (Cornell).

167. When asked by the Court about the Plaintiffs' disregard of the reported 1926 disbursements amount, which the Court referred to as "buying one half of this equation but not the other half," Professor Cornell explained that "[he was] more than willing to

go back and change [his] disbursement numbers to whatever is appropriate." Tr. 292:16-293:10 (Cornell).

168. While testifying, Professor Cornell estimated that decision to disregard the reported 1926 disbursements figure resulted in an overstatement of "$734 million in terms of the bottom line in 2008." Tr. 306:10-18 (Cornell).

169. Professor Cornell's model also ignored disbursements data in audited financial statements. Tr. 344:19-346:8 (Cornell) (discussing DX-438).

170. In support of Plaintiffs' selective use of collections data but not disbursement data, Mr. Pallais testified as to his perception of the unreliability of government IIM disbursement records. Tr. 429:25-430:2 (Pallais). At the October 2007 trial, however, Mr. Pallais did not draw a distinction between reliability of disbursement records and reliability of receipt records. At the October trial, Mr. Pallais testified generally about "insufficient reliability for the records reported to the individual account holders," 2007 Tr. 1819:5-6 (Pallais), and repeatedly stated that "records are unreliable," 2007 Tr. 1820:7-8 (Pallais), without ever distinguishing between reliability of receipts records and reliability of disbursements records.

171. Regarding the years for which complete receipts and disbursement figures exist (1909-1911, 1955), Dr. Angel criticized Plaintiffs for "includ[ing] the receipts figures for those years but not the disbursement figures." Tr. 821:7-9 (Angel). "Essentially if you're going to use one you've got to use both. You've at least got to show what the second number was, the disbursement figure in this case." Tr. 821:11-13 (Angel).

172. Plaintiffs also ignore disbursement evidence for 2003 from the 2007 trial, DX-236 at 1, which shows that checks of $129.239 million and EFT of $63.070 million were disbursed, for a total of $192.526 million. Instead, in their original model Plaintiffs showed 2003 disbursements totaling $125.601 million, and in their rebuttal model Plaintiffs showed 2003 disbursements totaling $143.50 million. Plaintiffs' disbursement calculations for 2003 thus understated actual IIM disbursements by 34.8% and 25.5% respectively.

D. Plaintiffs' Models Erroneously Assume That All Individual IIM Account Funds Belong Only To Class Members

1. Non-class Members and Account Holders Who Could Obtain An Accounting

173. Plaintiffs make no effort in their calculations of benefit to the government to apportion dollars between class members and other Individual IIM account holders. They assume that all money in the IIM System belongs only to class members despite clear proof to the contrary.

174. Ms. Herman, for example, prepared calculations for two subsets of Individual IIM account holders. Tr. 579:1-2 (Herman); DX-496.

(1) One subgroup consists of account holders who have or had an account that first opened during the Electronic Ledger Era and that have no credits coming from other accounts. Tr. 579:3-14 (Herman). This would likely include most Judgment and Per Capita account holders and also some land-based accounts that could receive a historical accounting that would satisfy the Court's requirements as set forth in its January 30, 2008 decision. Ms. Herman's investigation revealed

193,435 such accounts, which comprise $895,594,280 of collections. Tr. 579:10-12 (Herman); DX-496. Plaintiffs make no provision in their remedy calculation to adjust for these accounts that need no alternate remedy.

(2) Another subgroup consists of IIM account holders who are not members of the certified class. The class certified on February 4, 1997 includes then-present and former beneficiaries of Individual Indian Money Accounts. Order of February 4, 1997 (Dkt. No. 27). Individuals who first became IIM account holders after February 4, 1997, are not class members, but Plaintiffs have not screened out these accounts in their remedy estimates. Ms. Herman found that such newer accounts have had about $218 million in collections since February 4, 1997. Tr. 579:15-580:4 (Herman); DX-496.

175. For these two subgroups of IIM account holders, Ms. Herman estimates that their related collections total $1.1 billion. Tr. 580:5-7 (Herman). Plaintiffs, however, make no provision for these dollar amounts when calculating their remedy.

2. Deceased Individual IIM Account Holders

176. Individual IIM account holders who died before the 1994 Act was enacted are not class members in this litigation because their right to an accounting under the 1994 Act never accrued. Cobell XX, 532 F. Supp. 2d at 98. According to the Court, the heirs of these deceased class members would have been entitled to an accounting of their deceased predecessor's Individual IIM Account to ensure that the heir's opening balance was correct.[2] Id. However, it does not follow that the heirs would be entitled to restitution of

[2] Defendants respectfully believe that this decision was in error.

any amount not disbursed to their predecessor in interest who died before October 24, 1994, especially for those whose accounts were also closed well before October 24, 1994. In their revenue calculation, Plaintiffs make no provision for amounts that may have been undisbursed to deceased Individual IIM account holders and for which no current account holder has any interest.

3. Prior Settlements

177. Plaintiffs also fail to exclude any amount for judgments and prior settlements of claims against the United States by individual IIM account beneficiaries. The most obvious of these is the amount involved in the Mitchell litigation before the Supreme Court, United States v. Mitchell, 463 U.S. 206 (1983). See Order Granting Joint Motion and Stipulation for Entry of Final Judgment, (Cl. Ct. Aug. 29, 1989) (Nos. 772-71 - 775-71) ("Final Judgment"). The Final Judgment provided for the payment by the United States of $26 million to the individual allottee plaintiffs, and $600,000 to the Quinault Indian Nation. Final Judgment at ¶ 2. See also Kauley Ass'n, et al. v. Clark Complaint (Dec. 14, 1984) (CIV 84-3306T D.N.M.) ("seek[ing] an order compelling Defendants to enforce and comply with [FOGRMA] and the regulations requiring defendants to account for and pay to Plaintiffs their royalties with interest") and Order (Dec. 6, 1991) (approving settlement agreement); Mescal v. United States, Order Modifying Settlement Agreement (D.N.M. Jan. 19, 2001) (Civ No. 83-1408); Shii Shi Keyah Ass'n, et al. v. Clark, Joint Consent Decree Status Report (D.N.M. Apr.10, 1995) (CIV 84-1622M). All of these cases involved revenue claimed to be owed IIM account holders.

E. Plaintiffs' Proof Is Inadequate Because It Ignores Results of the Government's Historical Accounting Efforts

1. Plaintiffs' Low Disbursement Assumptions Disregard Accounting Work Performed on the Accounts of the Named Plaintiffs and Predecessors

178. As discussed by the Court in Cobell XX:

> In 1999 . . . the government hired Arthur Andersen to help both the Treasury and Interior Departments comply with Paragraph 19 of the First Order for Production of Information. Under Paragraph 19, defendants were to produce all "documents, records or tangible things which embody, refer to, or relate to the IIM accounts of the named Plaintiffs or their predecessors in interest." [Cobell II, 37 F. Supp. 2d 6, 16 (D.D.C.1999)]. Treasury produced over 2,000 documents pursuant to Paragraph 19, and . . . Interior searched approximately 80 facilities for documents responsive to Paragraph 19 and produced around 160,000 documents. Trial 1.5 Tr. [52:10-12,] Tr. 54:6-55:8, Tr. 66:5-7 (Brunner 6/6/03 [PM]).

Cobell XX, 532 F. Supp. 2d at 49-50.

179. Beginning in early 2001 through March 2003, the records produced in response to Paragraph 19 were reviewed and analyzed by Ernst & Young accountants, led by partner Joseph Rosenbaum. Tr. 1374:12-1375:25 (Rosenbaum); Trial 1.5 Tr. 53:5-54:12, 56:9-14 (Rosenbaum 6/9/03 AM). Mr. Rosenbaum testified as an expert in forensic accounting at this trial, Tr. 1370:16-25 (Rosenbaum), as well as at Trial 1.5, Trial 1.5 Tr. 18:7-9, 52:16-22 (Rosenbaum 6/9/03 AM). His expert report was admitted in evidence during Trial 1.5 as D-156. Trial 1.5 Tr. 58:6-14 (Rosenbaum 6/9/03 AM) (report identified as D-156); 107:13-15 (7/7/03 AM) (D-156 received in evidence) and refiled as AR-522 (July 6, 2007).

180. "A total of 37 accounts were analyzed [and] [t]he documents collected dated back to 1914." Cobell XX, 532 F. Supp. 2d at 50 (internal citation omitted); see DX-515 at 1

(Exhibit A to Rosenbaum expert report, AR-522 at 12) (listing name, number of accounts, and date of first and last transaction for each named plaintiff and predecessor in interest).

181. "Rosenbaum's report analyzed a virtual ledger of transactions reflecting the documents Interior had collected in response to Paragraph 19." Cobell XX, 532 F. Supp. 2d at 50. Defendants produced the Paragraph 19 document database to Plaintiffs in November, 2002, see Trial 1.5 Tr. 11:5-16 (6/9/03 PM), and provided the virtual ledger to Plaintiffs' counsel at the time of the Phase 1.5 trial in 2003, see Trial 1.5 Tr. 10:5-25, 76:7-18 (6/9/03 PM).

182. "Rosenbaum determined that the documents necessary for assembling transaction histories for the named plaintiffs and their predecessors were available, and that TFAS balances from December 31, 2000 were sufficiently supported by supplemental documentation." Cobell XX, 532 F. Supp. 2d at 50 (citing Trial 1.5 Tr. 56:15-22 (Rosenbaum 6/9/03 [AM])); see also AR-522 at 6-7; Tr. 1390:19-1391:4 (Rosenbaum).

183. "Supporting documentation was discovered for 86 percent of the 12,617 transactions reviewed, representing 93 percent of the total dollar value of those transactions, or approximately $1.12 million." Cobell XX, 532 F. Supp. 2d at 50 (citing Trial 1.5 Tr. 75:5-76:19, 77:6-19 (Rosenbaum 6/9/03 [AM]); see also AR-522 at 3, 6, 13; DX-515 at 2.

184. Of the examined transactions found in the ledgers, variances between the supported amount and recorded amount were found. AR-522 at 3, 8-9, 16. For the $1.1 million in total transaction value, the total net variance was $3,235.18, or less than 1% of the total

transaction value. Trial 1.5 Tr. 53:14-54:1 (Rosenbaum 6/9/03 PM); AR-522 at 15. Of 452 individual variances discovered, 401 were for $1.00 or less, and approximately 270 were off by approximately one penny, which was most likely due to rounding differences. Trial 1.5 Tr. 54:2-9 (Rosenbaum 6/9/03 PM); AR-522 at 15 (Exhibit C, Summary of Variances table).

185. Except for one $60.94 collection that was posted to the wrong IIM account, Ernst & Young found no indication of any transactions that should have been but were not recorded in the available IIM ledgers. Tr. 1391:18-1392:20 (Rosenbaum); Trial 1.5 Tr. 57:3-7, 78:11-79:2 (Rosenbaum 6/9/03 AM); AR-522 at 3. Mr. Rosenbaum concluded that "[t]here is no indication that the listing of transactions of the IIM accounts are not substantially accurate, nor that the transactions recorded are not substantially supported by contemporaneous documentation." AR-522 at 4; Tr. 1379:1-5 (Rosenbaum).

186. Ernst & Young "also performed an 'expected versus actual' analysis by comparing information about leases, transactions, and ownership interests." Cobell XX, 532 F. Supp. 2d at 50 (citing Trial 1.5 Tr. 54:17-55:10 (Rosenbaum 6/9/03 [PM]); see also Tr. 1382:22-1387:17 (Rosenbaum). Ernst & Young researched each discrepancy it found in the lease comparison to ascertain whether there was an explanation for the discrepancy. Trial 1.5 Tr. 55:11- 56:1 (Rosenbaum 6/9/03 PM). Where Ernst & Young could not find an explanation for differences between the amounts due under the relevant lease and the amount listed in the transaction ledger, the differences were noted as "unexplained differences." Trial 1.5 Tr. 55:21-56:1 (Rosenbaum 6/9/03 PM); AR-522 at 16.

187. Ernst & Young found "a total expected payment amount - . . . based upon a reading and understanding of the lease documents - of $289,910.91." Tr. 1383:18-20 (Rosenbaum). "[T]he amounts that were listed in the transaction ledgers total[ed] $289,942.95." Tr. 1383:20-22 (Rosenbaum). Having "identified and analyzed the majority of leases associated with the named plaintiffs that related to farming and oil and gas extraction, Trial 1.5 Tr. 57:20-58:3 (Rosenbaum 6/9/03 [PM]), [Ernst & Young found] a net of only $32.04 in unexplained differences between transaction ledger entries and leases." Cobell XX, 532 F. Supp. 2d at 50. The lease analysis established that "substantially all expected collection amounts were properly recorded and reflected in the listing of transactions of the IIM accounts." AR-522 at 3-4; see Tr. 1382:22-1383:7 (Rosenbaum).

188. Ernst & Young discovered the single transaction that was posted to the wrong IIM account while conducting the lease analysis; that account belonged to an individual who had a similar account number to named plaintiff Mildred Cleghorn, who should have received the $60.94. Tr. 1392:6-20 (Rosenbaum); Trial 1.5 Tr. 78:11-79:2 (Rosenbaum 6/9/03 AM); 31:13-39:22 (Rosenbaum 6/9/03 PM) (reviewing $60.94 transaction and related documentation in detail as part of lease analysis of expected versus actual payments); AR-522 at 3.

189. For the 12,617 analyzed transactions for the named plaintiffs and their predecessors in interest, 99.5% of the amount of collections posted to the accounts were disbursed from those accounts:

Collections (Receipts):	$549,857.03
Interest (Receipts):	$ 10,160.05

Total Receipts:	$560,017.08 [Collections + Interest]
Disbursements:	$557,219.08
Difference:	$ 2,798,000 [Receipts - Disbursements]

DX-515 at 2.

190. Of an additional 556 reconstructed or recreated transactions totaling $29,092.22, AR-522 at 6, 17; see Tr. 1412:3-7 (Rosenbaum) ("recreated transactions"), disbursements exceeded reconstructed collections by $2,033.82. Subtracting these excess disbursements from the $2,798.00 "difference" between the 12,617 collection and disbursement transactions results in a net undisbursed remainder of $764.18.

191. "No differences were noted" between the ending account balances stated in Interior's accounting systems and those calculated by Ernst & Young in examining the Paragraph 19 documentation and virtual ledger data. AR-522 at 6-7; Tr. 1390:20-1391:1 (Rosenbaum). To "make sure that the ending balance in the accounts . . . matched those within the TFAS system," Tr. 1390:22-24, Ernst & Young "obtained from Interior the TFAS account balances as of December 31, 2000 for the accounts in existence at that time." AR-522 at 6. Those balances were compared to the December 31, 2000 account balances Ernst & Young calculated from the Paragraph 19 documentation and transaction information. AR-522 at 6-7. "For accounts that were not in existence as of December 31, 2000, [Ernst & Young] compared the calculated balance to the ending balance of the account." AR-522 at 7. Tr. 1390:11-1391:17 (Rosenbaum); see Tr. 1390:25-1391:4, 1391:13-17. As of December 31, 2000, the account balances for all of the named

plaintiffs and their predecessors in interest totaled less than $3,000 dollars. Trial 1.5 Tr. 78:4-8 (Rosenbaum 6/9/08 AM).

