

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 24, 2007  
: :  
DIRK KEMPTHORNE, Secretary :  
of the Interior, et al. :  
: :  
Defendants : AFTERNOON SESSION

TRANSCRIPT OF EVIDENTIARY HEARING  
DAY 9  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

1  
2 THE COURT: Okay. Mr. Dorris.  
3 MR. DORRIS: Thank you, Your Honor.  
4 (The witness resumes the stand.)  
00:00:03 5 DIRECT EXAMINATION (Continued)  
6 BY MR. DORRIS:  
7 Q. Mr. Pallais, final area. Defendants' Exhibit 2 is the  
8 responsive report from Ms. Caren Dunne, which is on the screen  
9 there. Do you see that?  
00:00:13 10 A. Yes.  
11 Q. Now, have you had an opportunity to review that report?  
12 A. Yes, I have.  
13 Q. And would you please explain what -- maybe this is your  
14 response to her response, but would you focus on what you've  
00:00:33 15 identified to be the key difference between -- major difference  
16 between where you are and what she talks about in her report.  
17 A. The major difference is that Ms. Dunne concludes that the  
18 opinions rendered by the various independent accountants, that  
19 is Arthur Andersen, Griffin, and KPMG, were not qualified. She  
00:01:08 20 seems to believe that they provided assurance that the financial  
21 statements were fairly presented, and that the accountants were  
22 able to apply tests to the balances that got around their  
23 problems with internal control.  
24 And as I read the reports, they explicitly say that they  
00:01:31 25 cannot give assurance on the financial statements because of the  
  
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1 limitations caused by the internal control problems, and they  
2 could not apply additional substantive procedures to get around  
3 the issue.  
4 Q. Okay.  
00:01:44 5 MR. DORRIS: Your Honor, I have no further questions,  
6 but I would move to admit his report, which is Plaintiffs'  
7 Exhibit 4283.  
8 THE COURT: 4283 will be received.  
9 MR. DORRIS: Thank you, Your Honor.  
00:02:03 10 (Plaintiff Exhibit No. 4283  
11 received into evidence.)  
12 THE COURT: Mr. Siemietkowski.  
13 MR. SIEMIETKOWSKI: Good afternoon, Your Honor. And  
14 before I begin, sir, I do want to correct on the record  
00:02:22 15 something that I said during one of my objections, and that  
16 regarded whether the meta-analysis reports reviewed by  
17 Mr. Pallais were in the administrative record. They were not.  
18 They were provided to plaintiffs but they were not in the  
19 administrative record.  
00:02:35 20 Also, Your Honor, I would like to introduce two individuals  
21 at counsel table. My Justice Department colleague, Mr. Tim  
22 Curley, as well as our witness who has provided a responding  
23 report to Mr. Pallais's report, and that is Ms. Caren Dunne of  
24 Albuquerque.  
00:02:54 25 THE COURT: Ms. Dunne.  
  
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CROSS-EXAMINATION

- 1
- 2 BY MR. SIEMIETKOWSKI:
- 3 Q. Mr. Pallais, you testified that you have not reviewed any
- 4 government records underlying the IIM accounts, correct?
- 00:03:11 5 A. **Correct.**
- 6 Q. And you also testified, did you not, that you have not
- 7 reviewed any government records underlying Interior's historical
- 8 accounting effort, correct?
- 9 A. **Correct.**
- 00:03:21 10 Q. Now, regarding what you call external corroborating
- 11 evidence, you wouldn't consider a check to be inherently
- 12 unreliable, would you?
- 13 A. **No.**
- 14 Q. Likewise, you wouldn't consider information in an oil and
- 00:03:40 15 gas lease to be inherently unreliable, would you?
- 16 A. **No.**
- 17 Q. How about information in a farming lease? Inherently
- 18 unreliable?
- 19 A. **Probably not.**
- 00:03:51 20 Q. Likewise, a grazing lease, inherently unreliable?
- 21 A. **Information is a broad concept. Certainly the provisions**
- 22 **in it would not be inherently unreliable.**
- 23 Q. Keeping within the context of this external corroborating
- 24 evidence, would you consider information in a timber contract
- 00:04:12 25 inherently unreliable?

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- 1 for again, please?
- 2 A. **Statement on auditing standards.**
- 3 Q. Now, SAS standards apply to audits, correct?
- 4 A. **Correct.**
- 00:05:44 5 Q. And more specifically SAS 31 applies to audits, correct?
- 6 A. **It did apply to audits, yes.**
- 7 Q. And again, what is G-A-A-S, GAAS?
- 8 A. **That's generally accepted auditing standards.**
- 9 Q. And that applies to audits, does it not?
- 00:06:02 10 A. **Primarily, yes.**
- 11 Q. And what is G-A-A-P, GAAP?
- 12 A. **It's generally accepted accounting principles.**
- 13 Q. And that likewise applies to audits, right?
- 14 A. **Generally accepted accounting principles applies to a lot**
- 00:06:16 15 **more than audits. Audits may use generally accepted accounting**
- 16 **principles, but its application is far broader than audits.**
- 17 Q. Far broader. You did say in your report, though, did you
- 18 not, that GAAP principles do not apply to the summarization of
- 19 transactions reported in the HSAs. Correct?
- 00:06:36 20 A. **That's correct. They are intended to be reported under**
- 21 **another basis of accounting.**
- 22 Q. Now, an audit is not identical to an attestation
- 23 engagement, is it?
- 24 A. **No.**
- 00:06:48 25 Q. Likewise, an audit is not identical to a consulting

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- 1 A. **Probably not.**
- 2 Q. What about information in a court order? Would you
- 3 consider that inherently unreliable?
- 4 A. **Again, probably not.**
- 00:04:29 5 Q. You testified, did you not, that reconciliations are not a
- 6 standard accounting service.
- 7 A. **Yes, I did.**
- 8 Q. Now, your resume reflects no engagements by government
- 9 agencies; is that correct?
- 00:04:41 10 A. **I'm sorry. I don't understand that question.**
- 11 Q. Your resume indicates that you have not been hired by any
- 12 government agencies; is that correct?
- 13 A. **You mean I have not been employed by a government agency?**
- 14 Q. No, contracted.
- 00:04:55 15 A. **I have done consulting for a government agency, but my**
- 16 **resume doesn't list all of my clients.**
- 17 Q. Your resume does not indicate any testimony on behalf of
- 18 government clients, does it?
- 19 A. **It doesn't, no. It doesn't mean I haven't done it; it just**
- 00:05:15 20 **means it's not on my resume.**
- 21 Q. Now, Mr. Pallais, you recall testifying, do you not, that
- 22 if this were an audit -- do you remember using those words?
- 23 A. **I don't, but I will trust that I used those words.**
- 24 Q. I'm going to talk to you a little bit about some of the
- 00:05:32 25 terminology in your report. S-A-S, SAS, what does that stand

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- 1 engagement, correct?
- 2 A. **Correct.**
- 3 Q. You testified, Mr. Pallais, that you base your opinions on
- 4 the assumption that internal documents were unreliable based on
- 00:07:09 5 the history of independent audits, correct?
- 6 A. **I think that's generally what I said.**
- 7 Q. Now, it's true, isn't it, that one basis for qualified
- 8 audit opinions is what's called a contingent liability, correct?
- 9 A. **It can be. Typically, we don't qualify for contingent**
- 00:07:39 10 **liabilities since SAS 58 came out in the 1980s.**
- 11 Q. Contingent liabilities could include such things as pending
- 12 litigation. Is that not true?
- 13 A. **Yes. That's true.**
- 14 Q. I want to talk a little bit about your testimony regarding
- 00:07:57 15 completeness, Mr. Pallais. You believe that reporting on
- 16 recorded amounts without regard to whether there are other items
- 17 that should have been included is insufficient, correct?
- 18 A. **Correct.**
- 19 Q. In other words, in your opinion, if a beneficiary's account
- 00:08:18 20 was mismanaged, you believe that the reporting on the recorded
- 21 amounts should consider that mismanagement, correct?
- 22 A. **I'm sorry. You lost me with the word "consider."**
- 23 Q. I'm sorry. If a beneficiary's account was mismanaged, you
- 24 believe that any reporting on that beneficiary's account should
- 00:08:41 25 take into consideration that mismanagement, correct?

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00:09:01 **1 A. "Take into consideration" was not a lot better than**  
**2 "consider." I'm not sure whether you're saying the reported**  
**3 amount should consist of what actually happened in the account,**  
**4 what should have happened in the account, or whether the report**  
**5 to the recipient should say your account has been mismanaged.**  
**6 I'm not sure -- or perhaps a fourth alternative. I'm not sure**  
**7 which one you're asking.**  
**8 Q.** I think it was your second alternative. You would argue,  
**9** would you not, Mr. Pallais, that any accounting statement should  
00:09:18 **10** consider whether the information was -- whether the actual  
**11** account amount was properly recorded, correct?  
**12** THE COURT: Can you give the witness a verb different  
**13** from "consider"?  
**14** MR. SIEMIETKOWSKI: I'll try, Your Honor.  
00:09:42 **15** THE COURT: "Report"? "Reflect"?  
**16** MR. SIEMIETKOWSKI: How about "reflect," Your Honor?  
**17** THE COURT: All right. How about "reflect"?  
**18** BY MR. SIEMIETKOWSKI:  
**19 Q.** Mr. Pallais, would you agree that in your opinion if a  
00:09:52 **20** beneficiary's account was mismanaged, any accounting statement  
**21** provided to the beneficiary should reflect such mismanagement?  
**22** MR. DORRIS: Your Honor, I'm going to object. I think  
**23** this is beyond the scope of direct. I didn't ask him anything  
**24** about mismanagement of accounts. It's beyond the scope of what  
00:10:11 **25** this hearing is about.

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**1 Q.** All right. In the documents you have reviewed,  
**2** Mr. Pallais, have you seen any direct evidence of fraudulent  
**3** financial reporting?  
**4 A. No.**  
00:12:02 **5 Q.** Likewise, have you seen any direct evidence of  
**6** misappropriation?  
**7 A. No.**  
**8 Q.** Now, in assessing the 2007 Plan, Mr. Pallais, one must  
**9** consider the nature of the procedures called for in the plan,  
00:12:20 **10** correct?  
**11 A. Correct.**  
**12 Q.** And it's also true, is it not, that in assessing the plan  
**13** one must consider the government's proposed sampling approach,  
**14** correct?  
00:12:26 **15 A. I believe so. That wasn't part of my engagement, but I**  
**16 expect that is a true statement.**  
**17 Q.** And in fact, not being part of your engagement, you did not  
**18** actually analyze the government's sampling approach, correct?  
**19 A. That's correct.**  
00:12:44 **20 Q.** You mentioned the various accounting firms that have worked  
**21** for Interior on this project. Is it your testimony,  
**22** Mr. Pallais, that all five of those accounting firms contracted  
**23** by Interior have not applied sound professional judgment?  
**24 A. No.**  
00:13:04 **25 Q.** Mr. Pallais, you're not familiar with the requirements of

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**1** THE COURT: Well, management and mismanagement has  
**2** become -- or people think it's become kind of a term of art in  
**3** this court. I'm not sure that it is, and I'll let the witness  
**4** answer the question if he can. Overruled.  
00:10:25 **5** BY MR. SIEMIETKOWSKI:  
**6 Q.** Do you believe, Mr. Pallais, that any -- well, let's say an  
**7** HSA to a particular beneficiary should reflect any mismanagement  
**8** found by the accountants?  
**9 A. I haven't spent a lot of time thinking about what should be**  
00:10:45 **10 reflected in the HSA. My focus has been on whether the amounts**  
**11 are supported. So it could be acceptable, I suppose, for an HSA**  
**12 to be misstated and for the accountant to say the HSA is**  
**13 misstated. I'm really having trouble answering the question as**  
**14 you posed it.**  
00:11:14 **15 Q.** Well, let me move on to a related portion of your expert  
**16** report. Do you recall saying that Interior's reconciliation  
**17** process should include provisions to detect fraudulent financial  
**18** reporting?  
**19 A. No. I believe that's what the accounting standards manual**  
00:11:32 **20 said. And what my report says is that it provides no guidance**  
**21 about how the order should do that.**  
**22 Q.** Do you remember stating in your report that Interior's  
**23** reconciliation process should include provisions to detect  
**24** misappropriations?  
00:11:47 **25 A. No. I don't recall saying that in my report at all.**

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**1** the 1994 Trust Reform Act, are you?  
**2 A. No.**  
**3 Q.** You have not read the Court of Appeals decisions addressing  
**4** those acts' requirements, have you?  
00:13:31 **5 A. I don't believe so.**  
**6 Q.** You have not interviewed those actually doing the  
**7** accounting work, have you?  
**8 A. I may have to change the answer to the question I just**  
**9 answered previously. I may have read court opinions on that. I**  
00:13:52 **10 don't recall them, but in the name of fair play, I may have read**  
**11 those.**  
**12 Q.** Thank you for that clarification.  
**13 A. Sorry. Go ahead and ask your other question again.**  
**14 Q.** My next question, Mr. Pallais, was you haven't interviewed  
00:14:08 **15** any Interior accountants working on the project, have you?  
**16 A. No.**  
**17 Q.** You haven't interviewed any Interior contractors working on  
**18** the project, have you?  
**19 A. No.**  
00:14:18 **20 Q.** You haven't interviewed those with supervisory  
**21** responsibility for the project, have you?  
**22 A. No.**  
**23 Q.** The only documents you have reviewed are those provided to  
**24** you by Plaintiffs' counsel, correct?  
00:14:32 **25 A. Yes.**

