UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL,   : Civil Action 96-1285
et al.   :
                Plaintiffs   :
                                : Washington, D.C.
        v.   : Monday, October 22, 2007
                                :
DIRK KEMPTHORNE, Secretary   :
of the Interior, et al.   :
                                :
                Defendants   : MORNING SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 7
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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C O N T E N T S

E X H I B I T S

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1   P R O C E E D I N G S

2   THE COURT: Good morning, everybody. All right. We're

3   back on the record in the Cobell case. Mr. Kirschman, good

4   morning.

09:43:57 5   MR. KIRSCHMAN: Good morning, Your Honor.

6   The government would like to call Ronald Cymbor to the

7   stand.

8   THE COURT: All right.

9   (Oath administered by Courtroom Deputy.)

09:44:02 10   **(RONALD CYMBOR, DEFENDANT witness, having been duly sworn,**

11   **testified as follows:)**

12   **DIRECT EXAMINATION**

13   BY MR. KIRSCHMAN:

14   **Q.** Mr. Cymbor, could you state your full name for the record,

09:44:33 15   please?

16   **A. It's Ronald G. Cymbor.**

17   **Q.** And sir, where are you currently employed?

18   **A. Department of Treasury Financial Management Service in**

19   **Hyattsville, Maryland.**

09:44:46 20   **Q.** When did you begin your employment with Department of the

21   Treasury?

22   **A. August 1976.**

23   **Q.** How long have you worked within the Financial Management

24   Service?

09:44:53 25   **A. 31 years.**

1 Q. What position do you currently hold within Treasury's
2 Financial Management Service?
3 A. I am the director of the Check Resolution Division.
4 Q. And how long have you held that position?
09:45:06 5 A. I've held that position since October 1, 2007.
6 THE COURT: Congratulations.
7 BY MR. KIRSCHMAN:
8 Q. And could you explain to the Court why you have held that
9 position for only a few weeks?
09:45:21 10 A. Within our area we had a realignment, so we changed the name
11 from Financial Processing Division to Check Resolution Division.
12 Q. And what position did you hold in that former division?
13 A. It was director of the Financial Processing Division.
14 Q. And for how long were you serving as director for the
09:45:39 15 Financial Processing Division?
16 A. I obtained the position of director of Financial Processing
17 Division in December of 2001.
18 Q. Can you please explain for the Court, Mr. Cymbor, generally
19 the mission of your division?
09:45:50 20 A. My division has responsibility to reconcile the
21 U.S. Treasury checks, to handle the check claims that come in on
22 those Treasury checks, and do the associated accounting.
23 Q. You've mentioned reconciliation related to Treasury checks.
24 Could you explain to the Court briefly what that means?
09:46:10 25 A. Well, basically, the disbursing officers throughout the

1 world report their check issues into our system, and then the
2 paid information comes in from the federal reserve banks. We
3 compare that information in our system, and then if there are
4 exceptions, we handle that.
09:46:28 5 Q. You also mentioned addressing check claims. Can you tell
6 the Court what you were making reference to there?
7 A. Basically, the agency is notified by a payee that they have
8 not received a Treasury check. The agency basically provides to
9 us what we call an unavailable check cancellation, to check
09:46:47 10 status in our system. If the check is outstanding, the credit
11 is returned to the agency. If it's paid, we create a claim
12 form, mail the claim form and the image out to the payee for
13 them, to respond to their questions.
14 Q. Finally, you also mentioned that there was an accounting
09:47:04 15 related to the reconciliation of the Treasury checks, and the
16 handling of the check claims. Could you explain generally to
17 the Court what that accounting consists of?
18 A. Basically, it's the accounting for the reconciliation of the
19 Treasury checks and the accounting associated with the check
09:47:19 20 claims process, as well as the limited payability cancellation
21 process.
22 Q. Is this accounting that you just described to the Court
23 related to the historical accounting of Individual Indian Money
24 accounts that the Department of the Interior is performing?
09:47:42 25 A. The accounting that we do in our division is not related to

1 the Individual Indian Money accounts.
2 Q. And in performing the reconciliation work, you use what is
3 referred to as a Treasury Check Information System?
4 A. Yes, that's correct.
09:47:58 5 Q. Is the Treasury Check Information System what used to be
6 known as the CP&R?
7 A. Yes, that is correct.
8 Q. Can you tell the Court when the CP&R system was replaced
9 with the Treasury Check Information System?
09:48:11 10 A. The Treasury Check Information System began in June of 2006.
11 Q. Okay. We've discussed just real briefly an overview of what
12 your division does.
13 Can you please describe for the Court the
14 responsibilities that you personally have within the Check
09:48:29 15 Resolution Division?
16 A. Basically, I have management oversight over five branches
17 that handles the reconciliation of the Treasury checks, and the
18 check claims associated with those.
19 Q. And is one of those branches responsible for dealing with
09:48:40 20 the Treasury checks that are not cashed within one year?
21 A. Yes. One branch within my division, the accounts branch,
22 has responsibility to do that.
23 Q. What does the accounts branch do with respect to checks that
24 are not cashed within this one-year period?
09:48:54 25 A. Basically, they monitor it and ensure that it's recorded in

1 the Treasury Receivable Accounting and Collection System, and
2 it's passed on to the agencies.
3 Q. And how is this information passed on to the agencies?
4 A. The information is passed monthly to the Intergovernmental
09:49:10 5 Payment and Collection System.
6 Q. And you mentioned limited payability. Are canceled checks
7 that are not cashed within one year referred to as a limited
8 payability cancellation?
9 A. Yes, that's what we refer to them as.
09:49:26 10 Q. You mentioned the Intergovernmental Payment and Collections
11 System. Do you recall that?
12 A. Yes.
13 Q. Is that also known as IPAC?
14 A. That's correct.
09:49:35 15 Q. I-P-A-C.
16 Could you please describe to the Court generally what
17 IPAC is and what its function is?
18 A. Basically, it's a system to transfer funds between agencies.
19 Q. And you also mentioned limited payability activities
09:49:57 20 recorded in the Treasury Receivable Accounting and Collection
21 System. Correct?
22 A. Yes, that's correct.
23 Q. And this system is also known as TRACS, T-R-A-C-S?
24 A. That's correct.
09:50:09 25 Q. Could you please describe to the Court what TRACS is and

1 what function is serves?