192. Mr. Rosenbaum found no evidence of collections being disbursed or credited to the government instead of to a named plaintiff or predecessor-in-interest. Tr. 1392:25-1393:3 (Rosenbaum).

193. Plaintiffs presented no evidence at trial to rebut Mr. Rosenbaum's findings, conclusions or opinions presented in his report, AR-522, or in his trial testimony.

2. Plaintiffs' Low Disbursement Assumptions Disregard the Low Error Rates Demonstrated by the Litigation Support Accounting Project

194. In late 2003, following Congress' direction that Interior temporarily suspend historical accounting efforts, Interior began the Litigation Support Accounting ("LSA") project. Cobell XX, 532 F. Supp. 2d at 59. "Interior borrowed the term 'litigation support' from the appropriations bill . . ., which temporarily halted both the agency's obligation to perform an historical accounting of the IIM trust and, arguably, temporarily prohibited any work other than 'litigation support' on land-based IIM accounts . . . ." Id. (discussing Pub. L. No. 108-108, 117 Stat. 1241 (2003)).

195. This Court's Cobell XX opinion discusses the LSA project in detail, 532 F. Supp. 2d at 59-63, 92-93, including the following evidence:

> The government retained NORC to draw samples for the LSA project, which ultimately involved the reconciliation of 6,599 transactions from land-based accounts in the electronic era. NORC's goal in performing the LSA project was to deepen its understanding of the system in order to better target future historical accounting efforts. Tr. 974:18-975:1 (Scheuren). NORC – along with various accounting firms assisting with the LSA project – learned many lessons while performing this relatively small number of reconciliations. First, it learned that the cost of reconciling transactions in land-based accounts is significant. Tr. 964:23-

> 965:16 (Scheuren). Second, however, NORC encountered far fewer errors and missing records than it had expected to discover. Tr. 977:15-22 (Scheuren). The large sample sizes contained in the 2003 Plan had been based on Interior's assumption – an assumption informed by historical reports, anecdotal evidence, and decades of criticism – that records would be missing, erroneous, and in disarray. Those assumptions, NORC concluded, were overblown and incorrect.

Cobell XX, 532 F. Supp. 2d at 60. The Court further described the results of NORC's analysis as follows:

> Accounting firms working with the sampled transactions provided by NORC were able to reconcile 2,363 of the 2,372 debit transactions sampled, and 2,117 of 2,128 credit transactions sampled. Tr. 997:1-12, Tr. 1000:2-12 (Scheuren); AR-438 (tables 4 and 7). A posted transaction from the IRMS or TFAS database was considered "reconciled" if contractors found supporting documents sufficient to determine whether the transaction was correct or erroneous. Tr. 997:5-8 (Scheuren); . . . . No errors were found among the reconciled debit transactions, and 25 errors were found among the reconciled credit transactions. Tr. 997:1-12, Tr. 1000:7-20 (Scheuren). For statistical purposes, NORC also considered all unreconciled transactions erroneous (nine debit transactions and eleven credit transactions). 9/30/2005 NORC LSA Report, AR-438 at 14, 17. Both variable and attribute sampling were employed in the LSA project, as contractors noted both the presence of errors as well the total amount of dollars in error.

532 F. Supp. 2d at 62.

196. The sample design for the LSA project provided for a 100% reconciliation of all transactions of $100,000 or more. Cobell XX, 532 F. Supp. 2d at 62; 2007 Tr. 990:12-991:7 (Scheuren). Interior's accountants were able to reconcile all of those large transactions. 2007 Tr. 1001:16-1002:6 (Scheuren); AR-437.

3. Plaintiffs' Low Disbursement Assumptions Disregard the Low Error Rates Found in Performing the Historical Accounting for Judgment and Per Capita Accounts

197. Interior's 2003 Plan contemplated reconciling 100% of all 96,823 Judgment and Per Capita accounts, utilizing transaction-by-transaction testing. See Cobell XX, 532 F. Supp. 2d at 56. By the time Interior issued its 2007 Plan, Interior had reconciled 83,226 accounts, i.e., 86% of all accounts, and "deferred further work on reconciling the remaining [Judgment and Per Capita] accounts to shift scarce resources to efforts related to land-based account historical accounting." AR-566, ¶ V.A.1 ("What Work Remains" for Judgment and Per Capita Accounts), at 33-03-18; see 532 F. Supp. 2d at 56-57.

198. The total throughput – receipts plus disbursements – related to Judgment and Per Capita accounts to be reconciled as part OHTA's historical accounting work is over $832 million. Interior Status Report to the Court Number Twenty-Two, at 19-24 (Aug. 1, 2005), AR-540 at 2-7.

199. Differences noted during the reconciliation process were minimal, see, e.g., Cobell XX, 532 F. Supp. 2d at 71 ("After applying [the Interest Recalculation] test to Judgment and Per Capita accounts, Interior concluded that most discrepancies in individual accounts were minor, typically only a dollar over or two dollars under the posted interest amount. Tr. 116:4-9 (Cason).").

200. Of the 83,226 accounts for which reconciliation work is complete, the Court has granted approval to mail 17,096 Judgment and Per Capita HSAs, Order (Oct. 22, 2004), and Interior has mailed over 13,000 of those HSAs. Interior Status Report to the Court Number 27, at 4 (Nov. 1, 2006), AR-535 at 3. Mailing of 66,130 HSAs still awaits

approval from the Court. Interior Status Report to the Court Number 29, at 5 (May 1, 2007), AR-533 at 4.

201. Plaintiffs' models do not exclude the over $832 million in throughput related to the 96,823 Judgment and Per Capita accounts identified by Interior in its historical accounting work. Because HSAs were largely completed and can readily be accomplished for the remaining 14% of accounts, the receipts and disbursements related to those accounts should have been excluded from Plaintiffs' model.

4. Plaintiffs' Assumptions Disregard the Data Completeness Validation Results and Other System Tests

202. The work performed by Ms. Herman and FTI as part of the Data Completeness Validation (DCV) project has revealed low incidences of accounting discrepancies. Tr. 571:11-577:2 (Herman). Ms Herman testified about the DCV studies extensively last October and provided much detail on the results of the DCV work. See generally 2007 Tr. 447:23-468:3, 479:23-509:16, 510:2-531:12, 533:15-547:15, 547:25-569:23, 572:13-575:5 (Herman).

203. At this trial, Ms. Herman used the Pacific Region DCV results as of the September 30, 2007 report. The report indicated that the Pacific Region had only 187 unresolved transactions, with a value of $153,207, out of 961,829 examined. Check mispostings totaled about $20,966. Tr. 575:4-17 (Herman). Since the DCV is ongoing, some of these problem transactions could still be resolved, further reducing the dollars in question. Tr. 576:14-577:2 (Herman).

204. Similar information and figures for accounting discrepancies could be collected for other regions, using corresponding information from the DCV reports. Tr. 576:14-22 (Herman); see also DX-152A-158A (DCV reports).

205. "Interior's historical accounting plan includes a ['Land-to-Dollars' or 'Posting'] test designed to start with the land and examine whether revenue generated by IIM allotments has actually made it into the proper IIM accounts. Tr. 2121:13-15 (Dunne)." Cobell XX, 532 F. Supp. 2d at 69 (citing AR-565 at 33-02-21).

206. The Land-to-Dollars pilot testing at the Horton Agency uncovered no evidence that money that should have been received was not. AR-565 at 21. The test also demonstrated that all the money received moved into IIM accounts. Id.; see Cobell XX, 532 F. Supp. 2d at 69-70.

5. Plaintiffs' Assumptions Disregard Oversight By Treasury and GAO from 1890 to 1951

207. In discussing the Treasury and GAO settled account packages, Dr. Angel quoted from the Comptroller General's 1939 Annual Report: "[T]hese accounts embrace an accounting by agents of the Indian service for providing funds of individual Indians received and disbursed." Tr. 809:24-810:1 (Angel), quoting DX 256 at PDF 14. See also DX 256 at PDF 14 ("The complete accounting embraces both collections and disbursements for the account of the individual Indian.").

208. In discussing another settlement package, DX 246, Dr. Angel noted Interior's "address[ing] the complaints of the GAO on a point-by-point basis and explain[ing] what's been done." Tr. 812:25-813:1 (Angel); DX 246 at PDFs 51-56. According to Dr. Angel:

> These packages tell me as a historian that a second agency, the General Accounting Office, was conducting a fairly extensive examination of individual Indian monies on a very check-oriented basis. In other words, down at the check level they're examining receipts and disbursements, and there's a lengthy exchange between the Indian agent, the ISSDA, the [superintendent] and the GAO official actually doing the audit.

Tr. 813:24-814:6 (Angel).

209. As an historian, these packages demonstrate "government oversight," Tr. 814:10-11; 20-22 (Angel), which is important because, regarding reliability of the data, as "a historian, I feel a lot more comfortable knowing that one agency has produced records and another agency has reviewed those records at a very high level." Tr. 814:12-16 (Angel). In addition to the settlement packages, Dr. Angel also noted two other types of historical records that demonstrated oversight in Interior's administration of IIM. He explained how the ISSDA reports "were submitted to the Treasury department for review, and of course the receipt and disbursement reports . . . were submitted first to Treasury for review and then to the United States Congress." Tr. 815:5-12 (Angel).

210. Defendants presented the testimony of Frank Banda, a Certified Public Accountant (CPA), who offered expert opinions regarding accounting, auditing, and financial review procedures. Tr. 1319:18-1321:19 (Banda).

211. Mr. Banda is a Principal with the Reznick Group, a national CPA firm. Tr. 1319:24-1320:1 (Banda).

212. The Reznick Group conducted a review of ninety GAO Settlement Packages and ninety Treasury Settlement Packages randomly selected for review by NORC. Tr. 1322:14-1323:3 (Banda).

213. DX-510 is the Reznick Group's report on the GAO Settlement Packages review, dated June 6, 2006. Tr. 1323:14-21 (Banda); DX-510.

214. DX-511 is the Reznick Group's report on the Treasury Settlement Packages review, dated October 3, 2006. Tr. 1324:7-14 (Banda); DX-511.

215. Mr. Banda was the Engagement Principal for the Reznick Group's review of the settlement packages, and he is ultimately responsible for his firm's reports on the reviews. Tr. 1323:22-1324:6, 1324:15-17 (Banda). As the Engagement Principal, in 2006 Mr. Banda reviewed all of his firm's workpapers and reviewed excerpts from the settlement packages. Tr. 1324:18-21, 1326:15-18 (Banda).

216. Since issuance of the Reznick Group reports (DX-510 and DX-511), Mr. Banda has reviewed additional settlement packages at the National Archives, electronic copies of settlement packages provided by Morgan Angel, and "slightly over half" of his firm's workpapers related to the 2006 settlement packages review work. Tr. 1327:16-1328:9 (Banda).

217. To gain a further understanding of the work performed by Treasury and GAO auditors, Mr. Banda reviewed bookkeeping and accounting regulations of the Office of Indian Affairs and a GAO report for the year ended June 30, 1939, which described the processes for reviewing settlement packages. Tr. 1328:10-19, 1330:19-1331:4 (Banda); DX-509; DX-256.

218. In the course of their review, Reznick Group accountants observed "evidence of an accounting of collections and disbursements for the account of the individual Indian." Tr. 1331:22-1332:6 (Banda); DX-256 at 14.

219. Settlement packages included a document called an "Account Current," which was "a summary prepared by the Indian disbursing agent of the balance from the previous period plus the receipts less the payments in their control for that period of time." Tr. 1333:15-19 (Banda); DX-243 at 44-45.

220. The Account Current document was certified by the Indian disbursing agent. Tr. 1333:20-1334:5 (Banda).

221. Mr. Banda observed audit "tic marks" on the Account Current. Tr. 1334:9-23 (Banda).

222. Mr. Banda observed that Indian Affairs reviewed settlement packages before they were transmitted to GAO for their review. Tr. 1336:2-24 (Banda).

223. After GAO completed its review of the Account Current and underlying workpapers, it prepared a "Certificate of Settlement," which certified that GAO had examined the disbursing agent's account for a period of time and the balances due as of the Account Current date, and had set forth the GAO's audit findings. Tr. 1337:2-11 (Banda); DX-243 at 4.

224. During his review of settlement packages, Mr. Banda observed summaries of IIM transactions, which included opening balances, receipts, disbursements, and closing balances. Tr. 1338:13-20 (Banda); DX-243 at 67.

225. Mr. Banda concluded that "[f]rom the packages that were reviewed and the work done by our staff, it appears that there was a regular and orderly examination process and settlement process conducted by GAO and Treasury based on the settlement packages reviewed." Tr. 1341:12-25 (Banda).

III. PLAINTIFFS' UNFOUNDED ESTIMATES ARE BELIED BY DEFENDANTS' REASONED CALCULATIONS OF TOTAL COLLECTIONS INTO, AND DISBURSEMENTS OUT OF, THE IIM SYSTEM

A. The Current Unexplained Difference Between Collections and Disbursements for the IIM System is $158.7 Million

226. As he had in October, Dr. Angel testified that "for the most part, IIM records were not kept at the aggregate level." Tr. 784:14-15 (Angel). As Dr. Angel explained, "This truly is history from the bottom up. These records literally begin at ground level and work their way up to the individual, and there aren't a lot of aggregate receipt and disbursement records." Tr. 784:19-22 (Angel). The only years for which complete receipt and disbursement data could be found are 1909-1911 and 1955. Tr. 793:5-10 (Angel); DX 32-00007; DX 33-00002; DX 456-000145; DX 63-00006-7. However, receipt and disbursement data also exist for 1922-1949 (excepting 1945), though such numbers only report funds held outside of Treasury. Tr. 789:14-790:18 (Angel).

227. Dr. Angel conveyed the data he had found to both FTI and NORC. Tr. 798:9-21 (Angel). Along with conveying the data itself, Morgan Angel also worked to ensure that FTI and NORC "understood the limitations of the data itself. For example, . . . the limitations of those receipt and disbursement reports . . . [for] 1922-1949." Tr. 798:17-23 (Angel). Even more specifically, Dr. Angel alerted NORC that he viewed the data for 1922 as an "outlier," or "qualified data." Tr. 925:3-11 (Angel).

228. Ms. Herman's examination of fund flows in the IIM System over time revealed the difficulty in determining the difference between total collections into the IIM System and deposits into Individual IIM accounts. Tr. 500:19-502:12 (Herman).

229. It is very difficult to isolate only the funds relating to Individual IIM accounts. Tr. 502:3-7 (Herman). Records were not kept on an aggregated level for the system. Even audit reports do not break out transactions specific to Individual IIM accounts. Tr. 501:10-16 (Herman).

230. In practice, non-Individual money would come into the system combined with Individual money and had to be separated by Interior before it could be disbursed. Ms. Herman gave an example of payments on leases covering both tribal and allotted lands. Tr. 501:17-23 (Herman). Interior would deposit the entire sum into the IIM System to "ensure that the monies began to earn interest," while the disbursement process got underway. Tr. 501:24-502:2 (Herman).

