

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL,	:	Civil Action 96-1285
et al.	:	
	:	
Plaintiffs	:	
	:	Washington, D.C.
v.	:	Thursday, October 18, 2007
	:	
DIRK KEMPTHORNE, Secretary	:	
of the Interior, et al.	:	
	:	
Defendants	:	AFTERNOON SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 6
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:	DENNIS GINGOLD, ESQUIRE LAW OFFICES OF DENNIS GINGOLD 607 14th Street, NW Ninth Floor Washington, DC 20005 (202) 824-1448
	ELLIOTT H. LEVITAS, ESQUIRE WILLIAM E. DORRIS, ESQUIRE KILPATRICK STOCKTON, L.L.P. 1100 Peachtree Street Suite 2800 Atlanta, Georgia 30309-4530 (404) 815-6450
	KEITH HARPER, ESQUIRE JUSTIN GUILDER, ESQUIRE KILPATRICK STOCKTON, L.L.P. 607 14th Street, N.W. Suite 900 Washington, D.C. 20005 (202) 585-0053
	DAVID C. SMITH, ESQUIRE KILPATRICK STOCKTON, L.L.P. 1001 West Fourth Street Winston-Salem, North Carolina 27101 (336) 607-7392

Bryan A. Wayne, RPR, CRR
Official Court Reporter

<p style="text-align: right;">Page 1249</p> <p>For the Defendants: ROBERT E. KIRSCHMAN, JR., ESQUIRE JOHN WARSHAWSKY, ESQUIRE MICHAEL QUINN, ESQUIRE J. CHRISTOPHER KOHN, ESQUIRE JOHN KRESSE, ESQUIRE U.S. Department of Justice 1100 L Street, N.W. Washington, D.C. 20005 (202) 307-0010 JOHN STEMPLEWICZ, ESQUIRE JOHN J. SIEMIETKOWSKI, ESQUIRE Senior Trial Attorney U.S. Department of Justice Commercial Litigation Branch Civil Division Ben Franklin Station P.O. Box 975 Washington, D.C. 20044 (202) 307-1104</p> <p>Court Reporter: Bryan A. Wayne, RPR, CRR Official Court Reporter U.S. Courthouse, Room 6714 333 Constitution Avenue, NW Washington, D.C. 20001 (202) 354-3186</p> <p>Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.</p> <p style="text-align: center;">Bryan A. Wayne, RPR, CRR Official Court Reporter</p>	<p style="text-align: right;">Page 1251</p> <p>1 understanding. Go ahead, Mr. Harper. 2 MR. HARPER: Thank you, Your Honor. 3 (The witness resumed the stand.) 4 CROSS-EXAMINATION 5 BY MR. HARPER: 6 Q. Dr. Angel, good afternoon. 7 A. Good afternoon. 8 Q. I'd like to start if I could to turn your attention to 9 Defendants' Exhibit 42. This is one of the documents that was 10 the basis of your calculations on balances, correct? 11 A. Correct. 12 Q. Dr. Angel, this is a document from 1929, correct? 13 A. That's correct. 14 Q. And you talked a little bit about the importance, or I 15 think you agreed with the notion that it's important to 16 understand the numbers in context. Fair statement? 17 A. Correct. 18 Q. Okay. I'd like to turn your attention, if I could, to 19 Bates stamp No. 42-0005. Near the bottom of the page, the 20 second to last paragraph, beginning "resulting." And if we 21 could blow this up a little bit more beginning with the word 22 "frequently." 23 And I just want to read this item into the record if I 24 could. "Frequently, in the audit of the accounts of the Indian 25 service disbursing agents, questions arise as to the correctness</p>
<p style="text-align: right;">Page 1250</p> <p>1 P R O C E E D I N G S 2 THE COURT: Okay. Everybody is as they were. 3 Continue, Mr. Harper. 4 MR. HARPER: Thank you, Your Honor. 5 Your Honor, I have one point of clarification before we 6 proceed. Dr. Angel is on our may-call list, and if, with the 7 Court's indulgence, if I could have a little time to go through 8 just a couple of issues, I think that would mean that we would 9 not have to call him back to go through just a couple of small 10 points after the cross. 11 THE COURT: Okay. Just as a technical matter, 12 Dr. Angel is not a government employee. How would you call him 13 as a witness and for what purpose? 14 MR. HARPER: Heretofore, Your Honor, it's been the 15 contractors of the government have been asked to come to court 16 or the government produced those witnesses. 17 THE COURT: Is that the law of the case, counsel? 18 MR. KIRSCHMAN: It's my understanding -- 19 THE COURT: It's not usually the case that one side 20 can call the other side's experts in their own case. 21 MR. KIRSCHMAN: Maybe Mr. Reshovski can speak to this. 22 It's not the law of the case, but there has been at least an 23 understanding that we would produce witnesses as plaintiffs ask 24 for them during the course of the hearing. 25 THE COURT: All right. I'll go along with</p>	<p style="text-align: right;">Page 1252</p> <p>1 of the funds credited, with the various amounts reported to have 2 been collected." Do you see that? 3 A. I do. 4 Q. So that would be an item that would be worthwhile 5 considering, considering, would you agree, in determining 6 whether or not -- how to judge the report and the numbers in the 7 report. Fair statement? 8 A. May I just have one second to read the -- 9 Q. Sure. 10 A. Thank you. 11 (Witness reviewing document.) 12 Okay. 13 Q. If I could turn your attention to 007. Again, this is one 14 of your reports regarding your balance calculations. And if we 15 can look at the top, I guess first -- excuse me -- second full 16 paragraph. If you can see the paragraph beginning "while 17 Congress." Do you see that? 18 "While Congress authorized the use of tribal funds, the 19 superintendents at the several Indian units exercise 20 jurisdiction over individual Indian monies within limits 21 prescribed by the Commissioner of Indian Affairs. No detailed 22 check could be made of all revenues accruing in individual 23 Indians to determine that each received all of that which he is 24 entitled, nor could the expenditure thereof authorized by the 25 superintendents be examined to see that the Indian received the</p>