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1 Q. You have not reviewed any congressional appropriations  
2 documents, have you?  
3 A. No.  
4 Q. You have not reviewed any Interior budget requests, have  
00:14:43 5 you?  
6 A. No.  
7 Q. In formulating your opinion, you did not estimate the cost  
8 of adopting your approach, did you?  
9 A. No.  
00:14:51 10 Q. You haven't reviewed Dr. Angel's report on records, have  
11 you?  
12 A. No.  
13 Q. Likewise, you've not had a chance to read a transcript of  
14 his testimony, correct?  
00:15:02 15 A. I have not read it. I'm not sure whether it's accurate to  
16 say I haven't had a chance to read it, but I have not read it.  
17 Q. Understood. Yes, sir. You have not been to Lenexa, have  
18 you?  
19 A. No.  
00:15:17 20 Q. You've not been to OHTA, have you?  
21 A. No.  
22 MR. SIEMIETKOWSKI: No further questions, Your Honor.  
23 THE COURT: Mr. Pallais, I think that completes your  
24 testimony. You may step down, sir. Thank you.  
00:15:31 25 (The witness steps down.)  
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1 MR. DORRIS: Your Honor, we had two brief matters to  
2 raise before we call the next witness, if we might.  
3 THE COURT: All right.  
4 MR. DORRIS: Yesterday I failed to move in the  
00:15:43 5 exhibits for Mr. Homan's report, which was Plaintiffs' 4210, and  
6 the Arthur Andersen audit that we reviewed with Mr. Homan  
7 yesterday, and it's been referred to again today, which is  
8 Plaintiffs' Exhibit 575, and I would move for those to be  
9 admitted.  
00:16:02 10 THE COURT: 4210 and 575 are received.  
11 MR. KIRSCHMAN: Your Honor, may we address that  
12 briefly?  
13 THE COURT: Yes.  
14 MR. KIRSCHMAN: Mr. Homan's report has attached to it  
00:16:14 15 both his previous report and I believe his seven days of  
16 testimony. Government has no objection to the admission of his  
17 2007 report, but we would object to including the seven days of  
18 prior testimony and his earlier report.  
19 THE COURT: Fair enough.  
00:16:30 20 MR. DORRIS: Your Honor, I would suggest on his  
21 earlier report, which is attached to it, it is a report he  
22 prepared. I don't oppose any motion to not include the prior  
23 testimony.  
24 THE COURT: He's talking about his testimony.  
00:16:43 25 MR. DORRIS: But the prior report is incorporated into  
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1 and referred to in his present report for sake of brevity at  
2 times.  
3 THE COURT: All right. Report's in, testimony's out.  
4 MR. DORRIS: Thank you, Your Honor.  
00:16:56 5 MR. KIRSCHMAN: Thank you, Your Honor.  
6 (Plaintiff Exhibit Nos. 4210  
7 and 575 received into  
8 evidence.)  
9 MR. LEVITAS: Your Honor, my name is Elliott Levitas.  
00:17:03 10 I'm one of the counsel for the Plaintiffs and I have not  
11 appeared before you at this proceeding yet, and I wanted to  
12 introduce myself. I have a proffer which was discussed by the  
13 Court with Mr. Smith at the pretrial hearing relative to  
14 possible testimony of former congressman Klinger, and a motion  
00:17:27 15 *in limine* filed by the Government in connection with that. A  
16 copy has been provided to the Government. May I pass this up?  
17 THE COURT: Yes, of course. You want to talk about it  
18 or just file a proffer?  
19 MR. LEVITAS: I just want to pass up the proffer at  
00:17:49 20 this point.  
21 THE COURT: All right, sir. The proffer will be  
22 marked as an exhibit and made part of the record of this case.  
23 Thank you, sir.  
24 MR. KIRSCHMAN: Your Honor, we'd like to respond to  
00:18:00 25 the proffer briefly, if we may? Or would you rather...  
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1 THE COURT: Well, to what end? The proffer has  
2 been -- the proffer is just that. It's a proffer of what the  
3 testimony of Representative Klinger would be. I said I won't  
4 hear him, so the proffer is really the record that the  
00:18:22 5 Plaintiffs are making that I should hear him. What do you want  
6 to add to it?  
7 MR. KIRSCHMAN: Well, I was not clear -- and that's  
8 fine if that's the status of it. I was not clear from our final  
9 pretrial conference whether you would then view that in reaching  
00:18:36 10 a determination on whether to grant the motion *in limine* or  
11 permit the testimony. If a decision was going to be coming in  
12 that vein, then I would like to address it. If it's only a  
13 proffer as to what would have been heard, then that's certainly  
14 fine, Your Honor.  
00:18:47 15 THE COURT: Well, I need to go back and review the  
16 bidding. You don't have to respond to it now. We may take it  
17 up at a later time.  
18 MR. KIRSCHMAN: Okay. Thank you, Your Honor.  
19 THE COURT: Mr. Harper.  
00:18:59 20 MR. HARPER: Good afternoon, Your Honor.  
21 THE COURT: Good afternoon, sir.  
22 MR. HARPER: I would like to call as our next witness  
23 Mr. Richard Fitzgerald.  
24 (The witness takes the stand.)  
00:19:47 25 MR. HARPER: Good afternoon, Mr. Fitzgerald. Would  
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1 you state your full name and spell your last name for the  
 2 record.  
 3 THE WITNESS: Yes. It's Richard v. Fitzgerald.  
 4 F-I-T-Z-G-E-R-A-L-D.  
 00:20:10 5 MR. HARPER: Your Honor, briefly, the proffer for this  
 6 witness is that he is an expert witness. We filed an expert  
 7 report, Plaintiffs' Exhibit 4285. And he's an expert, among  
 8 other things, on operations of trusts, standards of government  
 9 trusts and the systems necessary to manage and administer trust  
 00:20:38 10 assets. He's been previously designated and has been approved  
 11 as a witness in the trial 1.5 in this proceeding.  
 12 THE COURT: All right.  
 13 **RICHARD FITZGERALD, WITNESS FOR THE PLAINTIFFS, SWORN**  
 14 **DIRECT EXAMINATION**  
 00:20:54 15 BY MR. HARPER:  
 16 Q. Mr. Fitzgerald, I would like to go over briefly with the  
 17 Court some of your background. Could you tell me -- you started  
 18 at the Office of the Comptroller of the Currency at some point.  
 19 Can you tell me what your first position there was?  
 00:21:06 20 A. Yes. In 1963, after graduating from law school, I joined  
 21 the Office of the Comptroller of the Currency as a trust  
 22 examiner at the entry level, and I was engaged for the next year  
 23 and a half or so in the examination of the trust departments of  
 24 various banks, national banks, here, in what was -- here in the  
 00:21:39 25 Washington, D.C., area, in what was then known as the fifth  
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1 law, if that was applicable, and certainly the principles that  
 2 govern trusts in general.  
 3 A report was then written, and that report was several  
 4 pages depending on -- and many, many pages in the larger banks  
 5 like Riggs and First National Bank of Maryland and those sorts  
 6 of places. That report would have basically a balance sheet on  
 7 the front, indicating how big the department was. A second page  
 8 would list any violations of law and any violations of fiduciary  
 9 principles. The rest of the report would then highlight those  
 10 problems with reference to the individual accounts, where those  
 11 problems had been discovered.  
 12 That report was then forwarded to the regional office. It  
 13 was signed by the representative in trust, who is the person in  
 14 charge of the examination. That report would then be filed with  
 15 the -- forwarded to the Richmond office, where it would be  
 00:25:13 16 reviewed by more senior and more experienced trust people, and  
 17 by the people who are in charge of the commercial side of the  
 18 bank, because the theory was that if there was a major default  
 19 in a trust account or in a trust department, that the  
 20 reparations for that would have to come out of the capital of  
 00:25:40 21 the bank, which would then threaten the solvency of the larger  
 22 bank. That's why that -- why we did trust exams.  
 23 And the reason that, back in the Kennedy administration,  
 24 why lawyers were doing this -- prior to that it was commercial  
 00:26:03 25 people who were doing it. But the reason that lawyers were  
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1 national bank region.  
 2 That region was headquartered in Richmond, Virginia, and  
 3 covered the states from Delaware down to North Carolina,  
 4 Georgia. I was involved in the on-site exams of those banks.  
 00:22:04 5 Do you want to know how those exams went at all?  
 6 Q. Yes.  
 7 A. They were surprise exams back at that time. We would get  
 8 orders on a Friday night to be someplace on a Monday morning.  
 9 We would go to the bank before it opened, introduce ourselves as  
 00:22:24 10 federal bank examiners. We would go in and seal the records,  
 11 both the vault and the individual account records in the trust  
 12 department.  
 13 We would then, among other things -- many of these things  
 14 went on simultaneously, particularly in the larger institutions.  
 00:22:48 15 We would look at the records of the bank and then go into the  
 16 records of the individual accounts to see that the two records  
 17 of securities agreed one with another. That included, I  
 18 remember this distinctly, having to spend many hours in vaults  
 19 counting securities, bonds, for instance.  
 00:23:18 20 We then go into the records of the individual accounts. We  
 21 would review the governing document, whether it was a will or a  
 22 trust agreement or what have you. We would then go and we would  
 23 review the administration by that institution of those accounts  
 24 to see to it that the administration of those accounts agreed  
 00:23:42 25 with and were consistent with the governing documents and state  
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1 doing this was that Comptroller Saxon felt that it was the  
 2 threat from the violations of the law rather than just the  
 3 commercial practices that was the real threat.  
 4 Q. If I can turn your attention to Plaintiffs' Exhibit 4285.  
 00:26:32 5 Mr. Fitzgerald, do you recognize this document?  
 6 A. Yes.  
 7 Q. Or this page, I guess?  
 8 A. That's the cover of my report.  
 9 Q. And if I can turn to page 13 of this document, which is the  
 00:26:51 10 first exhibit, Exhibit 1 to your report. Is this essentially a  
 11 synopsis of your work history?  
 12 A. Yes.  
 13 Q. And as you just described, your first position was with the  
 14 Office of Comptroller of the Currency. In very brief form, what  
 00:27:15 15 are the responsibilities of the OCC?  
 16 A. The OCC, the Office of the Comptroller of the Currency, the  
 17 Administrator of National Banks, which is its full title,  
 18 charter national banks and thereafter regulate those banks back  
 19 at that time through, primarily through on-site examinations.  
 00:27:41 20 The office was engaged in seeing to it that the banks  
 21 remained solvent, and when they were deemed to be insolvent they  
 22 closed the bank and, with the assistance of the FDIC, in most  
 23 cases were able to sell those insolvent banks to other banks.  
 24 We were also engaged -- the office itself was engaged --  
 00:28:12 25 I going too far or -- the office itself was engaged --  
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1 THE COURT: Was that question addressed to me?  
 2 (Laughter)  
 3 It is a bit of a narrative. You can kind of bite off your  
 4 answers and make him ask you another question.  
 00:28:30 5 THE WITNESS: Thank you, Your Honor.  
 6 BY MR. HARPER:  
 7 Q. Mr. Fitzgerald, it mentions here that in 1965 you were  
 8 commissioned as a representative of trust. And briefly, what is  
 9 a representative of trust?  
 00:28:42 10 A. The representative in trust was the -- bank examination is  
 11 an apprentice process, and there were three levels, and if I  
 12 remember correctly there was an assistant in trust, which is  
 13 what I was originally, then an associate, and then a  
 14 representative. And the representatives were the most senior,  
 00:29:03 15 most experienced field examiners.  
 16 I became a representative in trust when I became the  
 17 principal assistant to the deputy comptroller of the currency  
 18 for trusts, who oversaw the whole trust examination process.  
 19 Q. In that position, what were some of your responsibilities?  
 00:29:24 20 THE COURT: Mr. Harper, I'm not sure we need all of  
 21 that. I've just reviewed his resume and I see that he was in  
 22 the Office of Special Trustee from 1996 until 2004.  
 23 THE WITNESS: That's correct.  
 24 THE COURT: Although I think the bank examiner part --  
 00:29:45 25 bank trust examiner part of this is interesting, it's not nearly  
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1 any, and many of them were local in nature in that they were not  
 2 integrated or comprehensive.  
 3 Q. And then you became in 2004 the director of the Office of  
 4 Trust Regulations Policies and Procedures?  
 00:32:21 5 A. Yes. That was several years later, because the review that  
 6 we were doing was really a failure. I had to write a memo to  
 7 one of the people there and said we need to do this differently,  
 8 because it was sort of like pushing a string.  
 9 But anyway, in '04 I guess it was, I was, apropos of the  
 00:32:54 10 reorganization that the Department did of the -- of both the BIA  
 11 and the special trustee's office, I became the director of the  
 12 Office of Trust Regulations Policies and Procedures, which was a  
 13 new office but which was an office that was grafted onto an  
 14 office that had existed for about 10 years.  
 00:33:14 15 Q. And very quickly, what was your principal duty as head of  
 16 that office?  
 17 A. We were supposed to assist and ensure that the various  
 18 offices within the Department that had anything to do with  
 19 trusts, with Indian trusts, had, as the act requires, written,  
 00:33:41 20 consistent, integrated policies and procedures.  
 21 Q. And when you say "the act," what act are you referring to?  
 22 A. I'm referring to the '94 act, the American Indian Trust  
 23 Fund Management Reform Act. I hope I got that right.  
 24 Q. Have you been qualified as an expert -- to testify as an  
 00:34:02 25 expert in prior proceedings other than in the Cobell litigation?  
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1 so close to this case as his more recent experience. So I  
 2 wonder if you could kind of sneak up on that.  
 3 MR. HARPER: Fair enough, Your Honor.  
 4 BY MR. HARPER:  
 00:29:57 5 Q. If we could turn down to the bottom of this page.  
 6 Mr. Fitzgerald, this talks about when you joined the Department  
 7 of Interior, correct?  
 8 A. That's right.  
 9 Q. And you were in the Office of Special Trustee, and your  
 00:30:29 10 first position it says was a trust and policy officer. What  
 11 were your responsibilities in that office?  
 12 A. I was called down there to join that office because of my  
 13 background in trusts, and I reported to the deputy special  
 14 trustee for policy, and the primary focus of my responsibility,  
 00:30:55 15 what I was supposed to do, which flow out of the Trust Reform  
 16 Act, was to see to it and to help the Department to have written  
 17 and consistent policies, procedures, regulations, for the  
 18 administration of their trust responsibilities department-wide.  
 19 In doing that, one of the first things I did was to put  
 00:31:21 20 together a small group of people -- 10, 12 people, maybe -- from  
 21 different parts of the Department to review what policies and  
 22 principles then existed. What we found was, if you're  
 23 interested in what we found, was that OTFM had pretty good  
 24 policies and procedures, and they were continuing to develop  
 00:31:54 25 those. But in many of the other departments, there were few, if  
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1 A. Yes. I've testified in depositions any number of times  
 2 while I was in private practice, in commercial banking lawsuits,  
 3 and I then -- which I think is in my resume. I also testified  
 4 before the legislative -- I think it was the legislative  
 00:34:29 5 committee of the Rhode Island legislature, about the failure of  
 6 some small state-chartered depository institutions.  
 7 MR. HARPER: Your Honor, at this time Plaintiffs would  
 8 like to move that Mr. Fitzgerald be qualified as an expert on  
 9 trust standards, policies, procedures, and principles generally,  
 00:34:55 10 and the Department of the Interior's policies, procedures and  
 11 principles.  
 12 MR. STEMPLEWICZ: No objection.  
 13 THE COURT: All right.  
 14 BY MR. HARPER:  
 00:35:25 15 Q. Mr. Fitzgerald, during your tenure at the OCC when you were  
 16 reviewing bank trust departments, did you have occasion to  
 17 review accountings?  
 18 A. Yes.  
 19 Q. So are you familiar, then, with what is required in an  
 00:35:44 20 accounting?  
 21 A. Yes.  
 22 Q. In very general terms, could you give the Court a sense of  
 23 what is normally required in a fiduciary accounting?  
 24 A. What is normally required, expected in a fiduciary  
 00:35:59 25 accounting is a statement given to the beneficiary which lists  
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00:36:40 1 and identifies all of the assets that are held in trust for that  
 2 particular beneficiary. That would include the money that's in  
 3 the account at that particular time, the securities or other  
 4 assets that produce those funds, and also any property that is  
 5 held in trust that doesn't produce income.  
 6 It was not uncommon, for instance -- it wasn't very common  
 7 but you often saw a trust would hold a valuable painting, for  
 8 instance. So you would see -- you would expect to see that that  
 9 was listed on the accounting that was given to the  
 00:37:07 10 beneficiaries.  
 11 The best place I think to look for what I did was the  
 12 accountings that had to be done for the common trust funds,  
 13 which were relatively new back then. And those common trust  
 14 funds by regulation were required to give a report listing all  
 00:37:30 15 of those things to all of the participants in the common trust  
 16 fund on a quarterly basis.  
 17 Q. If we can turn back to your expert report, Plaintiff's  
 18 Exhibit 4285, page -- second page of that. Near the final line  
 19 at the bottom -- this section is called "Question One, what is a  
 00:38:00 20 fiduciary accounting?" Your second exhibit is what you call the  
 21 internal general guidance. That's the title. Could you tell me  
 22 what that document, why you prepared that document?  
 23 A. Yes. In OTP, which is what we called the office that I  
 24 became the director of, what we were supposed to be doing was  
 00:38:34 25 reviewing the regulations, policies, procedures, that the

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00:39:11 1 program people would put together, and they would then ship it  
 2 to, send it to OTP. We would then review it for compliance with  
 3 fiduciary principles, with the statutes that govern this  
 4 particular, and the regulations that govern this particular  
 5 trust.  
 6 And if we found that those things passed muster, we were  
 7 then able to assure the special trustee that these things that  
 8 were coming forward were fiduciarily appropriate and that they  
 9 were to be -- able to work together as the statute required us.  
 00:39:52 10 And the staff down there, the staff was located in Albuquerque  
 11 and had been inherited from the prior office, which was  
 12 OTFM-centered really.  
 13 There were maybe 12 people on that staff when I got there.  
 14 I don't think there was anybody on that staff who had tenure  
 00:40:17 15 with the Department of over a year. So it was those people who  
 16 came to me and said how are we supposed to review these things?  
 17 And I said, all right, I will put together the internal general  
 18 guidelines so that they could refer to those things as they were  
 19 reviewing the documents that were to come to me. That's how  
 00:40:47 20 that --  
 21 Q. And at the time you were the principal policies and  
 22 procedures person at the Office of Special Trustee, correct?  
 23 A. I was, at that particular time, I was no longer the trust  
 24 policy officer. That title and office had been eliminated in  
 00:41:06 25 the organization. I was now the director of the Office of Trust

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1 Regulations, Policies and Procedures, which I think the function  
 2 was somewhat different.  
 3 Q. If I could turn to this internal guidance, I just have a  
 4 brief question about it. That's your Exhibit 2 referred to, and  
 00:41:34 5 you prepared this document?  
 6 A. Yes.  
 7 Q. For the reasons you just stated?  
 8 A. Yes.  
 9 Q. And it was -- it was intended to aid in the operation of  
 00:41:46 10 the Indian trust. Is that fair?  
 11 A. Yes.  
 12 Q. If we can turn to the sixth page of this document. And I  
 13 just have one question about No. 6 here. "Keep the Beneficiary  
 14 Informed." If you could just read that to yourself. I just  
 00:42:23 15 have one question on this point in your document.  
 16 A. Yes. I'm familiar with it.  
 17 Q. What is meant there by the fact that the records are trust  
 18 assets?  
 19 A. It is a standard principle of the operation of any trust  
 00:42:46 20 that the trustee must keep the beneficiaries informed, and the  
 21 reason that you keep a beneficiary informed is so that the  
 22 beneficiary is aware of the management of his property interests  
 23 that are held in trust, so that he feels or she or it feels that  
 24 the management is proper. And if you don't feel that it is  
 00:43:24 25 proper, you can then take whatever action is appropriate to see

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1 to it -- to raise the question about whether it is proper or  
 2 not, and then to allow the beneficiary to take action to see to  
 3 it it is proper and to prevent a breach of trust.  
 4 Therefore, the information, the data in the records, is an  
 00:43:56 5 asset that belongs to the trustee and it is valuable to the  
 6 trustee. And it seems to me this is sort of a general principle  
 7 that goes over into all other sorts of walks of life. If you  
 8 take your automobile, for instance, to be repaired by the  
 9 mechanic down the road, and he gives you a bill for \$300 or  
 00:44:24 10 whatever it is, you will usually see on that bill, or you will  
 11 certainly ask, if you're smart enough, to say, okay, what did  
 12 you do for the \$300? What did you fix? What kind of parts did  
 13 you add? So that if any of these things go wrong, you can go  
 14 back and see to it that they are fixed without paying for them  
 00:44:46 15 twice.  
 16 So in that sense, that information is valuable to the  
 17 beneficiary, and since it is of value it is an asset and should  
 18 be kept secure, like all other assets.  
 19 Q. If I can turn your attention back to your expert report on  
 00:45:22 20 the second page -- actually the third page. We're still on this  
 21 first question in your report, what is a fiduciary accounting.  
 22 And you discussed that briefly. Let me ask you, what is  
 23 required to be produced to the beneficiary in fiduciary  
 24 accounting?  
 00:45:47 25 MR. STEMPLEWICZ: Objection. Calls for a legal

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1 conclusion.

2 THE COURT: Calls for a what?

3 MR. STEMPLEWICZ: Legal conclusion.

4 THE COURT: What in his experience? Go ahead.

00:45:57 5 BY MR. HARPER:

6 Q. In your experience, Mr. Fitzgerald.

7 A. **Repeat the question.**

8 Q. What is required in the fiduciary accounting in your

9 experience?

00:46:04 10 A. **To be included in --**

11 Q. Precisely.

12 A. **-- in the information that is given to the beneficiary. I**

13 **thought we --**

14 THE COURT: So far you've told us about listing and

00:46:14 15 identifying assets held in trust, including money, securities,

16 and property.