231. Given this mixture of non-Individual and Individual funds in the system, Ms. Herman wound up comparing Total Collections into the system with Total Disbursements. Tr. 502:8-15 (Herman).

232. When one compares total collections against total disbursements, it does not matter which box any disbursement goes to in Ms. Herman's flow chart diagram (DX-370), because "all of these categories would be included" in the total figures. Tr. 745:2-745:17 (Herman). Likewise, when tribal money is actually transferred into the IIM System, Ms. Herman's computations include it as part of total collections. Tr. 743:10-18 (Herman).

233. This work culminated in Ms. Herman's updated table for total collections and disbursements, DX-371. This table represents an update to and a refinement of AR-171. Tr. 537:23-25 (Herman); DX-371.

234. The major differences between DX-371 and AR-171 are:

(1) The table on DX-371 goes back farther in time to 1887, versus 1909;

(2) DX-371 has total disbursement estimates for 1887 through 1971, which AR-171 does not have; and

(3) DX-371 also includes data for more recent fiscal years, 2006 and 2007.

Tr. 538:1-9 (Herman).

235. Total Collections on DX-371 consist of the sum of Columns B through F, which appears in Column G. Tr. 539:1-4 (Herman). The individual columns of collection categories, B through F, correspond to the same columns on AR-171:

(1) Column B lists interest receipts that are known; some interest earnings remain under "Other Receipts." Tr. 539:5-19 (Herman).

(2) Column C again lists only the portion of Osage headright monies that enter the IIM System for ultimate deposit into Individual IIM accounts. Tr. 539:20-540:13 (Herman).

(3) Column D is Judgment and Per Capita monies identified as such in the system. Tr. 540:20-541:7 (Herman).

(4) Column E reflects Tribal IIM money. DX-371; see Tr. 474:25-475:5 (Herman).

(5) Column F remains the "Other Receipts" category that serves as a catchall for every dollar that does not fall into another category. DX-371; see Tr. 475:14-476:12 (Herman).

236. Total Disbursements appear in Column H, and this total for each period includes disbursements of non-Individual and Individual IIM account money out of the IIM System. Tr. 541:16-542:4 (Herman). DX-371 expressly states, in footnote 5, that total

disbursements in Column H includes all transfers to the Tribal Trust, as well as all checks and electronic fund transfers that move money out of the IIM System. Tr. 342:5-18 (Herman).

237. Column I represents each period's difference between total collections and total disbursements. Tr. 542:19-24 (Herman). For many years, this figure is negative because disbursements exceeded collections in those years. Tr. 543:4-14 (Herman).

238. Column J is the annual "Calculated Ending Balance," and reflects the reported beginning balance, plus Column I, which is the change for that particular year. It reflects the calculated ending balance based on Ms. Herman's research. Tr. 543:17-23 (Herman).

239. Column K is the annual "Reported Ending Balance." Tr. 543:24:544:12 (Herman). This figure is a year end balance figure that Ms. Herman obtained from a historical report or a system balance report. Tr. 544:1-3 (Herman). The source of the figure for any year is indicated on the last page of DX-371 in the source listing. DX-371 at 3; Tr. 544:4-12 (Herman).

240. Column L is a comparison, by year, of the Calculated Ending Balance with the Reported Ending Balance. The sum of these comparisons totals $158.7 million, which is approximately 1.11% of Total Collections over the entire 120 year history. Tr. 544:15-545:6 (Herman); DX-371 at note 8.

241. This net balance comparison figure of $158.7 million likely includes non-Individual (e.g., tribal) money as well as Individual IIM account money. Tr. 545:7-14 (Herman).

242. DX-371 is largely based on the same sources as AR-171. Where new sources were selected, these most often involved use of data that had been previously made available to Plaintiffs, such as audit reports. See DX-492; Tr. 546:10-24 (Herman).

243. DX-371 makes better use of all available historical data than AR-171. DX-371 includes a statistical estimate based on modeling done by NORC that, in turn, relies on all available historical records and electronic data. Tr. 547:4-22 (Herman). Thus, DX-371 reflects all the available historical information. Tr. 547:23-548:2 (Herman).

244. DX-371 also makes consistent use of audited accounting figures where available, and uses investment reports instead of General Ledger-Detail Ledger (GLDL) data. Tr. 548:3-13 (Herman). This was not done for AR-171.

245. Ms. Herman produced a five-binder set of work papers containing her supporting calculations for the figures contained on DX-371. The first binder contains summary sheets and supporting record citations, while binders two through five contain extensive records on Osage headright revenues and the portions of those sums that actually entered into Individual IIM accounts. Tr. 550:2-55:25 (Herman). At trial, Ms. Herman demonstrated how the handdrawn red referencing marks could be used to follow a particular entry on DX-371 back to its origination. Tr. 551:1-562:7 (Herman).

246. Other historical records are known to exist that could be studied to further refine the information on DX-371, but Ms. Herman testified that time limitations prevented exploring this other information. She mentioned certain Interior reports, known by their form numbers – 1178s, SF-1219s and SF-1220s – that were prepared for decades by agency or regional offices and could be mined to compile overall disbursement and

collection data for the Paper Ledger Era. Tr. 562:8-563:8 (Herman). Settled account packages are another source of historical data. Ms. Herman cited the Account Current, which reports collections and disbursements by Indian agents in years prior to 1953, as one example. Tr. 563:9-564:20 (Herman); see DX-245 at 95-96 (Account Current for October 1940). If time permitted, such data could be extracted and compiled. Tr. 564:21-23 (Herman).

247. Ms. Herman reviewed the Plaintiffs' calculation of the alleged benefit to the government, referred to as Attachment A (PX-41) and compared it with her work on total collections and total disbursements, as reflected in DX-371. She found several major differences:

(1) Plaintiffs do not use only the Osage headright payments related to Individual IIM accounts, but they instead increase their total collections estimate by adding in all Osage headright payments no matter how they were distributed in actual practice. Tr. 566:12-21 (Herman). Ms. Herman did not include all Osage headrights, because not all were deposited into Individual IIM accounts. Tr. 566:16-21 (Herman). Taking into account Plaintiffs' addition of an interest factor, Ms. Herman estimated that Plaintiffs' number would be about $10.5 billion less if they had used the same historical figures that Ms. Herman employed. Tr. 566:22-567:6 (Herman).

(2) Ms. Herman also noted that Plaintiffs' Attachment A as presented by Professor Cornell (PX-41) used a constant disbursement rate of less than 70% for most of the 1887-2007 period. Tr. 567:7-568:24 (Herman). In contrast, Ms. Herman's historical disbursement data on DX-371 have a range of 83% to 120% depending

on the year. Tr. 567:25-568:25 (Herman). Ms. Herman never saw a disbursement rate in the historical records that was as low as Plaintiffs' figure. Tr. 568:21-24 (Herman).

(3) To create their disbursement rates in PX-41, Plaintiffs use only CP&R check data, which excludes all electronic fund transfers, Tr. 568:25-569:11 (Herman), and ignores all "BB" account transfers. Tr. 569:12-570:6 (Herman). Concerning the importance of such transfers, Ms Herman testified that "[t]here's quite a few transfers both to and from the Tribal Trust." Tr. 569:19-20 (Herman). She noted that on DX-371, she expressly disclosed in a footnote that total disbursements included such "BB" tribal transfers. Tr. 569:23-570:6 (Herman).

(4) Plaintiffs' calculation assumed that unless a dollar was distributed in the year of receipt, it never got distributed at all. Tr. 570:7-571:10 (Herman). As Ms. Herman put it, "the [Plaintiffs'] model never allows the balance in the trust fund at the beginning of the period to be disbursed." Tr. 571:2-3 (Herman).

248. Ms. Herman also testified on redirect that the $158.7 million balance difference reported on her table, DX-371, does not indicate that any money is missing from the IIM System. Tr. 750:19-751:4 (Herman). Rather, it indicates that additional research could be done to reconcile the balance difference between her calculation and the reported figures. Tr. 751:3-8 (Herman).

B. Current Throughput Calculations Are Consistent With The Statistical Analysis Performed By NORC, Which Also Provided Measures of Uncertainty Due to Missing Data

249. Defendants presented the testimony of Dr. Frederick ("Fritz") Scheuren, a statistician employed by NORC at the University of Chicago, who offered expert opinions regarding statistics, the results of a Multiple Imputation effort undertaken by NORC, and NORC's analysis of the model presented by Plaintiffs' expert, Professor Cornell. Tr. 926:12-927:16 (Scheuren).

250. Statisticians commonly are called upon to address situations involving missing data. Tr. 929:5-7 (Scheuren).

251. From a statistician's point of view, it is not unusual to encounter missing data when addressing issues dating back several decades. Tr. 929:8-11 (Scheuren).

252. Statisticians employ various techniques to address missing data, including Multiple Imputation. Tr. 929:19-25 (Scheuren).

253. Dr. Scheuren is recognized as being one of the statisticians involved in the development of Multiple Imputation as statistical technique. Tr. 935:4-12 (Scheuren).

254. Dr. Scheuren has done much work in the area of missing data problems and wrote an article in November 2005 regarding his work with Professor Donald Rubin in the days when Multiple Imputation was being developed as a technique. Tr. 937:23-938:25 (Scheuren).

255. Although many statistically recognized techniques exist to fill in missing data or to impute data, Multiple Imputation allows a statistician to assess the uncertainty associated with missing data. Tr. 932:9-23 (Scheuren).

256. Uncertainty is significant because it affects the variance in estimates generated by statisticians. Tr. 933:23-934:3 (Scheuren).

257. A multivariate model looks at multiple variables, and statisticians utilize relationships among the variables to enhance their understanding of any of the variables. Tr. 941:11-15 (Scheuren).

258. Professor Cornell's model was a univariate model in that it only looked at a single variable. Tr. 941:17-18 (Scheuren)

259. The model presented by Professor Cornell did not address the issue of uncertainty. Tr. 934:17-23 (Scheuren).

260. NORC's analysis was a multivariate model, which considered fiscal years, collections, disbursements, balances, and Osage per-share amounts. Tr. 942:4-8 (Scheuren).

261. The first step performed in NORC's Multiple Imputation analysis involved examining the existing data, identifying what data was missing, and identifying reported data that would be classified as "outliers" and treated as missing. Tr. 939:22-940:12 (Scheuren); DX-460.

262. An "outlier" referred to data that did not look like it belonged with the same data set being analyzed. Tr. 943:1-11 (Scheuren).

263. The collections and disbursements amounts reported to NORC by Morgan Angel for 1922 were treated as outliers and as missing data because "they [didn't] fit in the time series, and this [was] the only instance where they're exactly equal between collections and disbursements." Tr. 943:23-944:21 (Scheuren).

264. DX-461 depicted the data provided to NORC for collections, disbursements, balances, and Osage Per-Share amounts for fiscal years beginning with 1887 and ending with 2007. Tr. 940:13-941:10 (Scheuren); DX-461.

265. DX-461 included numbers in cells where NORC obtained data from Morgan Angel (1887-1972) and from FTI (1972-2007). Tr. 942:12-21 (Scheuren); DX-461.

266. NORC's reliance upon data recorded pursuant to the Sundry Civil Appropriations Act of 1906 was justified because the data therein included both receipts and disbursements, rather than recording only under-reported receipts. Tr. 1655:20-1656:1 (the Court). NORC used those 1923-1949 (excepting 1945) numbers "anyway," Tr. 1655:25 (the Court), because, as Dr. Angel testified, the 1906 Act "called on all branches of the federal government . . . to send to the Treasury department any receipt and disbursement information concerning money that did not enter the general Treasury of the United States." Tr. 790:7-11 (Angel) (emphasis added).

267. Even a cursory review of those 1923-1949 receipts and disbursements reports shows reporting of both receipts and disbursements. See, e.g., DX-27-00006; 00009 (showing IIM receipts and disbursements for 1932 and 1933, respectively); Tr. 790:19-791:21 (Angel). While it is true that these receipts and disbursements numbers for 1923-1945 likely under-report true totals because they address only funds held outside of Treasury, they under-report both receipts and disbursements, not just receipts.

268. Moreover, because most IIM was held outside of Treasury from 1923-1949, DX-497-004; 007,[3] the 1923-1949 figures do not under-report receipts and disbursements to the point where they are not useful. Nonetheless, when conveying the 1923-1949 data to NORC, Dr. Angel ensured that NORC "understood the limitations of the data itself[, f]or example, . . . the limitation of those receipt and disbursement reports . . . [for] 1922-1949." Tr. 798:17-23 (Angel).

269. The second step performed in NORC's Multiple Imputation analysis involved generating estimates of the missing data and assessing missing data uncertainties. Tr. 945:1-6 (Scheuren); DX-460.

270. Before deciding to use the five variables in NORC's Multiple Imputation analysis, NORC undertook an exploratory data analysis step in which they looked at variables, prepared scatterplots to see relationships between the variables, and used techniques such as regression and correlation. Tr. 947:3-948:9 (Scheuren).

271. NORC used the Osage per-share amounts in their Multiple Imputation analysis because the total number of headright shares was not always available. Tr. 948:18-949:7 (Scheuren).

272. NORC did not impute Osage per-share amounts and avoided uncertainty issues that would have existed if NORC had decided to use total Osage payments amounts. Tr. 948:23-949:9 (Scheuren).

[3] Though 20.08% was held at Treasury in 1935, DX-497-007, the reported amounts for other years during this time range from 2.88% to 13.79%. DX-497-004, -007.

273. After determining which variables appeared to be related, NORC made estimates of the relationships and used them to prepare estimates of the missing data. Tr. 949:15-24 (Scheuren).

274. NORC utilized a commonly used computer application, known as "PROC MI," to generate estimates of the missing data. Tr. 949:22-950:9 (Scheuren).

275. Defendants provided Plaintiffs with a copy of the PROC MI applications and all of the data used by NORC to prepare the imputations. Tr. 950:10-22 (Scheuren).

276. NORC's analysis relied upon 10,000 imputations to generate estimates for the missing data, which was a "large number, probably more than normal." Tr. 952:14-24 (Scheuren).

277. DX-462 depicted the completed data matrix prepared by NORC, setting forth average imputed values. Tr. 953:8-12 (Scheuren); DX-461.

278. The third step performed in NORC's Multiple Imputation analysis involved identifying reported and imputed data to be modeled because of other identified uncertainties. Tr. 953:17-954:7 (Scheuren); DX-460.

279. In addition to the outliers identified earlier by NORC, the data also had uncertainties revealed by the fact that, with the exception of audited data from 1996-2007, the data did not "foot," i.e., the previous year's balance plus current year collections minus current year disbursements did not equal the current year's balance. Tr. 946:17-947:2, 954:4-17 (Scheuren).

280. The amounts shown in yellow boxes on DX-462 represented the average imputed values of the missing data adjusted for the further uncertainties in the reported amounts. Tr. 955:5-956:1 (Scheuren); DX-462.

281. The amounts shown in purple boxes on DX-462 represented the average imputed values for outlier data, which had been treated as missing data, and which, in the case of collections and disbursements, had been further adjusted for the uncertainties in the reported amounts. Tr. 956:10-957:6 (Scheuren); DX-462.