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1 full measure of benefits to which he was entitled." Do you see
 2 that?
 3 A. Uh-huh. I do.
 4 Q. Again, context is helpful, right?
 5 A. Indeed. Mr. Harper, with your indulgence, may I revisit an
 6 issue from before lunch?
 7 Q. Actually, I think on redirect your -- counsel for the
 8 defendants will probably ask you about that.
 9 A. Okay. That's fine. I'm sorry.
 10 Q. If I can now turn your attention again to Defendants'
 11 Exhibit 10, which I believe is also a document that you utilized
 12 for certain calculations of balances. Is that correct?
 13 A. That's correct.
 14 Q. And could you identify for the record what this document
 15 is?
 16 A. This document is entitled "Trust fund task force study,"
 17 compiled as of May 20, 1975. It's a document we collected from
 18 National Archives, the Washington Federal Records Center, and
 19 it's in record group 75, Bureau of Indian Affairs. This is a
 20 record that -- excuse me. This is a record that would be in the
 21 American Indian Records Repository now.
 22 Q. And this is indeed a record that you utilized for
 23 determining balances?
 24 A. Yes.
 25 Q. If you could turn your attention to 009 of this document.

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1 If we could begin -- if you see the title to this section is
 2 "Trust funds are being mismanaged by the BIA in the following
 3 areas."
 4 A. Yes.
 5 Q. And we can go to the second paragraph of No. 1. We see
 6 "Per capita distributions have been completed and checks are
 7 undisturbed. The proceeds thereof have been in a
 8 non-interest-bearing status. These checks total in the millions
 9 and cover the period 1880 to date. No overall plan for
 10 monitoring such plans, programs and distributions or for the
 11 retrieval of such funds or outstanding checks have ever
 12 existed." Do you see that?
 13 A. I do.
 14 Q. And then No. 2 says "Residual balances of program funds and
 15 per capita funds are being commingled with other trust program
 16 funds as per capita funds. Such predicated funds have lost
 17 their identity and interest. One area office has admitted in
 18 writing that they cannot determine to whom large balances and
 19 awards in judgment trust funds accounts belong!"
 20 Again, these are the kind of contextual issues that one
 21 would consider in determining the veracity of the information in
 22 the report, correct?
 23 A. Correct.
 24 Q. And one would want all pages of a report that might have
 25 information of that nature, right, to make those judgments,

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1 correct?
 2 A. Or a source citation that would allow the person to see
 3 where the report is, as I've given.
 4 Q. So the answer is yes, you would want to have the context
 5 and pages that have information such as that, correct?
 6 A. That's correct.
 7 Q. Finally, on defendants' exhibits that you utilized, I'd
 8 like to turn your attention to Defendants' Exhibit 90. And this
 9 is an Office of Inspector General, OIG report, it's an audit
 10 report, as can you see, correct?
 11 A. Correct.
 12 Q. And if you see down in the date, this is March 1986. Do
 13 you see that?
 14 A. I see.
 15 Q. And this is another document that you used for balance
 16 determinations. Fair?
 17 A. What's the date? Please may I see the date again?
 18 Q. March 1986. Defendants' Exhibit 90.
 19 MR. WARSHAWSKY: Objection, Your Honor. I don't
 20 believe we -- and correct me if I'm wrong, please -- I don't
 21 believe we had moved the admission of DX 90.
 22 THE COURT: Mr. Richburg, is DX 90 in evidence?
 23 THE DEPUTY CLERK: It was entered today?
 24 THE COURT: If at all, it was entered today.
 25 THE DEPUTY CLERK: No, sir. I don't show it.

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1 THE COURT: Not in evidence. That doesn't mean you
 2 can't show it to him, but it's not in evidence.
 3 BY MR. HARPER:
 4 Q. Do you recognize this document?
 5 A. Yes, I do.
 6 Q. Let me ask you, also when you're talking about putting
 7 things in context, you would want to put it in the context not
 8 only with the specific document but with contemporaneous
 9 material. Is that a fair statement?
 10 A. That is.
 11 THE COURT: Is this a document you relied on for your
 12 chart?
 13 THE WITNESS: Yes. I do cite it for figures.
 14 BY MR. HARPER:
 15 Q. If you would turn to page 007. And it says "highlights" on
 16 top of that other report. And if I can turn to the first
 17 paragraph. I won't read the whole thing, but let me read parts
 18 of this if I could and then ask you questions about it.
 19 "One of the most serious problems facing BIA's operations
 20 as a whole is the failure of many agencies to reconcile on a
 21 monthly basis their asset and liability account balances with
 22 corresponding summary (control) account balances maintained in
 23 the BIA's official IIM accounting records in Albuquerque. Some
 24 agencies have not accomplished these reconciliations in several
 25 years, and others may never have done so since inception of the

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1 automated accounting system 16 years ago. The most extreme
 2 example of an agency's account balance not agreeing with
 3 Albuquerque's balance was that of the Anadarko agency where, at
 4 March 29, 1984, the agency's balances for two assets and two
 5 liability accounts exceeded corresponding Albuquerque control
 6 accounts balances by over \$42 million." Do you see that?
 7 A. I do.
 8 MR. WARSHAWSKY: Objection, Your Honor. Form of the
 9 question. Again, we believe that it would be improper for
 10 counsel --
 11 THE COURT: I don't think he's asked a question so
 12 far. The only question is do you see that, and he answered yes,
 13 I do. Let's hear what the question is, Mr. Harper.
 14 BY MR. HARPER:
 15 Q. This also provides the kind of context about the validity
 16 of numbers; would you agree with that?
 17 A. Yes.
 18 Q. And when you have numbers like this where you have agency
 19 offices that disagree with the control balances at the main
 20 office in Albuquerque, is it your assumption that the
 21 Albuquerque numbers are accurate?
 22 A. Mr. Harper, I think that's a question more appropriate for
 23 an accountant.
 24 Q. So you wouldn't know one way or the other?
 25 A. I'm just saying in this specific instance that's a question

