

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285
et al. :
Plaintiffs :
: Washington, D.C.
v. : Wednesday, October 17, 2007
: :
DIRK KEMPTHORNE, Secretary :
of the Interior, et al. :
: :
Defendants : AFTERNOON SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 5
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

1
2 MR. GINGOLD: Good afternoon, Your Honor.
3 THE COURT: Good afternoon, Mr. Gingold.
4 MR. GINGOLD: Good afternoon, Dr. Scheuren.
00:00:07 5 THE WITNESS: Good afternoon.
6 (The witness resumed the stand.)
7 CROSS-EXAMINATION (Continued)
8 BY MR. GINGOLD:
9 Q. Dr. Scheuren, you testified at some length about what you
00:00:11 10 have done with regard to statistical sampling, correct?
11 A. Yes, in this context.
12 Q. I'd like to ask you one question about what you haven't
13 done. Isn't it true, Dr. Scheuren, that NORC was never asked to
14 design a sample which would provide the individual with a
00:00:29 15 statistical statement about his or her account balance?
16 A. As a statistician I could provide a statement about a
17 population, about a group. To provide a statement about an
18 individual is something that is arguably not even necessarily
19 statistical, but the answer is, no, we were not asked to do
00:00:55 20 that.
21 Q. Thank you, Doctor. When you were discussing the I think
22 three principal points in support of your hypothesis, that would
23 be a similarly low error rate in the paper records era, do you
24 recall your discussion about that? You identified GAO
00:01:23 25 settlement --

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1 A. I mentioned four, by the way.
2 Q. That's right. Including the early, I think you
3 characterized pilot testing?
4 A. Yes, this is continuing now.
00:01:32 5 Q. Do you have any reports that you've produced in that
6 regard?
7 A. Not yet.
8 Q. So you've begun that process?
9 A. We have begun, yes.
00:01:39 10 Q. When do you expect to complete it?
11 A. Statistical -- our statistical work will be contingent on
12 the availability of the transaction ledgers and them being
13 keyed, and I can't predict that right now. It'll be soon, I
14 think.
00:01:54 15 Q. I beg your pardon?
16 A. I have no control over that.
17 Q. Now, at this point in time you don't know when you'll be
18 able to complete it; is that fair?
19 A. No.
00:02:04 20 Q. And gathering the transaction or the ledgers is a
21 difficult, sometimes very time-consuming process, isn't it?
22 A. That is correct. It is underway, but it is not to my
23 knowledge complete.
24 Q. Do you have a scheduled date?
00:02:19 25 A. I have not asked that question. I don't know the answer.

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1 Q. With regard to the -- and again, I'm abbreviating what
 2 you've said to me so correct me where I'm wrong, Doctor. I
 3 think you said one of the other prongs or assumptions was the
 4 GAO Treasury settlement packages; is that correct?
 00:02:38 5 A. **One of the other data sets that we examined were the GAO
 6 Treasury settlement packages, yes, for the 60 years from 1890 to
 7 1950.**
 8 Q. These are older documents; correct?
 9 A. **They are in the archives, correct.**
 00:02:53 10 Q. Are you aware that this court has already rendered a
 11 judgment in part with respect to the GAO Treasury settlements
 12 packages?
 13 A. **I am aware of the testimony on this issue. Don't know if
 14 there was a judgment. There was testimony which seems at odds
 00:03:11 15 with the facts, but it's not been something I've been working
 16 on.**
 17 Q. Again, just to be clear, you're not informed that there has
 18 been a judgment that is relevant to that issue?
 19 A. **I have not been informed about a judgment on this.**
 00:03:25 20 Q. Would that be important for you to know?
 21 A. **I don't think so. I've seen the data. The data are really
 22 quite compelling. And they need to be looked at. I think the
 23 Judge or the Court might want to look at them to see what we're
 24 talking about here.**
 00:03:40 25 Q. But again, my question is different. There's a judgment on
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1 **And we were looking at whether the system had changed over
 2 time, how it had changed, whether there were problems with it in
 3 an era where we might be actually doing some sampling. And at
 4 the time we were engaged in this undertaking, no decision had
 5 been made as to how far back the accounting would go.**
 00:05:24 6 Q. So was your understanding that the reason you undertook the
 7 meta-analysis research was because the information back to the
 8 turn of the 19th/20th century was relevant to your task,
 9 correct?
 00:05:47 10 A. **My answer is what I just gave you. I didn't know whether
 11 it was going to be relevant or not, and for the sake of
 12 completeness, we included very old reports.**
 13 Q. And you didn't know because you don't know what the scope
 14 of the accounting is at this point in time?
 00:06:04 15 A. **Correct. It's not my decision. It was marginally -- of
 16 low marginal cost to go back further, and we did.**
 17 Q. So if in fact the Court determined that the scope of the
 18 accounting went back to 1938, the documents in the meta-analysis
 19 relevant to that period of time -- regarding that period of time
 00:06:24 20 would be relevant in your opinion?
 21 A. **Yes.**
 22 Q. And if the Court said that the accounting should go back to
 23 the inception of the trust in 1887, whatever documents you found
 24 during that period of time could be relevant. Is that a fair
 00:06:39 25 statement?
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1 this but you don't believe that's relevant?
 2 A. **I don't know what it is, so I'm not going to be able to say
 3 any more than that.**
 4 Q. Thank you. With regard to the meta-analysis, the documents
 00:03:53 5 you reviewed covered what period of time?
 6 A. **The intent was to find all of the documents that people
 7 knew about. It's quite clear to us -- which it goes back as far
 8 as we could go. It's quite clear to us at the time and it's
 9 stated in our report that we expect it to be incomplete. We did
 00:04:13 10 look at the rate at which we were learning about new documents
 11 and it was declining, so we thought maybe we're approaching what
 12 we're going to be able to learn.**
 13 **I haven't given you a specific date. You'll have to look
 14 at the dates in the reports themselves. Some of them are very
 00:04:31 15 old.**
 16 Q. Can you recall how far back you went at all, just as an
 17 estimate?
 18 A. **I think into the early 20th century.**
 19 Q. Perhaps even close to a hundred years?
 00:04:43 20 A. **That would be -- yes.**
 21 Q. And why were those documents relevant in your opinion?
 22 A. **We were trying to be complete, even though I've already
 23 indicated we were unsuccessful in being complete. Probably
 24 anyone starting this far into -- going that far into the past
 00:05:02 25 would be incomplete, but we were probably incomplete.**
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1 A. **That is a fair statement.**
 2 Q. Because they could relate to the reliability of the systems
 3 at the time?
 4 A. **The -- yes.**
 00:06:51 5 Q. Thank you, Doctor. Doctor, what you didn't note, and it's
 6 something that has been throughout the administrative record in
 7 various documents, is what has been referred to as the Ernst &
 8 Young report. Are you familiar with that?
 9 A. **Yes, I am.**
 00:07:08 10 Q. As a matter of fact, do you recall what you said about that
 11 report in your expert report?
 12 A. **No, I don't.**
 13 Q. If we can pull up Defendants' 6, at page 13. If we could
 14 focus in on the last paragraph. Can you read this, Doctor?
 00:07:43 15 What I'd like you to note is this is your report, your expert
 16 report. If you can drop one, two, three -- four lines down, the
 17 sentence reads, "NORC found the results of the historical
 18 accounting work for the named plaintiffs inconclusive and not
 19 necessarily applicable to a system-wide test."
 00:08:02 20 A. **That's correct. I said that.**
 21 Q. And you agree with that statement?
 22 A. **I do agree with that.**
 23 Q. Thank you, Doctor.
 24 A. **Could I explain why?**
 00:08:16 25 Q. I'm going to move on to the next. If counsel would like to
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1 ask you the question on redirect, that would be fine with me.
 2 Doctor, I'd like to call up an exhibit from the
 3 administrative record which is Bates stamp number 5730-1. Can
 4 you please focus on the top of this so Dr. Scheuren can see what
 00:08:49 5 this document is?
 6 Doctor, did you prepare this document? This is not
 7 identified to any particular individual, nor is it dated.
 8 **A. I think I may have prepared this document, yes.**
 9 **Q.** Doctor, I'd like to turn to page 3 of this document, and
 00:09:19 10 I'd like to focus on the paragraph immediately above the
 11 headnote, "controlling the paper records gathering."
 12 **A. I'm going to have to see the whole document. I just can't**
 13 **look at one paragraph.**
 14 **Q.** See the whole document?
 00:09:33 15 **A. I need to see the whole document. This is something, if it**
 16 **was done by me, it was done a long time ago, and my**
 17 **recollections will not be very heavy here. I can't just look at**
 18 **one paragraph.**
 19 **Q.** Can I ask you if you can recall this particular statement.
 00:09:45 20 This is going to be very brief, Doctor. If you did make the
 21 statement and you can't recall it, that's fine. It's page 3.
 22 Paragraph immediately above the headnote. You see in this
 23 paragraph it talks about the tribal reconciliation. Do you see
 24 that, Doctor?
 00:10:04 25 **A. I'm reading the paragraph which begins in 1972, 1992.**
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1 **Otherwise I can't answer yes or no.**
 2 **Q.** I'll move on to the next document. I'd like to call up
 3 another document from the administrative record. It is 482-1,
 4 and Doctor, this is identified as a Cadastral Resurvey Pilot.
 00:11:46 5 And your firm's name is on the cover, do you see that?
 6 **A. Yes.**
 7 **Q.** Do you recall this document?
 8 **A. I do recall the series of documents on cadastral.**
 9 **Q.** Doctor, I'd like you to turn to page 26, page No. 26 of
 00:12:01 10 this document. If we can focus on the second to last paragraph
 11 from the bottom, the headnote "how location error can adversely
 12 affect the IIM account." There's a statement, Doctor, that says
 13 there are an infinite number of ways an erroneously assumed
 14 allotment boundary can impact the IIM account." Are you
 00:12:29 15 familiar with that statement?
 16 MR. WARSHAWSKY: Objection. This is beyond the scope
 17 of direct, Your Honor.
 18 THE COURT: Let's have a foundation for why he knows
 19 anything about this.
 00:12:38 20 MR. GINGOLD: Why he knows anything about it?
 21 THE COURT: Did he write it?
 22 BY MR. GINGOLD:
 23 **Q.** Well, this is a NORC document, isn't it, Doctor?
 24 **A. It is a NORC document. There are a series of reports**
 00:12:53 25 **working with BLM on this issue. And this is a situation where**
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1 **Q.** Correct. Would you please read that to yourself, and when
 2 you finish, please let me know.
 3 (Witness reviewing document.)
 4 **A. Yes.**
 00:10:24 5 **Q.** Does this refresh your recollection? Did you write this?
 6 **A. I could have written it. You haven't given me the whole**
 7 **context. I don't have enough information.**
 8 **Q.** You could have written it?
 9 **A. That's what I said.**
 00:10:36 10 **Q.** I'd like to read this statement. I want to ask if you
 11 agree with this statement.
 12 **A. Are you asking me if I agree with what I said long time ago**
 13 **today?**
 14 **Q.** First of all, if you said it. You're not sure you said it.
 15 **A. I'm not sure I said it.**
 16 **Q.** But whether or not you said it, I would like to know
 17 whether you agree with it. "This warns us that we need to have
 18 a strategy that resolves the missing record problem for
 19 disbursements in a way that does not treat the failure to find
 00:10:57 20 the supporting documentation as an error in the account." Do
 21 you agree with that statement?
 22 **A. May I preface my remarks with -- I will answer your**
 23 **question.**
 24 **Q.** If you can first answer yes or no, if you can.
 00:11:16 25 **A. Maybe. You need to give me some more context here.**
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1 **we're working through an understanding of how small boundary**
 2 **errors could have affected the income streams for allotments.**
 3 **Okay. And BLM has a point of view. This may well be a**
 4 **quote from them, because two of these reports were done by them.**
 00:13:18 5 **I don't know whether this is. And then we dealt with those**
 6 **issues subsequently. We're sitting there as contractors at**
 7 **Department of Interior and we're between interpretations of**
 8 **issues that are beyond our scope, and we're trying to deal with**
 9 **that here and record what was said by the people involved. I**
 00:13:42 10 **don't know who wrote this.**
 11 **Q.** So you're not familiar with the information in this report?
 12 **A. You're again not giving me enough context for me to make a**
 13 **judgment that's adequate to respond to you.**
 14 **Q.** You discussed the fact that, in your testimony right now if
 00:14:02 15 I understand it, that BLM has taken certain positions with
 16 regard to the boundaries and the effect that the boundaries may
 17 have on the accounting?
 18 **A. That is my recollection.**
 19 **Q.** What is your understanding of BLM's position?
 00:14:17 20 MR. WARSHAWSKY: Objection, Your Honor. Again, this
 21 is beyond the scope of direct.
 22 THE COURT: I'll allow it. Want to lay a foundation
 23 for getting back into this document.
 24 THE WITNESS: I should answer this question?
 00:14:27 25 THE COURT: Yes.
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1 THE WITNESS: They felt that the boundary work should
 2 be part of the historical accounting, and that's what they
 3 wanted to do, and they made that point clear in the listening
 4 meetings when I first was engaged here. The meetings were in
 00:14:48 5 Albuquerque when I was first engaged. And that continued to be
 6 true for quite a long time after. I don't deal with them
 7 anymore because I'm not working on this aspect. That was a
 8 concern they had.
 9 And if you will recall, and I think you must be pretty
 00:15:00 10 aware of a lot of the material here, there was considerable
 11 discussion in my early reports about cadastral, and it was
 12 unclear to me as to what the scope of the historical accounting
 13 was supposed to be, okay, because I was listening to people at
 00:15:23 14 Interior, okay, and eventually these issues were clarified, and
 15 this issue was one that was moved off the table, because in fact
 16 in the research that's done, not in this report but in a later
 17 report, the notion of there being a major impact of minor
 18 boundary issues on income stream does not seem to be a strong
 19 one.
 00:15:43 20 Q. Some of the --
 21 THE COURT: Can we just, while this cover sheet is up
 22 on the screen, let's just for the record clarify the document
 23 that you -- that Mr. Gingold was showing the witness is entitled
 24 "Cadastral Resurvey Pilot BLM acreage and location results."
 00:16:05 25 Reports produced by the Bureau of Land Management."
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1 THE WITNESS: In a subsequent report, we addressed
 2 this issue.
 3 THE COURT: And have you delivered yourself of a
 4 professional opinion on that subject, or are you just kind of
 00:17:35 5 tossing that off today?
 6 THE WITNESS: I would have to recall the details of
 7 that report and based on that make this judgment.
 8 THE COURT: Okay.
 9 MR. GINGOLD: Your Honor, for clarification, the
 00:17:51 10 report discusses both small and large boundary errors. And
 11 depending on the period of time.
 12 THE COURT: All right.
 13 THE WITNESS: It also discusses the relative frequency
 14 of small and large boundary errors and makes, for me at least at
 00:18:15 15 the time, a compelling case that the number of large boundary
 16 errors is probably very small.
 17 MR. GINGOLD: But, Your Honor, I'm not going to be
 18 examining this witness on this point. I will move on.
 19 THE COURT: All right. Thank you.
 00:18:29 20 BY MR. GINGOLD:
 21 Q. This is once again administrative record document 50-2-1.
 22 Doctor, your name isn't on this document either. It's a NORC
 23 document, and it says "NORC analysis of LRIS tract history
 24 reports." This is also a 2003 document, but this actually
 00:18:47 25 precedes the Cadastral Resurvey Pilot. Are you familiar with
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1 THE WITNESS: That is correct.
 2 THE COURT: "At the request of the Office of
 3 Historical Accounting, reissued with a preface by NORC."
 4 THE WITNESS: That's correct. That's exactly what it
 00:16:19 5 is. Thank you, Judge. The particular page you're getting are
 6 some material that BLM has prepared.
 7 BY MR. GINGOLD:
 8 Q. And as of right now it's your understanding that the
 9 cadastral survey or boundary issue is not part of the
 00:16:34 10 accounting, correct?
 11 A. **That's my recollection. Yes.**
 12 Q. But BLM believed it should have been included, correct?
 13 A. **That's what they said at the listening meetings in 2001,**
 14 **yes.**
 00:16:47 15 Q. This document, Doctor, is dated 2003.
 16 A. **Yes?**
 17 Q. So it's not just 2001, correct?
 18 A. **That's correct.**
 19 Q. Thank you. I'd like to identify another document from the
 00:17:04 20 administrative record. It is 50-2-1.
 21 THE COURT: Before we leave this subject, I want to
 22 pick up the string of what the witness said. You said something
 23 to the effect that you didn't think it was likely that tiny
 24 little boundary adjustment matters would have a major effect on
 00:17:24 25 the accounting or something roughly like that. Am I correct?
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1 this document, Doctor?
 2 A. **Yes, I am.**
 3 Q. I would like you to turn to page 8. If we can focus in on
 4 the highlighted paragraph, please. Did you write this, Doctor?
 00:19:11 5 A. **No.**
 6 Q. I'd like to ask if you agree with it. And it says "We
 7 particularly emphasize our positive results in view of a report
 8 on the findings of the TIME project carried out by DataCom in
 9 2000. DataCom asserts an error rate of about 30 percent in
 00:19:32 10 postings." This says you disagree, I guess. Is that fair?
 11 A. **That's not what that said.**
 12 Q. Do you agree with the --
 13 A. **It said we particularly emphasize our positive results.**
 14 **Let me clarify something that you've been working around here**
 00:19:54 15 **about quality. And I've just written a book on quality. You**
 16 **may know that.**
 17 Q. Doctor, I haven't asked you about quality. I'd like to
 18 move on.
 19 A. **This asks me about quality. Those findings go to the**
 00:20:07 20 **quality issue.**
 21 Q. Doctor, I asked if you agree with this statement. Do you
 22 agree with this statement?
 23 A. **Well, I agree that -- yes, I agree with that statement.**
 24 Q. And your recollection is that DataCom asserted an error
 00:20:26 25 rate of about 30 percent in postings?
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- 00:20:43 1 **A. That's correct.**
- 2 **Q.** Doctor, did you read the DataCom TIME report?
- 3 **A. I read parts of it. It's a long time ago.**
- 4 **Q.** Let's pull up PPX 4352. This is the executive summary of
- 5 the TIME report, Doctor, from DataCom Sciences Inc., and I'd
- 6 like to turn to page 2. I'd like to focus in on the last --
- 7 first of all, Doctor, the first paragraph is probably important
- 8 for context.
- 9 **A. I'm not able to read it at the moment.**
- 00:21:05 10 **Q.** I'm not going to ask you questions until you have the
- 11 opportunity to read it. If we can focus in on the first
- 12 paragraph.
- 13 You haven't read it in a long time, so I would just like
- 14 you to see that this summary states that it deals with a
- 00:21:24 15 stratified random sample of 93 tracts that were selected from
- 16 the LRIS Rocky Mountain regional land base, which consists of
- 17 239,311 tracts. Do you see that, Doctor?
- 18 **A. Yes, I do.**
- 19 **Q.** It goes on to state that, "541 original current ownership
- 00:21:43 20 documents, encompassing 11 document types, are associated with
- 21 the 93 tracts, and these original documents were retrieved and
- 22 scanned onto CDs for assessment in Albuquerque, New Mexico."
- 23 Does this help you refresh your recollection about the TIME
- 24 report?
- 00:22:00 25 **A. No.**