282. NORC adjusted pre-1996 reported collections and disbursements utilizing a time-series analysis based upon a seven-year moving average, and these adjusted amounts were shown in DX-462 with a box around the numbers in the cells. Tr. 957:9-959:2 (Scheuren); DX-462.

283. NORC utilized the time-series analysis to adjust the values generated by the Multiple Imputation analysis. Tr. 959:3-10 (Scheuren).

284. As a result of the time-series adjustments of data, the point estimates generated by the Multiple Imputation analysis did not change significantly, but "[t]he uncertainty went up maybe about a third." Tr. 961:17-24 (Scheuren).

285. The fourth step performed in NORC's Multiple Imputation analysis involved calculating the difference between total collections and total disbursements to generate a "Calculated Balance." Tr. 964:15-25 (Scheuren); DX-460.

286. DX-463 is a histogram prepared by NORC, and it depicts the distribution of Calculated Balance results generated by the 10,000 imputations performed by NORC. Tr. 965:1-966:6 (Scheuren); DX-463.

287. NORC's analysis of 10,000 imputations generated an average Calculated Balance of $583.6 million. Tr. 966:7-10 (Scheuren); DX-463.

288. NORC's average Calculated Balance of $583.6 million is to be compared to the $423.7 million balance shown on DX-371 as of 2007, resulting in an unexplained difference of $159.9 million. Tr. 967:22-968:10 (Scheuren); DX-371; DX-464.

289. With regard to the $159.9 million difference, Dr. Scheuren explained that "our analysis suggests . . . more money in the system than the balance shown in the reports." Tr. 970:2-13 (Scheuren).

290. NORC's initial analysis of uncertainty in the data resulted in Dr. Scheuren concluding, at a 95% level of confidence, that the upper bound for the unexplained difference would be $365.7 million. Tr. 970:25-971:8 (Scheuren); DX-464.

291. Dr. Scheuren explained that the 95% level of confidence "is very commonly used, in many, many settings, including at the IRS, where [he] used to be, and at other places." Tr. 971:20-22 (Scheuren).

292. Dr. Scheuren explained that the 95% level of confidence is "appropriate in business settings" and that "[a]rguably this is a business setting." Tr. 971:24-972:2 (Scheuren).

293. Dr. Scheuren explained that he would not utilize a 99% confidence level in this case, even though a 99% confidence level could be calculated. Tr. 972:13-20 (Scheuren).

294. At a 99% confidence level, the upper bound would be $879.3 million, and the Calculated Balance would be $879.3 million less $423.7 million, or $455.6 million. Tr. 972:21-973:9 (Scheuren).

295. Because NORC's analysis for the years 1972-1995 included the time-series adjustments for uncertainties, the point estimates generated for those years remained "very good," even though NORC was not aware that some of the GLDL data in those years had been missing and had been substituted. Tr. 959:11-960:10 (Scheuren).

296. Dr. Scheuren concluded that the point estimates for 1972-1995 remained "very good" after learning about the estimates included in the GLDL data because NORC previously had adjusted it using the time series analysis as NORC "[had] this basic idea that there were issues with the data already." Tr. 959:14-24 (Scheuren).

297. After learning about the GLDL estimates, NORC further reviewed the data, and Dr. Scheuren concluded that the GLDL estimates involved were "relatively small, under five percent." Tr. 959:17-24 (Scheuren).

298. "Substitution" is a common method employed to address missing data situations, and that was the method used with regard to missing data supplied to FTI by the accounting firm CD&L. Tr. 930:1-22 (Scheuren).

299. Dr. Scheuren testified that the estimating process utilized for the GLDL data was "the kind of approach" he had taken in prior work experiences and that he was "very familiar with the way careful subject matter experts make these estimates." Tr. 959:25-960:6 (Scheuren).

300. While Dr. Scheuren concluded that the point estimates for 1972-1995 did not require further adjustment, he did conclude that NORC's conclusions about the uncertainty associated with the Multiple Imputation analysis would require further assessment. Tr. 960:9-10 (Scheuren).

301. DX-500 is the histogram prepared by NORC for its 10,000 imputations, with a two-sided 95% confidence interval. Tr. 973:13-18 (Scheuren); DX-500.

302. The two-sided confidence interval in DX-500 has a lower bound of 2.5% and an upper bound of 97.5%. DX-500.

303. In light of the additional uncertainty resulting from the GLDL estimates, Dr. Scheuren testified that while he "[had not] done a full analysis here, . . . [he thought] that a 97.5 upper bound would be an appropriate adjustment. That is, we are increasing the uncertainty to allow for [the estimates in the GLDL data]." Tr. 974:15-975:1 (Scheuren); DX-500.

304. Using the upper bound of 97.5%, Dr. Scheuren concluded that the difference between $833.5 million and the reported balance of $423.7 million, or $409.8 million, "is a number which the systems work cannot [explain]." Tr. 975:5-22 (Scheuren).

305. With regard to NORC's upper bound of $409.8 million, Dr. Scheuren further explained that "given where we are today, that's the amount of uncertainty that I believe the system has." Tr. 975:21-22 (Scheuren).

306. Dr. Scheuren concluded that with a 97.5% level of confidence, a difference no greater than $409.8 million is unexplained because of the missing data and "that's as bad as it gets." Tr. 975:23-976:3 (Scheuren).

307. Plaintiffs' expert, Professor Cornell, agreed that it was not surprising that there was "extraordinarily incomplete" data in this case, which looks back over a hundred years, and "[t]his is a problem with these long-run issues." Tr. 331:19-332:4 (Cornell)

(Professor Cornell encountered "somewhat the same problem with Swiss banking records related to the Holocaust").

C. Using All Available Historical Data, Plaintiffs' Model Would Produce A Claimed Amount of Only $31.5 Million

308. Following Professor Cornell's testimony, NORC undertook an analysis of his approach. Tr. 976:4-7 (Scheuren).

309. Dr. Scheuren explained that "Professor Cornell did not have a lot of the data that Ed Angel had provided" and that "[NORC] used his approach with the additional data we had." Tr. 976:8-12 (Scheuren).

310. Dr. Scheuren explained that he thought Professor Cornell's approach was a good one, "[i]f he had had the data that we had, yes." Tr. 986:20-23 (Scheuren).

311. The data utilized by NORC in connection with Professor Cornell's approach are set forth in PX-178. Tr. 1426:7-14 (Scheuren); PX-178.

312. Dr. Scheuren explained that NORC performed the analysis twice, consistent with NORC's practice of having two members of their staff perform the same analysis as a check "to make sure we get the same answer." Tr. 1422:14-25 (Scheuren).

313. NORC calculated a 96.84% disbursement rate as follows: "[W]e took all of the pairs where we had both collections and disbursements [], no missing data, added them up, and calculated the rate." Tr. 1429:5-12 (Scheuren).

314. NORC's analysis excluded the data reported for 1922 because the collections and disbursement data for that year had previously been identified as an outlier. Tr. 1433:2-12 (Scheuren).

315. Dr. Scheuren explained that Professor Cornell's disbursements analysis only considered CP&R check disbursement data and that he failed to consider electronic transfers and transfers of tribal money. Tr. 1431:2-17 (Scheuren).

316. NORC's spreadsheets supporting their analysis of Professor Cornell's method indicated total collections of $14.42658 billion, total disbursements of $13.9714 billion, and a disbursement rate of 96.84%. Tr. 1424:17-1425:24 (Scheuren); PX-175; PX-176.

317. NORC's analysis, using the additional data and a corrected disbursements rate, produced an upward adjustment of "30-some-million dollar[s]" above the 2007 reported balance of $423.7 million. Tr. 977:13-978:8 (Scheuren).

318. Using the amounts shown on PX-176, the 2007 balance would be $14.42658 billion less $13.9714 billion, or $455.18 million. PX-176.

319. The difference between the 2007 balance shown on PX-176 and the reported ending balance for 2007 is $455.18 million less $423.7 million, or $31.5 million. PX-176; DX-371.

320. Although Dr. Scheuren testified in Defendants' case-in-chief that Professor Cornell's model produced a difference of approximately $31.5 million in excess of the 2007 balance of $423.7 million, Plaintiffs did not ask Dr. Palmer to address Dr. Scheuren's testimony for purposes of their rebuttal case. Tr. 1602:24-1603:16 (Palmer).

IV. PLAINTIFFS FAILED TO ESTABLISH A BENEFIT DERIVED BY THE UNITED STATES THROUGH THE USE OF IIM FUNDS WRONGFULLY WITHHELD WITHIN THE TREASURY GENERAL ACCOUNT

321. Because Plaintiffs failed to establish the existence of any improperly undisbursed Individual IIM account money, they necessarily failed to establish any benefit conferred

on the government from such money. However, even if one assumes that Plaintiffs had sustained their prima facie case, they did not establish that the United States received any benefit at all. In the May 2, 2008 Pretrial Order, the Court indicated that Plaintiffs bear the burden of establishing both the "fact and the amount" of any "benefit" to the government. May 2, 2008 Pretrial Order at 2.

322. Based on her eleven years of experience working with the IIM data and historical records and based on the 119 million transactions studied as part of the DCV project to date, Ms. Herman testified as follows:

(1) She saw no indication that billions of Individual IIM account dollars disappeared from the system over time. Tr. 577:3-7 (Herman).

(2) She saw no indication that billions of dollars are being improperly withheld by the government. Tr. 577:8-11 (Herman).

(3) She saw no suggestion in the record that billions of dollars have been lost from the system. Tr. 577:12-15 (Herman).

(4) Her work with the DCV project suggests that the discrepancies in the IIM accounts amount to hundreds of thousands of dollars, Tr. 577:16-22 (Herman), not millions.

323. Defendants' expert historian, Dr. Kehoe, testified that he had seen no evidence of IIM funds being wrongfully withheld from account holders. Tr. 1089:16-21 (Kehoe).

A. Plaintiffs Failed to Demonstrate the Existence of Excess Cash Available for Use By the Government

1. Accounting Practices and Procedures at Interior

324. During the October 2007 trial, Robert J. Winter, a CPA and Director of OST's Office of Reporting and Reconciliation (ORR), described the processes in place since 1992 for reconciling IIM funds transactions using data received directly from Interior and data obtained from Treasury. See generally 2007 Tr. 844:5-20, 847:9-854:6 (Winter). ORR performs a myriad of cash and investment reconciliations on a daily, weekly, and monthly basis, as well as financial statement and regulatory reporting. 2007 Tr. 847:9-25 (Winter).

325. As part of the audit of OST's financial statements, TFAS has been "audited for internal controls . . . through generally accepted auditing standards for financial statement control." 2007 Tr. 898:18-22 (Winter).

a. Daily reconciliation of receipts and disbursements by OST

326. Every morning, ORR prepares a Daily Cash Reconciliation report (DCR), DX-233 at 1-3, a Daily Cash Statement (DCS), DX-233 at 4, and "TFAS Download," DX-235. 2007 Tr. 848:1- 849:2 (Winter). The DCR combines what is reconciled between the DCS and the TFAS transactional download; ORR compares all the cash that either came in or went out of Treasury on a daily basis, for the trust, to every transaction that has happened up through the previous day in TFAS, to ensure that all cash is properly accounted for. 2007 Tr. 849:3-11 (Winter).

327. Since at least 1992, OST has employed a "tick and tie" method, as shown on the DCS, DX-233 at 4-6, and TFAS Download, DX-235, to reconcile the transactions on a daily

basis. 2007 Tr. 849:12-18, 851:17-852:13 (Winter). Since the mid- to late-1990s, transactions handled by ORR have been subjected to extensive quality assurance checks. 2007 Tr. 875:17-876:11 (Winter).

328. If a receipt or disbursement shows in the Treasury information (DCS) but was not recorded in TFAS, or if a transaction is recorded in TFAS but not in the DCS, then ORR provides that information to its accounting group each morning so that discrepancies or reconciliation items can be addressed immediately. 2007 Tr. 849:19-850:1 (Winter).

b. Regulatory reporting to Treasury by OST

329. BIA and, since the late 1990s, OST have submitted monthly accounting reports to Treasury that are required by regulation. 2007 Tr. 847:9-25, 855:3-16 (Winter) (discussing DX-240).

330. When IIM funds are deposited to a Treasury general account at a bank, they are identified by Interior's Agency Location Code (ALC), 2007 Tr. 879:9-11 (Winter). The ALC identifies the funds as being Indian trust, but Treasury at that point does not know whether the funds are Tribal Trust or IIM trust. 2007 Tr. 879:11-20 (Winter). Subsequently, Interior reports to Treasury to say "what buckets each of those receipts go into." 2007 Tr. 879:16-20 (Winter).

331. The primary report is an SF-224, "Statement of Transactions," to which is attached an SF-1219, "Statement of Accountability," and an SF-1220, "Statement of Transactions," that concerns a subset of line items referenced on the SF-1219. DX-240; 2007 Tr. 847:20-25, 855:13-16 (Winter).

332. The SF-224 shows Treasury how OST has accounted for transactions in its various Indian trust accounts, including the 14X6039 IIM account. 2007 Tr. 853:23-856:20 (Winter); DX-240 at 1. "14X6039" is the Treasury fund account symbol assigned to IIM. 2007 Tr. 855:10-12 (Winter). However, the SF-224 is not helpful for determining throughput numbers, or trying to determine accurate receipts or disbursements. 2007 Tr. 855:17-22 (Winter).

333. The SF-224 also shows the aggregate of receipts and disbursements into and out of OST's "overnighter" investments with Treasury, each of which aggregated approximately $1.4 billion in July 2007. DX-240 at 1; 2007 Tr. 857:22-858:19 (Winter). Each afternoon, the balance in the 14X6039 account is swept out to purchase overnight investments, which constitutes a disbursement; then each morning, the redemption of the investment is moved back into the 14X6039 account, which constitutes a receipt. 2007 Tr. 858:3-859:5 (Winter).

334. At $50 million to $80 million each day, the aggregate receipts and disbursements into and out of OST's overnighter investments builds up to approximately $1.4 billion, a phenomenon that is not dependent on truly new deposits – or throughput – into the 14X6039 account. 2007 Tr. 858:1-19 (Winter); see also 2007 Tr. 859:14-862:13 (explaining Treasury-generated SF-224, DX-277 at 1-3, which shows daily transactions for overnighter investments in 14X6039 account). Extrapolated to an annual total, those receipts and disbursements would be about $17 billion. 2007 Tr. 20-22 (Winter).

335. The daily movement of IIM Trust funds into and out of the Treasury "overnighter" investment or other investments have not been counted in determining throughput for

Individual IIM accounts. See 2007 Tr. 881:21-883:25 (Winter); DX-240 at 1; DX-277 at 1, 3 (showing over $1.4 billion in July 2007 investments and redemptions into overnighter for IIM trust account number 14X6039); see also AR-120 (Bert Edwards, OHTA Executive Director e-mail to Roger LaRouche, OIG (Aug. 22, 2001) ("revenue and expenditure data in [KPMG] audits is a far better picture of 'throughput' in the IIM Trust Fund than Forms 224" because if "overnighter investments of the Fund are treated as receipts and disbursements, [then it] gross[es] up the data by about $15 billion").