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1 that would be more appropriate for an accountant.
 2 Q. And for your analysis of balances, did you use the
 3 Albuquerque general account control ledger numbers or did you
 4 use an aggregate of all the specific numbers?
 5 A. I used the document that was cited on page 5 of this
 6 defense exhibit, and I also used a second source as well, DX 91.
 7 Q. And do you know if those were the aggregate number of all
 8 the agencies or the control number at Albuquerque? Do you know
 9 one way or the other?
 10 A. I don't know one way or the other.
 11 Q. Would that matter to you one way or the other?
 12 A. These are -- what I'm attempting to do with this chart is
 13 report Bureau of Indian Affairs numbers about year-end account
 14 balances.
 15 Q. But you understand, as we just saw, Bureau of Indian
 16 Affairs' numbers disagree with one another. So I'm asking you,
 17 when they disagree, which ones do you use?
 18 A. Use the one in the report. So what I've taken is the
 19 number 436 million that was used in the two reports, and I've
 20 cited to the figures total IIM in banks and invested in federal
 21 securities. This report reports the total.
 22 Q. And if the report reports the Albuquerque total, and if
 23 that Albuquerque total is in significant odds with the aggregate
 24 for the agency offices, does that concern you as far as whether
 25 or not it's an accurate number?

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1 A. I guess what I'm saying is I'm using the numbers that were
 2 reported by the authors of this report.
 3 Q. So you're just putting out numbers. You don't know if
 4 they're accurate or not. Is that a fair statement?
 5 A. It's a fair statement to say that what I've been using, as
 6 I believe I've been saying all along, from 1909 forward, where
 7 the Bureau of Indian Affairs has given a year-end balance,
 8 that's the number I've been using. And this is an example of
 9 that.
 10 Q. But you haven't determined the accuracy of those numbers is
 11 all I'm asking.
 12 A. No, I have not determined the accuracy of the numbers.
 13 I've reported them.
 14 Q. During your direct examination, Dr. Angel, do you recall
 15 mentioning -- I'm sorry. We looked at the Defendants' Exhibit
 16 regarding totals and they left out Osage. Do you recall that?
 17 A. That's the 1926 report, yes.
 18 Q. Correct. And you added that number back in, right?
 19 A. Correct.
 20 Q. To get the total for individual Indians, correct?
 21 A. Actually, I didn't do it. Somebody in my office did it and
 22 I think what she had done was just go all the way down the list.
 23 Q. So she did that because Osage has head rights there, and so
 24 that's individual Indian money, correct?
 25 A. I'm not saying that, Mr. Harper. I'm saying that what we

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1 did was we added the figures down there. That's all I'd asked
 2 Kelly to do.
 3 Q. And those figures indicated -- not tribal trust monies,
 4 correct? Was tribal trust monies included in those figures?
 5 A. No.
 6 Q. So those were individual Indian monies figures, right?
 7 A. Those were reported to be individual Indian money figures.
 8 Q. That included Osage, correct?
 9 A. That included Osage.
 10 Q. You talked on your direct testimony a little bit about
 11 records, and I'd like to ask you a few questions in that regard
 12 as well.
 13 Let me see if I can sort of cut to the chase on this
 14 question. You believe that there are a lot of records out there
 15 that have been found, but you are not saying whether there are
 16 sufficient amount of records to do an accounting. Is that a
 17 fair statement?
 18 A. Could you please restate that? There's -- please restate
 19 that.
 20 Q. Let me ask you a preliminary question. Are you an
 21 accountant?
 22 A. No.
 23 Q. Are you a statistician?
 24 A. No.
 25 Q. So your judgment is here strictly as a historian, correct?

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1 A. That's correct.
 2 Q. To do an accounting you would need to have an accounting
 3 background. Fair statement?
 4 A. That's correct.
 5 Q. Based on what you know, what your testimony boils down to
 6 is that there's records out there, but you have not testified
 7 and it's not your position that there's sufficient records to do
 8 an accounting for any particular year over the life of this
 9 trust. Is that a fair statement?
 10 A. That's a fair statement.
 11 Q. You also talked a little bit about the AIRR. Do you recall
 12 that testimony?
 13 A. Yes, I do.
 14 Q. And you testified how that is a significant development
 15 since -- probably, what, 1999? Is that about when, 1999, 2000,
 16 when they started planning these things for the AIRR?
 17 A. I believe that was planned subsequently. I believe that
 18 was planned after the creation of OHTA. I could be mistaken
 19 about that.
 20 Q. There was an idea for a document repository back in the
 21 '90s, and then that developed ultimately into the AIRR in the
 22 year 2002 or something like that. Is that your recollection?
 23 A. I don't know. I don't know that to be the case.
 24 Q. But you talked about how that's an important development in
 25 being able to have access to records. Correct?

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1 A. That's correct.
 2 Q. Would you agree that it's still very difficult and takes a
 3 considerable amount of time to get specific records for specific
 4 transactions regarding the individual Indian trusts?
 5 A. I just testified I wasn't an accountant, Mr. Harper. You'd
 6 have to ask an accountant that.
 7 Q. So you don't know one way or the other if it takes a short
 8 period of time or a long period of time to, say, find a
 9 particular lease, and whether it exists at AIRR.
 10 A. I've only got hearsay on that, and the hearsay has been how
 11 quickly it's been done. But I've only got hearsay. My work at
 12 AIRR typically has been more policy related. I have worked with
 13 the accountants in the LSA project. I have helped them locate
 14 documents on -- you know, other elements of it, but it is not my
 15 role to go in and to find a specific lease.
 16 Q. With respect to records, ultimately you would agree that
 17 the question is not how many records are out there but whether
 18 or not there's sufficient records to provide an accounting for
 19 individual Indians, correct?
 20 A. Please say that a second time. Please reask it.
 21 Q. The question -- for purposes of this exercise, which is the
 22 discharge of the government's historical accounting duty, the
 23 important question is not whether there's a lot of records out
 24 there, but whether there's sufficient records to provide the
 25 accounting, correct?