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- 1 **Q.** And something can be construed as an error by one
- 2 consultant and not as an error by another; is that fair?
- 3 **A. There is this issue of conformance to requirements versus**
- 4 **fitness for use. These are two useful definitions of quality.**
- 00:23:41 5 **And if they're calling an error something which is a**
- 6 **misspelling, but if the person who's looking at the document can**
- 7 **still use it appropriately, it's still fit for use, even though**
- 8 **it does not -- is not correct. And that kind of application of**
- 9 **a standard has not to my knowledge been applied here.**
- 00:24:05 10 **Q.** So there's judgment used by the consultant in determining
- 11 whether or not a particular document supports the transaction
- 12 and doesn't. Is that fair?
- 13 **A. I don't know how they did it. I do know that this**
- 14 **criticism was leveled at what they did.**
- 00:24:25 15 **Q.** But at least you don't personally know whether or not what
- 16 they did was right or wrong, do you?
- 17 **A. We did not go back over it.**
- 18 **Q.** So basically if my understanding is correct, if DataCom
- 19 considered a particular document in error, that wouldn't
- 00:24:47 20 necessarily mean you would consider it an error. Is that a fair
- 21 statement?
- 22 **A. There are two definitions, and I've said this. We did have**
- 23 **another report which this came from, where we had done a**
- 24 **different kind of look at the results -- at similar documents,**
- 00:25:04 25 **and came up with a different result.**

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- 1 **Q.** Okay. Let's go to the table on the bottom of the page.
- 2 It's very hard to read, Doctor, but what we're dealing with are
- 3 what is called an error assessment document. And it says in
- 4 the -- right above the caption, "The following chart summarizes
- 00:22:25 5 the number of documents with at least one error within the 541
- 6 document sample." Do you see that?
- 7 **A. Yes, I do.**
- 8 **Q.** Does this refresh your recollection?
- 9 **A. I remember the 30 percent number.**
- 00:22:36 10 **Q.** Okay. You see --
- 11 **A. This is consistent with what you haven't allowed me to say**
- 12 **yet, but go ahead.**
- 13 **Q.** I'm just asking you to testify as to what you know and what
- 14 you understand. That's it. You see the last row in the table?
- 00:22:52 15 It says "total number of documents with error"?
- 16 **A. Yes, I do.**
- 17 **Q.** And the numbers are sample size 541, number of docs with
- 18 error 181, percentage of docs with error, 33.4 percent. Do you
- 19 see that?
- 00:23:07 20 **A. Yes, I do.**
- 21 **Q.** Now, do you have any reason to believe that the DataCom
- 22 sampling was wrong?
- 23 **A. I believe their definition of an error is a problem.**
- 24 **Q.** So definitions are very important, aren't they?
- 00:23:22 25 **A. Yes, they are.**

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- 1 **Q.** So a difference among professionals. Disagreement among
- 2 professionals.
- 3 **A. It's definitional issues.**
- 4 **Q.** Everything we're doing is definitional, Doctor. I'd like
- 00:25:19 5 to identify another document from the administrative record,
- 6 57-32-1. This again does not have anyone's identification on
- 7 it.
- 8 **A. I also wrote this. I know I wrote this.**
- 9 **Q.** You are the author of this straw man --
- 00:25:35 10 **A. I found this -- yes, I am. I found this electronically.**
- 11 **This is written in WordPerfect. That's how come I know it, I**
- 12 **know the date of it, very old.**
- 13 MR. WARSHAWSKY: I'm sorry, Mr. Gingold. What is the
- 14 Bates number on it?
- 00:25:49 15 MR. GINGOLD: It is 57-32-1.
- 16 BY MR. GINGOLD:
- 17 **Q.** So you remember this one pretty clearly. Do you recall
- 18 when you wrote this?
- 19 **A. I have found that date, but I don't have it here. It's**
- 00:26:01 20 **very early. I was -- it must be August or September of 2001**
- 21 **when I was just learning about this work.**
- 22 **Q.** Is it fair to say that the straw man design involves
- 23 adaptive sampling?
- 24 **A. Everything I do involves adaptive sampling. So that's**
- 00:26:23 25 **easy.**

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1 Q. Okay. It's real easy. Let's turn to page 2 of this
 2 document, the first full paragraph, and it deals with
 3 sizability. That's the headnote. And I'd like to turn your
 4 attention to the last three lines and ask you if you continue to
 00:26:41 5 agree with this or -- at this point in time. "What is an
 6 acceptable accounting needs definition. Clearly we are not
 7 talking about the standards used in a court case."
 8 With respect to the straw man design and adaptive sampling,
 9 was that your position at the time you drafted this?
 00:27:04 10 A. **There are a series of paragraphs here which are essentially**
 11 **questions for the client. Sometimes they have question marks on**
 12 **them and sometimes they don't. They are an effort by me to**
 13 **learn more about what was going on, and to yet give some early,**
 14 **you know, indications of why I want to know those things.**
 00:27:29 15 **I don't think that what I said here about the acceptable to**
 16 **the court's accurate. I wouldn't agree with that anymore. I**
 17 **think it's very important.**
 18 THE COURT: Particularly when you're sitting in court,
 19 right?
 00:27:46 20 THE WITNESS: No, I would have said it even if I
 21 weren't, sir. What I'm saying is here I'm asking questions
 22 about a client in a document that's pulled up five, six years
 23 later, okay, and asked, without much ability to even look at the
 24 rest of the document, what I think, and I've given you an
 00:28:05 25 answer.

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1 BY MR. GINGOLD:
 2 Q. Would you like to look at the entire document, then, to be
 3 more comfortable? But you recall why you said this, don't you?
 4 A. **I recall my wish to interact with the client about issues,**
 00:28:19 5 **okay, that I needed to have clarified. Remember, I'm working**
 6 **for Interior two months, three months in. I don't know exactly**
 7 **what the date of this is, but very early.**
 8 Q. Doctor, in the statement that --
 9 A. **May well have written this -- excuse me. I may well have**
 00:28:34 10 **written this on the plane coming home from Albuquerque.**
 11 Q. The last sentence in that paragraph, part of the paragraph
 12 I read to you, states, "Clearly we are not talking about the
 13 standards used in a court case." There's no question mark
 14 there, is there?
 00:28:49 15 A. **You're acting like DataCom. You're worrying about periods**
 16 **and commas. I don't think that I can be held accountable for**
 17 **not putting a period there.**
 18 Q. I simply asked you a question.
 19 A. **The answer is no, you're right. There's no question mark**
 00:29:02 20 **there.**
 21 Q. Thank you, Doctor.
 22 MR. GINGOLD: Your Honor, I've completed the cross.
 23 We would like to move some exhibits in, but if there's redirect
 24 we will do it afterwards.
 00:29:10 25 THE COURT: Okay.