2 A. Basically, it's the accounting system for the U.S. Treasury

3 check claims process.

4 Q. And how do you use it?

09:50:22 5 A. We use it on a daily basis, to record the activity

6 associated with the accounting with the Treasury claims.

7 Q. And for how long has your office used the TRACS?

8 A. TRACS was implemented in August of 1991.

9 Q. Now, TRACS is not used only for checks related to the

09:50:40 10 Department of the Interior. Correct?

11 A. That's correct.

12 Q. Who else uses it?

13 A. All --

14 Q. I'm sorry, let me strike that.

09:50:47 15 Information from what other agencies is contained in

16 TRACS?

17 A. Basically, it's any agency that has Financial Management

18 Service issue its checks. And the non-Treasury disbursing

19 officers -- excuse me.

09:51:04 20 Basically, it's any agency that requests FMS to issue

21 Treasury checks, and it's also our non-Treasury disbursing

22 officers who have authority to issue Treasury checks.

23 Q. Now, does this system, does TRACS keep a record of

24 individual checks?

09:51:19 25 A. Yes, TRACS keeps track of the individual checks.

1 Q. And what information about an individual check is recorded

2 in TRACS?

3 A. Basically it's the symbol, serial number, the issue amount,

4 the date of the issue, and also payee ID, if that's provided by

09:51:40 5 the agency.

6 Q. Is your division able to print reports from this system,

7 from TRACS?

8 A. Yes, my division is able to print reports from TRACS.

9 Q. And can these reports be organized by year?

09:51:50 10 A. Yes, the reports can be organized by year.

11 Q. I believe you mentioned disbursement or disbursement codes.

12 Can the reports be organized by those?

13 A. The reports can be organized by agency location code,

14 disbursing office, correct.

09:52:05 15 Q. What is an agency -- the term again?

16 A. Agency location code.

17 Q. What is that?

18 A. It's a code assigned to an agency for reporting purposes.

19 Q. And is there such a code for the Department of the Interior?

09:52:26 20 A. The code for Department of the Interior, Bureau of Indian

21 Affairs, is 4844.

22 Q. Mr. Cymbor, I would like to draw your attention now to what

23 has been marked as Defendant's Exhibit 273. That should appear

24 on the screen in front of you. Do you see the first page of

09:52:48 25 this exhibit on your screen?

1 A. Yes, I see Exhibit 273.

2 Q. Yeah. And you'll see at the bottom right it's marked

3 DX-273, and it's the first page. Do you see that?

4 A. Yes.

09:53:02 5 Q. Are you familiar with this document?

6 A. Yes, I am.

7 Q. Generally, do you recall the size of this document, how many

8 pages it consists of?

9 A. I believe it was about 170-some pages.

09:53:13 10 Q. Okay. How was this document generated?

11 A. Basically, it was generated at my request. I asked a

12 programmer within the Financial Management Service to create it

13 for me.

14 Q. Okay. And what instructions did you give the programmer?

09:53:27 15 A. Basically, I asked him to create for me a report that would

16 show for ALC-4844 the limited pay cancellations transferred to

17 that ALC.

18 Q. And does this document before you fill that request?

19 A. Yes, it does.

09:53:45 20 Q. Turning to the top portion of this first page, Mr. Cymbor,

21 can you please explain to the Court generally what this exhibit

22 demonstrates?

23 A. Basically it shows, for a particular year and a particular

24 month, the total dollar amount and item count transferred by

09:54:06 25 dollar category to ALC-4844.

1 Q. And again, that is the agency location code for BIA?

2 A. Yes, that's correct.

3 Q. Okay. And at the top of the page there's a confirmation

4 date, 1/1/92 through 12/31/06. Do you see that?

09:54:29 5 A. Yes, I do.

6 Q. And what does that range represent?

7 A. Basically, it means the limited payability cancellations

8 that were passed to 4844 for that time period.

9 Q. And the data contained in this document is drawn from TRACS.

09:54:50 10 Is that correct?

11 A. Yes, that is correct.

12 Q. And that's what's indicated at the top?

13 A. Yes, that's correct.

14 Q. Looking at the first page of this exhibit, and if we could

09:55:06 15 look at the first block, you'll see reference to year 1992 and

16 period 9201. Do you see that?

17 A. Yes, I do.

18 Q. Could you explain to the Court what both the period 9201 in

19 the first block and on the second block, period 9202 represents?

09:55:26 20 A. Basically the period represents -- I'm sorry, the period --

21 the first two digits represent the year, the last two digits

22 represent the month.

23 Q. So in this case, period 9201 is January 1992?

24 A. That is correct.

09:55:38 25 Q. And so on. Next one is February 1992?

1   A.   Yes, that's showing 1992, February.

2   Q.   Okay. Mr. Cymbor, I would now like to draw your attention

3   to the very last page of this document. And you'll see, in

4   fact, before we enlarge it - I needn't have bothered asking

09:56:08 5   you - it appears to be a 76-page document. Is that consistent

6   with your recollection?

7   A.   Yes, that is.

8   Q.   Looking at the top of the document, the top of the last

9   page, there's a grand total listed on this page. Do you see

09:56:24 10   that?

11   A.   Yes, I do.

12   Q.   Did you also ask that your programmer calculate a grand

13   total, as indicated here?

14   A.   Yes, I did.

09:56:33 15   Q.   Can you please explain to the Court what the first total of

16   $5,220,487.65 represents?

17   A.   **That's the grand total of limited pay cancellations that**

18   **were transferred to ALC-4844 for the time period indicated on**

19   **the report.**

09:56:53 20   Q.   Can you explain what you mean when you say it was

21   transferred to the ACL (sic)?

22   A.   **Basically, again, we record the cancellations in our TRACS**

23   **system. Our TRACS system then on a monthly basis transfers**

24   **those to the IPAC system, to the agency; 4844, in this case.**

09:57:10 25   Q.   And the second total on this page is 46,197. Can you please

1   explain to the Court what that number represents?

2   A.   **That is the number of checks that were canceled and passed**

3   **on to the agency 4844, for the time period indicated on the**

4   **report.**

09:57:28 5   Q.   Mr. Cymbor, I now would like to draw your attention to what

6   has already been marked as DX-275. It's a one-page document.