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1 A. Correct.
 2 Q. And you would agree that over time period there has been a
 3 considerable amount of destruction of trust records, correct?
 4 A. There has been a destruction of trust records.
 5 Q. Would you say there was a substantial amount of destruction
 6 of trust records?
 7 A. I would say that since 1971 there's been an effort put in
 8 place by the Bureau of Indian Affairs to prevent the destruction
 9 of trust records retroactive to 1926, but there has been a
 10 destruction of trust records.
 11 Q. So there was some effort that began in 1971, but that would
 12 necessarily say that as you go further back in time, the
 13 availability of records is probably less and less.
 14 A. My understanding of the Ernst & Young report -- I don't
 15 know if that's been discussed in here -- was that they were able
 16 to locate a considerable amount of documentation on the five
 17 named plaintiffs and their predecessors involving the financial
 18 transactions that affected them. That was my understanding of
 19 the Ernst & Young report, and I believe those documents --
 20 Q. Dr. Angel, I wasn't really asking about the Ernst & Young
 21 report. I just asked you whether or not as you go further back
 22 in time, it has been your experience that as you go further back
 23 there's fewer records.
 24 A. As you go further back there are fewer records.
 25 Q. So it may not be -- it wouldn't be a fair assumption, then,

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1 to take a period now and make a determination about what records
 2 are in existence, and then say that that's likely the same back
 3 in time. Is that a fair statement? It wouldn't be a good thing
 4 to presume?
 5 A. I'd agree it wouldn't be a good thing to presume, but I
 6 don't think it would be a good thing to discount out of hand
 7 either. I think that's where an accounting review comes in.
 8 Q. And indeed, from what you know, isn't it true that the
 9 majority of records that should be available for individual
 10 Indian trust beneficiaries have been destroyed?
 11 A. That's not to my knowledge.
 12 Q. And I would like to turn your attention to AR-56-28-01. As
 13 you can see, this is a report -- actually it's a letter to
 14 Mr. Bert Edwards. Do you know who Mr. Edwards is?
 15 A. I do.
 16 Q. And it's from NORC, July 8, 2002. And you already said you
 17 knew who Mr. Scheuren is, who is the author of this cover
 18 letter.
 19 A. Yes.
 20 Q. And if we can turn to enclosure B -- actually, before we go
 21 to that, if we can go down to the second to last paragraph, and
 22 if you can read that just to yourself.
 23 (Witness reviewing document.)
 24 Do you know the Crucita and Joe that they're referring to
 25 there?

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<p>1 A. I do. Crucita Grover, who is our contracting officer at 2 OHTA, and Joe Walker. 3 MR. WARSHAWSKY: Objection, Your Honor. Relevance of 4 this particular excerpt. 5 THE COURT: Yet to be seen. Overruled. 6 BY MR. HARPER: 7 Q. And it looks from here that they're the ones that the 8 information is based on. That's what it essentially says. Is 9 that a fair statement? 10 A. May I see the whole document, please? 11 Q. Sure. 12 (Witness reviewing document.) 13 A. Thank you. I've read it, thank you. 14 Q. In essence all that last paragraph is saying is that this 15 is based on their thoughts. Fair statement? 16 A. That's correct. 17 Q. And would you agree with the notion that Mr. Walker and 18 Ms. Grover are two individuals that have knowledge on Indian 19 records? 20 A. I would. 21 Q. If we could turn your attention to Bates stamp 005 of this 22 document. Last paragraph beginning "in 1998." "In 1998 the BIA 23 in preparation of the Cobell case constructed an estimated 24 volume of records based upon transactions per year." I'm not 25 going to read the whole thing. But I'll give you a moment to</p>	<p>1 following it. 2 (Witness reviewing document.) 3 Okay. Mr. Harper, may I ask you to restate, please? 4 Q. In essence, what they're saying here, when it boiled down 5 to the bottom line is there's about a billion dollars that were 6 not preserved because of -- excuse me -- records that were not 7 preserved because of destruction schedules. 8 THE COURT: Isn't there an objection from the 9 government that the document speaks for itself? 10 MR. WARSHAWSKY: Objection, Your Honor. Relevance. 11 The document speaks for itself. 12 (Laughter) 13 THE COURT: Sustained. I assume that this was written 14 by Grover and Walker; is that right? 15 MR. HARPER: Your Honor, I believe it was written by 16 Mr. Scheuren. 17 THE COURT: Oh, this is by Scheuren. Okay. 18 MR. HARPER: At least the cover letter's by 19 Dr. Scheuren. 20 MR. WARSHAWSKY: Your Honor, the first page, if 21 counsel would go back to that, I believe discusses whose 22 opinion's actually contained in the document itself. I believe 23 the cover letter was from Dr. Scheuren. 24 THE COURT: Containing two analytical pieces by Grover 25 and Walker. So whose opinion is this? Do we know? I mean,</p>
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<p>1 review it, Dr. Angel. 2 (Witness reviewing document.) 3 A. You know, I'm sorry. I think I'm a little too 4 old-fashioned in this case. I guess I need to see the paper, 5 the whole document. I understand -- you know, you're pointing 6 me toward individual portions of the document, and I understand 7 that, but it's sort of hard for me to read this and quite 8 understand the context that we're getting at. 9 Q. Because if you're just given a snapshot and there's other 10 things missing, then you can't really properly judge what's in 11 the document. Is that a fair statement? 12 A. What I'm saying is I'd like to see this particular letter. 13 Q. I just want to ask you a question about this. Would you 14 agree that this suggests that there was 1. -- they thought there 15 was 1.4 billion pages of documents, and it turned out that the 16 better estimate was about 200 million, and the vast majority of 17 that is deducting for the 2,500 pages as opposed to 2,000 pages 18 per box -- in aggregate the estimate for documents. 19 "We also believe they failed to consider the destruction of 20 records pursuant to record retention schedules." That that 21 basis was the cause of somewhere like a billion documents. Is 22 that a fair statement? I mean reading this, is that what in 23 essence this says? 24 A. I'm sorry, Mr. Harper. Give me one more second with this 25 and then please restate it. I'm having just a bit of trouble</p>	<p>1 what you want me to draw from this is that BIA grossly 2 overestimated the number of documents. Either that or that a 3 billion documents were destroyed. Bottom line. 4 MR. HARPER: We think a billion documents were 5 destroyed. Yes, Your Honor. 6 THE COURT: And you want me to put that estimate in 7 whose mind, mouth, or hand? 8 MR. HARPER: Well, I think it's an admission against 9 party opponent of the government. 10 THE COURT: Because you think it's contained in a 11 study done by Crucita Grover or Joe Walker. 12 MR. HARPER: Crucita Grover, who is a Department of 13 the Interior employee, and Mr. Joe Walker, who is a NORC 14 employee. 15 THE COURT: Thank you. I think the point's made. 16 BY MR. HARPER: 17 Q. Dr. Angel, your firm, Morgan Angel, also did a number of 18 assessments regarding documents and the disposal of documents 19 that may be relevant to the individual Indian trusts. Is that a 20 fair statement? 21 A. Yes. 22 Q. And would you agree that the -- I'm going to put up a 23 report, and we can make this pretty quick, I think, if -- it's 24 Plaintiffs' Pretrial Exhibit 545. Do you recognize this 25 document?</p>