336. OST also receives from Treasury a monthly "GWA Account Statement," DX-279, which shows ending balances that OST uses to reconcile all of its Treasury accounts that are divided between IIM and different tribal Treasury accounts. 2007 Tr. 862:14-22, 863:2-9 (Winter) (defining "GWA" as "the Government Wide Accounting initiative").

2. Accounting Practices and Procedures at Treasury

a. Cash and the TGA

337. The United States Treasury keeps its cash in two different places. One is the Treasury General Account, or "TGA," which is at the Federal Reserve Bank of New York. The other is Treasury Tax and Loan (TT&L) banks, which are commercial depositories. Tr. 1229:13-17 (Grippo).

338. The TGA is basically the central checking account for the federal government. Tr. 1148:12-15 (Hoge).

339. The TT&L accounts serve two purposes. One is to receive deposits of federal taxes from corporations. The second is to serve as the investment vehicle for the Treasury's

operating cash, whereby the TT&L banks take placements of cash from the Treasury on an overnight basis as a government investment. Tr. 1229:21-1230:4 (Grippo).

340. Although the federal government is a decentralized government where management decisions are made by the federal agencies, it practices centralized cash management. Therefore, disbursements are made only out of the TGA. Tr. 1148:15-18 (Hoge).

341. Cash that is deposited in the TGA is usually spent on the same day to fund expenditures of the government. Tr. 1231:1-3 (Grippo).

342. Cash is never frozen or set aside in the TGA. Tr. 1231:16-17 (Grippo).

343. Approximately $300 billion a week in actual cash flows through the TGA, including both receipts and disbursements. Tr. 1231:4-12 (Grippo).

344. The average end-of-day balance of cash in the TGA is approximately $5 billion. Tr. 1148:19-21 (Hoge). A cash balance of $5 billion is the minimum amount of cash that Treasury keeps in the TGA to ensure that there is a sufficient balance against overdraft. Tr. 1242:18-1243:1 (Grippo).

345. Collections of cash come into the TGA from many sources and many locations, and the Department of the Treasury controls the flow of that cash, manages the flow, and moves the cash through what is called the Cash Concentration System. The cash is ultimately moved to the TGA at the Federal Reserve Bank of New York. Tr. 1149: 10-19 (Hoge); Tr. 1258:16-18 (Grippo); DX-499 at 1.

346. The Federal Reserve Bank of New York can be viewed generally as Treasury's banker. Tr. 1230:5-8 (Grippo).

347. When cash first enters the Cash Concentration System, the source of that cash is identified by an Agency Location Code (ALC). Each deposit into this system has to have the ALC number associated with it before it can move through the system. Tr. 1149:20-1150:12; Tr. 1158:5-8 (Hoge).

348. When a cash deposit is made, a report is prepared and delivered to Treasury's Central Accounting System. The report contains the ALC for the deposit, as well as the amount of the deposit and contact information for the depositing agency's ALC. Tr. 1150:13-21 (Hoge).

349. These reports with the ALC and deposit amount information are delivered to the Central Accounting System on a daily basis. These reports constitute the initial classification of the funds, as the first step of the accounting process within the Central Accounting System. Tr. 1159:17-1160:3 (Hoge).

350. After that report is made, the ALC is dropped as the cash moves through the Cash Concentration System. Tr. 1150:23-25 (Hoge).

351. The Department of the Treasury has control over the money being deposited from the time it receives the ALC and other information, such as the deposit amount. Tr. 1183:7-24 (Hoge).

352. Cash reported into Treasury's Cash Concentration System is first deposited into banks designated as Treasury depository banks. Tr. 1151:3-15 (Hoge); DX-499 at 1.

353. These Treasury depository banks do not hold components of the TGA, which is at the Federal Reserve Bank of New York. Tr. 1257:13-1258:3 (Grippo).

354. In most instances, after cash is deposited into Treasury depository banks, the cash is moved very quickly to Federal Reserve banks. The Department of the Treasury begins to receive electronic reports from the Federal Reserve banks as soon as the banks receive the first deposit from the Treasury depository bank. If the cash should move from one Federal Reserve bank to another, Treasury receives electronic reports from both the sending Federal Reserve bank and the receiving Federal Reserve bank. Those reports are delivered to the Central Accounting System. Tr. 1152:2-1153:1 (Hoge).

355. The reports that come from the Federal Reserve banks to the Central Accounting System are called "bank transcripts." Most of these are delivered overnight in batches, and are loaded into the Central Accounting System overnight. Tr. 1153:20-1154:5; Tr. 1183:19-21 (Hoge).

356. Treasury requires these reports to assure that enough money is in the TGA to pay the federal government's bills each day and to provide the public with confidence that the federal government can pay its bills. Tr. 1153:8-19, 1157:1-8 (Hoge).

357. At the end of the Cash Concentration process, the cash moves from the Federal Reserve district banks into the TGA at the Federal Reserve Bank of New York. When that happens, the Federal Reserve Bank of New York sends the Department of the Treasury a report similar to the bank transcripts sent by the district banks. Tr. 1154:6-9 (Hoge); DX-499 at 1.

358. In addition, Treasury produces a daily report called the Daily Treasury Statement. This Statement shows the beginning balance in the TGA from the previous day and the ending balance at the end of the day. Between those beginning and ending figures, the Daily

Treasury Statement shows the inflows and disbursements from the TGA. Tr. 1154:10-21 (Hoge).

359. In addition to these reporting requirements, the Department of the Treasury employs the best available tools to ensure that the amount of cash that starts movement from one location is the amount of cash that is received at the following location. This includes the use of sophisticated error checking and the most modern security controls. The error controls are called "edits." Tr. 1155:5-15 (Hoge).

360. The nature of this error checking has not changed since at least 1985, although as technology has improved, the number of people needed to check for errors has decreased. Tr. 1157:9-19 (Hoge).

361. The error checking mechanisms today range from complex software packages to human monitoring for errors, performed by Treasury's Cash Accounting Division. That office performs "reasonableness" checks overnight. Tr. 1155:5-Tr. 1156:25 (Hoge).

362. Treasury's detailed reporting and sophisticated error checking are required to ensure that all money coming into the TGA is tracked to the penny. Because of these strict tracking requirements, no cash can disappear from or "leak out" of the Cash Concentration System that moves the cash into the TGA, to accumulate outside of the TGA. Nor could cash accumulate in the TGA from an unknown source, or from an agency that did not identify where the cash came from. Tr. 1157:20-Tr.1158:8 (Hoge).

363. Treasury keeps detailed records of the amount of cash in the TGA, to the penny. Jeffrey Hoge, Director of the Accounting Systems Division of FMS, knows this personally because his office operates and handles the tracking systems. Because of that detailed

tracking, there is no possibility that cash is unaccounted for somewhere within the TGA. Tr. 1158:9-1159:7 (Hoge).

364. Treasury's reporting processes and tracking systems that monitor the flow of cash in the TGA are the same for all cash coming into the Cash Concentration System, including cash coming in from the IIM System. Tr. 1159:8-11; Tr. 1160:21-25 (Hoge); Tr. 1230:21-25 (Grippo).

365. Although the amount of cash coming into the TGA from the IIM System is relatively small, that in no way means that Treasury ignores those cash amounts, or that they could get lost in the Cash Concentration System. Every dollar that comes into the TGA is accounted for on a daily basis. Tr. 1246:22-1247:4 (Grippo).

b. Accounting for "Funds" Versus "Cash"

366. For purposes of this proceeding, it is worth noting the distinction between management of "cash" and "funds." There are very significant distinctions between cash that enters the Cash Concentration System ending at the TGA and the fund amounts accounted for within Treasury's Central Accounting System. As the cash enters the TGA, there is no source information related to those dollars in that "checking account;" it is simply cash. Tr. 1162:18-21 (Hoge). Funds within the Central Accounting System, such as the IIM funds in 14X6039, are internal bookkeeping entries that lead to a fund balance within the account. Tr. 1162:22-1163:1; Tr. 1167:15-18; Tr. 1203:6-20 (Hoge); Tr. 1229:4-12, 1231:13-15; 1259:5-21 (Grippo).

367. As noted above, "14X6039" is the Treasury fund account symbol assigned to IIM. 2007 Tr. 856:10-12 (Winter). Fund symbols in the 6000 series are assigned to "deposit funds."

DX-466 at 37. A "deposit fund" is used to account for monies not belonging to the government, such as monies held temporarily by the government until ownership is determined or held by the government as an agent for others. DX-466 at 39.

368. Cash gets deposited into the TGA, but a corresponding credit to a deposit fund goes into an entirely different balance. Tr. 1268:15-23 (Grippo).

369. For that reason, if Interior wanted to determine the amounts that could be paid to individual Indians from the 14X6039 account, it would look to the Central Accounting System for that information, not the TGA. Tr. 1162:11-16 (Hoge).

370. There is no "14X6039 account" in the Federal Reserve system. Cash that is deposited moves through the Cash Concentration System to the TGA without any "14X6039" designation within the TGA. Tr. 1185:12-1186:8 (Hoge).

371. The Central Accounting System comprises approximately 12,000 Treasury accounts. Treasury maintains information about each account, including balances, collections, disbursements, and transfers. Tr. 1160:4-9; Tr. 1190:13-23 (Hoge).

372. Approximately 1,500 Agency Location Codes (ALCs) exist within the Central Accounting System, from throughout the federal government. Tr.1165:1-6; Tr.1190:13-17 (Hoge).

373. The Central Accounting System receives monthly reports from ALC contacts at the separate federal agencies. Those monthly reports are called "Statements of Transactions." Tr. 1161:23-1162:10 (Hoge); DX-499 at 2. It is through these reports that IIM funds are for the first time classified by Treasury as funds in the 14X6039 account. Tr. 1165:7-21; Tr. 1185:25-1186:1 (Hoge); DX-499 at 2.

374. Multiple ALCs report to the same Treasury account, 14X6039. Treasury has to receive monthly reports from each ALC to determine the effect on the 14X6039 balance. Tr. 1189:16-1190:11 (Hoge); DX-499.

375. When the Department of the Interior cuts a check to be paid to an Individual IIM account holder, that is reported to Treasury in a Statement of Transactions. See, e.g., DX-240 at 1-2 (form 224). At that time, a debit is made to the fund balance in 14X6039. If the check is presented for payment, the amount of cash in the TGA goes down by the amount of the check. If it is not presented for payment, then the TGA is not affected. Treasury takes over the accounting once the check is issued, and Treasury would have a liability for the amount of that check until it is presented for payment. Tr. 1205:6-1206:25 (Hoge); Tr. 1271:13-1272:20 (Grippo).

376. The monthly Statements of Transactions provide the fund symbol, and both the amount collected by the ALC and the amount disbursed by the ALC for that month. Treasury uses this information to monitor the funds, by comparing the daily banking reports it received from the ALC for that month with the monthly Statement of Transactions. Tr. 1163:9-1164:10 (Hoge).

377. Because of the reporting requirements, it is not possible for an agency to hide funds within the Central Accounting System by not submitting a Statement of Transactions at the end of the month. Receiving those Statements is a critical part of what Treasury does. If Treasury does not receive a Statement of Transactions from an ALC promptly, it quickly contacts the offending agency and provides this reporting failure to its Fiscal Assistant Secretary on a monthly basis. Tr. 1164:11-25 (Hoge).

378. Although it has not been established exactly when Treasury created the deposit account 14X6039 to track IIM funds, 14X6039 was in existence at least as early as 1955. See PX 65, Item 84, (Audit Report to the Congress of the United States, Administration of Individual Indian Monies by Bureau of Indian Affairs, Department of the Interior, dated November 1955), at D084-0005 to 0006 ("Collections made by the Bureau on behalf of these Indians are deposited into the Treasury of the United States in deposit account 14X6039, Individual Indian Money.").

B. Money in the 14X6039 Deposit Fund is Not Available for Use by the Government

379. Because funds in 14X6039 are deposit funds, they are handled differently than other funds recorded within the Central Accounting System. Tr. 1160:20-1161:4 (Hoge).

380. The IIM funds in 14X6039 are not the government's money. Tr. 1163:7-8; 1170:6-8 (Hoge); DX-466 at 38, 40.

381. A deposit fund account at the Department of Treasury does not belong to the federal government. Instead, a deposit fund account is an account established to record amounts (1) held temporarily by the government until ownership is determined, or (2) held by the government as an agent for others. The IIM 14X6039 account is the latter type of deposit fund account. Tr. 1169:16-1172:25 (Hoge).

382. The Department of the Treasury does not treat IIM funds as government funds. Tr. 1173:17-20 (Hoge).

383. The government does not benefit from a greater IIM fund balance within 14X6039 because IIM funds within the Central Accounting System are just bookkeeping entries.

Instead, as the amount in 14X6039 goes up, the government's liability goes up. That fund balance does not increase the amount of cash in the TGA. Tr. 1167:10-18 (Hoge).

384. Conversely, when the government spends cash in the TGA to pay for a non-Indian expenditure, the level of the funds in 14X6039 is not affected by that expenditure of cash. There is no impact on 14X6039. Instead, the fund that is affected would be the fund that the federal agency making the expenditure controls and used. Tr. 1166:21-1167:9 (Hoge); Tr. 1231:18-22 (Grippo).

385. When a government security is redeemed, the 14X6039 fund balance goes up by the amount of principal plus accrued interest and the invested balance goes down, and Treasury receives a report of that from Interior at the end of the month. Tr. 1195:2-9 (Hoge).

386. If an amount of cash deposited in an ALC was subsequently reported as a different amount in the monthly Statement of Transactions, that cash could not be inappropriately moved to a different ALC without being noticed by Treasury, at least by the end of a month. That situation would result in two different Statements of Difference, one for each of the two ALCs, and the situation would be evident at that point. Tr. 1167:19-1168:11 (Hoge); see Tr. 1192:12-19 (Hoge).

387. Jeffrey Hoge has no knowledge of funds being misclassified on a regular basis and believes that could not happen because of the safeguards in place within the system. Tr. 1168:12-18; Tr. 1169:2-4 (Hoge).

388. Those safeguards include error checking and IT security measures, such as penetration testing, as well as the requirements for Statements of Transactions and Statements of Differences. Tr. 1168:20-1169:1 (Hoge).

389. The Central Accounting System is not on the Internet and is, therefore, easier to protect. Tr. 1168:22-24 (Hoge).

390. There can be no theft of IIM funds within the Central Accounting System. Those funds constitute a fund balance, an intangible thing, a bookkeeping entry. Tr. 1169:10-15 (Hoge).

391. Deposit funds, including the IIM funds in 14X6039, are not included within the federal budget. Tr. 1173:10-1175:15; Tr. 1202:19-21 (Hoge); DX-466 at 38.

392. Neither Treasury nor OMB treats deposit funds as within the budget. Tr. 1174:2-22 (Hoge); DX-466 at 40.

C. The Government Cannot Use IIM Cash That is Not Deposited in the TGA or TT&L Accounts

393. Cash and Investments Held Outside Treasury (CIHO) is cash in accounts that are not part of Treasury's operating balance. It reflects investments held with commercial brokers and dealers outside of the Treasury. CIHO is cash that Treasury does not control. CIHO is not considered available to Treasury, and is not considered by Treasury in its debt management. Tr. 1245:24-1246:13 (Grippo).