7   Do you see that?

8   A.   **Yes, I see that document 275.**

9   Q.   Are you familiar with this document?

09:57:43 10   A.   **Yes, I am.**

11   Q.   And who created this exhibit?

12   A.   **This exhibit was created by a staff member on my staff.**

13   Q.   And what direction did you give the staff member in having

14   this document created?

09:57:56 15   A.   **Basically, I asked him to summarize the monthly totals that**

16   **were sent to the symbol 4844 for the time period January '92**

17   **through December 2006.**

18   Q.   Okay. Looking at -- this document has two charts on it.

19   Looking at the lower chart first, can you tell the Court where

09:58:17 20   the information on that lower chart came from?

21   A.   **That information came from the Check Payment Reconciliation**

22   **System.**

23   Q.   Okay. And what does that second chart indicate?

24   A.   **Basically, it indicates that check issues were processed**

09:58:31 25   **into the Check Payment Reconciliation System from January 1991**

1   **through December 2005, in the total dollar amount of**

2   **$2,812,902,010.36. And it also provides the number of items**

3   **that make up that dollar amount.**

4   Q.   During that time period?

09:58:50 5   A.   **During that time period, that's correct.**

6   Q.   Now let's turn to the top chart of this exhibit. Is it

7   correct to state that the data on this top chart came from the

8   previous exhibit we had just looked at?

9   A.   **Yes, that is correct.**

09:59:05 10   Q.   In fact, if you look at this top chart, you'll see a total

11   line in yellow. And is it correct to say that those numbers are

12   the same as appeared in the grand total line in the previous

13   exhibit?

14   A.   **Yes, that's the same total.**

09:59:20 15   Q.   Now, looking at DX-275 and the two charts contained in that

16   exhibit, is it accurate to read these as showing that of

17   approximately 6.5 million checks issued between 1991 and 2005,

18   only approximately 46,000 checks were not cashed?

19   A.   **Yes, that is correct.**

09:59:44 20   Q.   And is it also correct to state that these charts show that

21   of over $2.8 billion of checks issued between 1991 and 2005,

22   only approximately a $5.2 million was not cashed?

23   A.   **Yes, that is correct.**

24   Q.   Thank you, Mr. Cymbor.

10:00:04 25   MR. KIRSCHMAN: I have no further questions for this

1   witness.

2   And at this time, Your Honor, we would like to move

3   into admission these two exhibits, DX-273 and 275.

4   THE COURT: They'll be received.

14:52:42 5   (Defense Exhibits DX-273, DX-275 were moved into evidence.)

6   THE COURT: Mr. Harper?

7   MR. TAYLOR: Mr. Taylor, Your Honor.

8   THE COURT: Excuse me. Good morning. Mr. Harper is

9   the fellow sitting behind you.

10:00:34 10   MR. TAYLOR: Yes, sir.

11   THE COURT: It's Monday morning. Go ahead.

12   MR. TAYLOR: A little longer hair than I have, Your

13   Honor.

14   THE COURT: I noticed that.

10:00:40 15   **CROSS EXAMINATION**

16   BY MR. TAYLOR:

17   Q.   Mr. Cymbor, my name is Dan Taylor, and I have a few

18   questions that I would like to ask you this morning.

19   I believe you said you have worked for the Department

10:00:50 20   of Treasury for 31 years. Is that correct?

21   A.   **Yes, that is correct, 31 years.**

22   Q.   And can you tell me what your first position was?

23   A.   **I was an auditor with the Bureau of Government Financial**

24   **Operations.**

10:01:00 25   Q.   And how long were you in that position?

1 A. From 1976 until 1982.

2 Q. And then what was your next position?

3 A. My next position was a staff accountant.

4 Q. And how long were you in that position?

5 A. Probably about two years.

6 Q. '82 to '84?

7 A. Yes, that sounds about right.

8 Q. And are you an accountant, sir?

9 A. Yes, I am.

10 Q. Are you a CPA, sir?

11 A. No, I'm not.

12 Q. And what was your next position?

13 A. My next position was a section chief within the check

14 reconciliation branch.

15 Q. And how long were you in that position?

16 A. Probably a couple of years.

17 Q. So '84 to '86?

18 A. Yes, that sounds correct.

19 Q. And what was your next position?

20 A. My next position was manager of the check reconciliation

21 branch.

22 Q. And from '86 to roughly when?

23 A. 1992.

24 Q. And it was in that position that you were involved in an

25 investigation with regards to the possible -- or the destruction

1 of documents in connection with the mass cancellation event, for

2 lack of a better way to say it. Is that not correct, sir?

3 A. I remember, in terms of the that, I was asked some questions

4 about documents. That's correct.

5 Q. There were actually some documents, as I recall, boxes of

6 documents in the basement of the Department of Treasury at the

7 Hyattsville, Maryland facility, and those were the same

8 documents that you offered to the Smithsonian. Is that not

9 correct, sir?

10 MR. KIRSCHMAN: Objection, Your Honor. Outside the

11 scope of my direct, relevance. Outside the scope of the

12 hearing, for that matter.

13 THE COURT: Well, I'm going to allow it until I figure

14 out what's going on here. I'm not quite sure I understand the

15 relevance. But go ahead, Mr. Taylor.

16 A. Could you repeat the question?

17 BY MR. TAYLOR:

18 Q. Yes, sir. There were documents, or boxes of documents, in

19 the basement of the Department of Treasury at Hyattsville,

20 Maryland, and you offered those to the Smithsonian. Correct?

21 A. Yes, I offered some of the ledgers that were within those

22 documents, that's correct.

23 Q. And at the time, you did not understand that those documents

24 were not to be destroyed because they involved IIM account

25 material. Is that correct?

1 A. No, that's not correct.

2 Q. Could you explain your answer to me, sir?

3 A. At the time when I offered the ledgers to the Smithsonian,

4 we were in the process of trying to see if they were historical

5 documents that they wanted.

6 Q. Okay. And did you know at that time whether or not those

7 documents included IIM account ledgers?

8 A. I did not.

9 Q. Did you later determine that some of those documents that

10 you offered to the Smithsonian, which the Smithsonian rejected,

11 in fact included IIM ledgers?

12 A. I'm not aware of that.

13 Q. Sir?

14 A. I am not aware of that.

15 Q. Does the Treasury -- does the Department of Treasury confirm

16 in any fashion that the payee on the check is in fact the person

17 who cashes the check?