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1 A. I do. It was prepared by my former partner, William A.
 2 Morgan. It's a report he did entitled "Disposition or Disposal:
 3 An investigation into the historical disposition of Indian trust
 4 fund records." It was prepared in March of 2000.
 5 Q. And we can sort of go into detail, but let me ask this
 6 general question. Would you agree that it demonstrates that
 7 over time, from the late 1800s to present, there was significant
 8 destruction of Indian trust records?
 9 A. There was destruction of Indian trust records, yes.
 10 Q. And there's example after example in this report of fairly
 11 significant, large portions of records that were destroyed. Is
 12 that a fair statement?
 13 A. There were examples of records that were destroyed.
 14 Q. And at times significant amounts of records.
 15 MR. WARSHAWSKY: Objection, Your Honor. Asked and
 16 answered.
 17 THE COURT: He's not going to give you "significant,"
 18 Mr. Harper. Move on.
 19 BY MR. HARPER:
 20 Q. And it also documents a lot of situations where, from as
 21 early as 1893 through the 1940s and well beyond that, where
 22 there was poor conditions in the storage of trust records. Fair
 23 statement?
 24 A. That's a fair statement.
 25 Q. Dr. Angel, I'd like to now turn your attention to an

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1 exhibit, Plaintiffs' Exhibit 4475, which was Defendants' Exhibit
 2 105 in trial 1.5. Do you recognize this document?
 3 A. Yes, I do. It's a look at the management of individual
 4 Indian money accounts from the perspective of the appropriations
 5 process. That too was produced by Mr. Morgan back in June 1997.
 6 It was the very first report that was done in this litigation by
 7 a member of Morgan Angel.
 8 Q. Let me ask you a general question before we go in here. In
 9 this report and in a number of your other reports, would you
 10 agree that, among other things, there has been a demonstration
 11 of fraudulent conduct in the management of individual Indian
 12 trusts?
 13 A. Fraudulent, no.
 14 Q. If I could turn your attention, then, to 025. And if we
 15 look at the top, we can see that this is talking about a new
 16 accounting system that was put in in FY 1944. Do you see that?
 17 A. I do.
 18 Q. And could you identify who Mr. Greenwood is?
 19 A. I believe at this point he was assistant Commissioner of
 20 Indian Affairs.
 21 Q. And if we could go down to the dialogue between
 22 Mr. Greenwood and Mr. Johnson.
 23 THE COURT: This a dialogue in 1944?
 24 MR. HARPER: Yes, Your Honor.
 25 BY MR. HARPER:

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1 Q. If you can just read that to yourself for a moment,
 2 Dr. Angel.
 3 (Witness reviewing document.)
 4 And you can see there that they're talking about
 5 embezzlement of funds and falsified vouchers, correct?
 6 A. We have seen instances of that, but not significant.
 7 Q. You have seen instances of -- okay. What is the basis of
 8 your opinion on that?
 9 A. Records that I've seen. Also I've seen congressional acts
 10 that reimbursed Native Americans IIM funds for problems that
 11 have developed with them. In other words, when the funds were
 12 lost.
 13 Q. So you've seen instances when there have been funds that
 14 have been appropriated when there have been losses determined?
 15 A. Correct.
 16 Q. In some instances. And there's other instances when that
 17 hasn't been the case, correct?
 18 A. I don't know that.
 19 Q. We can get into that. I'll get back to this document in a
 20 moment, but I'd like to turn your attention if I could for the
 21 moment to another of your reports, Defendants' Exhibit 111 on
 22 Indian land sales.
 23 A. I don't believe that would be defendants' exhibit --
 24 Q. I'm sorry. Trial 1.5 Defendants' 111. Excuse me. I
 25 apologize. It's Plaintiff's Exhibit 4480 for this trial. Do