394. Cash that may be held by federal agencies in commercial banks is not held in TT&L accounts. No agency would hold cash in a TT&L account. Tr. 1246:19-21 (Grippo).

395. The historical record shows that, for most of the IIM System history, the majority of IIM was held outside of Treasury. As Dr. Kehoe testified, throughout its history, "IIM has

been placed in three general areas or categories . . . commercial banks, . . . federal securities, or in checking accounts with the Treasury under the control of BIA disbursing agents." Tr. 1077:4-8 (Kehoe).

396. The early records of the trust show that no IIM was reported held in Treasury until 1928. DX-497-003-4. In the first five years for which "held at Treasury" data is available, funds held at Treasury constitute no more than 6.87% of the IIM System. DX-497-004. From 1934 to 1944, the largest reported percentage held at Treasury is 20.08%, DX-497-007, the figures are 43.83% and 18.50% for 1955 and 1964, respectively, DX-497-008, and during 1967-1985, the largest reported percentage is 5.16%, DX-497-0010. Therefore, even in those years after the 1933 Glass-Steagall Act forced the BIA to "close all of the checking accounts at commercial banks that had been handling IIM, and move those funds into the Treasury checking accounts controlled by special disbursing agents," Tr. 1082:9-14 (Kehoe), the percentage of IIM held at Treasury was far lower than the percentage invested in federal securities. DX-497-007. Certainly in the 1970s and 1980s, "IIM [in] banks and in securities constitutes the great majority of the IIM system in any particular year . . . ." Tr. 1087:3-5 (Kehoe); DX-497-0010.

397. Dr. Kehoe repeatedly emphasized that it was the BIA, not the Treasury, who controlled IIM. Question by Plaintiffs' counsel: "Whether you're investing in banks or in federal securities, the person deciding where to invest it is the Department of Treasury, correct?" Answer: "No. No. That's exactly wrong. The person making the decision about how and where to invest it is the Bureau of Indian Affairs." Tr. 1097:13-18 (Kehoe). "[For the period] 1928 to 1933 . . . Treasury really had no involvement in placing IIM in

banks." Tr. 1098:5-7 (Kehoe). "I know that if these funds are invested in bank CDs, they're not held by the Treasury . . . ." Tr. 1100:2-4 (Kehoe). "I think it's a question of who controls that money and makes the investment decisions, which was the BIA." Tr. 1103:25-1104:2 (Kehoe).

D. Expenditures of IIM Reduce Cash Available for Use by the Government

398. To the extent that any potential exists for cash to benefit the government as it is received into the IIM System, the measure of such benefit is diminished as disbursements are made out of the system. Tr. 215: 12 ("net cash" eliminates the need to borrow), 216:13-16 (benefit comes from cash net of disbursements), 219:8 ("net receipts"), 220:11 ("net monies"), 222:19-20 ("what you're looking at . . . is the net") (Miller).

399. The measure of any potential benefit would be reduced to the extent, among other things, that the government purchases securities as investments for individual Indians. Tr. 216:18-23 (Miller).

E. Borrowing Decisions of the United States Are Unaffected By IIM Collections

400. Treasury makes the United States government's borrowing decisions. Two offices within Treasury together are responsible for making those decisions: the Office of the Fiscal Assistant Secretary and the Office of the Assistant Secretary for Financial Markets. Tr. 1232:1-10 (Grippo).

401. Eight individuals from these two offices comprise the "financing group." These eight individuals sign off on the borrowing decisions they reach by initialing a document. Tr. 1232:11-24 (Grippo).

402. Decisions regarding the sale of securities by Treasury are made in a two-step process. On a quarterly basis, the financing group will project the cash and debt needs of the government and prepare a financing plan for the quarter identifying amounts required, e.g., to meet any projected deficit. From that, a specific financing plan is developed with specific securities and maturities. Once that plan is in place and publicized, the financing group meets on a weekly basis to ensure that, for any upcoming low point, Treasury's cash balance financing is sufficient to make sure that funding is available in the TGA. Tr. 1232:25-12:33:16, 1238:18-1239:13 (Grippo); DX-503.

403. Treasury's debt management strategy for approximately the last thirty years is referred to as "regular and predictable." The "regular and predictable" strategy seeks to ensure that the timing and the amount and the maturities of the securities that Treasury sells are stable and that they do not fluctuate up or down very much. Treasury seeks to ensure that its debt management is transparent, such that the government securities market knows exactly how much Treasury should expect to borrow and what securities should be sold over time. Tr. 1233:17-12:34:18, 1235:7-8 (Grippo); DX-502.

404. As part of the "regular and predictable" strategy, Treasury borrows even when substantial amounts of cash are in the TGA or TT&L system as, for example, in April, when tax receipts are high. The government securities markets expect a "certainty of supply" from Treasury. Treasury will, therefore, still borrow and still supply the markets with regular and predictable debt issuance, even when it has a large amount of operating cash on hand. Tr. 1234:22-1235:6 (Grippo).

405. Prior to implementing this "regular and predictable" borrowing strategy, Treasury made borrowing decisions on a more short-term, tactical basis, where securities would be sold specifically to finance a short-term deficit or amount, based on specifically-forecasted deficit or cash needs. Tr. 1235:9-20 (Grippo).

406. Not every dollar in the government's hands represents a dollar that the government does not have to borrow. Tr. 1235:21-23 (Grippo). Financial management for the United States government does not take place in a simple or static environment in which any reduction in receipts would necessitate some equivalent cash increase to cover outlays. Tr. 1235:24-1236:7 (Grippo).

407. Typically, the federal government's outlays exceed receipts in a given fiscal year. That creates a deficit situation. In turn, deficits require Treasury to borrow to cover outlays. Tr. 1236:17-24 (Grippo).

408. In Fiscal Year 2007, the federal government's total budgetary receipts were approximately $2.6 trillion. Tr. 1236:13-16 (Grippo).

409. In Fiscal Year 2007, the total nominal amount of the federal government's borrowing was $4.5 trillion. That means that the total amount of securities issued was approximately $4.5 trillion. Tr. 1236:25-1237:6 (Grippo).

410. Treasury does not consider general ledger fund accounts or the fund balance of a deposit fund, such as 14X6039, in making borrowing decisions. Instead, borrowing decisions are derived from the level of operating cash. Tr. 1265:6-16, 1267:12-1268:11 (Grippo).

411. The operating cash of the United States includes amounts in the TGA as well as amounts that may be in the TT&L system. Tr. 1239:22-1240:2 (Grippo).

412. A key data point in Treasury's borrowing decisions is the "adjusted cash balance," which shows the amount of operating cash for each day. Tr. 1241:1-18, 1253:24-1254:12, 1257:4-8 (Grippo); DX-503.

413. When Treasury's financing group makes decisions about how much to borrow, it does not borrow down to the penny. Tr. 1242:10-12 (Grippo). Instead, Treasury borrows in billion-dollar increments. Determinations are made to increase or decrease the borrowing by at least one billion dollars. Tr. 1242:13-17 (Grippo).

414. According to Plaintiffs, the annual revenues into the IIM System in 2007 totaled approximately $336 million. Tr. 1237:11-25 (Grippo); PX-41 ("Attachment A").

415. An amount of $336 million in annual gross receipts would not factor into the United States government's borrowing decisions. The scale of borrowing at Treasury is at a level that marginal amounts - such as $500 million on a given day, let alone $336 million in an entire year - would not affect how much Treasury borrows. Tr. 1238:1-17 (Grippo).

416. If the above-mentioned $336 million in annual gross IIM receipts were entirely eliminated, that would not affect Treasury's decision about whether and how much to borrow. Treasury does not even look to a daily receipt amount under $100 million dollars. Also, because securities are issued in billion-dollar increments, borrowing decisions are not sensitive to daily amounts under approximately $500 million for a given day. Tr. 1244:13-23 (Grippo); DX-503.

417. The 2007 annual gross IIM receipts total of $336 million equates roughly to $6 million per week. Tr. 1243:6-10 (Grippo). This $6 million in weekly gross IIM receipts would not affect Treasury's decisions about how much to borrow. Tr. 1243:11-13 (Grippo).

418. There could be instances in which small incremental amounts of cash could be deposited into Treasury, and, when aggregated, those small amounts of cash could add up to a materially large amount that would have to be considered by the financing group. Tr. 1247:9-14 (Grippo). That possible circumstance does not apply to the annual marginal amount of IIM cash. As discussed above, the annual marginal amount of IIM funds is too small to affect Treasury's borrowing decisions. Even assuming that the entire amount of cash from the IIM System was added together over the past 120 years, when compared to the similar gross up of all the borrowing Treasury has done over that same time period, it would still not change the analysis. Tr. 1247:15-1248:4 (Grippo).

419. The major cash sources that Treasury reviews in making its cash balance forecasts are (1) individual withheld income taxes; (2) employment taxes; (3) individual non-withheld taxes (such as quarterly estimated taxes or taxes paid on April 15); (4) corporate taxes; (5) custom duties; (6) estate taxes; and (7) unemployment insurance taxes. Those sources comprise over 98% of the receipts of the United States. Tr. 1243:14-22 (Grippo).

420. The vast majority of the expenditures that Treasury considers in making its forecasts are (1) Social Security payments; (2) Medicare and Medicaid payments; (3) defense spending; and, sometimes, (4) education spending. Tr. 1243:23-1244:2 (Grippo).

421. Treasury's financing group has no knowledge of IIM. Tr. 1244:3-6, 12 (Grippo). Moreover, even if the financing group did have information about IIM, it would make no difference to its borrowing decisions. Tr. 1244:7-9 (Grippo).

422. Given that $336 million in annual gross IIM receipts does not affect Treasury's borrowing decision, net annual receipts (after subtracting out IIM disbursements) of

approximately $101 million would not affect Treasury's borrowing decisions. Tr. 1244:24-1245:6 (Grippo); PX-41 ("Attachment A"). Only receipts of IIM net of disbursements could provide any benefit to the government. Tr. 216:13-17 (Miller).

423. Furthermore, only IIM receipts net of amounts invested for the benefit of individual Indians could provide any benefit to the government. Tr. 216:18-24 (Miller). Interior's purchase of securities for IIM account holders either on the open market or from Treasury has no effect on Treasury's borrowing decisions. Tr. 1245:7-14 (Grippo).

424. Interior's deposit of IIM receipts into commercial banks would not have any effect on Treasury's borrowing decisions. Tr. 1245:19-23 (Grippo).

425. CIHO is not considered available to Treasury, and is not considered by Treasury in its debt management. Tr. 1245:24-1246:13 (Grippo).

426. Where a federal agency has authority to hold cash outside of Treasury or to hold cash that is not part of the Treasury operating cash, that authority constrains what Treasury does in making borrowing decisions. Tr. 1252:21-1253:5 (Grippo).

427. In contrast to CIHO, TT&L balances are available to Treasury and are taken into consideration in Treasury's borrowing decisions. Tr. 1246:14-18 (Grippo).

428. Cash that may be held by federal agencies in commercial banks is not held in TT&L accounts. No agency would hold cash in a TT&L account. Tr. 1246:19-21 (Grippo).

429. Plaintiffs' rebuttal model wholly disregarded Mr. Grippo's testimony that the government "borrow[s] in billion dollar increments." Tr. 1545:10-1546:7 (Palmer)

F. Plaintiffs' Models Contain Unwarranted Assumptions Regarding Retention of IIM Revenues, Compounding of Interest, and Appropriate Interest Rates

430. Plaintiffs' models include, as part of the "nominal benefit," the net IIM receipts subject to their restitution claim, i.e., total receipts less total disbursements. E.g., PX-41, col. G.

431. According to Plaintiffs, the alleged benefit to the government derives from using the net IIM receipts to cover outlays for which the government would otherwise have to incur debt. The saved borrowing costs, the interest payments the government would have to make on the securities it would have to sell, allegedly constitute the "benefit." Tr. 215:4-20 (Miller).

432. While the benefit purportedly consists of interest saved, interest would stop accruing when the avoided debt is paid off. See Tr. 1249:19-1250:4 (Grippo). Plaintiffs' models include each year's accruing principal amount in the accumulated totals – adding interest on top of it – every subsequent year throughout the 121-year period. E.g., PX-41, col. J. This is apparently based on the assumption that the accumulated total of net IIM revenues since 1887 remains in Treasury's possession and has been available since 1887 to maintain a minimum balance in the TGA (currently targeted at $5 billion), thus avoiding borrowing costs for 121 years. Tr. 217:5-13; Tr. 222:3-24 (Miller); Tr. 269:22-270:12 (Cornell).

433. Plaintiffs' assumption is clearly unwarranted. Even if the IIM revenues at issue are deposited into the TGA – an uncontroversial assumption for present purposes – the government spends cash on the same day that it is deposited in the TGA. Tr. 1231:1-3 (Grippo). Thereafter, that cash would be unavailable. Given a weekly TGA throughput of $300 billion, Tr. 1231:4-12 (Grippo), it is unreasonable to assume that net IIM

revenues, estimated by Plaintiffs at approximately $101 million for the year 2007, PX-41 at 5, col. G, or any other cash receipts remain in the TGA for any appreciable length of time, much less 121 years.

434. Plaintiffs' models are also fatally flawed because they compound interest throughout the 121-year period. To the extent the models purport to present an avoided-debt analysis, they vastly overstates the avoided-debt benefit because the government does not pay compound interest on its securities regardless of rate or maturity. Tr. 1250:15-16 (Grippo).

435. Another fatal flaw in Plaintiffs' models is their use of the "10-year US Treasury bond rate." Plaintiffs selected this rate because they considered it a reasonable approximation of the government's cost of borrowed funds. Tr. 264:9-22 (Cornell). However, as Mr. Grippo testified, due to the relatively small size of incremental borrowing that would be needed to replace the IIM cash (if it were unavailable and Treasury needed to make up the resulting cash deficit), Treasury would sell a short-term, even a very short-term, debt instrument. Tr. 1248:1-1249:23 (Grippo).

PROPOSED CONCLUSIONS OF LAW

I. AN AWARD OF MONEY TO PLAINTIFFS IS IMPROPER

A. The Court Lacks Authority To Award Money To Plaintiffs

1. The Court lacks jurisdiction to award money to Plaintiffs because the United States has not waived its sovereign immunity. As discussed in detail in Defendants' Response to Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement, at 5-11 (April 9, 2008) (Dkt. No. 3519) ("Defendants' Response"),[4] jurisdiction in this case is premised upon section 702 of the Administrative Procedure Act (APA), but that provision requires that the requested relief be for "other than money damages." 5 U.S.C. § 702. Plaintiffs' reliance on Bowen v. Massachusetts, 487 U.S. 879 (1988), to avoid this restriction is misplaced. Bowen only permitted a monetary award because that was the "very thing" which the statute there at issue required. Here, the "very thing" required by the 1994 Act is not the payment of money but the provision of historical accountings to Individual IIM account holders. Thus, Plaintiffs seek substitutionary relief which is not permissible under the APA. See Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999); Pueblo of Laguna v. United States, 60 Fed. Cl. 133 (2004).