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1 THE WITNESS: Thank you, by the way.
 2 MR. GINGOLD: You're welcome.
 3 MR. WARSHAWSKY: Good afternoon, Your Honor. I just
 4 have maybe one on redirect.
 00:29:33 5 REDIRECT EXAMINATION
 6 BY MR. WARSHAWSKY:
 7 Q. Early on there was an exchange where the Court was asking
 8 you, became involved I believe with regard to some exchange that
 9 you were having with Mr. Gingold. And I believe the Court asked
 00:29:48 10 you whether the population that you sampled from was
 11 transactions post 1994. And my question is is the population
 12 transactions post 1994 or accounts post 1994?
 13 A. **Good clarification. It was accounts opened on -- or open**
 14 **after October 1994.**
 00:30:17 15 Q. Okay. And so an account that was open after October 1994
 16 had a transaction in the 1985 to 1994 time period would have
 17 been subject to sampling?
 18 A. **Yes. It would have been included.**
 19 MR. WARSHAWSKY: Thank you. Your Honor, I have no
 00:30:33 20 more redirect.
 21 MR. GINGOLD: Your Honor, can I just have a brief
 22 re-cross to clarify something Mr. Warshawsky asked?
 23 THE COURT: If it's re-cross on that, yes.
 24 MR. GINGOLD: Thank you.
 00:30:42 25 RECROSS-EXAMINATION
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1 BY MR. GINGOLD:
 2 Q. Doctor, you were not sampling accounts, were you?
 3 A. **Pardon me?**
 4 Q. You were not sampling accounts, were you?
 00:30:51 5 A. **Of course the LSA project started out in a two-stage**
 6 **design. The first stage was a sample of accounts, the second**
 7 **stage was a sample of transactions, and that is proposed for the**
 8 **paper era too.**
 9 Q. And the question asked by Mr. Warshawsky, you were not
 00:31:11 10 sampling accounts, you were sampling transactions from certain
 11 accounts, correct?
 12 A. **Start over again. I'm not sampling what?**
 13 Q. You're not sampling an account to sample all the
 14 transactions in a particular account, are you?
 00:31:24 15 A. **We were sampling accounts, and within accounts we're**
 16 **sampling the transactions that are available in the '85 to 2000**
 17 **period.**
 18 Q. So all of the transactions in a particular account?
 19 A. **Were subject to sampling, right.**
 00:31:41 20 Q. How many transactions per account are you sampling?
 21 A. **The average was 20 per account.**
 22 Q. And how many transactions does each account on the average
 23 have?
 24 A. **It would be higher than that. It's probably 25 or 30. I**
 00:31:57 25 **don't have that number.**

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1 Q. So each account has 25 to 30 transactions?
 2 A. Averaged.
 3 Q. And you're sampling 20 of those for the average account?
 4 A. **Did not take all of them, that's correct. It was a sample**
 5 **of the transactions in the accounts that were sampled.**
 6 Q. Why did you choose not to sample all of them, Doctor?
 7 A. **Cost. We didn't need to, either.**
 8 MR. GINGOLD: Thank you.
 9 THE COURT: Thank you, Dr. Scheuren.
 10 THE WITNESS: Thank you.
 11 (The witness steps down.)
 12 MR. GINGOLD: Your Honor, may we move some documents
 13 into evidence?
 14 THE COURT: Go ahead.
 15 MR. GINGOLD: Your Honor, there's a document that was
 16 identified as one of the meta-analysis documents that was Bates
 17 stamped as NORC MA 231. We'd like to enter it as PPX 4474.
 18 THE COURT: All right.
 19 (Plaintiff Exhibit Nos. PPX
 20 4474 received into evidence.)
 21 MR. GINGOLD: A document that is the TIME report,
 22 which is PPX 4352. We'd like to move that into evidence.
 23 THE COURT: Received.
 24 (Plaintiff Exhibit No. PPX
 25 4352 received into evidence.)
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1 expect. He has offered opinions in this case, again with
 2 respect to the conclusions drawn by OHTA with respect to the
 3 testing for the electronic era and the proposed plan for the
 4 paper ledger era.
 5 THE COURT: All right.
 6 **DAVID B. LASATER, WITNESS FOR THE DEFENDANT, SWORN**
 7 DIRECT EXAMINATION
 8 BY MR. WARSHAWSKY:
 9 Q. Good afternoon, Dr. Lasater.
 10 A. **Good afternoon, Mr. Warshawsky.**
 11 Q. State and spell your full name for the record, please.
 12 A. **David Byron Lasater. L-A-S-A-T-E-R.**
 13 Q. Dr. Lasater, where do you reside?
 14 A. **I reside principally in Houston, Texas.**
 15 Q. And what do you do for a living?
 16 A. **I'm a senior managing director at FTI Consulting.**
 17 Q. Dr. Lasater, I'm having put up on the screen here what's
 18 been marked Defendants' Exhibit 159. And why don't you flip
 19 past the cover pages there for the filing to -- there we are.
 20 Dr. Lasater, this is all told roughly a 13-page document
 21 with the court filing on top of it. Do you recognize this
 22 document?
 23 A. **Yes, sir, I do.**
 24 Q. And what is it?
 25 A. **This appears to be an electronic facsimile of the report**
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1 MR. GINGOLD: Your Honor, a NORC report, which is
 2 "NORC analysis of LRIS tract history reports," identified as --
 3 from the administrative record, identified as Bates 50-2-1.
 4 THE COURT: Well, if it's in the administrative
 5 record, you don't need to move it into evidence. It's already
 6 in evidence.
 7 MR. GINGOLD: Your Honor, we'd like to move in the
 8 1982 GAO report, PPX 4174.
 9 THE COURT: Absent objection, I'll receive that too.
 10 MR. GINGOLD: Thank you, Your Honor.
 11 (Plaintiff Exhibit No. PPX
 12 4174 received into evidence.)
 13 THE COURT: Next witness.
 14 MR. WARSHAWSKY: Your Honor, the government calls
 15 Dr. David Lasater.
 16 THE COURT: All right.
 17 MR. WARSHAWSKY: Good afternoon again, Your Honor.
 18 Just to give you a quick preview, Dr. Lasater has been involved
 19 with the Cobell litigation since essentially its inception. He
 20 actually was involved with the tribal trust effort at Arthur
 21 Andersen prior to the filing of this case. Dr. Lasater is a
 22 CPA. He is also a Ph.D. whose expertise includes areas of
 23 statistics, and he has been accepted previously in this case to
 24 testify on several occasions regarding statistics issues.
 25 Dr. Lasater, his testimony will be relatively brief, I
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1 **that I filed recently in this case.**
 2 Q. And I'd like to refer to page 9 of this document, please.
 3 Dr. Lasater, what is depicted on this page?
 4 A. **A younger man in the upper left-hand corner. But it is a**
 5 **very brief summary of my professional experience.**
 6 Q. Was that taken of you before or after the Cobell case?
 7 A. **This would have been probably before the Cobell case.**
 8 Q. Dr. Lasater, does this accurately describe your educational
 9 background in the last paragraph?
 10 A. **Oh, yes, sir. It does.**
 11 Q. Do you also need it blown up?
 12 A. **Not at all. I was looking at the lower left-hand corner**
 13 **and it seemed incomplete.**
 14 Q. And Dr. Lasater, does this accurately describe your
 15 professional experience with regard to engagements in
 16 statistical work?
 17 A. **In extremely summary fashion at 30,000 feet.**
 18 Q. Would you refer to pages 10 and 11. Dr. Lasater, what is
 19 set forth on pages 10 and 11 of your report?
 20 A. **Pages 10 and 11 are my Rule 26 disclosures with respect to**
 21 **trial testimony and deposition testimony in recent years.**
 22 Q. And the next thing I'd like to pull up, and we won't go
 23 through the whole thing, but this is the transcript from the
 24 phase 1.5 trial, day 33 in the morning, pages 87, line 5, and
 25 this excerpt continues all the way to the afternoon, day 33 p.m.
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1 that is, page 56, line 5. You've reviewed this before, have you
 2 not, sir?
 3 **A. I have.**
 4 **Q.** Do you recall what this is?
 00:38:57 **5 A. Well, I think the discussion is my experience in**
6 statistics.
 7 **Q.** In fact, wasn't this the direct examination and *voir dire*
 8 that preceded Judge Lambeth accepting you as an expert to
 9 testify about statistics and statistical sampling?
 00:39:11 **10 A. Yes, it is.**
 11 MR. WARSHAWSKY: Your Honor, we offer Dr. Lasater to
 12 testify as an expert on the subjects of sampling and statistics.
 13 THE COURT: He may give expert testimony in those
 14 fields.
 00:39:27 **15 MR. DORRIS:** Your Honor, I don't know if this is the
 16 point where --
 17 THE COURT: You want to *voir dire* him?
 18 **MR. DORRIS:** No, Your Honor. We don't have an
 19 objection to what you just ruled or moved, but all of this
 00:39:36 **20 testimony being offered as an expert as a statistician is**
21 cumulative with the statistician that they've just called. And
22 we do not think that it should be cumulative to have one
23 statistician now to come in and say what the expert they just
24 had testify say the same thing.
 00:39:54 **25 THE COURT:** Well, let me hear what he's got to say
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1 **Q.** And those are the ones referenced in your expert report?
 2 **A. Yes, sir.**
 3 **Q.** Go back to 159, page 4, please. Your expert report refers
 4 to the tribal reconciliation project. What are you referring to
 00:42:08 **5 there, sir?**
6 A. Yes, the tribal reconciliation project was one that was
7 undertaken by principally the office of Arthur Andersen in
8 Albuquerque, that spanned a working period from about 1990 to
9 1995. The goal of the project was to, initially to try to
 00:42:28 **10 reconstruct the tribal accounts from 1972 to 1992, when that**
11 proved to be impracticable. Then the scope of the work changed
12 to evaluate to the extent practicable, and that's in the cover
13 letter to -- or the cover of the final report itself, the
14 accuracy of the balances in the tribal trust accounts, again
 00:42:54 **15 from 1972 to 1992.**
16 Q. Dr. Lasater, was the tribal reconciliation project relevant
 17 to your current expert opinion?
18 A. Relevant to my current expert opinion?
19 Q. Yes.
 00:43:06 **20 A. It is in the sense that the tribal reconciliation report**
21 informed the expectations about what would be the error rates in
22 the individual Indian accounting system, because the tribal
23 accounts and the individual Indian accounts are maintained by
24 the same bookkeepers in the agency offices on the same systems.
 00:43:33 **25 And so one would have anticipated that the error rates would**
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1 before we decide whether it's cumulative. I hope it's not going
 2 to be cumulative, Mr. Warshawsky.
 3 **MR. WARSHAWSKY:** It's going to be -- the element of it
 4 that's not cumulative, Your Honor, is simply that Dr. Lasater as
 00:40:14 **5 a CPA and person with an accounting background has some**
6 familiarity with this that Dr. Scheuren certainly did not bring
7 to the table. Dr. Lasater in fact has actually, as a member of
8 FTI, has had the opportunity to review the records. He's
9 reviewed records going back to the tribal --
 00:40:30 **10 THE COURT:** Let's hear it from him instead of from
 11 you, but I will call a pretty close game on cumulateness.
 12 **MR. WARSHAWSKY:** Well, let me try and be very brief on
 13 this, then.
 14 **BY MR. WARSHAWSKY:**
 00:40:43 **15 Q.** Dr. Lasater, let's go back to Exhibit 159, please. Page 3
16 of the document. And why don't you blow up paragraph No. 1, I'm
17 sorry, at the bottom.
 18 You referred to previously submitting two expert reports in
 19 this case, do you recall that?
 00:41:16 **20 A. Yes, sir.**
21 Q. And we have very quickly Defendants' 162 and Defendants'
22 163 from the phase 1.5 trial. Is that one of them, sir?
23 A. Yes, sir, it is.
24 Q. And 163? The fax header may help you with that.
 00:41:49 **25 A. Yes, sir. That would be the rebuttal report.**
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1 **have been approximately the same. I testified to that point in**
2 trial 1.5.
 3 **Q.** Now, you said that the tribal and individual bookkeeping
 4 was the same people. Have you personally observed that?
 00:43:55 **5 A. I've spoken to bookkeepers who are the bookkeepers who are**
6 in at least one of the agency offices who do that work. And
7 I've also had conversations with Brad Prieber, the partner in
8 Albuquerque who performed or was the overseeing partner on the
9 tribal reconciliation project.
 00:44:15 **10 Q.** The other item that's referenced in paragraph 2 of your
 11 report is the revised interim file report of Joseph R.
 12 Rosenbaum. Do you see that, sir?
13 A. Yes, sir, I do.
14 Q. Okay. And I believe you were in the courtroom earlier when
 00:44:29 **15 Mr. Gingold referred to the E&Y report?**
16 A. Yes, sir.
17 Q. Is that one and the same?
18 A. I'm assuming that it is.
19 Q. And why was Mr. Rosenbaum's revised interim final report
 00:44:41 **20 relevant to your analysis?**
21 A. Once again, as it was with respect to the 2003 plan and
22 with the 2007 plan, the rates of errors and the ability to
23 reconcile transactions found in the electronic system to
24 underlying business papers that would have supported those
 00:44:58 **25 transactions was informative to the likelihood of error**
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00:45:44 **1** discovery in both the 2003 original plan and the 2007 plan here.
2 Q. I'd like you to refer now -- let's go to page 4 of
3 Defendants' Exhibit 159. I'd like to focus on your four
4 opinions, Dr. Lasater. Would you summarize your first two
5 opinions for Judge Robertson.
6 A. The discovery project that has been ongoing since the IRMS
7 tapes were first provided to the team that I at that point
8 directed, and as the discovery has proceeded through the
9 collection of documents, now at Lenexa and in the area offices,
00:46:21 **10** along with the substantive testing, the individual transaction
11 testing, is very, very, very strong evidence that, No. 1,
12 documents can be found, No. 2, that the bookkeeping has been
13 surprisingly good, and that a plan that would proceed to
14 continue that and then ultimately report historical statements
00:46:55 **15** of account can be accomplished with the 2007 articulation of it.
16 Q. And in opinions 1 and 2, that's with respect to the
17 electronic ledger era?
18 A. It is.
19 Q. And you refer to the litigation support project. That's
00:47:11 **20** the LSA project?
21 A. It is.
22 MR. DORRIS: Your Honor, just a point of clarification
23 for my sake. Do I need to get up and object each time that --
24 THE COURT: No, I was about to ask Mr. Warshawsky in
00:47:23 **25** what respect these four opinions differ from what we've already
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1 just heard.
2 MR. WARSHAWSKY: I'm happy to say --
3 THE COURT: With the greatest respect for Mr. Lasater,
4 I think I've just heard all this.
00:47:37 **5** MR. WARSHAWSKY: I'm happy to say that Dr. Lasater's
6 opinions don't conflict with Dr. Scheuren's. I'd be
7 uncomfortable if they did. They do approach the same issue.
8 These are important issues for the 2000 plan from the
9 perspective of somebody who is not a professional statistician,
00:47:56 **10** such as Dr. Scheuren, and certainly not somebody who was working
11 for OHTA since 2001. I'll be very brief, Your Honor.
12 THE COURT: All right. I'll allow very brief coverage
13 of this. No, you don't have to get up every time, Mr. Dorris.
14 You can have a continuing objection.
00:48:17 **15** BY MR. WARSHAWSKY:
16 Q. Dr. Lasater, I'd like you to refer to Defendants' Exhibit
17 162, please. We'll have that brought up here.
18 THE COURT: I think you qualified him as an expert
19 statistician with an expertise in sampling and statistics.
00:48:51 **20** MR. WARSHAWSKY: I have offered him as somebody to
21 offer opinions about statistics and sampling.
22 THE COURT: Okay. I thought you distinguished him
23 from Dr. Scheuren by saying from a perspective of someone who's
24 not a statistician or something like that.
00:49:10 **25** MR. WARSHAWSKY: I'm sorry. What I meant to say is he
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1 is a CPA. He is somebody who --
2 THE COURT: I know, but I mean -- all right. Go on.
3 You said it's going to be brief. I trust you.
4 MR. WARSHAWSKY: It's getting briefer all the time,
00:49:25 **5** Your Honor.
6 THE COURT: Good. That's the idea.
7 BY MR. WARSHAWSKY:
8 Q. Dr. Lasater, are you familiar with -- yes. To distinguish
9 Defendants' 162, which was a report from the phase 1.5 trial, DX
00:49:57 **10** 162, are you familiar with this one, sir?
11 A. Yes, sir, I am.
12 Q. And what is it?
13 A. This is a summary schedule that I asked to be prepared in
14 the midst of the initiation of the Alaska work in the spring of
00:50:19 **15** 2004. The reason I asked for this to be prepared was that
16 following the trial 1.5 and the beginning of the substantive
17 testing into the transactions, I myself handled and participated
18 in vouching or reconciling transactions in Alaska.
19 For about two weeks I sat with the team here in Washington
00:50:52 **20** in the OHTA offices handling the newly developed accounting
21 reconciliation tool, and looking at transactions that had been
22 evidently identified through a sampling process from NORC. At
23 the conclusion of that two-week effort I wanted to see how we
24 were doing. I wanted to understand what sorts of errors were
00:51:18 **25** coming up, the nature of the errors, the magnitude of the
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1 errors, and this was just a document that was prepared at my
2 request.
3 It has remained in my files, but as part of the production
4 in this case, in the process of disgorging what I rely on in
00:51:40 **5** terms of my opinions, I identified this to Mr. Warshawsky,
6 because I've been, as this work has gone on, across the last
7 several years, that is the work from Ms. Herman and the people
8 that she's directing, I would refer back to this to see whether
9 or not the world was differently exposed than what I had
00:52:03 **10** discovered in the first couple of weeks of handling Alaska
11 transactions. That's what this document is.
12 Q. Okay. Let's go to your last two opinions very quickly.
13 Defendants' Exhibit 159, page 4. In opinions 3 and 4 you're
14 addressing the proposed methodology for the paper ledger era,
00:52:30 **15** correct?
16 A. I am.
17 Q. And are your opinions based in part upon your work of
18 having familiarity with the actual bookkeeping?
19 A. Yes, sir, it is.
00:52:41 **20** Q. And what is it about the bookkeeping that informs your
21 opinion?
22 A. Well, the information of the bookkeeping comes from testing
23 transactions in the paper ledger era, which of course included
24 from the Arthur Andersen tribal reconciliation, the period 1970
00:52:59 **25** to, as it's been described in the courtroom, approximately 1995.
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00:53:31 **1 That was a paper ledger era. And the \$15 billion of**
2 transactions that were vouched across -- I think it was about
3 200,000 transactions, some many of which were in that era,
4 informs the opinion about the feasibility of a paper ledger era
5 plan as it's described in 2007.
6 Q. And based on your experience, you don't have any quarrel
7 with the initial hypothesis proposed by NORC?
8 A. Not at all, because the hypothesis is one that's not only
9 driven off of the historical work, but also is a work in
00:53:46 **10 progress, as Dr. Scheuren said. The sampling is in effect**
11 interim. We get results and we evaluate the results to see
12 whether or not we have to sample more to learn more.
13 MR. WARSHAWSKY: Your Honor, that concludes my direct.
14 We would move the admission of Dr. Lasater's report.
00:54:07 **15** THE COURT: Well done, Mr. Warshawsky.
16 MR. WARSHAWSKY: Defendants' 159, Defendants' 162,
17 which was his work paper, and I believe that's it.
18 THE COURT: Cross-examine, Mr. Dorris?
19 MR. DORRIS: Your Honor, I would move to strike the
00:54:28 **20** testimony that he just provided about his opinions 3 and 4 as
21 being nothing but cumulative as of dealing with Mr. Scheuren's
22 work that Mr. Scheuren's already testified to extensively.
23 THE COURT: Motion is denied.
24 CROSS-EXAMINATION
00:54:46 **25** BY MR. DORRIS:

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00:54:59 **1 Q.** Mr. Lasater, opinion 3 that you just talked about indicates
2 that you believe that the methodology proposed for testing
3 transactions in the paper ledger era is reasonable.
4 A. Yes, sir.
5 Q. And that's the methodology proposed by Dr. Scheuren; is
6 that correct?
7 A. By OHTA and its plan, advised by Dr. Scheuren.
8 Q. Okay. And you've read the 2007 Plan.
9 A. I have.
00:55:13 **10 Q.** And what is your understanding of the methodology for the
11 testing in the paper ledger era?
12 A. My understanding is that those accounts that were open as
13 of 1994 that had paper, I've heard the word tail, trail. I'm
14 going to introduce a new word that makes more sense. It's the
00:55:34 **15 paper antecedent to the electronic era. That those accounts --**
16 THE COURT: Did you say antecedent?
17 THE WITNESS: Yes. That is transactions that preceded
18 the electronic era.
19 THE COURT: By golly there is still a pronunciation
00:55:50 **20** difference in this country. I'm glad to hear it.
21 MR. DORRIS: I don't think that's the way they say it
22 in Texas.
23 THE COURT: I thought we were getting homogenized,
24 but --
00:56:02 **25** THE WITNESS: Should I have said antecedent?

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1 THE COURT: I don't care how you say it, as long as I
2 understand it. I like antecedent.
3 All right. Mr. Dorris.
4 THE WITNESS: Yes, sir. So the transactions that were
00:56:20 **5** antecedent to those account reflections in the IRMS system would
6 be the accounts that were going to be sampled. Then those
7 accounts would be randomly selected across the regions. The
8 documents supporting the transactions, that is the ledgers for
9 those accounts, would be found, data would be hand-keyed into an
00:56:57 **10** electronic database, and then from that electronic database the
11 transactions would be randomly sampled to evaluate -- to provide
12 a base for the same kind of account reconciliation tool testing
13 that has been done for those transactions in the IRMS TFAS
14 system.
00:57:21 **15** BY MR. DORRIS:
16 Q. Okay. So specifically when you talk about methodology for
17 testing that you find to be reasonable, that's what you've just
18 described?
19 A. Yes, sir.
00:57:30 **20 Q.** You didn't see anything in the 2007 Plan that said how many
21 transactions would be in the random sample, though, did you?
22 A. No, sir.
23 Q. That hadn't been determined yet.
24 A. That's correct.
00:57:43 **25 Q.** So what you're saying is the methodology of creating these

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1 electronic ledgers out of the paper ledgers and then deciding
2 what to sample is what you're talking about as reasonable.
3 A. Well, the answer to that is yes, and also, given the
4 methods that are reflected in all of the NORC reports with
00:58:06 **5 respect to sample size reductions and the sophisticated methods**
6 that they use to get to lower sample size reductions, yes, sir.
7 Q. Okay. Now, let's talk about sample sizes for a minute,
8 because you're in a little bit of a different situation than
9 some witnesses, in that you came into court at the phase 1.5
00:58:28 **10** trial and testified about the 2003 plan, at least the sampling
11 portion of the 2003 plan. You remember that?
12 A. Yes, sir, I do.
13 Q. I can assure your testimony here will be much shorter.
14 A. Thank you very much.
00:58:44 **15 Q.** Now, on that 2003 plan, you testified previously that you
16 thought the sample size there was actually a little larger than
17 it needed to be, maybe twice as large as it needed to be. Do
18 you recall that?
19 A. I think I used the word superadequate.
00:59:00 **20 Q.** Well, you used that word superadequate with respect to
21 other sample sizes, but in essence what was going to be sampled
22 at that time, there was a sample from the electronic era and a
23 sample from the paper records era; is that correct?
24 A. Yes, sir.
00:59:19 **25 Q.** And there was going to be sampling of about 160,000

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1 transactions of \$5,000 and less from each era?
 2 **A. Yes, sir.**
 3 **Q.** And there was going to be a certainty stratum in excess of
 4 5,000?
 00:59:33 5 **A. Yes, sir.**
 6 **Q.** In other words, all of those transactions were going to be
 7 sampled, correct?
 8 **A. Yes, sir.**
 9 **Q.** But just with respect to -- and you thought that the 5,000
 00:59:41 10 cutoff was a reasonable cutoff, correct?
 11 **A. Based on what we knew at the time, yes, sir.**
 12 **Q.** And so that you thought it was reasonable for OHTA to do a
 13 hundred percent of the transactions of \$5,000 and more in both
 14 the electronic and paper records era, correct?
 01:00:02 15 **A. Yes, sir.**
 16 **Q.** Now, with respect to those below \$5,000, you felt like that
 17 the sample size that they had selected, which was 160,000
 18 transactions in both eras, or a total of 320,000 transactions,
 19 was about twice as large as it really needed to be.
 01:00:23 20 **A. Based on what we knew at the time, yes, sir.**
 21 **Q.** I understand all of your testimony at that time was based
 22 on what you knew then.
 23 **A. Yes, sir.**
 24 **Q.** So you don't have to keep -- I'm trying to save you having
 01:00:33 25 to qualify it each time.

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1 **Q.** Right. So in other words, if you're getting something less
 2 than a zero error rate or close to zero error rate, you may have
 3 to increase the sample size, correct?
 4 **A. Correct.**
 01:02:26 5 **Q.** In fact, what happened in the LSA project, even though it's
 6 a much smaller sample size, they had an error rate above zero,
 7 didn't they?
 8 **A. They did.**
 9 **Q.** And they then decreased the sample size all the way from
 01:02:40 10 160 -- excuse me -- 160,000 transactions of a hundred thousand
 11 dollars and less to about 4,500 transactions, correct?
 12 **A. Yes, sir.**
 13 **Q.** So that in fact the error rate was actually a little higher
 14 than the hypothesis that had been used by you in your
 01:03:03 15 calculation as to what a reasonable sample size was in the 2003
 16 plan.
 17 **A. I'm not sure that that's quite correct. When I said near**
 18 **zero, I'm not sure -- we'd have to look back at the calculations**
 19 **that I had done, for instance, on a white board or on a pad and**
 01:03:24 20 **the exact testimony. But my belief was that NORC was using a**
 21 **higher and higher expectation of error than I was expecting, and**
 22 **that was part of my belief. What has transpired is an approach**
 23 **that uses stratification that --**
 24 MR. DORRIS: Your Honor, I believe the witness has
 01:03:48 25 gone on and is not answering the question I asked him. I don't

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1 **A. Very good.**
 2 **Q.** Okay. Now, so you were thinking -- in that number, then,
 3 you would say instead of 320,000 transactions \$5,000 and lower,
 4 they really only needed to do about 160,000 transactions of
 01:00:50 5 \$5,000 lower, at least at that time.
 6 **A. Yes, sir.**
 7 **Q.** And you testified that that was in part because you had
 8 looked at some of these other studies and you thought that
 9 their, NORC's and OHTA's anticipation of a near zero error rate
 01:01:09 10 was a reasonable hypothesis to select that sample size.
 11 **A. Yes, sir.**
 12 **Q.** So you were saying, I think they need to do 160,000
 13 transactions, since I think it's a reasonable hypothesis that
 14 they will not find any appreciable error.
 01:01:28 15 **A. With the caveat that as the sample proceeds, the ability to**
 16 **modify the sample size was always on the table.**
 17 **Q.** Right.
 18 **A. Up or down.**
 19 **Q.** Well, specifically the plan in 2003 only talked about an
 01:01:50 20 adaptive adjustment upwards, didn't it?
 21 **A. I don't recall that it was adaptive upwards. I think that**
 22 **the language there was intended to reassure the reader that if**
 23 **error rates were greater than what was expected, OHTA and the**
 24 **Bureau of Indian Affairs was willing to and expected to have to**
 01:02:14 25 **increase the sample size.**