17 THE WITNESS: Right.

18 THE COURT: What else?

19 THE WITNESS: The other thing that goes into there are

00:46:25 20 the transactions that the trustee has engaged in and the

21 proceeds, if any, or the losses that have resulted from those

22 transactions. And the amount of time that that accounting

23 should cover is from the date of the last accounting. So it is

24 with respect to the funds, I suppose, it would be the nature and

00:47:04 25 amount of the funds, the status of the funds, which means to me

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1 **among lawyers who are trustees, that there is a verification**

2 **process that the records that are being kept are accurate and**

3 **up-to-date and complete.**

4 Q. In your experience, have you ever seen an accounting where

00:49:21 5 the source of the funds, the trust funds, has not been

6 identified?

7 A. **No. I don't think I have.**

8 Q. And in your experience where there is a fiduciary

9 accounting, if there is a lack of documentation, what is the

00:49:50 10 result of a lack of documentation?

11 A. **The lack of documentation?**

12 Q. The lack of documentation to support a particular

13 transaction.

14 A. **You know, in my experience in banking, I really never saw**

00:50:10 15 **that. Running a trust is really not rocket science. It's**

16 **really a pretty reasonable and obvious type of thing to do as**

17 **far as the records are concerned.**

18 **As I understand it, the scholarship says that where there**

19 **are doubts about what the record -- lack of records or what the**

00:50:44 20 **records mean, the doubts are resolved in favor of the**

21 **beneficiary. And the reason for that is that the trustee is**

22 **expected to know everything about the trust and its operation.**

23 **They're the only ones who are required to keep records.**

24 Q. I'd like to turn to your -- we've been talking about this

00:51:11 25 notion of what is a fiduciary accounting. I'd like to turn to

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1 where do those funds come from.

2 And that's why you have to identify the underlying trust

3 asset, the property that's held in trust in which the

4 beneficiary has an equitable interest.

00:47:28 5 BY MR. HARPER:

6 Q. Ordinarily, what kind of records would a trustee have to

7 provide in the accounting?

8 A. **The records that they would need -- the record that they**

9 **would need to provide would be a statement, a written statement,**

00:47:50 10 **very much like we would get, any of us get from our stock**

11 **brokers, very much like what the banks are required to produce**

12 **on a quarterly basis for their common trust funds.**

13 **That information is based on the data, the information that**

14 **the trustee keeps internally of the details of the management of**

00:48:19 15 **those trust assets.**

16 Q. Is there any verification process that's generally needed

17 in your experience?

18 A. **Verification process?**

19 Q. Yes.

00:48:31 20 A. **Well, of course the accounting is part of the verification**

21 **process, the statement that goes out to the beneficiaries. So**

22 **the beneficiary can say, yeah, that sounds right, or no, it**

23 **doesn't. So that is part of the verification process. There**

24 **are internal audits that go on all the time in institutions that**

00:48:59 25 **are trustees, and there should be audits that go on all the time**

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1 your concluding paragraph on that and just have you read that to

2 yourself. The paragraph beginning "Therefore in my opinion."

3 (Witness reviewing document.)

4 Maybe you can just explain what you mean there.

00:51:37 5 A. **Well, I think that's really what we were just talking**

6 **about. The trustee is the legal owner of the property that is**

7 **held in trust. He holds that or the trustee holds that for the**

8 **benefit of the beneficiary. So the beneficiary does not have**

9 **any responsibility for the maintenance of the property or the**

00:52:09 10 **maintenance of the records that relate to the property, but it**

11 **does have the benefit of the use of all of that property.**

12 **So the -- and the beneficiary is entitled to all the**

13 **information, complete and accurate information, about the**

14 **running of the trust. And if he doesn't, or the beneficiary**

00:52:41 15 **doesn't get that, then whatever he is given is not really a**

16 **fiduciary accounting.**

17 Q. If we can then turn to question two here. And it talks

18 about whether or not the Secretary of Interior follows

19 traditional trust principles. If you can just sort of synopsise

00:53:12 20 your answer to that question.

21 MR. STEMPLEWICZ: Your Honor, I'm going to object to

22 bringing up common law principles, since common law claims in

23 this case have been dismissed by the Court.

24 MR. HARPER: Your Honor, the precedents in this case,

00:53:27 25 common law standards fill out the interstices of the duties

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1 applicable --

2 THE COURT: We're going to worry a lot about the law

3 later on, but let me hear the witness's answer to the question.

4 THE WITNESS: Would you restate the question?

00:53:42 5 BY MR. HARPER:

6 Q. Your second question here is about whether or not the

7 Secretary of Interior follows common law and traditional trust

8 principles to account to the individual Indian trust

9 beneficiaries, and I just wanted you to give a synopsis of your

00:54:03 10 answer.

11 A. When I was there at the Interior Department, I had the

12 opportunity to read a whole bunch of Indian trust cases, and all

13 of those cases looked for guidance, let's say, to the

14 restatement and to the other treatises on trust, Bogart and

00:54:39 15 Scott.

16 The Department under Secretary Babbitt put out an order

17 which cited to a letter that the Department had produced when

18 Solicitor Krulitz was there, which cited to a whole lot of those

19 cases, and indeed, that particular solicitor's opinion said, if

00:55:11 20 I remember the verbiage correctly, was this was a trust, this

21 Indian relationship was a trust, and that it was appropriate for

22 the operation of that trust to be guided to some extent by those

23 things -- by those principles that guide private trustees.

24 I found, however, that while there was some implication

00:55:50 25 that the Department does follow those principles, I came to

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1 regarding the historical accounting and how to perform it?

2 A. I don't know that directly, except that I have now come to

3 understand that the position is -- and I understand this back in

4 '03 when the first historical plan was presented to the Court,

00:59:12 5 that what the Department wished to do was to report essentially

6 on the monies, the funds, if you will, that had actually been

7 posted to the various accounts.

8 That became even more clear to me after Mr. Swimmer became

9 the special trustee, because he said on at least one occasion

00:59:44 10 that the prior judge in this particular case had turned the case

11 from a funds case to an asset case. And we said it always was.

12 At another time in February out in Albuquerque, he restated

13 that and said we only have to report on funds because that's

14 what the statute says and -- meaning the '94 Act -- and we don't

01:00:17 15 have to do anything about non-income-producing assets. Both I

16 and Donna Erwin, who was the head of OTFM, disagreed with him.

17 And if I remember correctly -- yeah, if I remember

18 correctly, Donna Erwin actually asked me back in '03 to review

19 what the Department was going to put together, and I verbally

01:00:45 20 said to her, as acting special trustee, don't sign on to this,

21 because if you do you will be trapped into saying, okay --

22 MR. STEMPLEWICZ: Objection on basis of hearsay,

23 Your Honor.

24 THE COURT: Well, I'm going to sustain the objection

01:00:58 25 not because it's hearsay but because basically what the witness

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1 realize that they don't. Indeed, we were told quite

2 specifically by a relatively senior BIA person in reviewing some

3 stuff that we were putting out, that reference to the

4 restatement and to Scott and Bogart was inconsistent with the

00:56:21 5 position that they were presenting in this particular case.

6 Q. And that senior official, could you identify that senior

7 official?

8 A. Nancy Jemison.

9 Q. If I can turn to Exhibit 6 of the expert report. Is this

00:56:46 10 the e-mail you were referring to?

11 A. Yes, it is.

12 Q. And you were a recipient of this e-mail?

13 A. Yes. There under the cc.

14 Q. What was your reaction to this e-mail?

00:57:16 15 A. I wrote a memo to my immediate supervisor, the deputy

16 special trustee for policy, John Miller, and said that I didn't

17 see that that was a particularly good way to go, that the

18 litigation has to do with what had gone on before, and that I

19 think the position is inconsistent with what I understood the

00:57:59 20 case law to be with respect to Indian trusts.

21 Q. Do you believe that --

22 A. However, we did stop making reference to the restatement,

23 but we did continue to reference the general principles as I

24 understood them.

00:58:29 25 Q. Did this position have any implications for decisions

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1 is now recounting is internal disputes and debates within the

2 Department of the Interior which -- I'm more interested in the

3 outcome than I am the arguments that were used back and forth

4 within the Department of the Interior. I don't have any sense

01:01:18 5 that there was anything but good-faith discussion and debate

6 going on. So, people don't make admissions if they make

7 arguments within the hallowed halls of the Department of the

8 Interior.

9 Let's get on to what they did, what they decided, and what

01:01:35 10 this witness believes that it complies with or doesn't comply

11 with. But the hallway conversations, meetings, conferences that

12 led up to this policy, I think are not probative of anything

13 that I'm going to rule on.

14 BY MR. HARPER:

01:01:50 15 Q. Mr. Fitzgerald, have you reviewed the Government's 2007

16 accounting plan?

17 A. Yes.

18 Q. Do you think that, if implemented fully, it would discharge

19 their duty to account?

01:02:05 20 A. No.

21 Q. If we can turn to Question Three on your expert report,

22 page 5 at the bottom, this is in essence what this part of your

23 report evaluates?

24 A. Yes.

01:02:30 25 Q. If we can turn to the next page, page 6. The heading

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01:03:16 1 "Exclusions of beneficiaries and accounts." You talk about the  
 2 accounts that are closed prior to 1994.  
 3 **A. That I think was probably inarticulately put, because going**  
 4 **back and looking at that, it wasn't those closed prior to '94,**  
 5 **but I think it was the transactions that took place before '94.**  
 6 **I think that's what that was.**  
 7 **Q.** With respect to these accounts, do you think it's  
 8 appropriate to exclude them from the accounting?  
 9 **A. No, because the Department's fiduciary responsibilities**  
 10 **with respect to these beneficiaries and the assets held in trust**  
 11 **predates the Reform Act, which I think that that October 25th**  
 12 **relates to -- not I think, I know it relates to. The Reform Act**  
 13 **didn't create the trust obligations. Those were already there.**  
 14 **Q.** If we go down further to the next section here, it's called  
 01:04:18 15 "Direct pay."  
 16 THE COURT: Before you leave that, Mr. Harper, let's  
 17 straighten out with the witness and with me whether he meant  
 18 accounts closed before October 25, 1994, or transactions. I  
 19 think accounts is what he did mean, and I think that's what I  
 01:04:36 20 understand it to be.  
 21 MR. HARPER: That's my understanding, Your Honor, as  
 22 well.  
 23 BY MR. HARPER:  
 24 **Q.** Is it accounts prior to 1994 or transactions, do you  
 01:04:44 25 understand?

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01:07:18 1 **assets that produce those funds are trust funds, and therefore**  
 2 **these proceeds are also trust funds. And I feel that way**  
 3 **because the trustee has an obligation to see to it, for**  
 4 **instance, that the lease, if that's what's producing the funds,**  
 5 **is properly operating.**  
 6 **So these to me are trust funds, and I believe the**  
 7 **government has usually considered that they were trust funds for**  
 8 **which the government was responsible. Therefore, they should be**  
 9 **accounted for.**  
 01:07:38 10 **Q.** In your experience with respect to other trusts, are there  
 11 times when beneficiaries receive proceeds directly from a source  
 12 other than the trustee?  
 13 **A. Yes. Oh, yes. It is not, I suspect, uncommon for**  
 14 **businesses, for instance, that are run within a trust, to**  
 01:08:04 15 **produce funds for the beneficiary. As a matter of fact, I**  
 16 **remember one that -- I was over here at Riggs, and a fellow up**  
 17 **on Georgia Avenue died. The major business, his family business**  
 18 **was a liquor store. And I was over at Riggs and I said well,**  
 19 **how do you run that? Do you send one of your vice presidents in**  
 01:08:24 20 **there to run the liquor store?**  
 21 **He said of course not. We go over there and we see to it**  
 22 **that the business is being run properly, that the place is being**  
 23 **stocked and that there's no fraud going on and all that sort of**  
 24 **stuff. But those funds went directly to the family. It didn't**  
 01:08:43 25 **go through Riggs, because it was a family business. But because**

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01:04:58 1 **A. Yeah. I guess it is the accounts, right, because -- yeah.**  
 2 THE COURT: Okay. I think we're all on the same page  
 3 then. Proceed.  
 4 BY MR. HARPER:  
 5 **Q.** If we can turn your attention, Mr. Fitzgerald, to the  
 6 section entitled "Direct pay." Do you know what direct pay is?  
 7 **A. Yes. I think I do. That is a situation where a lessee or**  
 8 **a buyer or purchaser of trust assets has undertaken to pay**  
 9 **either the rent or the cost of the asset being acquired directly**  
 01:05:37 10 **to the beneficiary.**  
 11 **Q.** If I can turn your attention to the following page of this  
 12 section, the two highlighted areas here. See first, "That  
 13 failure to account for direct pay funds is inconsistent with the  
 14 Department's trust obligations to complete accounting of all  
 01:06:01 15 funds."  
 16 And then second highlighted area, it says "These funds  
 17 derive the trust character not because they are deposited in a  
 18 special deposit but because they are proceeds from the  
 19 trustees" -- excuse me, "a specific account," I misread that --  
 01:06:17 20 "but because they are proceeds from the trustee's management of  
 21 Indian trust assets." This second, could you explain a little  
 22 bit the second highlighted part there?  
 23 **A. Yes. I'd heard when I was over there that some people felt**  
 24 **that the funds, because they never came into the hands of the**  
 01:06:44 25 **trustee, were therefore not trust funds. But of course, the**

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01:09:04 1 **the business was held in trust, it was up to Riggs as the**  
 2 **trustee to see to it that it was run properly and that the**  
 3 **proceeds were proper proceeds, reasonable proceeds.**  
 4 **Q.** So would Riggs still have in that instance an accounting  
 5 duty to those beneficiaries?  
 6 **A. I believe they would, yes.**  
 7 **Q.** If we can turn down to the next section. Do you understand  
 8 whether or not the -- will the government pursuant to their 2007  
 9 Plan provide an accounting for deceased beneficiaries?  
 01:09:30 10 **A. I understand they do not intend to do that.**  
 11 **Q.** And do you think that's appropriate in your experience?  
 12 **A. I think that's inappropriate. That's not the way I**  
 13 **understand a trustee would act anyplace else.**  
 14 **Q.** In some circumstances, through the probate process in the  
 01:09:54 15 private sector, are there accountings provided to the  
 16 beneficiary?  
 17 **A. Oh, yes. If an estate goes before a probate court or**  
 18 **official, and part of the estate consists of a trust, it is**  
 19 **usual, normal for the trustee to produce an accounting to the**  
 01:10:21 20 **probate official, so that the probate official can review the**  
 21 **administration of the trust and so that the heirs, if there are**  
 22 **any that have an interest in the property that is coming out of**  
 23 **that trust, can also look at that.**  
 24 **That again is the function of an accounting, as far as I'm**  
 01:10:47 25 **concerned. It's what you would say, a review, calling people to**

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1 **account, a second-guessing if you will.**

2 **Q.** Do you understand in the Indian probate process, do they

3 perform that type of an accounting?

4 MR. STEMPLEWICZ: Objection. Lack of foundation.

01:11:09 5 BY MR. HARPER:

6 **Q.** Do you have an understanding, Mr. Fitzgerald, of how the

7 Indian probate process works?

8 **A. A general understanding, because that was one of the things**

9 **that we were trying to address in the Office of the Special**

01:11:28 10 **Trustee.**

11 **Q.** Based on your understanding, is there any accounting

12 provided to the beneficiaries during that process?

13 **A. As I understand it, BIA will provide information about the**

14 **trust to the probate officials. And as I understand it, the**

01:11:48 15 **probate officials will accept that information without question.**

16 **It's also interesting to me that both the trustee and the**

17 **probate people are within the body that is the trustee, so it is**

18 **one part of the trustee reporting to another part of the**

19 **trustee. So it's the trustee reporting to itself.**

01:12:23 20 **Q.** Do you understand that there is or is not an accounting

21 provided?

22 **A. I would not consider that an accounting, because it does**

23 **not put any beneficiary in the position to raise questions about**

24 **the administration of the trust.**

01:12:40 25 **Q.** So that would be a distinction with how probates sometimes

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1 **accounting.**

2 **Q.** And where there's never been an accounting provided, what

3 is the -- when does the accounting begin?

4 **A. Usually go back to the date when the trustee had**

01:14:54 5 **responsibility for the trust property, back to the beginning.**

6 **Q.** If we can go down to the next heading, which is Compacting

7 and Contracting Tribes, will the 2007 Plan as you understand it

8 from your review provide accounting for assets and funds held in

9 trust by the United States but managed through compacts or

01:15:27 10 contracts by tribes?

11 **A. As I understand it, there is to be no accounting for those**

12 **funds.**

13 **Q.** And in your view, in your experience, can you provide a

14 fiduciary accounting without accounting for those assets and

01:15:46 15 funds?

16 **A. You can't, it seems to me, because those assets that are**

17 **being managed or administered, whatever word you want to use, by**

18 **an agent or a contractor, which these compacting and contracting**

19 **tribes are, are acting on behalf of the trustee. And the**

01:16:12 20 **trustee cannot escape its responsibility for the actions of**

21 **their agents, essentially.**

22 **And we recite to the Leshy memo in there that -- well, let**

23 **me see. Yeah. The Leshy memo to Ken Rossman, "The fact that a**

24 **tribe takes over federal duties by entering into one or more**

01:16:49 25 **contracts or compacts does not extinguish the federal trust**

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1 work in the private sector when accountings are provided.

2 **A. That's right.**

3 **Q.** If we can turn to the next section on the next page.

4 Accounts Opened Prior to 1938.

01:13:08 5 **A. Yes.**

6 **Q.** And this deals with the fact that the transactions are not

7 being accounted for?

8 **A. Yes. This is what I was getting mixed up with with the**

9 **other one when I was talking about that, yeah. This is where**

01:13:22 10 **it's not the account, it's the transactions.**

11 **Q.** So your understanding of the 2007 Plan is that they are not

12 intending to provide an accounting for transactions that predate

13 1938?