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1 you recognize this document?
 2 A. Yeah. This was a report that was coauthored by Dr. Terence
 3 Kehoe on Indian land sales and IIM.
 4 Q. And who is Dr. Kehoe?
 5 A. Dr. Kehoe is an employee of Morgan Angel & Associates.
 6 Q. And as you sit here today, is there anything in this report
 7 that is inaccurate or that we should know about?
 8 A. I haven't read it for a long time, Mr. Harper.
 9 Q. If I could turn your attention to page 030 at the bottom.
 10 It says here -- I'm going to read this into the next page. "The
 11 peak year for supervised allottee land sales was 1920, when the
 12 total income on all reservations came to \$8 million." So land
 13 sales in this early period of time was a considerable source of
 14 income for individual Indian trusts. Isn't that a fair
 15 statement?
 16 A. Could we go back to the previous page? Is he saying the
 17 money's coming in to IIM? Because I'm not certain that that's
 18 the case. I'm not certain that that's the case at all, that the
 19 money is entering the IIM system.
 20 Q. That's not my question. I'm asking you whether land sales
 21 of allotted Indian land was a considerable source of income for
 22 individual Indians at this time. That's my question. \$8
 23 million.
 24 A. Yes.
 25 Q. And I mean that compared -- I mean that's a fairly large

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1 sum of money?
 2 A. In that time period, certainly.
 3 Q. And it says with a total acreage sold of 334,240, the
 4 average price per acre was about \$25. And it says "The question
 5 of whether Indians received fair value for their land is a
 6 complex one."
 7 MR. WARSHAWSKY: Objection, Your Honor. Relevance.
 8 This appears to be addressing asset management issues.
 9 MR. HARPER: Your Honor, this deals with fraud in the
 10 system of the management of individual Indian trustees. He
 11 said --
 12 THE COURT: What's the answer to the witness's
 13 question whether sales of allotted lands, whether revenues from
 14 those sales flowed through the IIM account system? Did they or
 15 didn't they?
 16 MR. HARPER: Your Honor, I believe it's a mixed
 17 answer. I think at times the Department chose to put them in
 18 IIM and sometimes they chose not to.
 19 MR. WARSHAWSKY: Same objection, Your Honor. The
 20 statement there speaks for itself. The question of whether
 21 Indians received fair value is --
 22 THE COURT: You're right. It is a management
 23 question, but it's too fine a line to draw at this point. I'll
 24 allow the question and answer.
 25 BY MR. HARPER:

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1 Q. I'll let you read the last part of this to yourself. It
 2 says a close student -- if we look down, that's McDonnell.
 3 Janet McDonnell, is it? She's a fairly well known historian,
 4 correct?
 5 A. Yes.
 6 Q. And has written extensively on issues of this nature,
 7 correct?
 8 A. Yes. She's written on this issue.
 9 Q. "Dispossession of the American Indian," very well known
 10 treatise on this period.
 11 A. That's correct.
 12 Q. And she concludes that "the appraisals are far below fair
 13 market value, and purchasers sometimes engaged in collusion and
 14 other fraudulent tactics to keep prices low." Do you see that?
 15 A. That's her --
 16 Q. So there was at least in the sales of significant Indian
 17 land, as you said a lot of money produced there, there was
 18 fraud, as she points out, correct?
 19 A. That's correct. But again, as long as we're agreed that I
 20 don't believe anybody is saying how much of this money entered
 21 the IIM system. I guess I don't understand if that's your
 22 point.
 23 Q. Dr. Angel, I'm just asking you the question about what this
 24 says and whether it indicates there's been some fraud.
 25 A. That's correct.

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1 Q. We can turn back to your Plaintiffs' Exhibit 4475. And I'd
 2 like to turn your attention if I could to 032. Now, is it true,
 3 Dr. Angel, to the best of your recollection, that the funding
 4 for the management of the individual Indian trusts oftentimes
 5 came from sources other than appropriated funds? Is that a fair
 6 statement?
 7 A. Please restate that.
 8 Q. The funds for the management of individual Indian trust
 9 assets oftentimes came from sources other than appropriated
 10 dollars. Is that a fair statement?
 11 A. No, I don't believe -- no, I don't know the answer to that,
 12 Mr. Harper.
 13 Q. If we can look down at the sentence after the block quote
 14 beginning "the fact that." "The fact that Indian tribes in
 15 certain cases helped fund the administration of the individual
 16 Indian money further complicates the study of the policy towards
 17 and financing of IIM accounts." Do you see that?
 18 MR. WARSHAWSKY: Objection, Your Honor. Relevance.
 19 We don't see how funding of the trust administration in any way
 20 relates to Dr. Angel's testimony.
 21 THE COURT: I sustain that.
 22 MR. HARPER: Your Honor, the government's position, if
 23 I could just speak briefly to that matter, is that this has been
 24 a free trust -- you heard Mr. Cason say that himself, that this
 25 is sort of a free trust for Indians, and it's highly relevant

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1 that tribes and I think, as we can demonstrate, there are
 2 numerous other sources for the payment of funds related to the
 3 management of Indian assets.
 4 THE COURT: Well, that's as it may be, but counsel's
 5 objection is it doesn't have anything to do with the testimony
 6 of this witness. Sustained.
 7 BY MR. HARPER:
 8 Q. Dr. Angel, if I could turn your attention to Plaintiff's
 9 Exhibit 4476, and this was Defendants' Exhibit 106 in trial 1.5.
 10 And if we can go up to the top of this. Do you recognize this
 11 document?
 12 A. It's the introduction to one of our reports. If you went
 13 to like maybe page 3 or 4, I'd see which report it is.
 14 Yes, I do recognize it. It's a report that I wrote.
 15 Q. You wrote this report?
 16 A. That's correct.
 17 Q. And let me -- I think we can cut to the chase on a couple
 18 of these issues. This report talks a lot about how Indian funds
 19 were under the custody and control of the United States,
 20 individual Indian funds, since the late 1800s. Fair statement?
 21 A. Fair statement.
 22 Q. And under their management as well, correct? They had
 23 comprehensive control of these funds. They were holding these
 24 funds for individual Indians, correct?
 25 A. Please define that, Mr. Harper. When you're saying that