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1 want to interrupt him without your permission.
 2 THE COURT: You just did.
 3 (Laughter)
 4 MR. DORRIS: Well, I was asking your permission.
 01:04:00 5 THE COURT: Finish your answer, Mr. Lasater.
 6 THE WITNESS: The NORC used an approach using
 7 stratification that is maybe the most sophisticated with respect
 8 to testing and accounting system that I've ever seen, and in the
 9 process of that with -- if you don't mind my using the term
 01:04:26 10 Monte Carlo simulations that were part of their sample size
 11 determinations and their random sampling, they have gotten the
 12 sample size down to an extremely small, reliable number.
 13 BY MR. DORRIS:
 14 **Q.** You're talking about NORC having gotten a sample size down
 01:04:47 15 to a very small number.
 16 **A. Yes, sir.**
 17 **Q.** Okay. But that small number you would agree is not a
 18 number that you were testifying to in 2003 as to what would be
 19 an adequate or a minimum sample size.
 01:05:01 20 **A. Using the approach that I understood was the one that they**
 21 **were going to use at the time, yes, sir.**
 22 **Q.** Now, with respect to -- you also talked about in your prior
 23 testimony steps that should be taken in terms of gathering
 24 third-party records. Do you recall that?
 01:05:22 25 **A. I do.**

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01:05:41 1 Q. And that someone that's trying to do a sample like this or
 2 do an exercise like this should not wait until the end to begin
 3 gathering third-party records, because it's standard practice to
 4 gather those type of records in this exercise. Do you recall
 5 that?
 6 A. It would be, yes, sir.
 7 Q. Now, with respect to the balances shown on any account
 8 statements, this sampling work is a sampling of transactions and
 9 not a sampling of accounts, correct?
 01:06:03 10 A. That is correct.
 11 Q. So that the sampling process that's undergoing does not
 12 result in arriving at accurate account balances or accounts,
 13 correct?
 14 A. I think we have to understand what the term result means.
 01:06:21 15 If you mean computationally from the sample extrapolation, the
 16 sample extrapolation does not result in account balance, account
 17 balance computations. What the sampling does is provide an
 18 extraordinarily large substantive test of the system that is
 19 tracking the transactions that, when added and subtracted from
 01:06:49 20 an existing balance, would cause that balance to be reliable
 21 across the time that the transaction tests were performed.
 22 Q. Okay. Now, I just want to make sure we're very clear. In
 23 what you just said, you said that would lead you -- that would
 24 give you an indication that the account balance was reliable.
 01:07:14 25 Actually being more precise, it would give you an indication
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1 correct balance, correct?
 2 A. That's not true, because in the tests of the transactions,
 3 let's remember what the transaction frame here is for the
 4 population that was tested. It is all of the debits and credits
 01:09:10 5 in the beneficiary accounts, and when a debit or credit was
 6 selected as part of the population that -- as part of the sample
 7 to be tested, that debit or credit, which could have included
 8 the initial credit to the account, was tested.
 9 And according to interviews that I've had with Ms. Herman
 01:09:32 10 since 2004, there have been initial balances tested during the
 11 sample frame that was part of the population that was subjected
 12 to sampling by NORC.
 13 Q. So you think that at least for some of the accounts opened
 14 in the electronic record era, there was a sample of opening
 01:09:54 15 balances that were tested?
 16 A. Those credits are exposed to the same testing as any other
 17 credit or debit.
 18 Q. But for those that are -- and I do say the word
 19 differently -- antecedent accounts, opening balances there were
 01:10:09 20 not and have not been tested to the best of your knowledge.
 21 A. That's correct.
 22 Q. Let's talk about one other aspect of the sample that you
 23 testified to in 2003, and one of the things you emphasized in
 24 your prior testimony that you like about the sample process for
 01:10:29 25 2003 was that there were going to be sample transactions from
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1 that the transactions that are recorded there are reliable.
 2 Correct?
 3 A. No, sir. What we're saying here is that this test that has
 4 been part of the LSA is a huge substantive -- and I use that
 01:07:33 5 term in an accountant's vernacular or an auditor's vernacular --
 6 a substantive test of transactions that are informing us about
 7 the quality of the bookkeeping system that was used for the
 8 period in the sampling -- that is defined by the sampling
 9 population. It tells us about the system that was in place at
 01:08:01 10 the time. And the changes in the balances driven by the
 11 transactions are reliable changes across the population that is
 12 tested.
 13 Q. Okay. But, for example, you recall testifying that in
 14 order to determine accurate account balances, you have to start
 01:08:20 15 with an accurate opening balance. Do you remember that?
 16 A. Yes, sir.
 17 Q. And this transactions testing is not determining whether
 18 the opening balances are correct?
 19 A. That is correct.
 01:08:31 20 Q. So the sampling does not end up with verifying account
 21 balances for a single account, do they?
 22 A. I'm not sure. For those accounts that are opened during
 23 the testing period, the test of the system should inform the
 24 reliability of that balance.
 01:08:52 25 Q. But you're not even testing to see if it's open with the
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1 every agency included.
 2 A. Yes, sir.
 3 Q. In fact, there were going to be, I think, 400 in each era
 4 from each of the 90-plus agencies. You remember that?
 01:10:47 5 A. Yes, sir.
 6 Q. And now, under the present sampling framework, there are
 7 going to be agencies that don't even have a single transaction
 8 during the electronic record era that are included at all in the
 9 sampling?
 01:11:04 10 A. There's no question that the attribute -- and perhaps
 11 attribute is the wrong word here, but the characteristic of the
 12 2003 sampling effort had the benefit of looking into every one
 13 of the agencies.
 14 Q. Right. And that is not one of the attributes that the 2007
 01:11:27 15 Plan has, correct?
 16 A. That is correct.
 17 Q. And you have seen -- and you've indicated you talked to
 18 Ms. Herman. There has been indication -- there have been
 19 indications to you -- in fact, I think you even testified that
 01:11:39 20 there were differences with how the, even during the electronic
 21 records, how from agency to agency they may use the system.
 22 A. There are potential differences, yes, sir.
 23 MR. DORRIS: Your Honor, I don't have anything
 24 further.
 01:11:55 25 THE COURT: Thank you, sir. Mr. Warshawsky, do you
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1 have more?

2 MR. WARSHAWSKY: I have no more redirect, Your Honor.

3 THE COURT: All right. Thank you, Mr. Lasater.

4 You're excused.

01:12:07 5 (The witness steps down.)

6 MR. WARSHAWSKY: Your Honor, our next witness is

7 Dr. Abe Haspel. Unfortunately, as of 10 minutes ago he was

8 gridlocked at 7th Street, en route. So he may even be in the

9 building for all I know at this point.

01:12:21 10 THE COURT: I think I'll break early.

11 MR. WARSHAWSKY: Thank you, Your Honor.

12 (Recess from 2:48 p.m. to 3:06 p.m.)

13 MR. TAYLOR: Your Honor, my name is Dan Taylor, I was

14 introduced to the Court, but I have not been admitted *pro hac*

01:28:28 15 *vice*, and I just wanted to call that to the Court's attention.

16 I have been designated by my team to cross-examine the next

17 witness. So I think we --

18 THE COURT: Do you have a little water there? Just

19 pour a drop or two on Mr. Taylor's head.

01:28:45 20 (Laughter)

21 MR. TAYLOR: Thank you, Your Honor. With one other

22 comment. We received last night about 9:30 nine pages of

23 calculations. And to be quite honest with you, 9:30 last night

24 was after my bedtime. And so we really haven't had much time to

01:29:02 25 go -- I don't know how long the direct examination is going to

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1 **A. I provide oversight for the Office of Historical Trust**

2 **Accounting.**

3 **Q.** And you are an economist by training?

4 **A. I am. I have a Ph.D. in economics from the University of**

01:30:35 5 **Pennsylvania.**

6 **Q.** Dr. Haspel, have you done any analysis in regard to the

7 specific question this court asked, which was what does it all

8 add up to, through-put versus what can be proven?

9 **A. I have.**

01:30:49 10 **Q.** Did you come up with an answer?

11 **A. I came up with a range of answers.**

12 **Q.** Were they hard numbers or were they estimates?

13 **A. They were estimates.**

14 **Q.** What were the key assumptions that you used in making those

01:31:06 15 estimates?

16 **A. There were three key assumptions. The first deals with the**

17 **length of the time period which is considered, whether we are**

18 **looking at 1909 through 2006, 1938 through 2000, or some other**

19 **combination thereof.**

01:31:25 20 **Q.** And how does that affect the analysis?

21 **A. The percentage that is proven coverage depends upon what**

22 **the denominator of the percentage is, and the denominator is**

23 **affected by the time period considered.**

24 **Q.** What other assumptions, key assumptions?

01:31:46 25 **A. Whether we are talking about collections or credits to IIM**

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1 go, but I may need some more time to deal with these nine pages.

2 THE COURT: After your bedtime.

3 MR. TAYLOR: Yes, sir. In Forsyth County, North

4 Carolina we go to bed early.

01:29:17 5 THE COURT: How many home runs were hit in the top of

6 the sixth inning last night?

7 MR. TAYLOR: I don't know. I don't even know who

8 played.

9 THE COURT: Then I believe you.

01:29:25 10 (Laughter)

11 MR. STEMPLEWICZ: Good afternoon, Your Honor. Our

12 next witness is Abraham Haspel.

13 THE COURT: All right.

14 **ABRAHAM HASPEL, WITNESS FOR THE DEFENDANTS, SWORN**

01:29:56 15 **DIRECT EXAMINATION**

16 **BY MR. STEMPLEWICZ:**

17 **Q.** Would you please state your full name for the record.

18 **A. Abraham E. Haspel.**

19 **Q.** Spell your last name, please.

01:30:04 20 **A. H-A-S-P-E-L.**

21 **Q.** What is your current job position?

22 **A. I'm the assistant deputy secretary of the Department of the**

23 **Interior.**

24 **Q.** What if any role do you play in regard to the historical

01:30:18 25 accounting for individual Indian monies?

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1 **accounts.**

2 **Q.** And how did that work?

3 **A. Well, again, if one is talking about collections, that**

4 **tends to be a larger number than credits, and so if you're doing**

01:32:02 5 **a division between the amount of collections or the amount of**

6 **credits that are proven to be -- which are proven coverage, then**

7 **depending on what you use as the denominator changes the answer.**

8 **Q.** And any other assumptions?

9 **A. One other assumption. We had to come up with an estimate**

01:32:25 10 **for how much of the population that is in the October 25, 1994,**

11 **or after group actually extends back into the pre-1985 paper**

12 **ledger era of records.**

13 **Q.** And how did you go about making that estimation?

14 **A. We assumed three possible extensions, a 15-year life,**

01:32:58 15 **25-year life, and 35-year life.**

16 **Q.** And those would be life spans of the accounts?

17 **A. Yes, that would be.**

18 **Q.** And how would that affect the analysis?

19 **A. Well, the shorter the life, the less of the collections**

01:33:11 20 **during the pre-1985 period that would be captured by the**

21 **accounts open on or after October 25, 1994.**

22 **Q.** Now, you say you came up with a range of estimates. Could

23 we see Defendants' Exhibit 365, please.