14 **A. That's right.**

01:13:36 15 **Q.** And do you think --

16 **A. And obviously as I wrote this, this is, as I said before,**

17 **inartfully done, I think, but this goes to the transactions,**

18 **yes.**

19 **Q.** And what is your view of that?

01:13:54 20 **A. Well, again, it is a situation where the beneficiary is**

21 **getting less information through this accounting, as they call**

22 **it, than would be usual in any other trust context.**

23 **Q.** Normally, for what period of time is an accounting

24 provided?

01:14:29 25 **A. Accounting is provided from the date of the last**

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1 **responsibility." I was pleased to see that, because that's my**

2 **understanding of what general trust practices would require.**

3 **Q.** In the private sector, are there times when there is an

4 agent or a contractor of a trustee that manages the trust

01:17:20 5 assets?

6 **A. I wouldn't call it managing the trust assets, but there**

7 **are -- because the management of the trust assets always**

8 **remains -- or the responsibility for the management of the trust**

9 **assets always remains with the trustee.**

01:17:38 10 **There are innumerable instances, and you see them almost**

11 **every place in the wider trust world, where a trustee will hire**

12 **outside people to keep the records, to execute securities**

13 **transactions, to collect the funds and pay the funds out, all of**

14 **that sort of thing. But everybody understands that those are**

01:18:11 15 **still the responsibility of the trustee for which the trustee is**

16 **responsible and liable if they go wrong.**

17 **Q.** Would it be consistent, then, with general trust principles

18 to exclude the transactions that were administered by compacting

19 and contracting tribes?

01:18:43 20 **A. Not in my view, no.**

21 **Q.** If we can turn our attention to the following page, page 9

22 of your expert report. And there's a section called Additional

23 Exclusions, and I think you talked briefly about a number of

24 other parts of the 2007 Plan. One of those, in the top --

01:19:13 25 second sentence, says -- talking about the plan, "It limits its

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1 accounting only to monies actually collected and recorded in the  
 2 individual accounts." Do you see that?  
 3 **A. Yes.**  
 4 **Q.** Is that your understanding?  
 01:19:26 5 **A. That's my understanding.**  
 6 **Q.** And is that appropriate if one wants to complete a  
 7 fiduciary accounting?  
 8 **A. No. Again, where records are kept accurately and**  
 9 **completely and up-to-date, you would see very, very few monies**  
 01:19:51 10 **that were collected but not recorded. Here that is not the**  
 11 **case. When I first got there, there was -- I can't remember how**  
 12 **many millions it was, but it was quite large. I understand**  
 13 **they're working that number down. But there's still, as I**  
 14 **understand it, a large amount of money that the trustee does not**  
 01:20:24 15 **really know where that money is to go, and needs to do a great**  
 16 **deal of research to see to it that it gets to where it's**  
 17 **supposed to go, to the proper account, to the proper**  
 18 **beneficiary.**  
 19 **So here you've got assets, funds, that have been collected**  
 01:20:51 20 **but haven't been attributed to the right account. They should**  
 21 **be accounted for, I believe. It'd be interesting to see how you**  
 22 **would do that, however. It might be with an asterisk at the**  
 23 **bottom of the statement, at the bottom of the beneficiary**  
 24 **statement, which says we've got X number of funds, some of which**  
 01:21:27 25 **you may be entitled to, but I don't think I've ever seen that**

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1 **anyplace.**  
 2 **Q.** Generally speaking, would in your experience a trustee have  
 3 to account for monies owed to beneficiaries?  
 4 **A. Absolutely.**  
 01:21:44 5 **Q.** And what about monies -- so monies owed but also monies  
 6 actually collected.  
 7 **A. Oh, yes. Right. Here they just don't know to whom it's**  
 8 **owed, and they should.**  
 9 **Q.** During your review of the systems at the Department of the  
 01:22:09 10 Interior, do you know if they have an accounts receivable  
 11 system?  
 12 **A. As I understand it, they do not. I asked that question**  
 13 **when I was back there, and there is no accounts receivable.**  
 14 **Q.** And you were there till 2005; is that correct?  
 01:22:22 15 **A. Yes.**  
 16 **Q.** And what would be the problem with not having that kind of  
 17 a system in place?  
 18 **A. As I understand it, there is no general record of the**  
 19 **things that are owed to the accounts. There is no accounts**  
 01:22:49 20 **receivable. So except going to the individual accounts, you**  
 21 **don't know when the money is owed, as I understand it, and**  
 22 **you're largely, therefore, dependent on the honor of the lessee,**  
 23 **if you will, to pay the money in, and you're also relying on the**  
 24 **accuracy of the local records, the individual records.**  
 01:23:31 25 **Q.** Turning to the next item on there, have you heard of a --

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1 do you know what a -- what's commonly referred to as a Youpee  
 2 interest?  
 3 **A. Yes. I learned about those when I was at Interior. As I**  
 4 **understand it, and I don't know the year, but Congress passed a**  
 01:23:53 5 **law apropos of I guess the -- correct me here, the Youpee**  
 6 **Indians or was Youpee the plaintiff?**  
 7 **Q.** I believe he was an individual plaintiff, for the record.  
 8 **A. An individual plaintiff. I don't remember the tribe. The**  
 9 **upshot of the statute was that there was a large amount of land**  
 01:24:16 10 **which was not producing very much money, if any, and Congress**  
 11 **said, well, let's escheat that land to the tribe, whatever tribe**  
 12 **it was.**  
 13 **Youpee said -- the plaintiffs said you've taken my land**  
 14 **unconstitutionally. And the Supreme Court agreed with that. So**  
 01:24:45 15 **there was then a project, I guess, going on about how do you get**  
 16 **that land into its proper hands.**  
 17 **Q.** Do you understand that the 2007 Plan will or will not  
 18 account for funds generated from Youpee interests?  
 19 **A. That's as I understand it, yes.**  
 01:25:09 20 **Q.** Excuse me, what is your understanding?  
 21 **A. That they will not account for those funds.**  
 22 **Q.** And do you think that's appropriate in light of --  
 23 **A. No.**  
 24 **Q.** In your experience, is it appropriate -- does a fiduciary  
 01:25:24 25 accounting, does it require the identification of the assets, of

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1 the nonfund assets of the trust?  
 2 **A. The nonfund assets of the trust?**  
 3 **Q.** The nonmonetary assets of the trust.  
 4 **A. Yes. Again, it is a basic principle that when a trustee**  
 01:25:45 5 **receives something in trust, whether it is income-producing or**  
 6 **not, that the records identify that asset. I used to talk about**  
 7 **if you're holding a valuable painting in trust and it's hanging**  
 8 **over at the National Gallery, what the accounting should show**  
 9 **each time is that that is an asset of the trust.**  
 01:26:26 10 **Why is that? It is easy, particularly in an institutional**  
 11 **situation, for the records to become incomplete, which then**  
 12 **means that the memory of the trustee becomes incomplete, and the**  
 13 **information being sent to the beneficiary becomes incomplete.**  
 14 **And that can happen in a trust that goes over many, many**  
 01:26:53 15 **generations.**  
 16 **So it is important for those assets, the**  
 17 **non-income-producing ones, to be listed all the time, to inform**  
 18 **the beneficiary that they hold it in trust, and to really remind**  
 19 **the trustee that that's what they have in trust. As a banker,**  
 01:27:15 20 **we used to say if it doesn't exist in the records, it doesn't**  
 21 **exist.**  
 22 **Q.** Looking at your concluding paragraph to this section, it  
 23 says -- well, it's up on the screen. I won't read it, but you  
 24 can see that there. Two questions on this. First, do you  
 01:27:38 25 believe in light of these exclusions the 2007 Plan, if fully