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1 the Indians were entitled to -- many Indians were entitled to
 2 take their funds out of the trust.
 3 Q. I'm not suggesting otherwise. I'm just asking you the
 4 question that -- I'm not saying that the government withheld
 5 them from them; what I'm asking is they held them for them.
 6 They were managing these funds, it was in the government
 7 possession.
 8 A. Yes.
 9 Q. Correct?
 10 A. Yes.
 11 Q. Since the late 1800s, correct?
 12 A. Correct.
 13 Q. Held in trust, correct?
 14 A. Correct.
 15 Q. If I can turn your attention to -- well, let me ask you --
 16 let me turn your attention to 093. Dr. Angel, before we go into
 17 this, let me ask you one final question with respect to these
 18 funds that were held by the United States in the 1800s and
 19 subsequent thereto. If that's true, how come the only -- the
 20 first balance you have is 1909?
 21 A. That's a complicated question, Mr. Harper. And I'll tell
 22 you why. Because, for one thing, it's my understanding that
 23 superintendents were holding these monies on behalf of the
 24 Indians, but it takes a while for banking to catch up. By
 25 catching up I mean gaining approval for banks to hold this IIM.

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1 I believe that act doesn't pass until about 1908. Things of
 2 that nature.
 3 So 1909 is the first time we get aggregate figures. Now, I
 4 don't know about prior to 1909 whether, if we looked at an
 5 agency by agency, we could get those figures. I do know that at
 6 this period, from about 1898 forward, the money was -- there
 7 were settled account packages that went to the Treasury
 8 Department as well, and the Indian special disbursing agent was
 9 including this as part of the package that went to the Treasury
 10 Department, IIM, as part of the package that went to the
 11 Treasury Department.
 12 Q. So you just haven't found -- but you haven't found any
 13 balance information from 1887 to 1909. Fair statement?
 14 A. Fair statement.
 15 Q. Let me ask you a question before we return to this
 16 document. The purpose of -- have you heard of the 1938 Act,
 17 what's commonly referred to as the 1938 Act?
 18 A. Yes, I have.
 19 Q. And essentially, is it true that the purpose of that act
 20 was to provide assurance that if funds were to be deposited in
 21 commercial banks, that they would be in interest-bearing
 22 accounts. Fair statement?
 23 A. That's a fair statement. It also provides for investment
 24 in Treasury securities as well, I believe.
 25 Q. That was the central purpose of the 1938 Act, correct?

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1 A. Yeah. Yes, it was.
 2 MR. WARSHAWSKY: Your Honor, we have a relevance
 3 objection to counsel's use of this particular document on the
 4 screen. And that is, the issue of interest rates is an asset
 5 management issue. Beyond that, Dr. Angel did not in his direct
 6 discuss application of interest rates to the trust funds.
 7 THE COURT: Well, remember, he's also a may-call
 8 witness here. He's a historian, this is history, I'll allow it.
 9 MR. HARPER: Thank you, Your Honor. If I could have
 10 one moment, Your Honor.
 11 Your Honor, I think that's all I have. I'd like to get my
 12 list and move in some exhibits if I may. Your Honor, plaintiffs
 13 would like to move into evidence Plaintiffs' Exhibit 681,
 14 Defendant's Exhibit 90, Plaintiffs' Exhibit 545, Plaintiffs'
 15 Exhibit 4475, and Plaintiffs' Exhibit 4476.
 16 THE COURT: They'll be received.
 17 (Plaintiff Exhibit Nos. 681,
 18 545, 4475, 4476 received.)
 19 (Defendant Exhibit No. 90
 20 received into evidence.)
 21 MR. HARPER: Thank you, Dr. Angel. Thank you, Your
 22 Honor.
 23 THE COURT: Any redirect?
 24 MR. WARSHAWSKY: Yes, Your Honor.
 25

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1 REDIRECT EXAMINATION
 2 BY MR. SIEMIETKOWSKI:
 3 Q. Dr. Angel, you had asked Plaintiffs' counsel if you could
 4 correct something that you had said earlier this morning
 5 regarding your 2003 report. And what was that correction that
 6 you wished to make?
 7 A. I think Mr. Harper was discussing whether or not I had
 8 written in my 2003 report the infamous 1915 report with the nice
 9 prose, and in fact I did write about it. It's on page 8 of the
 10 report. However, I don't have a DX number or -- I don't have a
 11 DX number or DX page number.
 12 Q. All right. Thank you for that clarification. Now,
 13 Dr. Angel, do you recall Mr. Harper discussing Defense Exhibit
 14 13 with you? That was one of the three exhibits that he had
 15 provided to you during the morning break.
 16 Could we have Defense Exhibit 13, please?
 17 A. Yes, I do.
 18 Q. Could we have the table of contents for that. That's
 19 Defense Exhibit 13, page 4. And do you recall Mr. Harper
 20 discussing the subsequent pages which were missing from that?
 21 A. I do.
 22 Q. All right. Could I please have Defense Exhibit 15 on the
 23 screen. And please have page 2 of Defendant Exhibit 15. What
 24 is this, if you recognize it, Dr. Angel?
 25 A. This is a report from the branch of investments. It's the

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1 office that's located -- it's part of the central office located
 2 in Albuquerque, and it's discussing generally the tribes and
 3 individual Indians that they're investing for.
 4 Q. Let me show you page 4 of Defense Exhibit 15 if I could,
 5 please. Dr. Angel, looking at page 4 of Defense Exhibit 15,
 6 how, if at all, does this appear to differ from the contents
 7 that plaintiffs' counsel showed you in Defense Exhibit 13?
 8 A. Defense Exhibit 13 is 1977. This exhibit is 1978.
 9 Q. Aside from the year difference, do the table of contents
 10 appear in any way different?
 11 A. No. The table of contents appear to be the same generally,
 12 yes. The same generally.
 13 MR. SIEMIETKOWSKI: For ease of reference, Your Honor
 14 may I hand the witness a hard copy of Defense Exhibit 15.
 15 THE COURT: You want this witness to prove by looking
 16 at the next year's report that the pages that were left out of
 17 the earlier report are not particularly important or material?
 18 MR. SIEMIETKOWSKI: Yes, sir.
 19 THE COURT: Let's pass that.
 20 MR. SIEMIETKOWSKI: Yes, sir.
 21 BY MR. SIEMIETKOWSKI:
 22 Q. Dr. Angel, do you recall talking on cross-examination with
 23 plaintiffs' counsel about how some documents had been destroyed?
 24 A. I do.
 25 Q. And in your historical research, have you made any