24 MR. TAYLOR: If Your Honor please, my objection would

01:33:32 25 be that sounds an awful lot to be like expert testimony. And

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1 we're about to hear one or more expert opinions, and I wanted to
 2 lodge that objection.
 3 THE COURT: All right. I understand the objection.
 4 I'm going to let him say what he did. All right?
 01:34:05 5 MR. TAYLOR: Yes, sir.
 6 THE COURT: What he did was make an estimate. Go
 7 ahead.
 8 BY MR. STEMPLEWICZ:
 9 Q. Do you see there on the screen in front of you what's been
 01:34:14 10 marked for identification as Defendants' Exhibit 365?
 11 A. I do.
 12 Q. Can you identify that, please?
 13 A. Yes. That's the first page of the exhibit that I prepared
 14 with some assistance to identify what the proven coverage would
 01:34:31 15 be.
 16 Q. You see there on that page there are two large boxes.
 17 Could you explain what those boxes are, A and B?
 18 A. Sure. Box A refers to the estimate using the collections,
 19 and box B refers to estimates using credits.
 01:34:56 20 Q. And within each box, we have a number of columns. The
 21 first on the left, starting from the left, is period of time?
 22 A. Yes. That indicates the various breakdowns in terms of
 23 time periods that we considered and were able to come up with
 24 collections and/or credit estimates.
 01:35:15 25 Q. And how did you come up with those time periods?
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1 dollars for which we have done accuracy testing or completeness
 2 testing. So the third column are the dollars which we have
 3 undertaken transaction reconciliation for, either the
 4 high-dollar, full transaction-by-transaction accounting, or the
 01:37:55 5 sample in the litigation support accounting project.
 6 And if you could scroll down to the bottom of this page
 7 you'll see the list of what goes into that calculation. The
 8 \$248 million of litigation support, high dollars, \$1.7 billion
 9 of litigation support sample credits. Go back up.
 01:38:22 10 The interest recalculation is all the interest transactions
 11 in the population that we considered in the 1985 to 2000 period,
 12 for example, are being subjected to a recalculation where we are
 13 checking and redoing the calculation using the interest factors
 14 that we've been given, and looking for differences.
 01:38:53 15 And so as a result -- and then we were applying the same
 16 sort of expectation into what's known as the paper tail of the
 17 accounts that were opened on or after October 25, 1994, and we
 18 estimate that that together will lead to this result.
 19 MR. STEMPLEWICZ: Your Honor, if it would assist, I do
 01:39:15 20 have paper copies of these if you'd like to have them.
 21 THE COURT: Yes, thank you. You don't have an extra
 22 one for my law clerk over here, do you?
 23 MR. STEMPLEWICZ: Yes, I do, Your Honor. May I
 24 approach?
 01:39:33 25 THE COURT: Yes.
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1 A. Well, starting with the third one, the 1985 to 2000 period
 2 is the electronic time period that is captured by the 2000 plan.
 3 The pre-1985 period, we used the 1938 break point because of the
 4 statutory language dealing with funds invested pursuant to the
 01:35:40 5 act of June 24, 1938. And so we have a 1909 to 1937 portion and
 6 a 1938 to 1984 portion, and then we added a last portion, which
 7 would be the post 2000, which would be 2001 to today.
 8 Q. As far as time periods are concerned, this first page, the
 9 scenarios here, if you will, A and B, they represent the longest
 01:36:12 10 time period that you looked at.
 11 A. Yes.
 12 Q. The next column is total collections excluding tribal IIM.
 13 And where did those numbers come from?
 14 A. They came from, I believe it's already an exhibit here. A
 01:36:32 15 set of estimates that included numbers coming from the June --
 16 July 2, 2002 plan, which showed what the collections were from
 17 '72 through today, those came off of systems, and there were
 18 estimates from 1971 back to 1909.
 19 Q. And in the middle column, proven by transaction
 01:37:03 20 reconciliation testing and interest recalculation, could you
 21 explain that, please?
 22 A. We consider proven --
 23 THE COURT: Could we blow this up to the extent that
 24 it's possible on this screen? It's very small.
 01:37:26 25 THE WITNESS: We consider proven coverage to be those
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1 BY MR. STEMPLEWICZ:
 2 Q. Now, I think the next column over, heading from left to
 3 right, is proven by DCV only. Could you explain that, please?
 4 A. Yes. I believe the Court has heard from Michelle Herman,
 01:40:02 5 who described the DCV process. These are the dollars which have
 6 been -- to which that process has been applied.
 7 Q. And then the far right column, what is that?
 8 A. It's simply the sum of the two columns previous, the third
 9 and the fourth.
 01:40:22 10 Q. If you could go up to the very top of the page, the caption
 11 there, what does that short paragraph there mean?
 12 A. Okay. The 15-year life span assumption leads to a
 13 different value in the third column, second cell, the 1,124. If
 14 you were to go to your next page, you would see that's different
 01:40:56 15 because of the 25-year assumption. It increases to 1,757. As
 16 the account gets older, longer, it captures more money from the
 17 pre-1985 period.
 18 Q. So just to be clear, page 2, all the assumptions on page 1
 19 are the same except the assumed or estimated average life span
 01:41:21 20 goes from 15 years to 25.
 21 A. That's correct.
 22 THE COURT: Because the reconciliation testing process
 23 reaches back through old documents?
 24 THE WITNESS: The process does do that, but it
 01:41:33 25 actually goes back even further with a 25-year life than it
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1 would with a 15-year life.
 2 THE COURT: Yes. And back further for a 35-year life.
 3 THE WITNESS: Correct.
 4 BY MR. STEMPLEWICZ:
 01:41:46 5 Q. And that would be page 3, correct?
 6 A. Correct.
 7 Q. Now, would you go to page 4 of this exhibit, please. Could
 8 you explain to the Court how the analysis changes for this set
 9 of scenarios?
 01:42:02 10 A. Okay. Page 4, 5 and 6 all deal with the period covered by
 11 the 2007 Plan. That plan does not include the pre-1938 period,
 12 nor the post-2000 period. So it would change the amount of
 13 collections which would be, and/or credits in the denominator
 14 when one captured the amount that one would actually calculate
 01:42:31 15 the coverage with.
 16 Q. And if you would go to -- and then explain again pages 5
 17 and 6, how they vary from 4.
 18 A. Page 4 is 15 years and page 5 is 25 years and page 6 is 35
 19 years. And as the Judge indicated, that brings us a somewhat
 01:42:56 20 higher value for the pre-'85 period.
 21 Q. How did you come to select the 15, 25 and 35-year averages?
 22 A. Well, we looked at, for example, the five named plaintiffs
 23 and their predecessor accounts and were able to calculate that
 24 those accounts on average were open for 33.8 years, and we
 01:43:23 25 looked at some others, and these seemed to be values that would

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1 Q. Could we please see Defendants' Exhibit 98, please. If we
 2 could zoom in on that a little bit too, that would be helpful.
 3 Can you please identify that page of Exhibit 98?
 4 A. Yes. This is a schematic or flowchart that describes the
 01:46:15 5 overarching process we would need to go through in order to
 6 provide statements of accounts to all account holders between
 7 the year 1909 and 2006.
 8 Q. And if we could go to the second page of that exhibit. And
 9 try to -- there we go. If we could zoom in -- well, first
 01:46:42 10 explain what that exhibit is.
 11 A. This exhibit indicates cost estimates for each of the steps
 12 or the boxes that were highlighted in the past schematic.
 13 Q. Could we zoom in on the box itself. There are a number of
 14 cost items listed there. Which ones -- could you go through
 01:47:11 15 with us the first of the most significant ones?
 16 A. There are three very significant steps which drive the
 17 cost. The first is the cost to image and code all the boxes of
 18 ledgers, probates, financial documents, any of the documentation
 19 we would need in order to do the accounting. We estimate that
 01:47:34 20 there are about 330 million pages that would be involved in
 21 this.
 22 Q. Could we go to the third page of the exhibit. And is this
 23 the imaging and coding process you're referring to?
 24 A. Yes. Now, I'm not going to go through all the steps, but
 01:48:01 25 basically in a box there are about 2,300 pages, and we believe

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1 span the range on average, or which would allow us to come up
 2 with estimates for the number of accounts. And we came up with
 3 account numbers cumulatively over time that range from about
 4 491,000 to 645,000 using these numbers, and that's within the
 01:43:43 5 ballpark, we think, of what the real answer might be.
 6 Q. Going to page 7, please, in this exhibit, can you explain
 7 how the analysis varies for pages 7, 8 and 9?
 8 A. Yes. There are two differences here. This does not
 9 include the pre-1938 period, but it does include the 2001
 01:44:15 10 through 2006 period. It also takes our concept of proven, which
 11 includes both, as I said, the accuracy and the completeness
 12 tests, and moves some of the money in the 2001 to 2006 from
 13 being proven by completeness only to being proven by accuracy.
 14 Without moving it to the accuracy column, we would be
 01:44:44 15 unable to issue a historical statement of account accompanied by
 16 an accuracy statement. So this movement in the coverage change
 17 is a result of both a slightly smaller amount of money in the
 18 collection and credits, but also recognizing that with this work
 19 we would be able to actually send historical statements of
 01:45:10 20 accounts to account holders through the current time.
 21 Q. Now, as a result of the Court also asking a question about
 22 cost, namely the cost to do the work that is not included within
 23 the scope of the 2007 Plan, did you have occasion to do an
 24 analysis in that regard?
 01:45:41 25 A. I did.

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1 we need to do about 144,200 boxes, and that's how we arrived at
 2 the 330 million page estimate.
 3 And each of these steps involve costs. And to do imaging
 4 code a page, the average would be about \$2.30. So 330 million
 01:48:30 5 pages at \$2.30 leads to the estimate that you saw on the table.
 6 Q. Could we go back to the table, page 2. And again, enlarge
 7 the table only. Now, could you discuss what the next major cost
 8 driver in your estimation is?
 9 A. The next major step would be step 8, to digitize the
 01:48:59 10 remaining transactions.
 11 Q. Okay. And is that process described on page 4?
 12 A. It is.
 13 Q. What's the cost element there?
 14 A. We estimate that we would have to digitize 370 million
 01:49:26 15 lines of records, and estimate that each line would cost \$1.65.
 16 Again, when you do the multiplication, you get the product.
 17 Q. And back to page 2, the table.
 18 A. The third major and largest is step 11, the linking of the
 19 predecessor accounts with the successor accounts.
 01:50:05 20 Q. Can we go to page 7, please. And is that the process there
 21 that you mentioned?
 22 A. This is the process that accountants would have to go
 23 through to effectively tie the accounts together from the past
 24 to the current period. It's a complicated process. We believe
 01:50:31 25 on average it would take an accountant about two days to do each

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1 of the accounts. We are assuming a modest \$150 an hour for the
 2 accountants' time, so each one of the accounts would cost --
 3 THE COURT: I wish you could do it with judges.
 4 THE WITNESS: I wish you could do it with civil
 01:50:52 5 servants. \$2,400 per account, and as I mentioned, there are
 6 somewhere between 491,000 and 645,000 accounts, and that leads
 7 to those billion dollar estimates.
 8 BY MR. STEMPLEWICZ:
 9 Q. This linkage step you're discussing right now, is this an
 01:51:09 10 element of the current plan, the 2007 Plan?
 11 A. No, it is not.
 12 Q. Why is it important to have it here but not there?
 13 A. Well, in this case, we need to do the linkage for two
 14 reasons. One is to figure out who to in fact give these
 01:51:27 15 statements to, and secondly, to be able to assure that the
 16 amounts that transferred from a closed account moved properly
 17 into the next successor account, from that successor account
 18 into the next successor account, until it finally reached the
 19 current successor account.
 01:51:44 20 Q. And the problem here of knowing to whom to give the account
 21 statement is due to age, is that --
 22 A. Beyond age, at this point until we go into the paper
 23 records, we don't know which accounts there even are.
 24 Q. Could we go to Defendants' Exhibit 97, please. And if you
 01:52:14 25 could highlight just the first quarter of that page or so.

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1 A. Yes, they are.
 2 Q. Could we jump to page 7, please. I'm sorry. To page 5.
 3 And explain the difference between this model and the others.
 4 A. Page 5 is still the same model but using 35 years.
 01:54:26 5 Q. Sorry. Yes. You're right. I was getting confused there.
 6 Page 7, please. Could you explain that?
 7 A. Whereas the first three that we discussed were land-based,
 8 these are estimates for judgments and per capita accounts, and
 9 here we assumed a much shorter time period, one of every five
 01:54:57 10 accounts closed, and that's because of the nature of these
 11 accounts.
 12 Q. And finally, at page -- or at least next at page 9, could
 13 you take a look at that?
 14 A. Here we assumed that it was one in every 10. So 10 percent
 01:55:13 15 as opposed to the previous, which was 20 percent closing.
 16 Q. And page 11 is?
 17 A. Would be the total at the bottom. I'm sorry. Page 11 is
 18 one in every 15 years.
 19 Q. Why is there a different analysis for land-based versus
 01:55:33 20 judgment and per capita?
 21 A. Well, we assumed that the land-based continue to generate
 22 funds over time, and depend on closure due to death, and here
 23 instead we know that per capita accounts are when a tribe, for
 24 example, is making a payment to each of their members, the
 01:56:00 25 length of time that that account stays open is not very long.

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1 Dr. Haspel, what is Exhibit 97?
 2 A. These are the estimates made by NORC of how many cumulative
 3 accounts have existed over time, making assumptions about
 4 whether one in every 15 accounts closes annually. That's the
 01:52:39 5 15-year life span, that assumption. It is based on about nine
 6 years of data that was reported by BIA over time, with the
 7 assumption being used to fit the data between the years. That's
 8 how we get the cumulative accounts.
 9 Q. Could we go down to the bottom of the next page of this
 01:53:03 10 exhibit. And you see the totals there?
 11 A. Mm-hmm.
 12 Q. Could you explain those lines?
 13 A. Sure. In order, depending upon whether we were going to do
 14 pre-1938 accounts or not, we did the analysis with and without
 01:53:22 15 those years. So the difference in the total of 643,424, for
 16 example, which is all accounts from the inception of the
 17 government's ability to take monies in statutorily, and then
 18 starting with 1938 is 619,804 accounts. Again, these are
 19 estimates.
 01:53:47 20 Q. All right. Could we go to the top of the third page of
 21 this exhibit. This is model 2. What does that mean?
 22 A. The difference here is that we're assuming that one account
 23 in every 25 closes annually, so about 4 percent of the accounts
 24 would close each year.
 01:54:07 25 Q. Now, these are land-based accounts, correct?