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1 implemented, will constitute a fiduciary accounting?  
 2 **A. No, because it doesn't give all of the information to which**  
 3 **the beneficiary is entitled.**  
 4 **Q.** And second, given your experience at the Department of the  
 01:28:00 5 Interior and in light of what you know about the state of the  
 6 policies and procedures and records, do you believe that the  
 7 Department of the Interior can perform a fiduciary accounting?  
 8 **A. I don't think so. We know that the records are incomplete**  
 9 **to some extent. What I understand is that as time has gone on,**  
 01:28:30 10 **the records are becoming more complete, but they're still**  
 11 **incomplete to some extent. And the fact that the Department has**  
 12 **put forward this idea that their only responsibility is for the**  
 13 **funds actually collected, suggests to me that what they want to**  
 14 **do is what they think they can do, as opposed to what they**  
 01:29:04 15 **should do.**  
 16 **Q.** I'd like to turn your attention for a moment to Exhibit 19  
 17 of your expert report.  
 18 **A. Oh, yes.**  
 19 **Q.** Do you recognize this document?  
 01:29:20 20 **A. I do.**  
 21 **Q.** And who is Mr. Thomas Slonaker?  
 22 **A. He was the special trustee in July of '02.**  
 23 **Q.** Did Mr. Slonaker ever deliver this testimony?  
 24 **A. I don't think he did.**  
 01:29:38 25 **Q.** Do you know why not?  
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1 MR. HARPER: Your Honor, I have no further questions  
 2 for this witness. Thank you, Mr. Fitzgerald, for your  
 3 testimony.  
 4 THE COURT: Cross-examine?  
 01:31:58 5 CROSS-EXAMINATION  
 6 BY MR. STEMPLEWICZ:  
 7 **Q.** Good afternoon, Mr. Fitzgerald.  
 8 **A. Good afternoon. Nice to see you again.**  
 9 **Q.** Nice to see you too. *Deja vu* all over again. Just a  
 01:32:14 10 couple of questions about your period of time at the OCC.  
 11 **A. Yes.**  
 12 **Q.** You mentioned your concern there was about the  
 13 administration of a trust through the trust department having  
 14 the potential to bring down the bank.  
 01:32:33 15 **A. That's right.**  
 16 **Q.** And why was that an issue?  
 17 **A. Why was it an issue?**  
 18 **Q.** Right.  
 19 **A. The comptroller was concerned as a policy matter that the**  
 01:32:47 20 **office be fully aware of all of the risks that might affect the**  
 21 **solvency of a particular institution. Prior to Mr. Saxon being**  
 22 **there, the examination of the trust departments was conducted by**  
 23 **examiners who were experienced in the commercial side of the**  
 24 **bank and really didn't have any knowledge or experience with**  
 01:33:19 25 **trusts or trust principles or trust law.**  
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1 **A. He was advised --**  
 2 MR. STEMPLEWICZ: Objection, Your Honor. Calls for  
 3 speculation.  
 4 THE COURT: What's your basis of -- how do you know  
 01:29:49 5 what he was advised of?  
 6 THE WITNESS: He told me what he was advised of.  
 7 THE COURT: And who is -- where is Thomas Slonaker  
 8 now?  
 9 MR. HARPER: He was on our witness list, Your Honor,  
 01:30:04 10 but I think he's in India.  
 11 THE COURT: I think I'll sustain the hearsay  
 12 objection.  
 13 BY MR. HARPER:  
 14 **Q.** If we could turn back to the front of your expert report to  
 01:30:33 15 page 10. And Question Four is "Is it justified and" -- "Is it  
 16 unjustified and inconsistent with fiduciary principles for the  
 17 government to bear the costs of the accounting for the IIM  
 18 trust?" And you say the answer to this question is no. And why  
 19 do you say that?  
 01:31:09 20 **A. I believe that the government as a trustee, as a fiduciary,**  
 21 **owes the beneficiaries a complete and accurate accounting**  
 22 **statement.**  
 23 MR. STEMPLEWICZ: Your Honor, I'm going to object on  
 24 the basis of relevance.  
 01:31:33 25 THE COURT: Sustained. Sustained.  
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1 **Q.** Well, that historical perspective is nice, but  
 2 fundamentally what was the problem with a bank going under?  
 3 **A. If a --**  
 4 **Q.** The depositors wouldn't get their money, correct?  
 01:33:37 5 **A. Yes --**  
 6 MR. HARPER: Objection, Your Honor. Could he let the  
 7 witness finish his answer.  
 8 THE COURT: If he thinks it's a nonresponsive  
 9 question, he can -- I think he appropriately interrupted. I'll  
 01:33:49 10 overrule the objection. Ask your question again,  
 11 Mr. Stemplewicz.  
 12 BY MR. STEMPLEWICZ:  
 13 **Q.** The problem with the bank going under essentially is that  
 14 the depositors would lose their money, correct?  
 01:33:59 15 **A. The depositors would lose their money. That was the first**  
 16 **thing and most important thing, but the failure of banks,**  
 17 **particularly large banks, impacts the whole system. And we were**  
 18 **concerned about that.**  
 19 **Q.** If the trustee in the kinds of trusts you were looking at  
 01:34:26 20 back then were to lose all the money of the beneficiary, where  
 21 did the beneficiary have to look for recourse?  
 22 **A. To the trustee.**  
 23 **Q.** The trustee's insolvent.  
 24 **A. Yes, that's exactly true, and they would probably lose all**  
 01:34:42 25 **of their money because the FDIC didn't insure any of that.**  
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1 Q. What was the extent of FDIC insurance at that time, do you  
 2 remember?  
 3 A. **I think it was a hundred thousand dollars per account.**  
 4 Q. In the '80s?  
 01:34:57 5 A. **Savings account.**  
 6 Q. In the '80s?  
 7 A. **What did I say, a hundred thousand dollars?**  
 8 Q. Yes.  
 9 A. **No, I didn't mean a hundred thousand dollars. Thank you**  
 01:35:07 10 **for correcting me. A thousand dollars.**  
 11 Q. Now, also, while you were at the OCC, were you an associate  
 12 of Mr. Homan's, who was here before?  
 13 A. **Mr. Homan, I met Mr. Homan when Mr. Homan came to**  
 14 **Washington. I think I preceded him in the Washington office,**  
 01:35:26 15 **but whenever he came to Washington, I met him then. But he was**  
 16 **on the commercial side rather than the trust side.**  
 17 Q. And also Mr. Miller whom you mentioned is the deputy  
 18 special trustee --  
 19 A. **That's right. He was in the law department when I was in**  
 01:35:40 20 **the law department.**  
 21 Q. And Mr. Gingold was there at the time?  
 22 A. **That's true.**  
 23 Q. You indicated that you had provided some internal guidance  
 24 to the Department of the Interior regarding doing accountings  
 01:36:01 25 for Indian trust beneficiaries. Does that refer to current  
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1 **accounting, you need to have confidence that the starting**  
 2 **balance of whatever current accounts are there are appropriate**  
 3 **and are accurate, and that relies on the accountings that should**  
 4 **have been done, and therefore, if they weren't done, you should**  
 01:38:33 5 **do them now.**  
 6 Q. Okay. Over the course of many years, the administration of  
 7 the individual Indian monies accounts, day to day, year to year,  
 8 administration of the accounts was conducted at the agency  
 9 level, correct?  
 01:38:51 10 A. **That's as I understand it, yes.**  
 11 Q. Did you, in forming your opinions or instituting your  
 12 policies, did you go back to the field agencies and talk with  
 13 any of the employees about their work?  
 14 A. **I did not personally, no.**  
 01:39:05 15 Q. So you weren't familiar with the kind of knowledge that BIA  
 16 on-the-ground employees doing this work had with the accounts,  
 17 with their constituents, the kind of familiarity they had with  
 18 the problems of the account holders and that sort of thing?  
 19 A. **As I was there, I became more aware of what was going on in**  
 01:39:35 20 **the different offices, and what struck me was that there was**  
 21 **very little understanding about what a trust really was and what**  
 22 **sort of principles would apply to it. I did know that in many**  
 23 **cases the people in those regional offices knew the**  
 24 **beneficiaries quite well, but that's a different question from**  
 01:40:13 25 **about whether they appropriately managed the assets that they**  
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1 accounting, providing information currently or to the historical  
 2 accounting?  
 3 A. **As I remember it, there was -- and I can't remember the**  
 4 **year, but it was relatively early on. The Department wanted to**  
 01:36:28 5 **put out -- and I think it eventually did -- put out a Federal**  
 6 **Register notice to basically Indian country, about what do you**  
 7 **want in an accounting. And there were meetings about what that**  
 8 **accounting should look like.**  
 9 **The special trustee, and I was part of that, said that the**  
 01:36:57 10 **accounting, to be an accounting that we felt was fiduciarily**  
 11 **appropriate, would have to go back to the very beginning, or**  
 12 **else an accounting couldn't be done as fiduciary people**  
 13 **understand it.**  
 14 Q. Now, obviously, instituting policies and procedures in the  
 01:37:22 15 1990s could not be retroactively applied to the early part of  
 16 the century, the middle or any time prior to that, correct?  
 17 A. **I didn't understand the very beginning of your question.**  
 18 Q. Right. If you were trying to develop policies and  
 19 procedures in 1996 or '97 or that era, obviously they wouldn't  
 01:37:46 20 pertain to the policies and practices that the BIA followed in  
 21 administering the IIM accounts in the past.  
 22 A. **I'm not sure I understand that.**  
 23 Q. I mean, they couldn't be retroactively instituted. They  
 24 did what they did, correct?  
 01:38:04 25 A. **They did what they did, but in order to have a current**  
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1 **were supposed to manage.**  
 2 Q. Did you actually interview BIA employees who were doing  
 3 this work?  
 4 A. **I did indirectly through the training courses that we had**  
 01:40:30 5 **put together. Not indirectly, but I did interview and have**  
 6 **interaction with a number of those people in the training course**  
 7 **situation.**  
 8 Q. Did you interview IIM account holders about their  
 9 satisfaction or lack of satisfaction with how their accounts  
 01:40:50 10 were being administered?  
 11 A. **Many of those people who work at Interior are IIM account**  
 12 **holders, and of course as you know, we also had an advisory**  
 13 **board, and those people were IIM account holders outside of DOI.**  
 14 **So yeah.**  
 01:41:13 15 Q. And Ms. Cobell was on that board?  
 16 A. **Yes, she was.**  
 17 Q. How many account documents, documents used in the  
 18 administration of the IIM accounts did you review in determining  
 19 the state of the documentation to do the historical accounting?  
 01:41:32 20 A. **I don't think I personally reviewed any of those. I relied**  
 21 **on the information that was coming to us from other sources**  
 22 **about the collection of and the -- well, the availability and**  
 23 **the collection of and the condition of the records at that**  
 24 **particular time.**  
 01:41:55 25 Q. Now, on the subject of trust documents, would  
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1 correspondence and memos and things like that that go back and  
 2 forth within the agency, in the administration of the IIM  
 3 accounts, would they be trust documents?  
 4 **A. If they have to do with trust administration, yes.**  
 01:42:21 5 **Q.** And you've testified that trust documents are trust assets.  
 6 **A. That's right.**  
 7 **Q.** Yet many of them are produced from your personal files in  
 8 this case.  
 9 **A. Yes, but none of those have anything to do with individual**  
 01:42:34 10 **accounts.**  
 11 **Q.** Let's talk about the individual Indian trust. How does  
 12 that compare with the tribal trust in terms of the beneficiary  
 13 composition? I mean, individual Indian trust is not an  
 14 aggregate trust, is it? It's a one-on-one. It's an account  
 01:42:59 15 holder by account holder trust?  
 16 **A. The individuals -- yes. Right.**  
 17 **Q.** It's really hundreds of thousands of trusts.  
 18 **A. That's right. Or hundreds of thousands of trust accounts,**  
 19 **yes.**  
 01:43:13 20 **Q.** But also hundreds of thousands of trusts. There's not one  
 21 unitary individual Indian trust.  
 22 **A. Oh, I see what you're saying. Yes, I would agree with**  
 23 **that.**  
 24 **Q.** So no single IIM beneficiary would necessarily have an  
 01:43:31 25 interest or a right to demand an accounting of the whole  
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1 individual Indian trust.  
 2 **A. They have, the individual has -- and I guess I would agree**  
 3 **with that. He does have, the individual Indian does have a**  
 4 **right to an accounting for his account, or her account as the**  
 01:43:57 5 **case may be.**  
 6 **Q.** And what sort of an accounting is the common law right to  
 7 an accounting? Where does that come from? How does that  
 8 accounting get generated? What does it start with? Doesn't it  
 9 start with a request of the account holder?  
 01:44:14 10 **A. It can, but there is a general obligation to keep the**  
 11 **beneficiary informed, and indeed for the trustee to remain**  
 12 **informed about the beneficiary so that the trustee can act in**  
 13 **the best interest of that particular beneficiary.**  
 14 **Q.** But in a shorthand way, I think you previously described  
 01:44:48 15 the accounting under common law as an on-request right.  
 16 **A. It can be on request, but again, I say if the trustee wants**  
 17 **to assure that it's doing a good job, it would to me be**  
 18 **proactive in producing those accountings.**  
 19 **Q.** Now, the type of accounting you're referring to under the  
 01:45:23 20 common law, the common law is the default form of an accounting,  
 21 correct? In other words, if the trust instrument itself doesn't  
 22 provide for direction to the trustee as to how to provide the  
 23 accounting, then the law would look to the common law.  
 24 **A. Yes. Or Scott or Bogart, the scholarship in the area.**  
 01:45:55 25 **Yeah.**  
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1 **Q.** You've testified and your opinion covers the scope of the  
 2 historical accounting under the 2007 Plan. But I did not see  
 3 any mention or hear any in your testimony, didn't see in your  
 4 report or hear in your testimony anything regarding Section  
 01:46:15 5 102(a) of the 1994 Act, which is what this is about.  
 6 **A. 102 --**  
 7 MR. HARPER: Objection, Your Honor. There's no  
 8 foundation that that's what this is about. There's a dispute on  
 9 that specific question here.  
 01:46:30 10 MR. STEMPLEWICZ: Well, the fact is --  
 11 THE COURT: Extract the words "that's what this is  
 12 about" from the question and ask it again.  
 13 BY MR. STEMPLEWICZ:  
 14 **Q.** It is a fact that you did not quote Section 102(a) of the  
 01:46:43 15 1994 Act in your report?  
 16 **A. Tell me what 102(a) is, if you would.**  
 17 **Q.** Well, that's the --  
 18 THE COURT: I think it's probably an answer to his  
 19 question. If he doesn't know what it is, it's not in his  
 01:46:54 20 report.  
 21 THE WITNESS: Well, it's been two years since I've  
 22 looked at that statute, so if you really want an answer to the  
 23 question, whether I dealt with it or not without referring to  
 24 102 --  
 01:47:06 25 THE COURT: It was a rhetorical question. He knows  
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1 it's not in your report. Ask the next question,  
 2 Mr. Stemplewicz.  
 3 BY MR. STEMPLEWICZ:  
 4 **Q.** With regard to the question of statistical sampling, your  
 01:47:18 5 opinion is that statistical sampling is inappropriate?  
 6 **A. Inappropriate for an accounting, yes.**  
 7 **Q.** And have you read what the Court of Appeals has written in  
 8 this case about that subject?  
 9 **A. I am aware of what they said.**  
 01:47:32 10 **Q.** You disagree with that.  
 11 **A. I would say that I would have approached it differently.**  
 12 **Q.** Direct pay. To your knowledge, direct pay money does not  
 13 go through IIM accounts, correct?  
 14 **A. That's as I understand it.**  
 01:47:58 15 **Q.** Assuming that to account for direct pay, the Department of  
 16 the Interior would have to institute some sort of administrative  
 17 controls that would enable them to identify payments and verify  
 18 them and that sort of thing, and those administrative controls  
 19 were to slow down the receipt or the payment, the ultimate  
 01:48:24 20 receipt by the beneficiary, would that be something do you think  
 21 the beneficiaries might have some concerns about?  
 22 **A. I don't see why it would necessarily slow down anything.**  
 23 **Q.** I'm just asking you --  
 24 MR. HARPER: Objection, Your Honor. Calls for  
 01:48:40 25 speculation. This witness doesn't know --  
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1 THE COURT: Sustained.  
 2 BY MR. STEMPLEWICZ:  
 3 Q. You testified and your report I think indicates that no  
 4 deceased beneficiaries will receive an accounting. Were you  
 01:49:02 5 intending to include beneficiaries who died after October 25,  
 6 1994?  
 7 A. Yeah. Yes, I suppose so. I haven't really considered that  
 8 particular question, but yes. Any deceased beneficiary who  
 9 hasn't had an accounting should have an accounting.  
 01:49:26 10 Q. If you were to find out that the scope of the historical  
 11 accounting, the population of accounts from which the accounting  
 12 is done would include accounts of beneficiaries who died after  
 13 October 1994, would that affect your opinion any?  
 14 A. That it would include those?  
 01:49:49 15 Q. Yes.  
 16 A. I would conclude that if the Department is giving an  
 17 accounting to the -- apropos of the beneficiaries who have died,  
 18 that that would be consistent with fiduciary practice.  
 19 Q. And would the same hold true if the population of accounts  
 01:50:12 20 in the 2007 Plan included estate accounts that were open as of  
 21 October 25, 1994?  
 22 A. I hope I understand what you're asking me. This would be  
 23 for accounts for estates?  
 24 Q. Yeah. A deceased account holder, the funds from the IIM  
 01:50:35 25 account are now in an estate IIM account, and that account is  
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1 the accounting. That falls under the rubric of keeping the  
 2 beneficiary informed.  
 3 Q. Turning to the issue of compacting and contracting tribes,  
 4 is it your understanding that these tribes that do the  
 01:52:34 5 compacting and contracting are considered to be sovereign  
 6 nations?  
 7 A. Yes. I assume they are sovereign nations. They are  
 8 considered to be -- recognized tribes are considered to be  
 9 sovereign nations.  
 01:52:44 10 Q. And is it also your understanding that the compacting and  
 11 contracting is part of the U.S. policy to promote  
 12 self-governance by the tribes?  
 13 A. I understand that also. Indeed, I think there's a letter  
 14 from John Miller to Mr. Sinclair on this very point in my  
 01:53:08 15 exhibits, and that letter, if I remember correctly, recites to  
 16 those.  
 17 Q. In your experience in the private sector, does that  
 18 situation have any analogue in the private sector, where a  
 19 trustee delegates to a sovereign nation pursuant to a national  
 01:53:29 20 policy?  
 21 A. In the trust area, not that I am aware of. However, in the  
 22 commercial banking area, there are similar sorts of situations.  
 23 When I was back at the Comptroller of the Currency, for  
 24 instance, there was a situation where some foreign nationals who  
 01:53:58 25 were part of the royal family of some sovereign nation wanted a  
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1 still open as of October 25, 1994.  
 2 A. And in probate I take it?  
 3 Q. Yes.  
 4 A. And the Department will do an accounting for those?  
 01:50:52 5 Q. Assume that's the case.  
 6 A. Assuming that's the case, that is consistent with, as I  
 7 understand it, fiduciary principles.  
 8 Q. You indicated that BIA does present trust asset information  
 9 to the probate official?  
 01:51:09 10 A. That's as I understand it, yes.  
 11 Q. But that the information does not constitute in your  
 12 opinion an accounting.  
 13 A. As I understand it, yes, because no questions are asked  
 14 about it; as I understand it, it is accepted by the probate  
 01:51:26 15 people on its face.  
 16 Q. Well, what about the beneficiary? Does the beneficiary  
 17 have an opportunity then to make the common law on-request right  
 18 for an accounting?  
 19 A. Perhaps if they know they have that right, but --  
 01:51:48 20 Q. How does any beneficiary know? If it's an on-request  
 21 right, how does any beneficiary know they have a right to an  
 22 accounting or ever get an accounting?  
 23 A. It would seem to me that that would be something that the  
 24 trustee should inform the beneficiary of, that he does have the  
 01:52:08 25 right to an accounting and has a right to raise questions about  
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1 bank charter, and they wouldn't give us all of the information  
 2 that we requested, standing behind their sovereign status. And  
 3 I can't remember whether we got that information or whether the  
 4 application was withdrawn.  
 01:54:24 5 But here the trust information is -- are trustee  
 6 information documents which have been given to a sovereign  
 7 nation as an agent of the trustee.  
 8 Q. In regard to missing documents, could you explain again  
 9 this idea of -- you think the concept applies to the government  
 01:55:09 10 like it does in the private sector, that if you can't prove the  
 11 transaction, then the trustee is liable?  
 12 A. You need to explain that to me a little bit better than  
 13 that.  
 14 Q. What was exactly your testimony in regard to the inability  
 01:55:30 15 to prove up a transaction in the private sector on the part of a  
 16 trustee due to lack of documentation?  
 17 A. If there's a lack of documentation, and this again is the  
 18 general trust principle, and there are any doubts raised about  
 19 not only the lack of documentation but documentation that is not  
 01:55:58 20 clear, that any doubts are resolved in favor of the beneficiary.  
 21 And that's standard trust principles.  
 22 Q. And the whole discussion of that issue as I understand it  
 23 is to enlighten the Court about what happens in the private  
 24 sector, but not necessarily to say that's what would happen  
 01:56:24 25 here.  
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01:56:56 **1 A. No. I don't agree with that. As I understand it, the**  
**2 government is a trustee. The courts have said the government is**  
**3 a trustee. That the principles that apply to private trustees**  
**4 can be the guidance for the actions of the government as**  
**5 trustee, and I rely to a certain extent on that of what Mitchell**  
**6 said and particularly what the dissenting judges in Mitchell**  
**7 said, which was very, very interesting, it seemed to me.**  
**8 So this is a fiduciary obligation. I believe that the**  
**9 congress knew exactly what it was doing. The government knew**  
01:57:21 **10 exactly what it was doing when these trusts were set up. In**  
**11 prior generations I believe there was a good deal better**  
**12 knowledge about what a trust is and what it involves than today.**  
**13 Q. Well, wouldn't that concept of having to pay if you've lost**  
**14 the documents through negligence be a form of absolute**  
01:57:52 **15 liability?**  
**16 A. It would seem to me that it could be, but what I would**  
**17 rather characterize it as, the admonition to keep good records**  
**18 so that you don't lose them.**  
**19 Q. Right. But in your analysis have you considered the**  
01:58:09 **20 concept of absolute liability as applied to the United States?**  
**21 A. As I understand it, the United States has been held liable**  
**22 for mismanagement of the trust in other cases.**  
**23 Q. On a showing of liability, correct, not on an absolute**  
**24 liability theory?**  
01:58:38 **25 A. On a showing of liability, I suppose. I'm not sure --**  
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01:58:56 **1 Q. You haven't currently looked at Supreme Court cases like**  
**2 the Dalehite case that talks about absolute liability?**  
**3 A. No, I have not.**  
**4 Q. Now, you indicated that it's your belief that the**  
**5 Department of Interior cannot produce an accounting to the IIM**  
**6 trust beneficiaries, correct?**  
**7 A. I think my testimony --**  
**8 Q. It's just impossible.**  
**9 A. Excuse me?**  
01:59:08 **10 Q. I'm sorry. It's just impossible in your view?**  
**11 A. I don't know that particularly. What my opinion goes to is**  
**12 that what the Department is now proposing is not an accounting.**  
**13 If they are able to discover all the records that they need to**  
**14 discover, if they actually exist, then yes, I suppose you could**  
01:59:35 **15 do an accounting.**  
**16 Q. One last point. Have you been to Lenexa, to the AIRR, the**  
**17 American Indian Records Repository?**  
**18 A. No. I've seen pictures of it.**  
**19 MR. STEMPLEWICZ: Thank you. No further questions.**  
**20 MR. HARPER: I have a couple questions on redirect.**  
**21 THE COURT: Okay.**  
**22 REDIRECT EXAMINATION**  
**23 BY MR. HARPER:**  
**24 Q. Mr. Fitzgerald, you testified on cross regarding whether or**  
02:00:25 **25 not a beneficiary must request an accounting. Do you recall**  
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**1 that --**  
**2 A. That's right.**  
**3 Q. -- those questions? Without a request for an accounting,**  
**4 does the trustee have to provide an accounting at regular**  
02:00:40 **5 intervals?**  
**6 A. I would say that a trustee needs to and is expected to**  
**7 provide an accounting on regular intervals, if that's yearly or**  
**8 whatever. As I understand the scholarship --**  
**9 THE COURT: You've answered the question. What's the**  
02:01:08 **10 next question?**  
**11 BY MR. HARPER:**  
**12 Q. Are the trust assets of individuals Indians, are they**  
**13 commingled?**  
**14 A. I understand some of them are through fractionization.**  
02:01:17 **15 Q. What about the fund assets, are they commingled?**  
**16 A. They are commingled at OTFM. As the money comes in, those**  
**17 things are invested in a commingled fashion.**  
**18 Q. The defense counsel asked you about whether or not a single**  
**19 beneficiary has the right to seek an accounting of the entire**  
02:01:40 **20 IIM trust. Since the funds, as you've just testified, are**  
**21 commingled, how can a beneficiary receive a full accounting**  
**22 without an accounting of the entire trust?**  
**23 A. They can, and that accounting would look very much like**  
**24 what commercial banks do in the -- with common trust funds.**  
02:02:09 **25 Q. Do you recall counsel asking you about compacting and**  
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**1 contracting tribes?**  
**2 A. Yes.**  
**3 Q. Have you reviewed the self-determination statute that**  
**4 provides for the ability to compact and contract?**  
02:02:25 **5 A. Yes.**  
**6 Q. Is there anything in that statute regarding whether or not**  
**7 it diminishes trust responsibility?**  
**8 A. Indeed those statutes, as I understand them, go exactly the**  
**9 opposite direction, that compacting and contracting does not**  
02:02:40 **10 diminish the fiduciary responsibility. And that was cited to in**  
**11 Mr. Miller's letter to Mr. Sinclair.**  
**12 MR. HARPER: Your Honor, I'd like to move in**  
**13 Plaintiffs' Exhibit 4285, Mr. Fitzgerald's report. And I have**  
**14 no further questions.**  
02:03:01 **15 THE COURT: 4285 is received. We'll be in recess for**  
**16 15 minutes max. When we get back I want to talk a little bit**  
**17 about where we're going from here. I want to set up a schedule**  
**18 for talking about this proffer. And maybe it's time we should**  
**19 talk a little bit about Lenexa.**  
02:03:35 **20 (Plaintiff Exhibit No. 4285**  
**21 received into evidence.)**  
**22 (Recess from 3:35 p.m. to 3:51 p.m.)**  
**23 MR. DORRIS: Your Honor, we expect to have three more**  
**24 witnesses. This afternoon Mr. Jeff Zippin from OST, OTFM, and**  
02:19:17 **25 then tomorrow we expect to have Sally Willett, who has been an**  
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1 administrative law judge in probate for the Department. And  
 2 then completing with Joe Christie, who, we think both witnesses  
 3 we should be able to complete first thing in the morning.  
 4 I will go ahead and tell the Court both of those witnesses,  
 02:19:38 5 whom we don't have control over, live in the West and both are  
 6 traveling to Washington, D.C. today. So they will be available  
 7 first thing in the morning. But upon the completion of those  
 8 three witnesses, we plan to rest our case.  
 9 THE COURT: All right. Then there will be some  
 02:19:59 10 rebuttal witnesses from the government, right?  
 11 MR. KIRSCHMAN: Yes, Your Honor. Caren Dunne will be  
 12 available to testify tomorrow. And as necessary, Dr. Hinkins  
 13 from NORC will also be available. At this point, it appears  
 14 that Plaintiffs will not be presenting Robert Vaughn, correct?  
 02:20:18 15 MR. DORRIS: We do not plan to present Mr. Vaughn.  
 16 MR. KIRSCHMAN: Because of that, Your Honor, we  
 17 propose -- we had previously designated the prior testimony of  
 18 Professor Langbein. He wrote a subsequent report in 2007 to  
 19 address Mr. Vaughn's. We proposed that his designated testimony  
 02:20:41 20 be offered to the Court because it is relevant to the testimony  
 21 you just heard from Mr. Fitzgerald, but there's no reason to  
 22 bring him in to add anything new regarding Mr. Vaughn obviously,  
 23 who's now not being presented, which is one reason we suggested  
 24 he be treated as a responsive witness, so that we won't have to  
 02:21:02 25 take the time to present testimony before Mr. Vaughn actually  
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1 whole.  
 2 THE COURT: In the ordinary course of things, we don't  
 3 receive expert testimony just designated in written form, but if  
 4 there's no objection to it, I guess I'll let it be part of the  
 02:23:01 5 record as long as it doesn't cover the cost issue. I guess  
 6 that's where we are on that.  
 7 Let's proceed with the witness you have yet this afternoon.  
 8 MR. DORRIS: Thank you, Your Honor. The Plaintiffs  
 9 call Mr. Jeff Zippin.  
 02:23:43 10 (The witness takes the stand.)  
 11 MR. DORRIS: Your Honor, if you would state your name  
 12 and spell your last name, please.  
 13 THE COURT: Robertson. James Robertson. R-O-B --  
 14 (Laughter)  
 02:24:00 15 MR. DORRIS: Sorry, Your Honor.  
 16 THE WITNESS: My name is Jeffrey Zippin. Z-I-P-P-I-N.  
 17 MR. DORRIS: And Your Honor, to tell you the areas we  
 18 plan to cover, I cannot tell you what Mr. Zippin is going to  
 19 say. I've never met him, and he obviously works for the  
 02:24:21 20 government. But want to go through with his involvement in the  
 21 2003 and 2007 Plan, including especially the assembly of the  
 22 administrative record here, and some of the documents there that  
 23 are in that record; in addition want to then address with him  
 24 questions regarding how the government is treating the  
 02:24:44 25 calculation of interest with respect to the 2007 Plan.  
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1 appeared.  
 2 So, again, we will be presenting Ms. Dunne and Dr. Hinkins,  
 3 and we have designated previously Professor Langbein's 2003  
 4 testimony. We request that that be admitted.  
 02:21:23 5 THE COURT: Mr. Harper.  
 6 MR. HARPER: Your Honor, if I can just speak to the  
 7 point of the designation of Professor Langbein's testimony. As  
 8 I understand it, that's principally regarding the consideration  
 9 of the cost of the accounting. When we were exploring that area  
 02:21:39 10 with Mr. Fitzgerald, Defendants' counsel objected, and as I  
 11 understood it, the Court sustained that objection. So I don't  
 12 see how that could possibly rebut testimony that we didn't get  
 13 into with Mr. Fitzgerald.  
 14 MR. KIRSCHMAN: Your Honor, Professor Langbein's prior  
 02:21:57 15 testimony addressed the trust standards, similar to what  
 16 Mr. Fitzgerald just discussed. He might address cost, but it's  
 17 related to the applicable trust standards that are justified in  
 18 this case. Certainly his -- well, his report and subsequently  
 19 his testimony do not relate solely to cost.  
 02:22:26 20 MR. HARPER: Your Honor, our objection it to the cost  
 21 issues. So if the Defendants want to state which aspects of the  
 22 designated testimony, we can review that and then make the  
 23 determination at that point.  
 24 THE COURT: All right.  
 02:22:35 25 MR. KIRSCHMAN: We would submit his testimony as a  
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1 THE COURT: All right, sir.  
 2 **JEFFREY ZIPPIN, WITNESS FOR THE PLAINTIFFS, SWORN**  
 3 **DIRECT EXAMINATION**  
 4 BY MR. DORRIS:  
 02:24:52 5 **Q.** Mr. Zippin, I'm Bill Dorris, one of the attorneys for the  
 6 Plaintiffs. And we've never met, but I do have a number of  
 7 questions for you today.  
 8 **A. Okay.**  
 9 **Q.** What is your present position?  
 02:25:01 10 **A. I'm the deputy director of the Office of Historical Trust**  
 11 **Accounting.**  
 12 **Q.** And how long have you been with OHTA?  
 13 **A. Since the inception of the office in 2001.**  
 14 **Q.** And prior to 2001, what was your position?  
 02:25:16 15 **A. I was with the Office of Special Trustee starting in April**  
 16 **2001, until the creation of OHTA.**  
 17 **Q.** Prior to April of 2001, were you with the Department of  
 18 Interior in any capacity?  
 19 **A. Yes, I was.**  
 02:25:31 20 **Q.** And what were you doing then?  
 21 **A. Prior to that, I was the GPRA program manager for the**  
 22 **Department, sort of like the strategic planner for the**  
 23 **Department.**  
 24 **Q.** As part of that, did you have any involvement in the  
 02:25:48 25 individual Indian trust issues?  
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02:26:04 **1 A. Only to the extent that those issues were reported on as**  
**2 part of accountability reports that the government filed.**  
**3 Q.** Was that a significant part of the work you did prior to  
**4** going to the OST's office?  
**5 A. No, sir.**  
**6 Q.** Now, did your responsibilities and role change when you  
**7** moved from the OST's office to OHTA?  
**8 A. Not terribly. A little bit.**  
**9 Q.** Okay. Would you tell us what your present responsibilities  
02:26:24 **10** have been since you became deputy director of the Office of  
**11** Historical Trust Accounting?  
**12 A. Well, our office began with just two people, executive**  
**13 director Bert Edwards and myself, and we had a summer intern.**  
**14 So the first step was to build an office. By design, the office**  
02:26:40 **15 has a small number of federal employees but a large number of**  
**16 expert contractors who work for us.**  
**17 And so part of the task that I undertook was engaging**  
**18 experts and contractors to do this work. I would just generally**  
**19 state that my duties now are to carry out the mission program of**  
02:27:02 **20 the office and oversee that work.**  
**21 Q.** And when you say oversee that work, what work are you  
**22** talking about, sir?  
**23 A. The historical accounting for IIM trust, special deposit**  
**24 cleanup, as we refer to it, and tribal trust accounting.**  
02:27:21 **25 Q.** And when you say your responsibility is to oversee that  
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**1 Q.** And what about at the Bureau of Indian Affairs, is there a  
**2** specific contact that is your primary contact there?  
**3 A. Well, we were working with a fellow -- we work with a**  
**4 number of people, but one of the principal ones was Arch Wells,**  
02:29:24 **5 who recently retired. We now work with Ms. Vicki Forrest. But**  
**6 we work through all the people that we need to deal with. Mike**  
**7 Jones is a person we deal with who deals with realty issues. We**  
**8 just deal with a variety of people as the need arises.**  
**9 We also deal directly with the regional offices and any of**  
02:29:51 **10 their suboffices as -- the agency offices, as we need to, to get**  
**11 information.**  
**12 Q.** Are you the primary person that the various contractors  
**13** that are hired by OHTA report to?  
**14 A. No. We have, our staff are the contracting officer's**  
02:30:15 **15 representatives. They oversee the contract work and make sure**  
**16 the contractors are doing the work that we've assigned. Our**  
**17 office works in many ways, rather than a typical contractor**  
**18 relationship, we view these people sort of as -- we use them**  
**19 almost as staff in effect, and so the day-to-day reporting**  
02:30:37 **20 relationships are varied.**  
**21 Q.** Who from the office of the Secretary do you deal with, if  
**22** anyone?  
**23 A. Principally, two people. Dr. Abe Haspel and Jim Cason.**  
**24 Q.** Okay. Now, who was the person -- we will look at it in a  
02:30:58 **25** minute, that you signed, I think it's called a certification  
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**1** work, is that work that's being performed primarily by outside  
**2** contractors to the Office of Historical Trust Accounting?  
**3 A. That's a fair statement.**  
**4 Q.** How many employees of the Office of Historical Accounting  
02:27:44 **5** are there that are involved with this process?  
**6 A. It varies, obviously, but about 35 employees and about 400**  
**7 contractors.**  
**8 Q.** Okay. The employees, do they report directly to you?  
**9 A. We've moved to a bureaucratic hierarchy, so we have**  
02:28:06 **10 division chiefs now below me, who are now the direct report --**  
**11 most of that, a lot of the staff are direct reports of those**  
**12 people, but then they report through me.**  
**13 Q.** And with whom else in terms of in other offices are your  
**14** primary contacts or that you have the most interface with with  
02:28:25 **15** respect to the effort to provide an accounting to the individual  
**16** Indian beneficiaries?  
**17 A. Primarily with the Office of the Special Trustee and the**  
**18 Bureau of Indian Affairs.**  
**19 Q.** And the Office of Special Trustee, who from the Office of  
02:28:42 **20** Special Trustee do you primarily deal with?  
**21 A. Quite a number of people. The special -- Ross Swimmer, the**  
**22 special trustee, some of his Washington staff, particularly with**  
**23 respect to budget office items or congressional items. We also**  
**24 deal with the staff in Albuquerque, principally with Ms. Donna**  
02:29:05 **25 Erwin and her deputies and her staff.**  
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**1** regarding the administrative record. Who was primarily  
**2** responsible for putting together the administrative record  
**3** that's being referred to in this hearing?  
**4 A. There was a process that we undertook. We had some**  
02:31:16 **5 meetings with our solicitor's office and also with**  
**6 representatives of the Department of Justice to talk about what**  
**7 the scope of that needed to be. We then tasked people within**  
**8 Office of Historical Trust Accounting. We have a records**  
**9 manager who is responsible for maintaining our records and**  
02:31:37 **10 files. We also have a chief of staff who was tasked with**  
**11 working on this.**  
**12 At various times I became involved as necessary. And**  
**13 ultimately the administrative record was compiled. There were**  
**14 memos that were sent out from -- I'm not sure if it was a memo**  
02:31:55 **15 or an e-mail, from the deputy solicitor's office, requesting**  
**16 that people provide to us any documents they have which would**  
**17 reflect decisions being made in the administrative record, and**  
**18 also directing our employees to provide information as well.**  
**19 Q.** That e-mail or memo that you're talking about, was that  
02:32:18 **20** sent to people outside of the Office of Historical Trust  
**21** Accounting?  
**22 A. It went to other levels in the Department. I don't recall**  
**23 the full extent of that, sir.**  
**24 Q.** Okay. Now, it sounds like you were involved to some extent  
02:32:32 **25** with the assembly of the administrative record. Is that fair to  
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1 say?