18 A. That's the responsibility of the banking institution that

19 cashes that check.

20 Q. And does the Department of the Treasury, or did the

21 Department of the Treasury -- let me restate that.

22 Has the Department of the Treasury ever treated IIM

23 checks - that is, the cutting and the issuing of those checks -

24 any differently than any other checks issued by the Department

25 of Treasury?

1 A. Not that I'm aware of.

2 Q. Okay, sir. Now, what was the system that was used -- I

3 believe you said the I-TRACS (sic) system was first used in

4 1992. The I-TRACS, 1992. Is that correct?

5 A. No, the Treasury Receivable Accounting Collection System was

6 implemented in August of 1991.

7 Q. Okay, 1991. What was the system before that?

8 A. It was a system called FARS, Financial Accounting and

9 Reporting System.

10 Q. Do you know the aggregate amount of uncashed checks as of

11 the date of the transfer of systems, outstanding aggregate

12 amount of uncashed checks?

13 A. I do not know what that amount was, no.

14 Q. Would it have been in the billions?

15 A. Transferred between where, sir?

16 Q. Well, no, sir. The aggregate amount of uncashed checks on

17 the system immediately prior to the implementation of TRACS.

18 A. Again, I did not have responsibility for that system at that

19 time.

20 MR. TAYLOR: Could you put up, please, Exhibit

21 Number 275, Defendant's Exhibit Number 275. And I'm probably

22 going to want 273 next, if you can help me with that.

23 BY MR. TAYLOR:

24 Q. Okay. I understand that exhibit to be providing us

25 information for the period January 2 through December -- excuse

1 me, January 1992 through December 2006. Is that correct?

2 A. That's correct.

3 Q. What was the information -- what information -- what was the

4 dollar amount of limited payee cancellations transferred for the

10:06:40 5 period, say 1909 to December 1991? In other words, the

6 information preceding this?

7 A. I do not have that information.

8 Q. Am I correct to understand that this chart is -- as I

9 understand it, purports to be -- just covers that block of time

10:07:03 10 that is January 1991 through December 2005?

11 A. The chart at the bottom shows the check issues reported for

12 that time period. The chart up top shows the limited payability

13 cancellations transferred to ALC-4844 for the time period

14 indicated.

10:07:18 15 Q. Right. So I am correct that it does not include any checks

16 that were issued prior to January 1991?

17 A. That's correct.

18 Q. And do you have that information, sir?

19 A. We have that within our Check Payment Reconciliation System,

10:07:35 20 yes.

21 Q. And how far back does that information go?

22 A. The Check Payment Reconciliation System was implemented in

23 November of 1986.

24 Q. And do you have it prior to 1986, sir?

10:07:49 25 A. We do not have records, I believe, back that far.

1 Q. So you cannot tell me -- even if you went to your office and

2 spent whatever time you needed to spend, you could not tell me

3 the dollar amount or the total item count for checks issued at

4 any point in time with that block ending December 31, 1985,

10:08:17 5 could you?

6 A. I believe there was a mass cancellation effort done with the

7 old Check Payment Reconciliation System, and the time period up

8 to the time of the period that the limited pay law took effect.

9 Q. I'm sorry, sir. I'm a little slow sometimes. Is that a yes

10:08:38 10 or a no to that?

11 A. It's a yes, in the sense that there was a calculation done

12 of limited pay cancellations prior to November of '86.

13 Q. And where is that?

14 A. Again, that was done and processed on the Treasury records.

10:08:59 15 Q. And do you have that information available to you?

16 A. I do not have that with me today.

17 Q. Now, do I understand that when the Treasury, during this

18 time period of '91 through 2005, reports back that a check has

19 not been cashed, they report back the symbol, the check number,

10:09:23 20 and the dollar amount, but they do not report back the payee?

21 A. It depends upon the agency, and whether the agency provided

22 that payee ID information on the check issue information.

23 Q. And what is the form or document that this report back to,

24 in this case Department of Interior, would be? What is the

10:09:42 25 identification of that?

1 A. Basically, it's the IPAC document.

2 Q. Does it have any more specific designation, like Form 2607

3 or something like that?

4 A. Not that I'm aware of.

10:09:59 5 THE COURT: Does the IPAC document reflect this credit

6 back to the agency check by check, or is it aggregated in some

7 way?

8 THE WITNESS: It provides a summary total, as well as

9 individual items.

10:10:11 10 BY MR. TAYLOR:

11 Q. And sir, have you or anyone in your department ever

12 confirmed the data that is on the CP&R reports?

13 A. Can you -- when you say confirmed...

14 Q. Well, where does the CP&R report, where is that generated?

10:10:33 15 A. Well, the Check Payment Reconciliation System, it was

16 operational in the Hyattsville data center.

17 Q. Right. But where is that report generated?

18 A. It's not a report, sir. The Check Payment Reconciliation

19 System is a system.

10:10:49 20 Q. And have you ever confirmed -- strike that. I'm sorry.

21 And when, sir, did you begin generating the information

22 that's represented by Defendant's Exhibit 273 and Defendant's

23 Exhibit 275? And I can have the other exhibit put up if you

24 don't remember it.

10:11:21 25 A. Yes, could you put those up? Because I can't see the...

1 Q. Yes, sir. Absolutely.

2 A. Okay. Document 273, of course, is a summary which I

3 requested in August of this year.

4 Q. And 275 was the one that you saw just before.

10:11:40 5 A. That document also was prepared at the same time.

6 Q. And what did you understand the purpose of Exhibit 273 to

7 be, sir?

8 A. The purpose was to show the number of checks that were

9 limited pay canceled and transferred to ALC-4844 by year and by

10:11:56 10 month.

11 Q. During that limited time period?

12 A. That's correct.

13 MR. TAYLOR: No further questions, Your Honor.

14 THE COURT: All right. If there's nothing further for

10:12:06 15 Mr. Cymbor...

16 MR. KIRSCHMAN: No redirect, Your Honor.

17 THE COURT: Thank you, sir. You're excused.

18 THE WITNESS: Thank you.

19 MR. KIRSCHMAN: Your Honor, may I have one moment?

10:12:19 20 THE COURT: Yes.

21 (OFF THE RECORD.)