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1 So once they're paid it tends to be closed and we move on.
 2 So the idea that some of these would stay open very long is
 3 not usual; it becomes whereabouts unknown and other reasons why
 4 we might not be able to get these to them. So five years to 10
 01:56:22 5 years to 15 years was more reasonable than 15 to 25 to 35.
 6 Q. Could we go to Defendants' Exhibit 101, please. Can you
 7 identify that exhibit, Dr. Haspel?
 8 A. Yes. This is an illustration that I put together to
 9 demonstrate simply what is happening in these accounts.
 01:56:51 10 Q. What is the purpose of the estimation of numbers of
 11 accounts? How does that fit into the other analyses that you've
 12 done?
 13 A. Many of the costs are costs per account, and since we do
 14 not have a hard number for what has occurred prior to 1985,
 01:57:13 15 until we go into the boxes and actually see, we have to come up
 16 with an estimate of what might have preceded the electronic
 17 period. And we do know that accounts close, accounts open,
 18 accounts close, accounts open, so this is a way to think about
 19 what is going on in these accounts.
 01:57:38 20 Q. Could we go back to 98. Do you recall this exhibit,
 21 Dr. Haspel, the overall process?
 22 A. I do.
 23 Q. If we could go to the ninth page of this exhibit. What
 24 does this depict?
 01:58:12 25 A. The previous one was land-based only. This is a total

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01:58:35 **1 estimate for both land-based and the judgment and per capita**
2 accounts. The third column, which says "cost estimate,
3 land-based," is simply the total column from the last chart we
4 looked at.
5 Q. All the way over on the right-hand side, at the very bottom
6 of that page, there is a range from approximately 2.9 billion to
7 3.4 billion. Could you explain what those bottom line numbers
8 are?
9 A. That represents our estimate of what it would cost to
01:58:55 **10 provide historical statements of accounts for all IIM accounts**
11 that there ever were between 1909 and 2006.
12 Q. Could we go to Defendants' Exhibit 99, please. Can you
13 identify that, please?
14 A. I can. This is a chart which identifies the cost estimates
01:59:34 **15 beginning in 1909, and also beginning in 1938, indicating the**
16 difference as to what it would cost to begin later.
17 Q. Next I want to go to Defendants' Exhibit 100. What does
18 this exhibit represent?
19 A. This represents our estimate of the cost of undertaking the
02:00:17 **20 structural injunction the second time it was issued.**
21 Q. And if we could go to the top of the page, it indicates it
22 was created in March 2005. Is that your recollection of when
23 this document was created?
24 A. That would be my recollection. We made some adjustments to
02:00:40 **25 the one we had done after the first structural injunction.**

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1 A. These were the President's budget requests.
2 Q. Okay. Now, did Interior request those?
3 A. Interior requested 135 million in each instance, to the
4 best of my recollection.
02:03:21 **5 Q.** Each of the exhibits you've seen today, Dr. Haspel,
6 Defendants' Exhibits 97 through 102 and the first exhibit, which
7 was actually Exhibit 365, did you have any involvement in the
8 preparation of those exhibits or was it done under your
9 supervision?
02:03:41 **10 A.** Both, actually. I supervised and was involved in.
11 Q. Do they accurately reflect to the best of your knowledge
12 the information contained therein?
13 A. Absolutely.
14 MR. STEMPLEWICZ: Your Honor, at this time we move for
02:03:57 **15** admission of Defendants' Exhibits 97 through 102 and 365.
16 THE COURT: 97 through 102 and 365 will be received.
17 MR. STEMPLEWICZ: Thank you, Your Honor. I have no
18 further questions at this time.
19 (Defendant Exhibit Nos. 97
20 through 102 and 365
21 received into evidence.)
22 MR. TAYLOR: Your Honor, we do have some things that
23 were updated last night. I would like to reserve my right to
24 object.
02:04:20 **25** THE COURT: All right. Do you have any cross?
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02:01:12 **1 Q.** Could we go to the second page of this exhibit. Now, the
2 second page, what does that reflect? Does that refer back to
3 one of the line items on the first page?
4 A. Yes, it does. I don't remember how we did this, but it
5 deals with how we would go about locating and imaging and coding
6 documents.
7 Q. To your knowledge, does the remainder of this exhibit, DX
8 100, reflect essentially the supporting analysis behind that
9 table in the first page?
02:01:29 **10 A.** Yes. These are the backups to each of the elements that
11 were in the first table that you showed.
12 Q. To your knowledge, have any of the cost elements reflected
13 on the first page gone down since this was created?
14 A. No, not to my knowledge. If anything, they've gone up.
02:01:49 **15 Q.** If we could finally go to Defendants' Exhibit 102. And I
16 believe we've seen this exhibit before in the trial, but could
17 you explain what those statistics represent?
18 A. These represent the budget requests made by the President
19 and then the amount that was appropriated by the Congress in
02:02:26 **20 each of the fiscal years on the left, as well as the sums of**
21 monies that we actually obligated.
22 Q. And if you look there at fiscal year 2004, the budget
23 request was 130, and then in 2005 it was 109.4, and in 2006, 135
24 million. Do you have any recollection of what the actual budget
02:03:00 **25** requests were for those periods?

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1 MR. TAYLOR: Yes, sir, I do. I'm well rested.
2 THE COURT: You're well rested.
3 MR. TAYLOR: Yes, sir.
4 THE COURT: Before you start, I have sort of a bemused
02:04:34 **5** question. When I look at these costs of imaging all of these
6 documents, taking them out of their boxes, putting them back in
7 their boxes, imaging them, digitizing them, rekeying them and
8 then putting them through the computer matching thing, has
9 anybody ever to your knowledge considered whether or not it
02:04:57 **10** might be cheaper to do this the old-fashioned way, with guys
11 with green eyeshades like Bob Cratchit just walking around
12 pulling documents out of boxes? In other words, has anybody
13 thought about whether this computer age has really made this any
14 cheaper?
02:05:12 **15** THE WITNESS: We believe it has.
16 THE COURT: I know you believe it has. But has
17 anybody subjected it to the level of analysis that you have with
18 all these papers?
19 THE WITNESS: No, not directly.
02:05:26 **20** THE COURT: I didn't think so. It's a new article of
21 faith, computers can do everything. Proceed, sir.
22 MR. TAYLOR: Thank you, Your Honor.
23 CROSS-EXAMINATION
24 BY MR. TAYLOR:
02:05:37 **25 Q.** Dr. Haspel, my name is Dan Taylor and I'm going to ask you

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1 some questions. I understand that you have been part of the
 2 oversight team on this project, if you will, the Cobell
 3 litigation, for a number of years; is that correct?
 4 **A. That's correct.**
 02:05:49 5 **Q.** And how long has that been, sir?
 6 **A. Five years.**
 7 **Q.** Five years. And I received last night what was identified
 8 today as Exhibit DX-365. Is that an exhibit that you created?
 9 **A. I participated in its creation, yes, sir.**
 02:06:06 10 **Q.** If we could just put the first page. If you would do that
 11 for me, please.
 12 Sir, when did you start working on Exhibit 365?
 13 **A. The exhibit itself, probably last week at some point.**
 14 **Q.** Can you recall when last week, sir?
 02:06:28 15 **A. No, not directly.**
 16 **Q.** Do you recall when you were first advised to create what
 17 has become Exhibit 365?
 18 **A. Well, we've been actually working on the answer to this**
 19 **since the Court asked the question. But many of the people that**
 02:06:45 20 **were involved were busy working on other aspects of this as**
 21 **well, and we needed to in fact wait until the DCV work, the**
 22 **report that was done on September 30 was completed, so we could**
 23 **begin calculating those that were proven by the DCV only.**
 24 **We also needed to be able to characterize our way of**
 02:07:11 25 **thinking about this as simply as possible. And so there were a**

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1 **Q.** At at least a high altitude?
 2 **A. Yes.**
 3 **Q.** And basically, that work, would you not agree, really was
 4 not a reconciliation of tractions, was it?
 5 **A. I would not agree.**
 6 **Q.** You would not agree, okay. Well, tell me, sir, if it was
 7 anything more, anything more than selecting a number of accounts
 8 and then selecting a number of transactions from that selected
 9 group of accounts and simply going back to see if there were
 02:09:16 10 existing records of some sort within the DOI system to support
 11 that ledger entry. Is there anything more than that?
 12 **A. I believe it's more than that.**
 13 **Q.** What more than that was it, sir?
 14 **A. They selected through a statistical design the accounts.**
 02:09:34 15 **From there they did select the transactions that would represent**
 16 **the type of activity that occurred within the population. There**
 17 **was no knowledge when they had selected that, whether or not we**
 18 **had the records to reconcile those particular transactions. As**
 19 **it turns out, we had 99.8 percent of the records necessary to**
 02:09:59 20 **reconcile those transactions. What they found was very small**
 21 **errors.**
 22 **Q.** Again, basically there was a ledger entry that had a
 23 number, and you went back to the DOI records and found a
 24 document that supported that entry on the ledger entry. That's
 02:10:15 25 all you did, isn't it?

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1 **couple of different versions that we tried to put together, and**
 2 **this is ultimately what we came up with.**
 3 **Q.** And when did you complete Exhibit 365?
 4 **A. Yesterday.**
 02:07:26 5 **Q.** Yesterday. And what part of this was dependent on the work
 6 from FTI?
 7 **A. If you look at it, the fourth column, and as a result,**
 8 **being able to calculate the part that would also be left in**
 9 **terms of the being able to then calculate the total column, the**
 02:07:50 10 **fifth column.**
 11 **Q.** Did you receive a draft copy of the data completeness
 12 validation of materials prior to the final copy?
 13 **A. I didn't.**
 14 **Q.** You did not? Did anyone on your staff, sir?
 02:08:02 15 **A. I don't know the answer to that.**
 16 **Q.** And I believe you indicated that this included a time
 17 period from 1909, and my recollection and memory may not be
 18 correct in this, but I believe you said to today?
 19 **A. Well, the end of 2006.**
 02:08:21 20 **Q.** Okay. Thank you. I take it, then, in your oversight role
 21 that you have been briefed from time to time on the activities
 22 of the various contractors at Department of Interior of the
 23 Cobell project? So you're familiar with the sampling work that
 24 has been done by NORC, are you not?
 02:08:40 25 **A. I am.**

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1 **A. Well, we went -- it's a little bit more than supporting**
 2 **that. We went to make sure it was in fact accurate by looking**
 3 **at ownership records -- in other words, you went from the**
 4 **transaction to what it was on, say, a journal voucher, back to**
 5 **the collection, back to the lease from which the payment was**
 6 **made, back to the title to make sure that the ownership was**
 7 **proper, and then moving that interest forward to assure**
 8 **ourselves that in fact the proper payment was posted to the**
 9 **account, not simply finding that oh, gee, the account, that this**
 02:10:52 10 **payment was made to it.**
 11 **Q.** Sir, in your review of any of this work, have you ever seen
 12 any record supporting any ledger entry that was part of the
 13 sampling process that came from a third party?
 14 **A. Third party, no.**
 02:11:04 15 **Q.** Thank you. Now, you're familiar with the work that was
 16 done as part of the data completeness validation as well, are
 17 you not?
 18 **A. I'm familiar with it.**
 19 **Q.** And basically all that was done there was going back to DOI
 02:11:17 20 records and filling in information that was present and existing
 21 in DOI records, but wasn't on the electronic database; isn't
 22 that right, sir?
 23 **A. They looked for contemporaneous support to make whole the**
 24 **account, yes.**
 02:11:32 25 **Q.** But they did not look outside of DOI.