2 **A. Yes, sir.**

3 **Q.** And were you the one principally responsible for ensuring

4 that the administrative record was complete?

02:32:44 5 **A. I guess that's a fair statement.**

6 **Q.** And did you review the administrative record when it was

7 assembled?

8 **A. I reviewed a lot of the index of it and talked about it**

9 **with our staff who were working on it, to -- asking about where**

02:33:04 10 **they looked, what they went through of my records, did they get**

11 **things from other people, just making sure that the documents**

12 **that we considered were included therein.**

13 **Q.** Okay. Other than the one memo that you mentioned that I

14 think you said came from the solicitor's office, what steps were

02:33:22 15 implemented to ensure that all the documents that were

16 considered in making the 2003 and 2007 Plans were included in

17 the administrative record?

18 **A. Looking it over and doing a review of that index, there**

19 **were a number of documents that I knew to be important,**

02:33:43 20 **certainly the NORC reports, which were provided in their**

21 **entirety. We had accounting conferences that helped formulate**

22 **our approach. Those conferences took place in 2002 and 2003.**

23 **We wanted to make sure those were in there.**

24 **So I looked for particular kinds of documents that I knew**

02:34:06 25 **were important, as well as going through my own notes. And I**

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1 are stamped draft in the administrative record. You're aware of

2 that, right?

3 **A. Yes, sir.**

4 **Q.** Some of those are documents that it's hard to tell who

02:35:43 5 prepared them. Others it indicates, for example, some of the

6 Morgan Angel reports, are stamped draft. Or do you recall that?

7 **A. Not with any specificity, but I believe that that's**

8 **correct.**

9 **Q.** But all of the documents that were included were documents

02:35:59 10 that were maintained by and in the custody of the Department of

11 the Interior. Is that right?

12 **A. Correct.**

13 **Q.** So that if it's a draft report from Morgan Angel, it is a

14 report that Morgan Angel had actually furnished to the

02:36:14 15 Department if it's included in the administrative record.

16 **A. That would be correct.**

17 **Q.** And the other documents that do not show who prepared them,

18 is there any way to determine who the preparer of the document

19 was?

02:36:27 20 **A. Some of them I might be able to recall or recollect who**

21 **did, but I wouldn't say that that's true for all of them.**

22 **Q.** Okay. Now, we'll look at some of those. Was there an

23 administrative record coordinator appointed for purposes of this

24 administrative record assembly?

02:36:53 25 **A. Yes.**

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1 **also know that our executive director, Bert Edwards, went**

2 **through his notes and any relevant material -- well, not notes,**

3 **but I should say e-mails and relevant materials as well.**

4 **Q.** We've seen a few examples when Mr. Cason -- were you here

02:34:25 5 when Mr. Cason testified?

6 **A. Yes, I was.**

7 **Q.** We've seen some examples when he was testifying of typed

8 notes that indicated they were transcriptions of your notes.

9 Did you have your notes then typed and included in the

02:34:40 10 administrative record?

11 **A. Some of the notes were typed by one of the people in the**

12 **office, and I reviewed them then to make corrections. And then**

13 **there was another group of my notes that I typed myself.**

14 **Q.** Okay. And were those all of your notes that you had taken

02:34:58 15 in connection with the development of the 2003 and 2007 Plans?

16 **A. Yes, sir.**

17 **Q.** And were all of the notes of Mr. Edwards that he had also

18 included in the administrative record?

19 **A. I don't think Mr. Edwards is a note-taker, sir.**

02:35:15 20 **Q.** So I take that to the extent that you're saying we don't

21 see notes from Mr. Edwards in the administrative record, you

22 think that's because he did not have notes. Is that fair?

23 **A. That's correct.**

24 **Q.** Now, in the administrative record, we've looked at during

02:35:31 25 the course of this hearing and there are others, documents that

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1 **Q.** And who was that?

2 **A. That was our chief of staff, Steve Alcorn.**

3 **Q.** And can you spell his last name, please?

4 **A. A-L-C-O-R-N.**

02:37:04 5 **Q.** Okay. And does he report to you?

6 **A. Yes, he does.**

7 **Q.** And did you and Mr. Alcorn attempt to follow the

8 Departmental manuals and directives for the assembly of the

9 administrative record?

02:37:26 10 **A. We actually talked through with our solicitor's office, we**

11 **had a copy of those requirements. We reviewed them with them**

12 **and in discussions, and were using that as a guide, yes, sir.**

13 **Q.** When you say you're using that as a guide, did you follow

14 that guide in each instance?

02:37:41 15 **A. I believe we did, sir.**

16 **Q.** Now, let's look if we can at Plaintiffs' Exhibit 4504.

17 That should come up on your screen there. If you'll blow up the

18 middle. This is then where there's a notice of filing by the

19 Interior defendants of a certification of administrative record,

02:38:06 20 and if you would scroll down I think it'll show us the date of

21 September 19, 2007. And if you would look, would be the fourth

22 page of this exhibit, please. And this is a declaration. And

23 if we can look at the next page and confirm that this is the

24 document you signed.