2. The Appropriations Clause prohibits monetary relief to Plaintiffs because no specific res, appropriated by Congress, exists from which the monetary relief sought by Plaintiffs

[4] Rather than restating the discussion contained in Defendants' Response, that Response is incorporated here by reference.

could be paid. U.S. Const. Art. I, §9, cl. 7; City of Houston v. HUD, 24 F.3d 1421 (D.C. Cir. 1994). For a detailed discussion, see Defendants' Response, at 11-14.[5]

3. Plaintiffs' suggestion that the jurisdictional infirmities in their claims may be overcome because the Court sits as a "Chancellor in Equity" cannot be squared with Cobell v. Norton (Cobell XVII), 428 F.3d 1070, 1077 (D.C. Cir. 2005), in which the Court of Appeals characterized as an "ill-founded assumption" the notion that "the 1994 Act gave the [court] the freedom of a private-law chancellor to exercise its discretion." Instead, Plaintiffs are bound by long-standing principles of sovereign immunity. For a detailed discussion, see Defendants' Response, at 14-20.

4. The Court lacks jurisdiction because the APA's waiver of sovereign immunity is not available "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Supreme Court has recognized that the Tucker Act, 28 U.S.C. § 1491, and its companion statute, the Indian Tucker Act, 28 U.S.C. § 1505, permit prescribed monetary claims for breach of trust relationships established by Congress. See, e.g., United States v. Mitchell, 463 U.S. 206 (1983). Just as Congress intended the Tucker Act to serve as the vehicle for litigating contract claims against the government – and thus impliedly forbade any relief (damages, equitable remedies, or otherwise) on a contract under the APA – it is reasonable to conclude that

[5] To the extent Plaintiffs contend that the Judgment Fund is available, the D.C. Circuit made clear in City of Houston, 24 F.3d at 1428, that, if monetary relief comes from any other source of funds apart from an identified res, it cannot possibly be viewed as the very thing to which a plaintiff was entitled – rather, it is substitutionary in nature and, therefore, damages. Use of the Judgment Fund is substitutionary and would constitute an award of money damages, thus falling outside of the waiver of sovereign immunity provided by section 702 of the APA.

Congress likewise intended for monetary breach of trust claims to proceed, if at all, under the Tucker Act and thus be impliedly forbidden under the APA. For a detailed discussion, see Defendants' Response, at 20-25.

5. Claims for the payment of money were stricken from the Complaint and the only relief available to Plaintiffs is an accounting pursuant to the 1994 Act. For a detailed statement of the numerous instances in which Plaintiffs have disavowed claims for monetary relief and the Court has held that such claims are not part of this case, see Defendants' Response, at 25-28.

6. The Court's January 2008 finding that an accounting is impossible does not justify a monetary payment to Plaintiffs based upon an aggregate throughput analysis which bears no causal relationship to Interior's ability to provide historical accountings to Individual IIM account holders. The Court's impossibility finding regarding that latter duty does not lead to a monetary award at all. Instead, Interior should proceed with its accounting activities as permitted by the funds appropriated by Congress and/or the case should be dismissed. For a detailed discussion, see Defendants' Response, at 36-43.

7. The doctrine of laches and the statute of limitations bar claims for equitable restitution and disgorgement. After years of disclaiming that they sought anything but historical accountings for Individual IIM account holders, Plaintiffs now rely upon an aggregate throughput analysis dating back more than a century to support their monetary claims. Interior maintained a decentralized record keeping system for decades, a fact presumably known to Plaintiffs. Had Plaintiffs' newest theory been timely asserted, Interior's record keeping practices might have been modified or, at the very least, the hundreds of millions

of dollars devoted to individual accountings could have been directed to an aggregate analysis. Such unfair and prejudicial consequences, caused by Plaintiffs' delay, comprise the very harm which the doctrine of laches is intended to avoid. Moreover, because Plaintiffs now appear to claim Defendants' longstanding failure or inability to provide a comprehensive historical accounting constitutes a repudiation of the government's trust responsibilities – one that would have occurred decades ago – the statute of limitations imposed by 28 U.S.C § 2401(a) proscribes relief. For a detailed discussion, see Defendants' Response, at 43-47.

8. The current remedies proceeding is inappropriate because the Court lacks jurisdiction to compel an historical accounting under the unreasonable delay provisions of the APA. See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004).

B. The Certified Class Cannot Be Awarded Substantial Monetary Relief

9. The class is certified under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), which limit Plaintiffs to common declarative or injunctive relief. Plaintiffs' new theory abandons such relief and replaces it with a claim predominantly for money – relief which is neither common across the class nor shared undividedly by the class members. For these substantive reasons, as well as procedural deficiencies, including the lack of appropriate notice and opt-out opportunities, monetary relief is not available to the existing class. For a detailed discussion, see Defendants' Response, at 47-69.

10. The only interests at stake in this litigation are those belonging to the named Plaintiffs and to the members of the certified class that four of the named Plaintiffs represent. This Court's Order of February 4, 1997, adopted verbatim the class definition that Plaintiffs

had drafted and proposed. That Order certified "a plaintiff class consisting of present and former *beneficiaries of Individual Indian Money accounts* (exclusive of those who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint)." Order of February 4, 1997 at 2-3 (Dkt. No. 27) (emphasis added). Thus, even under the broadest reading of the class definition, the only claims before the Court are those held by individuals who have actually had an Individual IIM account at some time prior to February 4, 1997, the date of class certification.

11. The accounting duty at issue in this case reaches only those funds deposited into a class member's (or, as the Court appeared to find in January, into a member's predecessor's) IIM account. See Cobell v. Norton, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (concluding that the statutory accounting duty extends to "*all funds,* irrespective of when they were deposited (or at least so long as they were deposited after the Act of June 24, 1938)" (emphasis in original)). This construction necessarily excludes from the Court's jurisdiction money paid directly to individuals, particularly money that never enters the IIM System. Indeed, the only claims presently before the Court are claims for an accounting of funds deposited into IIM accounts belonging to a recognized subset of all Individual IIM account holders.

12. The plain wording of the class definition can only logically include persons who had, as of February 4, 1997, status as an Individual IIM account holder. That is what "present and former" means. "Future" account holders are not part of the definition, and so the class does not automatically include people who first obtained an IIM account after February 4, 1997. Cf. Abbott v. Meese, 824 F.2d 1166, 1167 (D.C. Cir. 1987) (noting

that district court had ordered the "class consist of all current and future prisoners"), vacated on other grounds, 490 U.S. 401 (1989); Samuels v. District of Columbia, 669 F. Supp. 1133, 1135 (D.D.C. 1987) (identifying plaintiffs as "class representatives of all current and future tenants in public housing properties"); Edwards v. Schlesinger, 377 F. Supp. 1091, 1093-94 (D.D.C. 1974) (refusing to certify proposed class of "all past, present, and future female applicants" in part because of impossibility of giving notice to future members of class), rev'd on other grounds sub nom. Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1974).

13. Moreover, the Supreme Court has expressed disapproval about including "future" claimants among class membership due to doubts about the existence of subject matter jurisdiction over unripe claims. Matthews v. Diaz, 426 U.S. 67, 71 n.3 (1976); accord LoBue v. Christopher, 82 F.3d 1081, 1085 (D.C. Cir. 1996) (dictum noting subject matter jurisdiction would be lacking for putative class members not yet subjected to the alleged governmental wrong). Although Plaintiffs may seek to rely on nonbinding dictum in a footnote of a dissenting and concurring opinion by Circuit Judge Robinson in Council of & for the Blind of Delaware County Valley, Inc. v. Regan, 709 F.2d 1521, 1543 n.39 (D.C. Cir. 1983) (Robinson, J., concurring and dissenting), for a proposition that anyone who happens to fit within Plaintiffs' class definition at any future date is automatically in the class, no court in this Circuit has adopted that interpretation.

14. In any event, it would be a practical impossibility for more recent account holders to have standing in this case, because it would be virtually impossible for the Secretary of the Interior to delay unlawfully in rendering an historical accounting for IIM accounts that

did not even exist until after class certification. Moreover, as this Court has already noted, the Department of the Interior began sending quarterly account statements to all account holders by 2000, Cobell XX, 532 F. Supp. 2d at 44, making the need for an historical accounting, as well as the grounds for an unreasonable delay claim, dubious at best.

II. AS A MATTER OF LAW, PLAINTIFFS FAILED TO MEET THEIR BURDEN TO ESTABLISH A CLAIM FOR EQUITABLE DISGORGEMENT

A. Applicable Principles of Equity Preclude Relief

15. Although Plaintiffs' claim for alternative relief sounds in equity, the maxims of equity jurisprudence offer little specific guidance in the uncharted waters of this case. There are twelve traditional maxims of equity, but none expressly addresses the burden of proof or the specificity required for calculation of a monetary award. See generally J. McGhee, SNELL'S EQUITY §§ 3-01 to 3-28 (30th ed. 2000) (describing the twelve traditional maxims).

16. Still, some equity decisions of the Supreme Court and other federal courts do provide general guidance to temper the Court's approach in deciding whether any remedy in lieu of the individual historical accountings is appropriate, and if so, on what basis any remedy can be granted.

17. Since 1938, federal district courts have entertained only one type of action – a "civil action" – and as a result of the 1937 amendments to the Federal Rules of Civil Procedure, federal actions are no longer brought as actions at law or suits in equity. Fed. R. Civ. P. 2 ("There is one form of action – the civil action."); see, e.g., Ross v. Bernhard, 396 U.S. 531, 539-40 (1970) (under Federal rules, there is only one action, which may combine

claims seeking legal and equitable relief); Saffron v. Dep't of the Navy, 561 F.2d 938, 942 n.32 (D.D.C. 1977) (unification of district court proceedings in one form of action occurred in 1938).

18. The D.C. Circuit has rejected the notion that the Court is sitting as a "Chancellor in Equity." In Cobell XVII, the Court of Appeals confirmed that the 1994 Act did not establish this Court as "a private-law chancellor to exercise its discretion." Cobell XVII, 428 F.3d at 1077. In rejecting this Court's injunction mandating specific elements for the performance of the historical accounting, the Court of Appeals emphasized that in the 1994 Act, "Congress was, after all, mandating an activity to be funded entirely at the taxpayers' expense." 428 F.3d at 1074-75.

19. This Court's power to grant equitable relief is contingent upon a finding that legal remedies are inadequate to provide redress to a plaintiff. See, e.g., Women Prisoners of the Dist. of Columbia Dep't of Corr. v. Dist. of Columbia, 93 F.3d 910, 922-23 (D.C. Cir. 1996) (citing J.N. Pomeroy, A Treatise on Equity Jurisprudence § 218, at 369 (5th ed. 1941) and W.Q. de Funiak, Handbook of Modern Equity § 18, at 32 (2d ed.1956)).

20. Although equitable relief is designed to provide a remedy when a legal remedy would be inadequate, a party seeking equitable relief still bears the burden of establishing a factual basis for the relief it seeks. See, e.g., Kelly v. Intermountain Planned Parenthood, Inc., 828 F. Supp. 788, 794 (D. Mont. 1992) ("It is axiomatic that no rule of equity should be applied in blind disregard of fact."); In re C.A.F. Bindery, Inc., 199 B.R. 828, (Bankr. S.D.N.Y. 1996) ("[T]he application of equity requires a factual basis.").

21. A pertinent maxim is that "equity follows the law." It has long been settled that a "[c]ourt of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law. . . ." Rees v. Watertown, 86 U.S. [19 Wall.] 107, 122 (1874). The Supreme Court more recently reinforced this limitation when it stated that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 332 (1999). Although "equity is flexible . . . in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief." Id. at 322. However, "'courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 485 (1997) (quoting INS v. Pangilinan, 486 U.S. 875, 883 (1988)).

22. Indeed, it is clear that "courts of equity must be governed by rules and precedents no less than the courts of law." Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (quoting Missouri v. Jenkins, 515 U.S. 70, 127 (1995) (Thomas, J., concurring)). "[T]he alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot." Id. (citing 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886)).

23. A central consideration in the decision to grant or deny equitable relief is the requirement that any relief granted be fair to both parties to the litigation. As one appellate court has explained, "This determination [of the amount owed by the defendants] must be made in accordance with principles of equity. Such principles would not allow 'windfalls' in

either direction. . . . Equity attempts to do justice to all parties." Bollinger & Boyd Barge Serv., Inc. v. Motor Vessel, Captain Claude Bass, 576 F.2d 595, 598 (5th Cir. 1978); see also United States v. Systron-Donner Corp., 486 F.2d 249, 252 (9th Cir. 1973) ("When equitable powers are involved, close scrutiny must be given to a result which appears to be inequitable."); Herald Co. v. Bonfils, 315 F. Supp. 497, 503 (D. Colo. 1970) ("Equity seeks to balance the equities, and while it will endeavor to do complete justice without stint, it will not overcorrect, limiting relief to that which is essential and appropriate in view of all the circumstances."), rev'd on other grounds sub nom. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972); Steyhr Daimler Puch of America Corp. v. Pappas, 35 B.R. 1001, 1004 (Bankr. E.D. Va. 1983) ("Principles of equity require that justice is done to all parties, and that this Court not hastily reach a result which is inequitable to one of the litigants.") (citing Bollinger and Systron-Donner).

24. "As always when federal courts contemplate equitable relief, our holding must take account of the public interest," U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 26 (1994), and such consideration is even more significant when the relief under consideration would be granted against the federal government.

25. Thus, this Court must abide by the rules of evidence and not impose extraordinary requirements of precision upon the government for presenting a heretofore unessential aggregated analysis of Individual Indian Money spanning more than 120 years. "Equity never seeks the impossible nor orders the unreasonable – its orders are adapted to the exigencies of the case." Taylor v. Sterrett, 499 F.2d 367, 368 (5th Cir. 1974).

26. This is not an action for an accounting under private trust law. It is an action under the APA to compel agency action, but the remedy phase of this case is without precedent. Therefore, the rules governing the relationship between private fiduciaries and beneficiaries or accountings between them do not apply here with the same vigor. See Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980); see also Cobell XVII, 428 F.3d at 1074 (“the IIM trust differs from ordinary private trusts along a number of dimensions”).

27. "The court cannot sit as an auditor or accountant. It sits as a trier of fact." Red Lake Band v. United States, 17 Cl. Ct. 362, 407 (1989).

28. "[T]here is a strong presumption that government officials act in good faith and within the scope of their authority.” White Mountain Apache Tribe of Ariz. v. United States, 26 Cl. Ct. 446, 449 (1992), aff’d, 5 F.3d 1506 (Fed. Cir. 1993) (citing Andrade v. United States, 485 F.2d 660, 665 (Ct. Cl. 1973); see also Parsons v. United States, 670 F.2d 164, 166 (Ct. Cl. 1982) (“It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations, and the burden is on the plaintiff to prove otherwise.”). “[The] presumption of regularity surrounds public officers to the extent that, in the absence of contrary evidence, a reviewing court assumes that they have properly discharged their official duties.” Kephart v. Richardson, 505 F.2d 1085, 1090 (3d Cir. 1974) (citing 2 Davis, Administrative Law Treatise § 11.06).

29. There is a "presumption of regularity which attaches to the conduct of government employees," and "the lack of underlying documentation is more likely due to the lapse of

time and difficulty of assembling materials than to theft or abuse of trust." Red Lake Band, 17 Cl. Ct. at 408-09.