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02:11:52 **1 A. No, we did not go to third parties if we had records that**
2 would in fact demonstrate the completeness.
3 Q. And, sir, have you seen any record from any third party
4 used as part of the data completeness validation test?
5 A. I'm not familiar with any.
6 Q. Okay, sir. And as part of the work that has been -- excuse
7 me. Let me strike that. The work that has been done so far,
8 approximately \$150 million has been spent?
9 A. 127.
02:12:08 **10 Q.** 127, okay. And that's been essentially massaging the
11 records of DOI.
12 A. It has been used to do the work that we have done to date.
13 Q. Using the records of DOI and not using anyone else's
14 records or getting any records from anybody else?
02:12:27 **15 A. We have been using the records that are in the NARA,**
16 National Archives, in our field offices that have been retired
17 by our agencies that are now at Lenexa, and at Treasury and
18 other places, yes. So they're federal government, primarily.
19 Q. Yes, sir. And I don't want the judge to get on me for
02:12:48 **20** quibbling with you, but again, you have not relied on any
21 records other than those records which were DOI records?
22 A. They were federal records, yes.
23 Q. I'm sorry, yes, sir. Thank you. I'll take that for sure.
24 So wouldn't it be safe to say that everything that's been done
02:13:07 **25** to date, the accuracy of everything that's been done to date is
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1 in the past, that there were no records to support, when in fact
2 there are now records to support them. And they're historical
3 records, they're not new records.
4 Q. Okay, sir. I'm not going to quibble with you further. I
02:14:53 **5** think we're where we need to be on that. How much money, sir,
6 has been spent collecting documents for third parties who
7 purchased oil and gas rights from IIM properties? The answer's
8 none?
9 A. We spent a little bit of money working on an approach that,
02:15:15 **10 should we find a large need or a need at all for third-party**
11 records, we would be in a position to go forward and do that. I
12 don't know how much was spent on that, but it probably wasn't a
13 lot, and directly answering your question, probably very little.
14 Q. Well, in fact, no third-party records have been obtained?
02:15:35 **15 A. None have been obtained that I'm aware of.**
16 Q. And how much money has been expended collecting documents
17 from third parties who purchased timber rights from IIM
18 properties?
19 A. Well, none. I'll stipulate we don't have any third-party
02:15:51 **20 records.**
21 Q. Then I won't beat on you. The answer would be the same for
22 grazing lots. Okay. Thank you.
23 In your capacity, sir, have you ever overseen or been
24 responsible for an audit?
02:16:11 **25 A. Not directly.**
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1 premised on the accuracy of DOI and federal government records?
2 A. Yes. 100 years worth of different people who did the
3 record keeping over that time period, and the different people,
4 the land records were different people than the ones who
02:13:27 **5 actually put the amount on the ledger and made the disbursement,**
6 the people who collected it are different than the people who
7 disbursed it. Yes. Those were all federal employees doing that
8 and we counted on their records.
9 Q. Yes, sir. And basically, and maybe I'm just a simple guy,
02:13:46 **10** but maybe it's sort of the elephant in the courtroom that no one
11 has identified quite yet, is the fact that the government is
12 using its own records to say that its records are reliable, and
13 the plaintiffs are using government's records, reports,
14 Congress, audits or whatever, to say that they're not reliable.
02:14:04 **15** Would you agree with that?
16 A. I think there's a lot of conventional wisdom that's wrong.
17 Q. As in the latter set of government documents are not
18 correct, but the former set of government documents are correct?
19 Is that what you're saying, sir?
02:14:21 **20 A. No. I think a lot of people assumed that the records did**
21 not exist, and therefore there was no basis on which to make
22 these conclusions. We've now been able to show that the records
23 do exist, we've been able to index them, find records that both
24 sides are looking for, and being able to make statements that --
02:14:37 **25 and correct statements that may have been erroneously concluded**
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1 Q. So have you ever had auditors report to you?
2 A. I've had a lot of jobs. Not directly.
3 Q. Okay. Well, are you aware of the fact that one of the
4 things that auditors routinely do in validating records and
02:16:43 **5** controls is to seek third-party confirmations with regard to
6 such things as accounts receivable?
7 A. No.
8 Q. You're not aware of that?
9 A. I'm not aware of that.
02:16:50 **10 Q.** Okay. You're not aware that auditors regularly seek
11 third-party confirmations with regards to accounts payable?
12 A. No, I'm not aware of that.
13 Q. Or with regards to the status of sale transactions? You're
14 not aware of that either?
02:17:05 **15 A. No.**
16 Q. Sir, don't you think -- would it be fair to say that one of
17 the objectives of the Department of Interior in this exercise
18 would be able to render a fair and accurate accounting to my
19 clients?
02:17:33 **20 A. I think that's what we're doing.**
21 Q. Right, sir. And don't you think it would have been easier
22 and more direct in that process, and the government could have
23 done a better job by obtaining as many third-party records as
24 possible as soon as possible, and used those records to match up
02:17:55 **25** against the government records, to see whether or not the system
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1 was reliable from a perspective of third parties and the
 2 government?
 3 MR. STEMPLEWICZ: Your Honor, I'm going to object at
 4 this point as being beyond the scope of direct.
 02:18:07 5 THE COURT: Sustained.
 6 BY MR. TAYLOR:
 7 Q. Let me ask you just a question, if I could, sir, with
 8 regards to Exhibit 98-2, which is a corrected copy. And item
 9 No. 11 is closing link balances in predecessor accounts. I just
 02:18:31 10 want to understand that. Does that include going back and
 11 opening up or confirming the probate results?
 12 A. **It would be a full, restarting back with the original**
 13 **allottee, then we would be going all the way forward through**
 14 **this. Would we be opening probates? That's something for**
 02:18:55 15 **someone else to decide.**
 16 Q. But basically your intention would just hypothetically, if
 17 there was only one allottee back in the beginning of time, is to
 18 take that all the way forward and to make sure when an account
 19 was closed it did in fact at that point in time have a zero
 02:19:12 20 balance?
 21 A. **Well, it would have a balance that would then be**
 22 **transferred to another account.**
 23 Q. Understand. A zero balance after it transfers out to
 24 wherever it might have gone.
 02:19:24 25 A. **Yes.**

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1 Q. Do you know whether -- I think you answered this. Did I
 2 understand you correctly to say that at this point in time you
 3 don't even know whether that's possible?
 4 A. **Oh, I think it's possible, if we had to go back into all**
 02:19:44 5 **the accounts and start from the beginning and start tracing them**
 6 **through, we'd be able to, to the extent we have the records to**
 7 **do it, yes.**
 8 Q. Understand. Your answer is dependent upon the existence of
 9 records, and you as you sit here today don't know whether the
 02:20:00 10 records exist or don't exist. And I don't either.
 11 A. **Until we open all those boxes, no.**
 12 Q. Yes, sir.
 13 MR. TAYLOR: No further questions, Your Honor.
 14 THE COURT: Mr. Haspel, as I understand this \$3
 02:20:17 15 billion number, it would not include the cost of doing cadastral
 16 surveys.
 17 THE WITNESS: That's correct. We asked the Bureau of
 18 Land Management how much it would cost, and they gave me a \$1.1
 19 billion estimate.
 02:20:32 20 THE COURT: So that's another billion dollars. And it
 21 would not include the cost of trying to sort out, if it were
 22 deemed to be part of an accounting requirement, and that's a big
 23 if, but if it were required, it wouldn't include the cost of
 24 trying to find and trace direct payments.
 02:20:58 25 THE WITNESS: No, it does not.

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1 THE COURT: And it would not include the cost of
 2 trying to sort out, find and validate compact, contract tribal
 3 agreements.
 4 THE WITNESS: No.
 02:21:12 5 THE COURT: And of course it would not include the
 6 cost of trying to figure out what money was never collected or
 7 should have been collected.
 8 THE WITNESS: Absolutely not.
 9 THE COURT: And of course it would not include that
 02:21:27 10 part of this whole dispute that has come to be called a
 11 management issue, which is whether in fact oil and gas royalties
 12 were undervalued, grazing permits were sold cheap, or timber was
 13 sold cheap.
 14 THE WITNESS: That's correct. It's not included.
 02:21:49 15 THE COURT: And it wouldn't involve what has come to
 16 be known in my mind as the Gingold issue, which is what happens
 17 to the money inside the Department of Treasury and how it's
 18 invested and interest and so forth.
 19 THE WITNESS: No.
 02:22:10 20 THE COURT: Thank you, sir.
 21 REDIRECT EXAMINATION
 22 BY MR. STEMPLEWICZ:
 23 Q. Dr. Haspel, I wanted to follow up with one of the questions
 24 that His Honor asked you a little bit ago about the difference
 02:22:23 25 between the coding and imaging regime or way of proceeding and

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1 the method of doing everything by hand. Is there or have you
 2 done any analysis of whether you get more out of coding and
 3 imaging vis-a-vis doing the whole process by hand?
 4 A. **Well, the analysis we did do was whether or not we would**
 02:22:47 5 **search for the documents that we knew we needed to get, and then**
 6 **just image and code those, and the answer is it would cost just**
 7 **as much to find the limited set of documents as to image and**
 8 **code all the documents. And this way we imaged and coded all**
 9 **the documents, we could search electronically and even have**
 02:23:08 10 **those we weren't quite sure we needed at the point we were doing**
 11 **the searching.**
 12 MR. STEMPLEWICZ: Thank you.
 13 THE COURT: Reminds me of one more question, which is
 14 again just musing. One advantage of paper records that were
 02:23:28 15 created a hundred years ago is that you can find them and you
 16 can still read them.
 17 THE WITNESS: Yes.
 18 THE COURT: Is any thought being given in the design
 19 and conduct of this process that's going on now whether a
 02:23:38 20 hundred years from now anybody can figure out what those
 21 electrons mean?
 22 THE WITNESS: There is an ongoing federal project to
 23 figure out what we're going to do with federal records that are
 24 electronically generated. And one of the big concerns is that
 02:23:55 25 there are things called bit drop and other sorts of

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1 deterioration of our electronic records. So your concern is
 2 very valid.
 3 And the National Archives is at this point telling agencies
 4 that we have to refresh our electronic records every 10 years,
 02:24:15 5 which is an incredible cost. So I am sort of in your camp with
 6 paper may not be such a bad idea for those documents that you
 7 want to keep for a really long time. And so we'll see what NARA
 8 actually comes out with and instructs us to do.
 9 THE COURT: Thank you, sir. Anything more of this
 02:24:34 10 witness? Thank you -- yes, Mr. Kirschman? May we release
 11 Mr. Haspel?
 12 MR. KIRSCHMAN: Yes.
 13 (The witness steps down.)
 14 MR. KIRSCHMAN: Your Honor, the government has two
 02:24:46 15 more witnesses for its case-in-chief we intended to present. I
 16 have to tell you, though, that they're not here. The pace today
 17 went much faster than we anticipated.
 18 THE COURT: I warned you about this.
 19 MR. KIRSCHMAN: I know you did, Your Honor, and I
 02:24:58 20 apologize to the Court.
 21 THE COURT: All right. They'll be here tomorrow
 22 morning?
 23 MR. KIRSCHMAN: One will be. We're trying to locate
 24 the other, who is out of town right now, and I've not been able
 02:25:07 25 to locate him as I've stepped out since lunchtime, Your Honor.
 Bryan A. Wayne, RPR, CRR
 Official Court Reporter

1 I do want to mention that last witness. He's our last
 2 will-call witness. Ron Cymbor, he's a Treasury witness. As we
 3 grappled with the scope of the through-put issue as the Court
 4 wanted it addressed, we included Mr. Cymbor as a will-call,
 02:25:30 5 because, as you may recall from my opening, there was a short
 6 discussion on uncashed checks and the small percentage of checks
 7 that were not cashed.
 8 Given the Court's indications yesterday regarding
 9 Treasury's involvement, we are also contemplating whether that
 02:25:51 10 was within the scope of what the Court wanted to hear at this
 11 time.
 12 So our next witness is Ed Angel, the historian who will
 13 testify regarding documents related to through-put, the
 14 historical documents, and who also has provided an expert
 02:26:10 15 responsive report that we don't anticipate will change based on
 16 what a witness says. So as Dr. Scheuren did, we would present
 17 him in our case-in-chief because he's addressing both fact
 18 matters and a responsive matter. That leaves us with Ron
 19 Cymbor, as I'm trying to locate and have not --
 02:26:32 20 THE COURT: But your question to me is do I really
 21 want to hear him.
 22 MR. KIRSCHMAN: That is the question for you. Because
 23 if I do locate him, I certainly would appreciate the Court's
 24 guidance as to whether this is within the scope contemplated by
 02:26:44 25 the Court, talking about receipts and, on the other end,
 Bryan A. Wayne, RPR, CRR
 Official Court Reporter

1 disbursements. It would be short testimony related to
 2 Mr. Cymbor's work and the results of that work as it relates to
 3 following the history of these uncashed checks from 1991 through
 4 2005.
 02:27:03 5 He will be introducing a couple of exhibits and one of his
 6 own that summarizes these numbers. And I presented those to you
 7 in my opening.
 8 THE COURT: Well, I think in the interest of
 9 completeness I should hear him. It's not critical that I hear
 02:27:18 10 him now. I mean, we won't stop the world. If you can find him,
 11 find him. If you have to bring him back from vacation, we'll
 12 hear him later.
 13 MR. KIRSCHMAN: Okay. Your Honor, to that extent, I
 14 know he will be back on Monday morning and will be ready to
 02:27:33 15 testify.
 16 THE COURT: All right. Let's hear him on Monday
 17 morning and have the plaintiffs prepare to tee up a witness
 18 tomorrow. Are you ready to go with some witnesses?
 19 MR. HARPER: Your Honor, I'm afraid we are not ready
 02:27:46 20 to go by tomorrow. We were not expecting, in light of the two
 21 other will-calls, that we would have a witness available
 22 tomorrow. We can go back and find out, but the pace, as the
 23 government has stated, I think we're in accord on this notion,
 24 that it's gone a lot quicker than either side anticipated. I do
 02:28:09 25 have one other issue to raise.
 Bryan A. Wayne, RPR, CRR
 Official Court Reporter

1 THE COURT: I keep hearing this from lawyers.
 2 MR. HARPER: We will be ready on Monday.
 3 THE COURT: Just let me say one more time, estimate
 4 the time you think it's going to take and take about 50 percent
 02:28:25 5 off of it, if you're planning on bringing witnesses in here.
 6 Because as I think you have observed, I'm quite accustomed to
 7 sort of pole-vaulting over testimony and moving things along.
 8 So I expect to do that again and I think everybody ought to be
 9 on notice.
 02:28:55 10 It's only 4:00 on Wednesday and we're looking now at having
 11 one more witness this week, and that's -- and there are 30
 12 people in this room, and the transactional costs of that are too
 13 high for me. But see if you can find some witnesses to proceed
 14 with tomorrow. If you can't, I'll overlook it this time, but
 02:29:13 15 next week I really want witnesses lined up and ready to go,
 16 please.
 17 MR. HARPER: Thank you, Your Honor. We will make sure
 18 that we have sufficient witnesses next week. The one final
 19 issue that I have is that Dr. Angel is defendants' next witness.
 02:29:29 20 And I notified the Court regarding the missing pages. My
 21 understanding is that they're going to utilize a lot of those
 22 exhibits for tomorrow, and they still haven't supplied those
 23 exhibits, those missing pages. So before this kind of thing
 24 happens here and disturbs the examination, I just wanted to
 02:29:48 25 raise that issue with the Court. Thank you.
 Bryan A. Wayne, RPR, CRR
 Official Court Reporter

02:30:04

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THE COURT: All right. Well, it will be the same ground rule as before. If and to the extent you're prejudiced by bringing in anything late that you weren't prepared for, you'll have the opportunity to call him back when you are ready.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you. We're finished for the day.
(Proceedings adjourned at 4:06 p.m.)

* * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

BRYAN A. WAYNE

Bryan A. Wayne, RPR, CRR
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