02:38:39 25 **A. Yes, sir, it is.**

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02:39:10 1 Q. Okay. Now, let's go back to the prior page and look at  
 2 your certification. In your certification, you indicate that,  
 3 this is the first bullet, that "The attached index reflects the  
 4 documents constituting the administrative record supporting the  
 5 plan for completing the historical accounting of individual  
 6 Indian money accounts of May 31, 2007," and then you also refer  
 7 to the January 2003 plan. Do you see that?  
 8 A. Yes, sir.  
 9 Q. So this is the administrative record for both plans; is  
 02:39:27 10 that correct?  
 11 A. Yes, sir.  
 12 Q. And where you indicate here that this is the documents  
 13 supporting the plan, those two plans, did you include documents  
 14 in the administrative record that did not support the plans?  
 02:39:41 15 A. **Included in the administrative record were documents we  
 16 considered in developing both plans.**  
 17 Q. Okay. Were there documents that were maintained by the  
 18 Department of Interior that were not included in the  
 19 administrative record and that would show recommendations or  
 02:40:05 20 suggestions that something other than what was being proposed in  
 21 the 2003 and 2007 plans should be undertaken?  
 22 A. **I believe there may be some documents in the administrative  
 23 record that do that. I believe you've used those as exhibits in  
 24 this trial.**  
 02:40:48 25 Q. Mr. Zippin, what I'm trying to find out is, you say in this  
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1 THE WITNESS: I believe we included all of them,  
 2 Your Honor.  
 3 MR. DORRIS: Okay.  
 4 BY MR. DORRIS:  
 02:42:17 5 Q. Good. But there may be some in other offices that you  
 6 don't know of whether they were included or not. Let me  
 7 restate. You look puzzled so I better ask that one again. You  
 8 do not know if other offices in the Department of Interior  
 9 maintain documents that do not support these plans that have not  
 02:42:39 10 been included in the administrative record?  
 11 MR. QUINN: Objection, Your Honor. Asked and  
 12 answered.  
 13 THE COURT: I'm not sure it's been answered.  
 14 THE WITNESS: I don't know of other documents that  
 02:42:53 15 other offices may have.  
 16 BY MR. DORRIS:  
 17 Q. Can you state in court here today and to Judge Robertson  
 18 that a thorough effort was undertaken to locate all such  
 19 documents at other offices of the Department of Interior and  
 02:43:06 20 include them in the administrative record or not?  
 21 MR. QUINN: Objection. Vague, Your Honor.  
 22 THE COURT: Well, may I see counsel at the bench on  
 23 this one.  
 24 (Bench conference off the record.)  
 02:44:13 25 BY MR. DORRIS:  
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02:41:08 1 declaration we included the documents that supported these  
 2 plans. And I'm trying to find out if there were documents that  
 3 the Department of Interior has that don't support the plans, in  
 4 other words, would impeach the plans or be contrary to them,  
 5 that were not included in the administrative record.  
 6 A. **Sir, my understanding of the term "supportive" is in a  
 7 general way. I believe it should be documents that we  
 8 considered, and I do believe there are documents in the record  
 9 that present alternative approaches to what we're doing and  
 02:41:24 10 alternative thoughts on the matter, including some of the  
 11 limitations that have been discussed here.**  
 12 Q. I follow that. I understand that answer. My question's a  
 13 little different. Are there documents that you're aware of that  
 14 the Department maintains or any office of the Department  
 02:41:38 15 maintains that have not been included in the administrative  
 16 record that do not support these plans?  
 17 A. **I have no way of knowing what other offices in the  
 18 Department of Interior may have to that regard.**  
 19 Q. Does the Office of Historical Trust Accounting maintain any  
 02:41:53 20 documents that would be contrary to or not supportive of these  
 21 plans that have not been included in the administrative record?  
 22 A. **Sir, I believe that my answer is that we included documents  
 23 of that nature in the administrative record.**  
 24 THE COURT: The question is whether you included all  
 02:42:13 25 of them.  
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1 Q. Looking at the screen, at the last bullet that is there,  
 2 that indicates that "The documents reflected by the index are  
 3 those considered by the Department of the Interior in  
 4 formulating the plans identified above," do you see that?  
 02:44:44 5 A. Yes, sir, I do.  
 6 Q. It goes on, it says, "As well as documents that demonstrate  
 7 implementation of the plans or provide explanatory or background  
 8 material." Do you see that?  
 9 A. Yes, sir.  
 02:44:56 10 Q. So all of the documents that were considered by the  
 11 Department of Interior in formulating the plans have been  
 12 included?  
 13 A. **To the best of my knowledge, that's correct.**  
 14 Q. And some of the documents that are in the administrative  
 02:45:08 15 record were not those considered by the Department but were  
 16 included to demonstrate implementation of the plans or to  
 17 provide background material?  
 18 A. Yes, sir.  
 19 Q. Now, let me ask you, we did not see in the administrative  
 02:45:25 20 record a document that -- Mr. Cason is the one that signed the  
 21 2007 Plan, correct?  
 22 A. **Yes. It's on the front page of that document, sir.**  
 23 Q. Correct. And we did not see any decisional documents that  
 24 he executed leading up to that plan. Are you aware of any in  
 02:45:52 25 the administrative record?  
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02:46:19 **1 A. No. I don't believe there are any in the administrative**  
**2 record, except for a document that I submitted that reflected**  
**3 issues that were being considered for the 2007 Plan, and I**  
**4 believe I had an accompanying note that stated that these were**  
**5 the last documents that Mr. Cason had seen in making the**  
**6 decisions that were made. And that is included.**  
**7 Q.** Okay. Let's look at the administrative record, Bates  
**8 document 63-2-1, and see if that is the note that you are**  
**9 referring to.**  
02:46:38 **10 A. That is correct.**  
**11 Q.** So that the other documents that are part -- the other  
**12 pages that are part of this document that's Bates numbered 63-2**  
**13 are the last documents that Mr. Cason reviewed prior to the 2007**  
**14 Plan; is that correct?**  
02:47:03 **15 A. That's correct.**  
**16 Q.** Now, let's just look, for example, over at Bates page 5 of  
**17 63-2. You see there are a number of options there. We're not**  
**18 going to go through those. None of these, if you'll look at the**  
**19 bottom of the page, the decision, none of these are then signed,**  
02:47:28 **20 is that correct?**  
**21 A. That's correct.**  
**22 Q.** But you maintained these and included them in the  
**23 administrative record as reflecting what?**  
02:47:45 **24 A. These reflect the discussions that we were having and the**  
**25 options that OHTA presented to Mr. Cason and to Dr. Haspel as**  
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**1 A. That's correct.**  
**2 Q.** And I take it you would also have been at that meeting,  
**3 inasmuch as you were taking notes?**  
**4 A. Yes, sir.**  
02:49:28 **5 Q.** We're going to look at the next page. And this is a  
**6 meeting in November 20, 2002. Right before, you see where it**  
**7 says SID? There's a, right above that line, it says "How do we**  
**8 deal with missing data?" And then the last two lines of these**  
**9 notes talk about missing data and errors versus unsupported, and**  
02:49:53 **10 it says T-R-A-N-S, I take it that would be transactions?**  
**11 A. That would be my recollection.**  
**12 Q.** Do you recall what the discussion was at this point in  
**13 dealing with missing data and the question of errors versus**  
**14 unsupported transactions?**  
02:50:12 **15 A. I don't have a distinct recollection in particular of this**  
**16 meeting, but ultimately as the decisions have evolved, we agreed**  
**17 that in doing our transaction-by-transaction reconciliation, if**  
**18 we could not find data to support reconciliation of the**  
**19 transaction, it was treated as an error in the statistical**  
02:50:36 **20 analysis.**  
**21 Q.** So that you're not saying that decision was made at this  
**22 particular meeting, but what you recall, that issue was being**  
**23 discussed at this meeting?**  
**24** MR. QUINN: Excuse me, Your Honor. I hate to  
02:50:49 **25 interrupt. The record reflects this is a telephone conference**  
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**1 well for the 2007 Plan.**  
**2 Q.** Now, I want to look at -- we may come back to this document  
**3 on a couple items. I want to look at some of your notes to get**  
**4 you -- I tried to ask Mr. Cason about some and they weren't his**  
02:48:09 **5 notes. I want to ask you about a few things in your notes,**  
**6 okay?**  
**7 A. Yes, sir.**  
**8 Q.** Let's look at administrative record document 63-10,  
**9 beginning at page 10. And we'll look at the top. You recognize**  
02:48:33 **10 this document as being one of the documents that was typed of**  
**11 notes that you took at a meeting, correct?**  
**12 A. Yes, sir.**  
**13 Q.** And did you take handwritten notes and then they were typed  
**14 or did you actually type them on this form?**  
02:48:46 **15 A. I take handwritten notes in a series of notebooks that date**  
**16 back to the inception of the office, and then these were typed**  
**17 for the administrative record.**  
**18 Q.** But these are accurate as to what notes you took while you  
**19 were sitting in the meeting?**  
02:49:03 **20 A. Yes, sir.**  
**21 Q.** Okay. Good. This indicates the attendees, it appears to  
**22 be the Secretary; is that correct?**  
**23 A. Yes.**  
**24 Q.** Mr. Griles, Mr. Cason, Mr. Bernhardt, and Mr. Jensen; is  
02:49:21 **25 that right?**  
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**1** call. He keeps referring to it as a meeting. But just so the  
**2 record is clear.**  
**3** THE WITNESS: I'm sorry, could you repeat the  
**4 question.**  
**5** BY MR. DORRIS:  
**6 Q.** Yes. I'm just trying to find out, was that decision made  
**7 at this meeting, or was this meeting one of the meetings where**  
**8 that was being discussed?**  
**9 A. My recollection would be that, given this was 2002, it was**  
02:51:16 **10 a discussion topic as opposed to a decision topic.**  
**11 Q.** Okay. Now, let's look over at, in the same document, Bates  
**12 page 12. And this would then be -- let's make sure it's a**  
**13 meeting. Yes, it's a meeting with Mr. Cason and Mr. Haspel on**  
**14 December 6, 2002. Do you see that?**  
02:51:38 **15 A. Yes, sir.**  
**16 Q.** And if we look down toward the bottom of the page, it says  
**17 "As a national program sample size below less than 1,000 to get**  
**18 a 99 percent conf with 2 percent, to get to level where each**  
**19 region or agency can stand on its own." Do you see that?**  
02:52:09 **20 A. Yes, sir.**  
**21 Q.** What was the effort being undertaken here to have each  
**22 region or agency stand on its own?**  
**23 A. When the 2003 Plan was being formulated, my understanding**  
**24 and recollection is that the sample size was based on including**  
02:52:29 **25 a certain number of samples from each agency.**  
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02:52:58 **1 Q.** And why was that?

**2 A.** **Initially we wanted to provide coverage for a statistical**

**3 analysis, and thought that at that time that was an approach to**

**4 looking at it, to include some things so there would be**

**5 something from each agency, and that's why we had such a large**

**6 sample size in the 2003 Plan.**

02:53:18 **7 Q.** And the thought underlying that was because there was, at

**8 least at that time, there was a thought or concern that each**

**9 region and each agency may be different from another one. Is**

**10 that right?**

**11 A.** **That was a possibility to consider.**

**12 Q.** In other words, that was part of what was driving what

**13 became the decision to make sure that there were samples coming**

**14 from each agency, correct?**

02:53:30 **15 A.** **At the time.**

**16 Q.** All right. Has that now changed?

**17 A.** **It has changed in the 2007 Plan.**

**18 Q.** And was there at some point a study or determination made

**19 that in fact there were not differences between the agencies**

02:53:48 **20 that would necessitate having each agency stand on its own?**

**21 A.** **In fact, what we relied on, the study was in fact the**

**22 litigation support accounting, which was undertaken initially as**

**23 a separate component apart from what we had had in the 2003 Plan**

**24 which, if you recall, was rejected by the Court, and we were in**

02:54:12 **25 limbo in 2004 because Congress had barred us from pursuing any**

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**1** excuse me. It would be document 63-11-5. And if we come to the

**2** top of this, this is then a meeting with Mr. Cason on November

**3** 10, 2003 that Mr. Cason, Mr. Haspel, Bert -- that would be Bert

**4** Edwards?

02:56:30 **5 A.** **Yes, sir.**

**6 Q.** Yourself and Alyce. Who was Alyce?

**7 A.** **Alyce Schiess. Alyce Schiess is an employee in the office.**

**8 S-C-H-I-E-S-S.**

**9 Q.** Look down about halfway down the page where it talks about

02:56:53 **10 third-party records. Let me give you a moment to review that.**

**11 A.** **Could you go back to the top again, sir?**

**12 Q.** Yes, sir.

**13 A.** **Okay.**

**14 Q.** Can you read it at that size?

02:57:10 **15 A.** **Starting with "for third-party records"?**

**16 Q.** Yes.

**17** (Witness reviewing document.)

**18 A.** **Okay.**

**19 Q.** What's your recollection of what was being discussed here?

02:57:35 **20 A.** **My recollection was one of the breaches that had been --**

**21 that the Court had noted in an earlier ruling dealing with**

**22 third-party records, and this was a discussion of third-party**

**23 records.**

**24 Q.** And what ended up being decided regarding obtaining

02:57:59 **25 third-party records?**

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**1 of what the judge had ordered, and so the litigation support**

**2 accounting was, as it states, it was intended to provide**

**3 information that could support settlement discussions that were**

**4 being undertaken under the auspices of Congress.**

02:54:35 **5 Q.** Okay. In light of what you've just said, is it correct

**6 that the decision to move from making sure that each agency**

**7 could stand on its own and ensuring a certain number of samples**

**8 came from each agency, to what we now see in the 2007 Plan, was**

**9 the result of the LSA or information gained from the LSA?**

02:55:00 **10 A.** **That's a fair statement.**

**11 Q.** But the LSA -- was the LSA -- were there samples in the LSA

**12 from every agency?**

**13 A.** **I don't know to the extent that coverage ended up including**

**14 every agency. However, every account and every agency was**

02:55:18 **15 subject to sampling.**

**16 Q.** Okay. But you do not know whether -- you do know, don't

**17 you, that there were some agencies where there were no samples**

**18 taken, correct?**

**19 A.** **The only one I know of for sure is the Horton Agency, sir.**

02:55:35 **20 Q.** And we know of that because that's where the

**21 land-to-dollars test was done, and that was one of the reasons**

**22 they went to the Horton Agency, was because they figured they**

**23 weren't tired of providing information at that point, right?**

**24 A.** **That was one of the criteria for selecting Horton Agency.**

02:55:57 **25 Q.** Now, let me ask you to look at the same document -- no,

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**1 A.** **Well, I don't know specifically coming out of this. The**

**2 Department has a departmental manual release; our office**

**3 actually undertook to go out and survey some third-party records**

**4 and ultimately in the historical accounting, under LSA we use**

02:58:20 **5 third-party records to reconcile transactions.**

**6 Q.** And what third-party records were used to reconcile

**7 transactions in the LSA?**

**8 A.** **I'm aware of two. One involved a right-of-way payment in**

**9 Arizona. We couldn't verify the payment amount without going to**

02:58:36 **10 an attorney who represented an allottee in negotiations with the**

**11 state of Arizona. And the second one we couldn't verify an**

**12 electronic funds disbursement in Alaska, and we ended up calling**

**13 the bank which had succeeded the previous bank, and they were**

**14 able to look in their records and confirm that the payment was**

02:58:57 **15 made.**

**16 Q.** But those are the only two instances in the LSA

**17 reconciliation project that you're aware of where third-party**

**18 records were obtained in order to try to support one of the**

**19 reconciliations?**

02:59:10 **20 A.** **Those are the ones that I readily recall. I think there**

**21 may have been some others.**

**22 Q.** But you don't recall them here. Now, look at this same

**23 document, Bates page 8, which appears to be a meeting on**

**24 December 15, 2003, and you see the people that were in**

02:59:40 **25 attendance there. So this is document No. 63-11-8 that we're**

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1 looking at. You see where it says "Dollars in and dollars out,  
 2 preferred reporting, 13 billion in"? Do you see that?  
 3 **A. Yes, sir.**  
 4 **Q.** And what was the discussion as to why it was preferred to  
 03:00:00 5 report that amount?  
 6 **A. What we refer to as the blue document, the report to**  
 7 **Congress, that first surfaced and had a table referencing the 13**  
 8 **billion -- actually referred to that as throughput. Throughput**  
 9 **in the parlance that we use means you're counting the money as**  
 03:00:21 10 **it comes in and you're counting it again as it goes out.**  
 11 **Whereas what I think has been referred to in this case,**  
 12 **Your Honor, as collections is just the money coming in, and so**  
 13 **it's -- the preferred reporting should have been and going**  
 14 **forward should be 13 billion in collections, using the data that**  
 03:00:40 15 **we had at that time.**  
 16 **Q.** Okay. So that was what, the best you recall as to why  
 17 that's preferred reporting, is to make it clear that that's the  
 18 money coming in, at least as far as the Department saw.  
 19 **A. Yes, sir.**  
 03:00:54 20 **Q.** Let me ask you to look -- let's start in this same  
 21 document, Bates page 10. And look up at the date of the  
 22 meeting, and it appears to be a meeting from June 17, 2004, that  
 23 you had with Mr. Cason. Do you see that?  
 24 **A. Yes, sir.**  
 03:01:21 25 **Q.** And could you just scroll down the page so he can get the  
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1 **A. Yes, sir, I have.**  
 2 **Q.** And are any of those included in the administrative record?  
 3 **A. My understanding, they were presented as an exhibit.**  
 4 **Q.** Okay. But were they prepared after the administrative  
 03:03:34 5 record?  
 6 **A. Yes, sir.**  
 7 **Q.** But none were prepared as of the time you put together this  
 8 administrative record?  
 9 **A. I don't believe they were, sir.**  
 03:03:43 10 **Q.** Other than those that had been presented as an exhibit, are  
 11 you aware of any draft historical statements of account for  
 12 land-based account holders?  
 13 **A. No.**  
 14 **Q.** All right. And are you aware of even the ones that were  
 03:04:00 15 presented as an exhibit that contained a statement from the  
 16 paper record with an opening balance that cannot be verified?  
 17 **A. I don't recall what that refers to.**  
 18 **Q.** The note here in this meeting, you don't recall what that's  
 19 referring to?  
 03:04:17 20 **A. No, sir.**  
 21 **Q.** Is it expected that there will be land-based accounts that  
 22 go back into the paper record era where the Department will not  
 23 be able to verify the opening balance?  
 24 **A. I believe that if we have an account that goes back to**  
 03:04:34 25 **1938, and if we follow what the courts have said about using the**  
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1 context of this meeting. And then if we'll look at the next  
 2 page, if we may.  
 3 **A. Okay.**  
 4 **Q.** And so we're now at document Bates page 63-11-11. Do you  
 03:01:50 5 see where this is a continuation of that same meeting, correct?  
 6 **A. I believe so.**  
 7 **Q.** Okay. And you see where it's talking about example  
 8 statements 3 to 4? Would you look at that?  
 9 **A. Yes, sir.**  
 03:02:06 10 **Q.** It says "sample of a statement from paper record with  
 11 opening balance we cannot verify." Do you see that?  
 12 **A. Yes, sir.**  
 13 **Q.** Was a statement, a draft statement of historical accounting  
 14 such as that ever prepared?  
 03:02:23 15 **A. I don't think at this date we had produced any statements.**  
 16 **I know later on when we were beginning to talk about historical**  
 17 **statements of account we pulled together just an example of all**  
 18 **the transactions that might exist in an account. But at this**  
 19 **time we did not have anything like that, I believe.**  
 03:02:56 20 **Q.** Okay. The 2007 Plan talks about there being statements of  
 21 historical accounts sent out to a variety of different  
 22 beneficiaries, some of whom have land-based accounts, correct?  
 23 And my question just goes to the land-based accounts. Have you  
 24 seen draft statements of historical accounts for land-based  
 03:03:22 25 beneficiaries?  
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1 **act of June 24, 1938, as the limit of the accounting, then**  
 2 **that's as far back as we would go.**  
 3 **Q.** Okay. Now, let's look over at the next page. And this is  
 4 a meeting of July 2, 2004, where there's a briefing for  
 03:05:01 5 Mr. Cason on LSA results, and you see the attendees at that  
 6 meeting, and I assume you were also there, correct?  
 7 **A. Yes. It says so.**  
 8 **Q.** And would you -- let's look -- do you see where it says  
 9 "draft by July 9" toward the bottom of the page?  
 03:05:19 10 **A. Yes.**  
 11 **Q.** Do you see just above there where it says "we assume no  
 12 connotation on missing information"?  
 13 **A. I see that.**  
 14 **Q.** Do you know what that's referring to?  
 03:05:34 15 **A. In light of what we ended up producing, no, sir, I don't,**  
 16 **because we ended up -- if we couldn't reconcile the transaction**  
 17 **because of missing information, we assumed it was an error.**  
 18 **Q.** Okay. So to the extent that this is an indication that the  
 19 LSA results had made no connotation on missing information, that  
 03:05:56 20 ultimately did not end up being the decision as to how the  
 21 reconciliation would be done?  
 22 **A. At this time, this part of the LSA was only partially**  
 23 **completed in 2004, and I believe we included an interim report**  
 24 **by NORC about it. So this is while it was ongoing. And**  
 03:06:21 25 **ultimately it's the final report on LSA that contains the**  
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03:06:36 **1 conclusions that were made and describes the process.**  
**2 Q.** So this was at some point while LSA had not yet been  
**3** completed; is that correct?  
**4 A. Yes, sir.**  
**5 Q.** Now, let me ask you to look at one -- it'll be the last  
**6** note that we'll look at -- is going to be Bates page from the  
**7** administrative record 63-13-2. And this is a July 21, 2006,  
**8** document that indicates it's a contemporaneous note of yours,  
**9** and the subject is "Paper era accounts." And it appears that it  
03:07:18 **10** was a meeting just between you and Mr. Cason. Do you see that?  
**11 A. Mm-hmm.**  
**12 Q.** It says under "Notes," "Paper era accounts needed. If 200  
**13** yields 75, is that enough?" What was being discussed, if you  
**14** recall?  
03:07:38 **15 A. My recollection of this is that we did not at this time**  
**16 have a good number for how many of the accounts in the**  
**17 historical accounting population went back into the paper**  
**18 records era. I think that's been referred to both as a paper**  
**19 records tail and a paper records antecedent.**  
03:08:06 **20 Q.** I don't think they said antecedent the way you said --  
**21 A. I think they said antisedent. That was new to me too.**  
**22 But I think at this time what we were looking at was if we**  
**23 were to draw a certain sample, how many would likely be in the**  
**24 population. And we didn't do it at that time because we didn't**  
03:08:28 **25 have enough information.**