B. Plaintiffs Failed To Establish The Wrong They Allege

30. Plaintiffs' "disgorgement remedy claim" is not based upon a failure to account. Instead, it is based upon the assertion that more money was collected than was disbursed to Individual IIM account holders. Tr. 96: 2-7 (Laycock)

31. To establish a wrong, Plaintiffs had to show that money that was collected and owing to them had been wrongfully withheld from Individual IIM account holders. See Allstate Ins. Co. v. Receivable Finance Co., 501 F.3d 398, 413 (5th Cir. 2007) (citing SEC v. First City Fin. Corp., 890 F.2d 1215, 1231 (D.C. Cir.1989) ("the party seeking disgorgement must distinguish between that which has been legally and illegally obtained").

32. Plaintiffs failed to demonstrate how Defendants lost or misdirected collections for any class member, and made no effort to do so even for the named Plaintiffs or their predecessors, despite the fact that the government provided to Plaintiffs in response to Paragraph 19 of the First Order of Production the over-160,000 document database and virtual ledger of transactions. Therefore, Plaintiffs have no basis for a claim to equitable restitution or disgorgement.

C. Plaintiffs Failed To Establish The Requisite Causal Relationship Between Their Claimed Amount And The Alleged Wrong

33. "Because disgorgement is meant to be remedial and not punitive, it is limited to 'property causally related to the wrongdoing' at issue." Allstate Ins., 501 F.3d at 413 (quoting First City Fin. Corp., 890 F.2d at 1231).

34. The disgorgement must be a "reasonable approximation of the profits causally connected to the violation." First City Fin., 890 F.2d at 1231; SEC v. Patel, 61 F.3d 137, 139-40 (2d Cir. 1995); Office & Prof. Employees Int'l Union, Local 2 v. FDIC, 27 F.3d 598, 602 (D.C. Cir.1994) (in a collective bargaining violation case, plaintiff seeking to recover lost profits must ordinarily prove the fact of injury with reasonable certainty, proof of the amount of damages may be based on a reasonable estimate.); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir.1983) (in antitrust action, once causation is determined, however, the actual amount of damages may result from a "reasonable estimate, as long as the jury verdict is not the product of speculation or guess work."); Frito-Lay v. Local Union No. 137, Int'l Bhd. of Teamsters, 623 F.2d 1354, 1364 (9th Cir.) (in union no-strike violation, court will not review "the merits of various methods of calculation, so long as the method actually employed by the district court is designed to yield a reasonable approximation of damages."). While courts have only required "reasonable approximations" of the amount of damages, courts have consistently required plaintiffs to prove in a reasonable manner the link between the injury suffered and the alleged illegal practices of the defendant. MCI Commc'ns Corp., 708 F.2d at 1161; Assoc. for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577, 586 (D.C. Cir. 1984).

35. Neither equity nor law warrants imposing strict liability upon the United States. Defendants' Response, at 77-79.

36. Plaintiffs failed to meet their burden to show that the amount they claim is causally related to the government's failure or inability to provide an historical accounting for Individual IIM account holders who are members of the class. Because Plaintiffs failed to establish any misconduct which is causally related to the monetary relief which they seek, Plaintiffs' requested relief is unavailing as a matter of law.

D. Plaintiffs Failed To Meet Their Burden of Proving A Reasonable Approximation

37. Plaintiffs concede, as they must, that they have the initial burden of establishing a "reasonable approximation" of the amount to be disgorged. Plaintiffs' Memorandum in Support of Equitable Restitution and Disgorgement at 18 (Mar. 19, 2008) (Dkt. No. 3515); see also Defendants' Response, at 70-71.

38. Only after the plaintiff satisfies its initial burden does the defendant shoulder the burden to "demonstrate that the disgorgement figure was not a reasonable approximation," First City Fin., 890 F.2d at 1232, or to establish applicable expenses to offset the revenues. Taylor v. Meirick, 712 F.2d 1112, 1122 (7th Cir. 1983) (in an infringement case, the copyright owner must prove the gross revenues before the infringer is required to prove the deductible expenses); George P. Roach, How Restitution and Unjust Enrichment Can Improve Your Corporate Claim, 26 Rev. Litig. 265, 323-24 (2007); 1 Dan B. Dobbs, Law of Remedies § 4.35, at 610 (1993). While placing the burden of rebutting plaintiffs' disgorgement approximation is appropriate in the SEC enforcement context where deterrence is a key objective, in other cases where compensation is the key objective, the

disgorgement plaintiff may have a greater burden to prove the claim. First City Financial, 890 F.2d at 1231 n.24.

39. While Plaintiffs' burden in a case seeking equitable disgorgement is softened to require only a showing of a reasonable approximation of the amount to be disgorged, it is still a burden that Plaintiffs were required to meet before the burden of persuasion would shift to Defendants. See FTC v. Verity Intern., LTD., 443 F.3d 48, 69-70 (2d Cir. 2006) (the failure of the plaintiffs to establish the reasonable approximation of the unjust gain means that the burden does not shift). Plaintiffs failed to meet their burden because the sole witness offered in their case-in-chief on this subject, Professor Cornell, only presented a model which he openly admitted "requires further work than [he had] done." Tr. 324:16 (Cornell).

40. The insufficiency of Plaintiffs' case-in-chief was confirmed by Professor Cornell, who testified "I can develop a model, which I have done, but I'm going to need help from the Court and from both parties to make sure that the most accurate figures go in there." Tr. 346:14-16 (Cornell).

41. Because of the fatal flaws in the model presented in Plaintiffs' case-in-chief described in the Findings of Fact above, and for the reasons discussed in Defendants' Rule 52(c) Motion for Judgment Against Plaintiffs on Their Equitable Restitution and Disgorgement Claim (June 12, 1998) (Dkt. No. 3540), Plaintiffs, as a matter of law, did not establish a reasonable approximation of the amount to be disgorged.

42. Because Plaintiffs failed to establish a reasonable approximation of the amount to be disgorged, the burden never shifted to Defendants to demonstrate that it was unreasonable.

43. Even if the Court were to consider the testimony of Plaintiffs' sole rebuttal witness, Dr. Palmer, the evidence presented in Plaintiffs' rebuttal case did not establish a reasonable approximation of the amount to be disgorged, as a matter of law, because of the flaws described in the Findings of Fact above.

44. Plaintiffs' failure to provide a reasonable approximation warrants denial of their claim. See Restatement (Third) of Restitution And Unjust Enrichment § 51 cmt. e(4) (Tent. Draft 5) (June 2007) ("If the claimant's evidence will not yield even a reasonable approximation, the claim of unjust enrichment is merely speculative, and disgorgement will not be allowed.").

E. Defendants Established that Plaintiffs' Proposed Amount To Be Disgorged Is Unreasonable

45. As discussed in detail above, Defendants' accounting efforts to date demonstrate low error rates in the accounting records of collections and disbursements of IIM funds, including the accounting records of the named Plaintiffs and their predecessors. The total amount of aggregate throughput through the entire IIM System unexplained by current accounting efforts is only $158.7 million, and this figure includes amounts owed to Individual IIM account holders (some of whom are class members in this case) as well as to tribes and others who are not members of the class (and whose interests are not before this Court). The statistical analysis conducted by the National Opinion Research Center (NORC) concluded that with a 97.5% level of confidence, no greater than $409.8 million

is unexplained because of missing data. DX-500; DX-464. Therefore, Plaintiffs' claimed amount of nominal benefit to the government of $3.9 billion, their calculated difference between collections and disbursements through the IIM System, is unreasonable as a matter of law.

46. As detailed in the foregoing Proposed Findings of Fact, Plaintiffs' claim for disgorgement of $46.8 billion, which is based on an enhancement of the nominal benefit, is also unreasonable as a matter of law.

47. Because Plaintiffs include Osage "headright" revenues in their analysis even if such revenues did not go through the IIM System, their disgorgement claim is overstated and thus unreasonable as a matter of law. For a detailed discussion, see Defendants' Response, at 104-107.

48. Unlike the accounting for many of the land-based accounts, the accounting work on the Judgment and Per Capita accounts does not suffer from the problems described in Cobell XX, which led the Court to deem the overall accounting under the 1994 Act impossible to accomplish. DX-465 at 4; Tr. 144:23-145:17 (Ziler). Because Plaintiffs include in their calculations money collected into the IIM System destined for Judgment and Per Capita accounts, their disgorgement claim is overstated and thus unreasonable as a matter of law.

49. Further, no class member is entitled to recover for unjust enrichment on the basis of being a Judgment or Per Capita account holder because an accounting within the parameters of Cobell XX can be done for them.

50. Similarly, an accounting within the parameters of Cobell XX can be done for some land-based accounts. See Tr. 579:3-14 (Herman): DX-496. Because Plaintiffs include in their calculation money collected into the IIM System destined for these land-based accounts for which an accounting can be done, their disgorgement claim is overstated and thus unreasonable as a matter of law.

III. AN AWARD OF INTEREST AGAINST THE GOVERNMENT IS PROHIBITED

51. Plaintiffs' computation of an alleged benefit to the government is simply an inflated estimate of prejudgment interest which, as a matter of law, cannot be awarded against the United States. It is well-settled that "interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest." Library of Cong. v. Shaw, 478 U.S. 310 (1986); accord Amax Land Co. v. Quarterman, 181 F.3d 1356, 1359-60 (D.C. Cir. 1999) (where "Congress has not expressly provided by statute or contract for recovery of interest against the government, and in the absence of such a waiver of sovereign immunity, interest cannot be awarded against the United States"). The immunity of the government from claims for interest is not altered by considerations of equity or that it would be "right or just" for the claimant to recover interest. See, e.g., United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947). For a detailed discussion, see Defendants' Response, at 114-116.

52. Plaintiffs are not permitted to assert a disgorgement claim here for interest under the 1994 Act. Prior to the 1994 Act, consistent with several court decisions, the Comptroller General of the United States concluded that the BIA was not liable to IIM account holders for loss of interest because the governing statute at that time did not require the

payment of interest on IIM accounts. See In re Liability of Bureau of Indian Affairs for Interest on Individual Monies, B-243029, 1991 WL 197151 (Comp. Gen. March 25, 1991). Given the absence of a clear and unambiguous retroactive waiver of sovereign immunity, prior to 1994, Plaintiffs would not be entitled to interest based on the alleged mismanagement of IIM, nor at any time would they be entitled to the disgorgement of alleged "savings" to the government. An Individual IIM account holder might properly assert, as part of a damage claim in the Court of Federal Claims, a claim for simple interest (not compound interest, nor interest based on the 10-year Treasury note rate, as Plaintiffs claim) on deposits for the period from approximately 1966 to the present. See 25 U.S.C. § 4012. For a detailed discussion, see Defendants' Response, at 116-117.

53. Plaintiffs' alternative model (replacing the 10-year Treasury Bond rate with one loosely based on the Act of September 11, 1841, ch. 25, 5 Stat. 465 ("1841 Statute"))[6] is a thinly disguised attempt to obtain interest by calling it equitable disgorgement or restitution. This new claim for interest fares no better.

54. The non-applicability of the 1841 Statute to claims of Indian tribes and Indian money accounts, was fully addressed in Mescalero Apache Tribe v. United States, 518 F.2d 1309 (Ct. Cl. 1975). The court stated:

> The reliance by the Indians and the Commission on the 1841 Act as authority for the award of simple and compound interest on I.M.P.L. Funds [Indian Moneys, Proceeds of Labor] is misplaced. In the first place, the Act did not expressly require the Government to pay interest to Indian tribes or to anyone else. It was merely a directive to the appropriate officers of the Government holding trust funds that were required by

[6] The 1841 Statute is now codified in 31 U.S.C. § 9702, although the language has been modified.

> treaty, contract, or statute to be invested, to invest them only in stocks of the United States, bearing interest at not less than five percent per annum. The primary purpose of the Act was to prevent any future investment of trust funds in state stocks or bonds. Thus the Act did not create any obligation on the Government to pay interest on trust funds, but only provided where they must be invested if any statute or treaty required them to be productive.

Id. at 1324. The court concluded:

> During the long period of time that the 1841 statute has been on the books, no court that has considered it has held that the Act required the Government to pay interest on any trust fund unless there was a contract, treaty, or statute (other than the 1841 Act) requiring the payment of interest.

Id. at 1325-26; accord White Mountain Apache Tribe of Arizona v. U.S., 20 Cl. Ct. 371, 380-82 (1990) (neither the Act of 1841 nor the Indian Claims Commission Act, 25 U.S.C. § 70a, required "specifically and unequivocally" the award of interest on IMPL accounts before 1930.").

55. As the court in Mescalero Apache noted, "the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." Mescalero Apache, 518 F.2d at 1322; accord Shaw, 478 U.S. at 321 (citing Mescalero and stating, "But the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution.").

56. Plaintiffs' reliance upon the 1841 Statute as a basis for the type of specific relief discussed in Bowen, 487 U.S. 879, is misplaced. The 1841 Statute does not mandate the payment of interest on Indian funds, including the individual Indian funds at issue here.

Further, when Congress originally passed legislation concerning the interest on Indian tribal funds, the individual Indians fund were not included.

57. Only with the addition of 25 U.S.C. § 161a(b) in 1994, were individual Indian funds given the same treatment as tribal Indian funds, namely, invested "in public debt securities with maturities suitable to the needs of the fund involved, as determined by the Secretary of the Interior, and bearing interest at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable securities." However, prior to the 1994 Act, no statute mandated the payment of interest on funds of Individual Indians. See Comp. Gen. Op. B-243028, 1991 WL 197151 ("Section 162(a) does not require the payment of interest" on Individual Indian Monies).

58. Individual Indian money funds are not classified as trust funds held by the United States Department of the Treasury. While 31 U.S.C. § 1321(a)(20) ("the Permanent Appropriations Repeal Act" or "PAR") lists "(20) Indian moneys, proceeds of labor, agencies, schools, and so forth" as "trust funds," the Act of June 25, 1936, ch. 814, 49 Stat. 1928, provided "That section 20 of the Permanent Appropriation Repeal Act, approved June 26, 1934 (48 Stat. 1233), shall not be applicable to funds held in trust for individual Indians, associations of individual Indians, or for Indian corporations chartered under the Act of June 18, 1934."

59. In the Treasury system, all of the account numbers in the 7000 to 9999 range are reserved for trust fund accounts. Chippewa Cree Tribe of the Rocky Boy's Reservation v. U.S., 69

Fed. Cl. 639, 653 (Fed. Cl. 2006). The IIM funds at issue in this matter are denoted as 14X6039, a denomination that indicates a deposit fund.

IV. PLAINTIFFS' CLAIM FOR EQUITABLE RESTITUTION CREATES IRREMEDIABLE RES JUDICATA PROBLEMS

60. Plaintiffs' failure to establish a reasonable approximation of an amount to be disgorged or a means to determine amounts to be disgorged to individuals will prejudice Defendants' ability to assert res judicata and any future court's ability to determine which issues are precluded by this litigation. For a detailed discussion, see Defendants' Response, at 82-83.

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Respectfully submitted,

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