22 MR. KIRSCHMAN: Your Honor, Mr. Cymbor was our last

23 witness in our case-in-chief. Before we close, we would like to

24 take care of one administrative matter.

10:12:45 25 You will recall that the DCV volumes prepared by FTI

1 were in some -- related to some pages, they were corrected

2 during the proceeding, and additional pages were added.

3   We have copies of those documents. We have given a

4 copy to plaintiffs. And now, if I may approach the bench, I

10:13:08 5 would like to give copies to the Court. These copies are

6 properly marked. They are marked DX-152-A through DX-158-A.

7   May I approach, Your Honor?

8   THE COURT: Yes. Thank you, sir.

9   MR. KIRSCHMAN: At the time, Your Honor, the Court had

10:13:29 10 asked if we could check to see whether any corrected or

11 additional pages were used during the course of the proceeding.

12 And no such pages were used on our direct examination or

13 redirect. On cross-examination, plaintiffs' counsel used one

14 page, DX-152-035 - that is, DX-152 at page 35 - and that was a

10:13:57 15 corrected page.

16   And that's the extent of our administrative matters.

17   THE COURT: All right, sir. Thank you.

18   MR. KIRSCHMAN: With that, we would rest.

19   THE COURT: Thank you.

10:14:14 20   Mr. Smith?

21   MR. SMITH: Good morning, Your Honor.

22   THE COURT: Good morning.

23   MR. SMITH: Your Honor, the plaintiffs' first witness

24 this morning is Sharon Red Thunder.

10:14:26 25   THE COURT: All right.

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1   (Oath administered by Courtroom Deputy.)

2   MR. SMITH: Your Honor, in accordance with your request

3 that we provide an outline of where her testimony would go,

4 Ms. Red Thunder is from the state of Washington. She was a BIA

10:15:10 5 employee for approximately 37 years at the agency level. She

6 also worked for a compacting tribe. And her testimony will be

7 relatively brief because we don't want to duplicate what you

8 have already heard last week.

9   But she will testify regarding five areas: Number one,

10:15:26 10 her experience with two of the databases that you heard about

11 last week, the IRMS and the LRIS databases; number two, her

12 experience with cadastral surveys; number three, certain aspects

13 of the handling of probate transactions at BIA; number four, how

14 compacting tribe and direct pay transactions were handled at

10:15:51 15 BIA; and finally, in a limited area, she's going to talk about

16 certain aspects of Special Deposit Accounts.

17   THE COURT: All right.

18   (SHARON RED THUNDER PLAINTIFF WITNESS, having been duly

19 sworn, testified as follows:)

10:16:00 20   DIRECT EXAMINATION

21 BY MR. SMITH:

22 Q. Ms. Red Thunder, can you state your full name for the Court,

23 please?

24 A. Sharon A. Red Thunder.

10:16:07 25 Q. And where are you from, Ms. Red Thunder?

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1 A. From the state of Washington, Colville Indian Reservation.

2 Q. And what is your Tribal affiliation?

3 A. I'm a member of the Confederated Tribes of the Colville

4 Indian Reservation.

10:16:21 5 Q. And are you also an allottee?

6 A. Yes. I'm a landowner allottee.

7 Q. How long have you been an allottee?

8 A. 1968.

9 Q. Did you inherit your interest from your father?

10:16:32 10 A. From my father, who died then.

11 Q. You previously were employed by the BIA?

12 A. Yes, I've been employed by the Bureau of Indian Affairs, was

13 employed by the Bureau of Indian Affairs since 1965.

14 Q. And when did you retire from BIA?

10:16:47 15 A. 2003.

16 Q. And you worked at various agencies within BIA?

17 A. Yes, I did.

18 Q. What are the agencies at which you worked?

19 A. I started working in 1965 for the Colville Confederated

10:17:00 20 Tribes, transferred to the coastal area, worked for the Western

21 Washington Agency. I then transferred down to Southern

22 California, worked at the Southern California Agency;

23 transferred back to Colville, worked at the Colville Agency,

24 state of Washington; transferred back down to the Pacific Region

10:17:20 25 in Sacramento, and retired there in 2003.

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1 Q. Was most of your work at the Colville Agency?

2 A. I was -- the majority of my time was the realty officer at

3 Colville Agency, for 25 years.

4 Q. Generally, what types of things did you do at these

10:17:41 5 agencies? You mentioned working as a realty officer. What else

6 did you do?

7 A. I started off as a realty clerk handling transactions in

8 1965 concerning realty, land sales. I transferred to western

9 Washington. I worked as a probate technician. I worked in the

10:18:01 10 probate department. When I transferred down to Southern

11 California, I worked in all aspects of realty, which was the --

12 handled the leasing, the rights of ways, the permits, the land

13 sales, the negotiated sales.

14   And when I transferred from Southern California back to

10:18:23 15 Colville Agency, as the realty officer I covered all of -- I

16 supervised all of the functions of realty, which was 10-year

17 management, was the leasing, rights of ways, permits; the

18 acquisition and disposal department, which covered the land

19 transactions, acquisition and Trust; Trust-to-Trust

10:18:47 20 transactions, which was gifts; negotiated sales, supervised

21 sales.

22   I then also supervised the records and probate

23 department, which took care of all of the records of the

24 allottees, allotments, and also probating the estates of the

10:19:10 25 deceased; not only Tribal members, but decedents that owned

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1 Trust land.

2 Q. Did your work encompass, as well, direct pay transactions?

3 A. Yes. The leases that I supervised had direct pay.

4 Q. When you retired from the BIA, where did you go work?

10:19:29 5 A. I then, when I retired in 2003, I worked for the Colville

6 Confederated Tribes for three years.

7 Q. And is the Colville Confederated Tribe, is that a compacting

8 tribe?

9 A. Yes, compacted tribe.

10:19:45 10 Q. I want to begin talking about land records. Obviously, when

11 you began in the '60s, we didn't have the electronic systems we

12 have today. Is that fair?

13 A. Yes. I started working in 1965 prior to the establishment

14 of the Land Titles and Records Office.

10:20:01 15 Q. So everything was done manually back then?

16 A. Everything was done manually, yes.

17 Q. On the real estate side, what is the first electronic system

18 you used?

19 A. The first electronic system we used was LRIS.

10:20:15 20 Q. Okay. And was that at Colville?