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**1 A. Yes. And I do believe, although I don't have a specific**  
**2 recollection of who prepared this, I do believe this came from**  
**3 one of our accounting conferences.**  
**4 Q.** So you do not even know if this document was prepared by  
03:10:44 **5** somebody within the Department of Interior or a contractor. Is  
**6** that right?  
**7 A. I think it would have been by a contractor, but I can't be**  
**8 certain.**  
**9 Q.** And likewise, in light of what you said, you wouldn't know  
03:10:58 **10** which contractor prepared it.  
**11 A. No, sir.**  
**12 Q.** And you do not know when it was prepared, do you?  
**13 A. Short of going back and looking through the accounting**  
**14 conference books and seeing if that copy exists in there, no, I**  
03:11:11 **15 would not.**  
**16 Q.** And did you make the decision to include this document in  
**17** the administrative record?  
**18 A. I made the decision that we should include all of our**  
**19 accounting conference binders, because of material like this**  
03:11:26 **20 that was presented at those meetings, which -- recall that these**  
**21 were mostly held prior to even the first plan being developed.**  
**22 This is part of what I would call the formative information that**  
**23 we considered in developing the plans.**  
**24 Q.** Okay. Let me ask you, in the administrative record there  
03:11:49 **25** were a number of exhibits where there were, on the front it

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**1 Q.** Okay. So the 200, would that be -- if 200,000 accounts  
**2** ends up there being 75,000 accounts that have a paper record  
**3** tail?  
**4 A. Actually, I think it might have just been 200 and 75. I**  
03:08:46 **5 don't know -- I don't recall more than that.**  
**6 Q.** That's fair. Look at the first subparagraph there. It  
**7** says find best of remaining accounts and do minimis. What do  
**8** you remember was being discussed about doing minimis?  
**9 A. I don't recall how that applies.**  
03:09:12 **10 Q.** But this is a note that you made in a meeting between you  
**11** and Mr. Cason in July of 2006, correct?  
**12 A. That's correct.**  
**13 Q.** Let me ask you to look at Bates document 57-30-1. And if  
**14** we'll blow up the top there. This is one of those documents  
03:09:37 **15** that did not clearly indicate to us who had prepared it. Do you  
**16** know where this document came from?  
**17 A. Is there anything further down below, sir?**  
**18 Q.** Yes. We can --  
**19 A. I think -- my guess is this would probably be from one of**  
03:10:06 **20 the accounting conferences.**  
**21 Q.** Okay. We don't really work with guesses here very well.  
**22 A. In that case I don't who the author is.**  
**23 Q.** Okay. But you do know this was a document that was  
**24** maintained by the Department of Interior and was considered in  
03:10:25 **25** connection with the development of the plans.

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**1** would make it clear it was from an accounting conference. Okay?  
**2** And this, as you will see, is page 1 of this particular  
**3** document.  
**4 A. I'm sorry. This is page 1 of...**  
03:12:07 **5 Q.** If we look at the Bates number down at the bottom, and if  
**6** you can blow that up at all, or at least where we can read it.  
**7** You know how the administrative record is numbered and Bates  
**8** numbered?  
**9 A. I know those numbers, but I couldn't tell you what that is.**  
03:12:22 **10 Q.** Okay. But do you see that this is page 1 of the particular  
**11** document?  
**12 A. Yes, sir.**  
**13 Q.** Okay. Now, there's one particular statement I want to show  
**14** you in here to see if that refreshes you as to who wrote this,  
03:12:39 **15** or if you can give us a time frame that it came from, okay?  
**16** Look on Bates page 3, the paragraph just above the heading about  
**17** two-thirds of the way down the page. And we'll look at the  
**18** highlighted language. Let me let you read the entire paragraph  
**19** and then I'll ask you.  
03:12:59 **20 A. Well, could I see the entire page first before focusing on**  
**21 this?**  
**22 Q.** Yes, sir.  
**23** (Witness reviewing document.)  
**24** Are you able to see that, Mr. Zippin?  
03:13:12 **25 A. With glasses I can.**

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1 **(Witness reviewing document.)**  
 2 **Okay.**  
 3 **Q.** The highlighted part says -- this is after talking about  
 4 there being a small error rate on the disbursement side, it says  
 03:13:58 5 "although there were problems in locating all the support  
 6 documents," I want you to focus on this sentence that says "this  
 7 warns us that we need to have a strategy that resolves the  
 8 missing record problem for disbursements in a way that does not  
 9 treat the failure to find the supporting documentation as an  
 03:14:14 10 error in the account." Do you see that?  
 11 **A. I do.**  
 12 **Q.** Does that refresh your recollection as to the origin of  
 13 this document or the timing that this document was prepared?  
 14 **A. I don't know exactly when it was prepared, but given what**  
 03:14:32 15 **it's talking about, it was obviously one of the things we**  
 16 **considered, because someone was presenting it to us as what you**  
 17 **could learn from the tribal reconciliation.**  
 18 **Q.** Okay. But you can't tie down who prepared this document?  
 19 **A. No.**  
 03:14:46 20 **Q.** Okay. Now, Mr. Zippin, have you been involved with the  
 21 issue of how interest is going to be handled in the 2007 Plan?  
 22 **A. Yes.**  
 23 **Q.** And can you describe for the Court how interest is going to  
 24 be handled in the 2007 Plan?  
 03:15:03 25 **A. Yes. All of the interest postings in an account that are**  
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1 necessary to undertake a recalculation of the interest for each  
 2 and every account?  
 3 **A. I wouldn't characterize it as such a -- the way you have.**  
 4 **I think it was just something as part of our due diligence in**  
 03:17:14 5 **presenting account holders with as complete a historical**  
 6 **statement of account as practicable, that we could do this.**  
 7 **Q.** You said that you were going to use the stated interest  
 8 factors, or words to that effect. Did I get it right?  
 9 **A. Yes.**  
 03:17:30 10 **Q.** What interest factors, who states them, and what are those  
 11 that are being used?  
 12 **A. My understanding is that whenever there is an interest**  
 13 **period, interest is moved into a special deposit account,**  
 14 **interest that's been earned by the pooled funds, and that**  
 03:17:51 15 **divided by the dollars that are being in the accounts to which**  
 16 **this interest is applicable, generates a decimal fraction.**  
 17 **That's the factor that is then applied to calculating interest**  
 18 **in all accounts that are eligible to receive interest.**  
 19 **Q.** And who is making that calculation?  
 03:18:10 20 **A. That's the -- it's in the Office of the Special Trustee.**  
 21 **And prior to that it would have been the Bureau of Indian**  
 22 **Affairs.**  
 23 **Q.** So that's a historical calculation that's been done?  
 24 **A. Yes, sir.**  
 03:18:21 25 **Q.** So there has been a calculation done over the course of  
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1 **part of our population are going to be recalculated using the**  
 2 **interest factor that was applied either by the Bureau of Indian**  
 3 **Affairs or Office of Trust Funds Management, OST, to a**  
 4 **particular transaction.**  
 03:15:33 5 **Q.** Why is that going to be done? What's the thinking behind  
 6 it?  
 7 **A. We had concerns about whether in fact interest may have**  
 8 **been calculated properly, and wanted to do a recomputation of**  
 9 **that to report to people as part of the historical accounting.**  
 03:15:53 10 **Q.** And why did you have concerns as to whether or not interest  
 11 had been posted correctly to the accounts?  
 12 **A. I think largely anecdotal, the kinds of things that had**  
 13 **been raised from a variety of sources.**  
 14 **Q.** And it was not based on any study that was undertaken to  
 03:16:21 15 determine whether interest and earnings had been posted  
 16 correctly to the accounts?  
 17 **A. No. Other than the results that -- we began doing this**  
 18 **with judgment and per capita accounts as a matter of course, and**  
 19 **noted that sometimes there were interest differences calculated.**  
 03:16:39 20 **So we decided to apply this to all historical statements of**  
 21 **account that we would be sending out.**  
 22 **Q.** Would it be fair to say, even though it was based on  
 23 anecdotal evidence, that there was sufficient concern by the  
 24 Department of Interior that the interest had not been correctly  
 03:16:57 25 calculated and posted to the accounts, that it thought it  
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1 time as to what -- an effort to determine what interest was  
 2 actually being earned on the pooled investments; is that  
 3 correct?  
 4 **A. Well, it's not a report of the interest. The factor used**  
 03:18:35 5 **is what is actually applied to the dollars that are in an**  
 6 **account, in accordance with what the applicable interest payment**  
 7 **rules were at the time.**  
 8 **Q.** Okay. I got totally lost on that last part.  
 9 **A. I apologize.**  
 03:18:47 10 **Q.** No, I don't know that it's you. I don't understand what  
 11 you just told me. Can you explain how -- what these interest  
 12 factors are?  
 13 **A. And I want to draw the distinction these are not interest**  
 14 **factors. These are factors that were used -- the factor itself**  
 03:19:07 15 **is not about interest earned; it's about the total amount that**  
 16 **was available to be paid from the interest, and the factor is**  
 17 **what they use to apply to the money in accounts.**  
 18 **Q.** Okay. Let's try to do this quickly, but we need to break  
 19 it down fairly simple for me if we can. Funds are in a pooled  
 03:19:29 20 account; is that correct?  
 21 **A. Yes. The IIM funds are pooled.**  
 22 **Q.** And they are pooled and invested in some type of security  
 23 or bond that pays a dividend or interest, correct?  
 24 **A. Yes.**  
 03:19:47 25 **Q.** And so you have a pooled amount that has a certain amount  
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1 of dollars in it, correct? And then there's a certain amount  
 2 earned on that pool of funds, correct?  
 3 **A. On those investments of the pool, yes.**  
 4 **Q.** Now, how then is the interest -- well, you're not calling  
 03:20:08 5 it interest factor. How is the factor, the stated factor then  
 6 determined based on that?  
 7 **A. My understanding is that the interest earned during the**  
 8 **period, the applicable period, is in an interest account, it's**  
 9 **referred to as, and then the sum that is available there is**  
 03:20:29 10 **divided by all the dollars that are represented in the**  
 11 **individual accounts that are entitled to earn interest, and that**  
 12 **division yields a factor then that is applied to the dollars in**  
 13 **each account.**  
 14 **Q.** Okay. And that calculation assumes, doesn't it, that the  
 03:20:47 15 pooled funds that were invested reflects accurately the total of  
 16 all of the individual IIM accounts, correct?  
 17 **A. I'll have to say that that would be my understanding. I**  
 18 **don't have direct knowledge of that.**  
 19 **Q.** Okay. Now, what's the basis for your understanding?  
 03:21:05 20 **A. The discussions that we've had about recalculating**  
 21 **interest.**  
 22 **Q.** Okay. And do you know whether or not the amount of the  
 23 pooled investments always reflected the same total as the sum of  
 24 all of the individual accounts?  
 03:21:26 25 **A. Well, the investments vary because there's a cash need**

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1 **Q.** And when are you going to report on that?  
 2 **A. There is, in the information accompanying the historical**  
 3 **statement of account, there would be information about any**  
 4 **limitations about what is included.**  
 03:23:38 5 **Q.** And have you ever seen that written up?  
 6 **A. We've been working on drafts as we move towards doing that,**  
 7 **but nothing has been put into final form.**  
 8 **Q.** Okay. Now, the interest that was applied to the individual  
 9 postings, that was done at the agency level for most of these  
 03:23:57 10 periods of time, correct?  
 11 **A. I'm not sure exactly where it was done. I just don't know.**  
 12 **Q.** And you have seen indications that it was not consistently  
 13 done between the various regions or agencies that did it,  
 14 correct?  
 03:24:10 15 **A. I don't think I'm aware of that. I just, from the results**  
 16 **that we've seen, we see that there are rounding errors, there**  
 17 **are just some mathematical errors that have taken place. I'm**  
 18 **not aware of any major differences that have been recalculated.**  
 19 **Q.** But to make sure we're clear, the method by which interest  
 03:24:34 20 is going to be recalculated here does not necessarily reflect  
 21 the amount of interest that was actually earned on any  
 22 individual particular account?  
 23 **MR. QUINN:** Objection. Asked and answered,  
 24 **Your Honor.**  
 03:24:51 25 **THE COURT:** Overruled.  
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1 **every day, there's a liquidity amount that has to be available,**  
 2 **and those are invested in an overnighter. So what is actually**  
 3 **invested in longer-term instruments I don't know. It's managed**  
 4 **by another office.**  
 03:21:48 5 **Q.** But can you state that the factor that's going to be used  
 6 to calculate interest for particular times reflects the interest  
 7 rate or the earnings or dividend rate that the funds were  
 8 actually earning during that time?  
 9 **A. I don't understand the question, really.**  
 03:22:14 10 **Q.** Okay. You have seen in some of the documents where there's  
 11 indications that the amount of funds that are being pooled for  
 12 investment are not as large as the total of the sum of the  
 13 amounts in the individual accounts, correct?  
 14 **A. Yes.**  
 03:22:42 15 **Q.** Okay. So, if that occurred, and you only use the amount of  
 16 money, the interest that was available that was earned at that  
 17 time to spread among all of the accounts, each of the  
 18 beneficiaries is then getting less than what it should have  
 19 actually earned on its particular account, correct?  
 03:23:06 20 **A. I believe that's correct.**  
 21 **Q.** All right. And how is what the Department is doing today  
 22 going to solve that problem?  
 23 **A. I don't know that it's going to cure the problem. It's one**  
 24 **of the things that we intend -- that we would report on as part**  
 03:23:22 25 **of the historical statement of account.**

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1 **THE WITNESS:** Could you restate the question again?  
 2 I'm sorry.  
 3 **BY MR. DORRIS:**  
 4 **Q.** I'll try. The method that is being used in the 2007 Plan  
 03:25:05 5 for, quote, recalculating interest, does not end up reflecting  
 6 then on the historical statement of account the actual amount of  
 7 interest that was earned by the dollars in a particular  
 8 individual's account. Is that correct?  
 9 **A. I think it does.**  
 03:25:25 10 **Q.** Okay. You're saying it reflects the dollars that were  
 11 earned off the investment pool, where the funds were pooled  
 12 together, correct?  
 13 **A. If that's what you're asking, yes.**  
 14 **Q.** And it does not reflect what interest for a particular  
 03:25:44 15 individual's account was earned for that account?  
 16 **A. Again, I'm confused by where you're going. I'm sorry.**  
 17 **Q.** Okay. I think we've already gotten there. Thank you,  
 18 **Mr. Zippin. I have no further questions.**  
 19 **MR. DORRIS:** Well, can I have one moment, Your Honor?  
 03:26:00 20 **(Plaintiff counsel conferring.)**  
 21 **MR. DORRIS:** I have nothing further, Your Honor.  
 22 **THE COURT:** Thank you. Mr. Stemplewicz?  
 23 **MR. QUINN:** Michael Quinn for the government.  
 24 **THE COURT:** Sorry, Mr. Quinn.  
 03:26:37 25 **MR. QUINN:** That's all right. We have no questions.  
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03:26:52

1 No cross, Your Honor.  
 2 THE COURT: Perfect timing. It's 5:00. You may step  
 3 down, Mr. Zippin.  
 4 (The witness steps down.)  
 5 Unless the game goes into extra innings, in which case --  
 6 we'll see you all here at 9:30 tomorrow morning.  
 7 (Proceedings adjourned at 4:59 p.m.)  
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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

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6 Jeffrey Zippin Direct Examination..... 1934

7 \*\*\*\*\*

8 **EXHIBITS RECEIVED**

9 Plaintiff Exhibit No. 4283..... 1866

10 Plaintiff Exhibit Nos. 4210 and 575 ..... 1877  
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