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1 conclusions regarding whether duplicate copies of some of those
 2 items perhaps would have been made and sent elsewhere?
 3 A. One of the things I discussed at the 1.5 trial is that the
 4 Bureau of Indian Affairs typically did make, for example, three
 5 copies of leases and multiple copies of some of the financial
 6 transaction documents. In other words, there typically was not
 7 just one copy made of a particular document.
 8 Q. Now, plaintiffs' counsel also on cross-examination showed
 9 you several, for lack of a better expression, negative comments
 10 in reports. Do you recall seeing those on the screens?
 11 A. I do.
 12 Q. As a historian, what if anything do those negative comments
 13 tell you about the oversight you were referring to earlier
 14 today?
 15 A. Well, exactly that, that BIA policy was subject to
 16 scrutiny.
 17 MR. SIEMIETKOWSKI: Nothing further, Your Honor.
 18 THE COURT: All right. Dr. Angel, thank you, sir.
 19 You're excused. You may step down.
 20 THE WITNESS: Thank you.
 21 (The witness steps down.)
 22 THE COURT: There was one more witness. Is he here?
 23 MR. KIRSCHMAN: No, Your Honor. As we discussed
 24 yesterday, we will present him Monday morning.
 25 THE COURT: All right.

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1 MR. KIRSCHMAN: Mr. Cymbor.
 2 THE COURT: All right.
 3 MR. KIRSCHMAN: Your Honor, I have three brief
 4 administrative matters.
 5 THE COURT: We may have to work next Friday, counsel.
 6 MR. KIRSCHMAN: I'm sorry?
 7 THE COURT: For your sins we may have to work next
 8 Friday.
 9 MR. KIRSCHMAN: I'll leave that to your discretion,
 10 Your Honor.
 11 THE COURT: I'll decide that next week after I see how
 12 brisk and to the point both sides are during the week.
 13 MR. KIRSCHMAN: We will try to atone, Your Honor.
 14 THE COURT: All right.
 15 MR. KIRSCHMAN: One, now that we are moving into
 16 plaintiffs' case, and plaintiffs using plaintiffs' exhibits,
 17 defendants have plaintiffs' exhibits, but they're not addressed
 18 by plaintiff exhibit numbers. We have the Bates numbers related
 19 to those but not exhibit numbers. So if we could obtain the
 20 exhibit numbers, that will be very helpful to us to follow
 21 along.
 22 THE COURT: Do you need them to prepare for Monday?
 23 MR. KIRSCHMAN: I'm sorry?
 24 THE COURT: Do you need them now to prepare for
 25 Monday, or is it sufficient that they announce them when they

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1 show a document on the screen?
 2 MR. KIRSCHMAN: No. We'd need them as soon as
 3 possible. And we'll work with plaintiffs on that.
 4 THE COURT: If you have a translation chart, please
 5 give it to them, Mr. Harper.
 6 MR. HARPER: We believe we've already provided that to
 7 the defendants, but we will talk to them after court today to
 8 make sure.
 9 THE COURT: Thank you. What's next?
 10 MR. KIRSCHMAN: Also, too, I want to clarify that we
 11 had previously agreed that plaintiffs would not have to subpoena
 12 any of our contractors. I do want to make clear, though, that
 13 we were not addressing the costs associated with bringing any of
 14 our contractors in for any length of time.
 15 And finally, based on discussions with Mr. Smith, it is our
 16 understanding that Ms. Herman will not be called back Tuesday,
 17 although she does continue to look for the documents that
 18 Mr. Smith asked her to look for.
 19 THE COURT: Okay. Anything further, Counsel? I
 20 should never ask that question.
 21 MR. GINGOLD: Your Honor?
 22 THE COURT: Yes, sir.
 23 MR. GINGOLD: Mr. Kirschman raised the issue of costs.
 24 The way this has been handled over the years in this litigation,
 25 plaintiffs have not been required to pay the costs for the

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1 government's contractors, that this Court -- well, the
 2 understanding was they would be produced and there has not been
 3 any payment of cost for the contractors, Your Honor.
 4 THE COURT: Mr. Warshawsky?
 5 MR. WARSHAWSKY: Mr. Kirschman says I'm the one who
 6 has the historical background on this. Your Honor, frankly,
 7 I've racked my brain. I don't recall a specific agreement we
 8 had on this issue. I know it's a concern to us because from the
 9 plaintiffs' pretrial they've listed roughly 30 potential
 10 contractors as witnesses, and we don't know what that might
 11 entail if they started to actually call in all their witnesses.
 12 And we certainly don't want to agree to pay the bills associated
 13 with those contractors. We'll pass along --
 14 THE COURT: I expect that, given the order of
 15 magnitude of effort and expense that's gone into this trial, the
 16 issue of who pays travel and lodging expenses of government
 17 contractor experts is going to be sort of a drop in the bucket.
 18 But my take on it is that there is no understanding, and it
 19 looks to me, just given the normal way that normal cases work,
 20 that this will be the obligation of the person calling the
 21 witness.
 22 MR. WARSHAWSKY: Very good. Thank you.
 23 THE COURT: Good afternoon.
 24 (Proceedings adjourned at 2:36 p.m.)
 25

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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

Bryan A. Wayne, RPR, CRR
 Official Court Reporter

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