21 A. Yes, at Colville.

22 Q. And approximately when did you begin using LRIS?

23 A. It was in the probably latter part of '60s or early part of

24 '70s.

10:20:30 25 Q. And just as an example, if there was a land transaction at

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1 Q. So you couldn't look at LRIS and determine where the money

2 was supposed to go?

3 A. Right.

4 Q. Okay. Now, at some point in time did you begin using the

10:22:07 5 IRMS system?

6 A. Yes. We were directed by the central office, Bureau of

7 Indian Affairs, to use the IRMS system.

8 Q. And you refer to that as IRMS?

9 A. Yes, IRMS.

10:22:19 10 Q. About when were you directed to begin using IRMS at

11 Colville?

12 A. Let's see. It was probably in the '80s. I believe the

13 latter part of the '80s.

14 Q. Latter part of the '80s?

10:22:40 15 A. Uh-huh.

16 Q. Now, did IRMS have its own ownership module within it?

17 A. No. What IRMS consisted of, it was a download of the LRIS

18 system.

19 Q. Okay. So LRIS was downloaded into IRMS?

10:22:55 20 A. Yes.

21 Q. When you began using IRMS, did you have any difficulties?

22 A. Yes, a lot of difficulties.

23 Q. What were the difficulties?

24 A. When IRMS was downloaded from LRIS, we had a lapse of time

10:23:12 25 that it was not updated. It was eight to 10 years backlogged in

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1 the Colville Agency, what was the process for having that

2 transaction recorded and input into the LRIS system?

3 A. Okay. What we had to do is, we had to send all of our

4 instruments, the documents, down to the northwest region where

10:20:51 5 the physical location of the system, LRIS, was at, the northwest

6 region in Portland, Oregon. We had to go in and pull all of our

7 documents and get them recorded, which were deeds, leases,

8 rights of ways, probates.

9 Q. And then would they return to you a recorded copy of that

10:21:12 10 document?

11 A. Yes, they were.

12 Q. By the way, the Colville Agency, how many tribes are under

13 the jurisdiction of the Colville Agency?

14 A. Okay. We have 13 bands.

10:21:24 15 Q. 13 bands?

16 A. Yes.

17 Q. Okay. If you had a lease payment that came into the

18 Colville Agency, and you wanted to know where to distribute

19 those funds, would you look at LRIS?

10:21:40 20 A. Prior to -- now, are you talking -- I guess I need

21 clarification. Are you talking when I started working, or after

22 LRIS was established?

23 Q. Once LRIS was established.

24 A. Okay, yes. Well, LRIS was not up to date, so we manually

10:21:58 25 determined distribution.

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1 ownership.

2 Q. Now, you testified previously that you would send

3 transactions down to the office where it was recorded. What was

4 the -- how come it wasn't being placed in LRIS?

10:23:34 5 A. Okay. In the -- I believe the manual, in the "Land titles

6 and records section," it states that they have to record the

7 document within a certain amount of time, and then return the

8 recorded instrument to the agency. However, there was no

9 requirement that the document be encoded into the tract history.

10:23:56 10 So therefore, when we started working on IRMS, we found

11 out that -- and we had the capability of getting informational

12 ownership from LRIS, we found out that all of the documents were

13 not encoded into history. So therefore, ownership was not

14 current.

10:24:16 15 Q. So you would send the transaction down to be recorded, but

16 it was never coded into the LRIS system?

17 A. Yes.

18 Q. What is an LTRO office?

19 A. Land Titles and Records Office.

10:24:29 20 Q. And have you ever been to a Land Title Records Office?

21 A. Yes, I have.

22 Q. And when you went there, what did you discover?

23 A. I discovered that there were a lot of un-encoded documents

24 in the Northwest Region. When we found out that we had the

10:24:48 25 capability of updating IRMS at the agency, I did a study on land

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1 titles and records for the possibility of compacting, or
2 contracting land titles and records, because we find out that we
3 have the capability of updating IRMS. And IRMS was more updated
4 than LRIS because of the documents that had not been encoded
10:25:13 5 into the system.
6 When I went down to the Northwest Region, I found out
7 that they had piles and piles of documents that had not been
8 encoded into the system. And when you requested a title status
9 report from the Northwest Region, what they would do is, when
10:25:32 10 they got to the request, they would go searching through all of
11 the piles of documents to see if there was any documents
12 affecting that particular tract that was being requested a TSR
13 on.
14 Q. Okay. Going back to when you first started using the IRMS
10:25:51 15 system, did you have to in fact modify the IRMS system at the
16 agency in order to be able to use it?
17 A. Yes. At Colville Agency, we kept manually posting our
18 ownership. When there was a probate, we would then go in and
19 post to our allotment or estate records the current owners. If
10:26:14 20 somebody had died, it was probated, we would manually post on
21 those allotment or estate records.
22 We would post if there was a mortgage on the property.
23 We did all of our -- if there was a deed, if there was a gift
24 deed or a negotiated sale to the tribe or to another member, we
10:26:34 25 manually posted on the allotment or estate record.

1 So therefore, we used our own records to update the
2 IRMS system, because we could not -- when the LRIS system was
3 downloaded into IRMS, it was so outdated that we couldn't use it
4 for distribution. So we had to go in and do our own encoding to
10:26:59 5 update the IRMS system.
6 Q. So you would, as an agency, modify the IRMS -- the ownership
7 information on the IRMS system?
8 A. Yes, we did.
9 Q. And so therefore, would your agency information be
10:27:14 10 inconsistent with what is on LRIS?
11 A. Yes, it was. More updated.
12 Q. But based on your experience, how did other agencies handle
13 this problem with LRIS?
14 A. It was a problem, because some agencies didn't manually post
10:27:26 15 their records. The -- some agencies did not use IRMS because of
16 that.
17 Q. So some agencies just wouldn't use it at all because the
18 information was inaccurate?
19 A. Yes.
10:27:41 20 Q. Did some agencies adopt their own electronic systems?
21 A. I'm aware of some that did, yes.
22 Q. What is the MAD system?
23 A. Okay. It was a system that was used for distribution, I
24 believe -- I'm not too sure all of the agencies that utilized
10:27:58 25 it, but I do know that the Standing Rock Agency did.

1 Q. So that is another system apart from IRMS and LRIS?
2 A. Yes.
3 Q. You mentioned TPRs. That's a title record?
4 A. TPRs, I don't think. TSR.
10:28:20 5 Q. I'm sorry, TSR.
6 A. Yes, title status report.
7 Q. And under what circumstances would you want a title status
8 report?
9 A. Okay. We were instructed that in order to process
10:28:31 10 transactions, if you wanted to sell your land, if somebody came
11 in and applied for a sale of land or wanted to lease their land,
12 we had to have the current ownership.
13 So we would request a title status report, a TSR, from
14 the Land Titles and Records Office. And it was hard. They were
10:28:53 15 late in getting those documents, title status reports, to us,
16 because they had to be updated as we requested the title status
17 report.
18 Q. Does that continue to be a problem today?
19 A. Yes. It is slow in getting a certified title status report
10:29:10 20 from Land Titles and Records.
21 Q. And is that due to problems with LRIS?
22 A. Yes.
23 THE COURT: Excuse me, Ms. Red Thunder. Would you move
24 that microphone just away from you a little bit? You're loud
10:29:22 25 and clear.

1 MR. SMITH: Thank you, Your Honor.
2 BY MR. SMITH:
3 Q. Are there situations where the owner of the allotment may
4 not necessarily be entitled to the income from the allotment?
10:29:32 5 A. Yes, there is.
6 Q. Okay. Let me give you an example. What is an indebted
7 estate?
8 A. An indebted estate is, when a decedent passes away, if they
9 have last illness, hospital bills, if they have funeral
10:29:59 10 expenses, the creditors file a claim against the estate. And
11 more than likely, it's approved by the administrative law judge.
12 Then, once those claims are approved, money does not go
13 to the heirs until that indebtedness is paid or expired.
14 Q. So, can you look in LRIS to determine who is entitled to
10:30:27 15 that money from the probate?
16 A. No, because LRIS shows the ownership and it doesn't indicate
17 indebted estates.
18 Q. How about the new system they're talking about, TAAMS? Can
19 you go to TAAMS?
10:30:41 20 A. TAAMS, that also poses the same problem.
21 Q. So where would you have to go to find out who was entitled
22 to the money?
23 A. I would say to the IRMS system, or either to manual records.
24 Q. And that's different based on what agency you're at?
10:30:57 25 A. Yes.

1 Q. Because some agencies don't use that IRMS system?

2 A. Right.

3 Q. So is it fair to say that if you're looking for who the

4 money is entitled to be distributed from income received from

10:31:14 5 allotment, you don't want to look at LRIS. Is that fair?

6 A. Yes, that's fair to say.

7 Q. And you might find the information on the IRMS system at the

8 agency?

9 A. Yes.

10:31:22 10 Q. But it depends on whether the agency used that system or

11 not?

12 A. Yes.

13 Q. Have there been any -- let me ask this question: As part of

14 your responsibilities working for BIA, have you observed

10:31:35 15 disbursement of funds to beneficiaries?

16 A. Yes.

17 Q. Have there ever been any circumstances where you were

18 concerned about disbursements not going directly to a

19 beneficiary?

10:31:46 20 A. Yes.

21 Q. Can you give me an example?

22 A. I know -- since we did not have all of the LRIS to rely on,

23 I do know of one instance at Colville that we had a staff member

24 that had misinterpreted a decision approving a will. And there

10:32:12 25 were several codicils in there, and the payment went to the

1 wrong person. And we were attempting to get that corrected, to

2 receive the money back from the person that received the payment

3 so it would go to the proper heirs.

4 Q. Have you ever seen money go to BIA employees that were

10:32:29 5 intended for beneficiaries?

6 A. Yes, I did. When I was a realty officer, I was concerned

7 about an employee within the Bureau of Indian Affairs, a social

8 worker who was taking money out of individual Tribal members'

9 accounts. And he would obtain a power of attorney from the

10:32:51 10 individual, and a lot of them had alcohol problems or were non

11 compos mentis, and he would take the money out of their

12 accounts, had a power of attorney over them, and he would place

13 the money into his bank account.

14 Q. Did you raise your concerns with your superiors?

10:33:10 15 A. Yes, I did. I went to the superintendent of the agency and

16 I told him that I didn't think it was right that a person who

17 had Trust -- federal Trust responsibility was allowed to take

18 the money out of their accounts and then handle it from his own

19 personal account.

10:33:27 20 Q. And were you ever able to get a resolution of that?

21 A. I turned it in. Once the new system was set up, I turned it

22 in as a whistle blower. I felt that this person was taking

23 advantage of our Indian people. And I knew that money was

24 coming in from land sales, I knew they were getting large

10:33:51 25 amounts of money, and this person was removing the money from

1 their account. So that way there wasn't a lot of supervision

2 over those individual accounts.

3 Q. Let me turn to a different subject, and that's --

4 THE COURT: Aren't you going to tell us what happened

10:34:11 5 after she blew the whistle?

6 BY MR. SMITH:

7 Q. Were you able to get any resolution?

8 A. I turned it in and blew the whistle. I was working down in

9 Sacramento when this happened. I hadn't heard a word. And I

10:34:26 10 finally kept calling and I said, "Well, whatever happened to

11 this case?" And I was told that they found no wrongdoing. And

12 I said, "Shouldn't I have been notified, since I was a whistle

13 blower?" And they said, "If you want to find out the results of

14 the investigation, you have to file a FOIA request to get that

10:34:48 15 information."

16 Q. Turning to -- I take it you never filed a FOIA request?

17 A. No. I spent a lot of time -- I had copies of ledgers where

18 these checks were drawn out, and I just felt that I went to a

19 lot of time and effort. And when they told me that I had to

10:35:07 20 request a FOIA, I just thought I wasn't going to follow through

21 with it because I felt that I had already done a lot.

22 Q. When you're talking about these checks, was it a small

23 amount of money or a large amount of money?

24 A. Large amounts.

10:35:19 25 Q. And would these beneficiaries come to you looking for their

1 money?

2 A. Some of them would state that they didn't have money any

3 more. And I couldn't understand why they didn't, because they

4 had large amounts of money. And that's when I started

10:35:37 5 investigating on their ledgers, finding out that money was being

6 removed.

7 Q. Okay. Let's change the subject to cadastral surveys. Have

8 concerns been raised about cadastral surveys at the Colville

9 Agency?

10:35:52 10 A. Yes, there have been concerns on cadastral surveys.

11 Q. And have you personally experienced problems with cadastral

12 surveys as to your allotment?

13 A. Yes. I own an interest in an allotment that is off

14 reservation, and one of the landowners applied to have the

10:36:10 15 timber cut. And at the time that the foresters went out, there

16 was some discrepancy with the boundaries, and then we found out

17 that the surveys were incorrect.

18 Q. So were you able to ever develop income from that allotment?

19 A. No.

10:36:33 20 Q. Have tribes gone out and tried to get private surveys, to

21 compare them to the federal cadastral surveys?

22 A. Not on that particular allotment.

23 Q. On other allotments that you're familiar with?

24 A. Yes.

10:36:48 25 Q. And what have been the results of those?

1 A. The tribe had hired their own Tribal surveying department.

2 And they couldn't -- since they weren't recognized by Bureau of

3 Land Management, they disbanded the program, even though -- they

4 ended up having some dispute over the boundaries with BLM.

10:37:13 5 Q. So what the private surveyor discovered wasn't consistent

6 with what the federal records showed?

7 A. Yes, yes.

8 Q. By the way, you mentioned off-reservation allotment. What

9 is an off-reservation allotment?

10:37:26 10 A. It's allotments that lie outside the boundaries of the

11 reservation. We have reservation allotments that are within the

12 exterior boundaries of the reservation. Our reservation was

13 originally over 2. (sic) million acres, but because of the

14 discovery of gold, over a million acres was ceded.

10:37:49 15 So Indians lived in certain areas, and once those areas

16 were ceded, some of them were allowed to remain and were issued

17 allotments, and they are within the Aboriginal territories.

18 So we have allotments that are outside the exterior

19 boundaries of the current reservation.

10:38:10 20 Q. Okay. One more question about the cadastrals. If the

21 private surveys were inconsistent with the BLM surveys, and

22 these are income-producing properties, how do you know where the

23 income is supposed to go?

24 A. There has been some problem in the past. A lot of it had to

10:38:30 25 do with forestry, trespass. They would have to try to determine

1 with the private surveyor and the BLM surveyor where the lines

2 were, and exactly how much money was to go to...

3 Q. And has that always been resolved?

4 A. I'm not aware of it on the forestry side.

10:38:51 5 Q. Were you personally involved in a cadastral survey program

6 at one time?

7 A. Yes.

8 Q. And what was the nature of your involvement?

9 A. I was an instructor with the Bureau of Land Management

10:39:03 10 during my employment in California.

11 Q. And did you become familiar with a BIA manual on cadastral

12 surveys?

13 A. Yes. Yes.

14 Q. And were you supposed to train people with regard to

10:39:17 15 cadastral surveys?

16 A. Yes. I was one of the instructors as to how to apply for

17 funds for cadastral surveys, because it was an unfunded program

18 at the agencies; and how to identify what needed to be surveyed;

19 how to go out and obtain assistance of the Bureau of Land

10:39:39 20 Management.

21 Q. What happened to that program?

22 MR. STEMPLEWICZ: Objection to relevance, Your Honor.

23 THE COURT: Overruled.

24 A. The program was funded out of the Trust reform, and they

10:40:00 25 were informed that there wasn't enough response from the Indian

1 people. Most of the participants were Bureau of Land Management

2 participates. So the funding was, I guess, pulled back. And

3 now what they're looking at is going out for training for the

4 new boundary survey standards.

10:40:24 5 BY MR. SMITH:

6 Q. So were you ever able to train anybody as part of that

7 program?

8 A. Yes.

9 Q. You did train some?

10:40:34 10 A. Yes.

11 Q. Until the program was disbanded?

12 A. Yes.

13 Q. Okay.

14 THE COURT: Put a time frame around this, would you?

10:40:40 15 BY MR. SMITH:

16 Q. When you're talking about the cadastral survey program in

17 which you were involved, what time?

18 A. I would say probably 2001, 2002.

19 Q. Okay. Thank you.

10:40:54 20 THE COURT: So you're telling me that BIA had a program

21 in 2001/2002 whereby account holders or individual Indians could

22 apply for funds to conduct cadastral surveys on land that they

23 owned or thought they owned. Is that right?

24 THE WITNESS: It was a Bureau of Land Management

10:41:16 25 program, not a Bureau of Indian Affairs program. And what they

1 did was, agencies applied for that funding through tribes -- I

2 mean, tribes through agencies applied for the funds, not

3 individuals.

4 THE COURT: So, all right. So it was a Tribal request

10:41:36 5 made to the agency?

6 THE WITNESS: Uh-huh.

7 THE COURT: And the agency would apply to BLM for

8 funds?

9 THE WITNESS: Yes.

10:41:43 10 THE COURT: And BLM would provide the funds for the

11 survey?

12 THE WITNESS: If it met their priorities, yes.

13 THE COURT: Were any cadastral surveys ever conducted

14 under that program, to your knowledge?

10:41:53 15 THE WITNESS: There were limited, yes.

16 THE COURT: And how long did this program last?

17 THE WITNESS: I believe it still exists. The training

18 program doesn't exist anymore, but there is a way that you can

19 request a cadastral survey. However, it's limited funds.

10:42:09 20 THE COURT: All right. Go ahead, Mr. Smith. Thank

21 you.

22 BY MR. SMITH:

23 Q. Ms. Red Thunder, I want to ask you some limited questions

24 about Special Deposit Accounts. With we've heard about Special

10:42:21 25 Deposit Accounts this past week. Were they used at the Colville

1 Agency?

2 A. Yes, they were.

3 Q. And under what circumstances would the Colville Agency use

4 Special Deposit Accounts?

10:42:33 5 A. Special deposits have been in existence since I began

6 working. And this was an account that was used if money was

7 paid in on an allottee, or if you had a lease that the ownership

8 could not be determined at the time.

9 Prior to electronic, everything was done manually, and

10:42:56 10 you had to determine who the landowners were. And if you

11 couldn't do the distribution at the time the money came in, you

12 had to do something with that check within 24 hours. That was

13 the time frame; you had to turn that deposit around. And a lot

14 of times it was placed in special deposits because the ownership

10:43:19 15 was not able to be determined at the time.

16 Q. So these Special Deposit Accounts go back into the

17 preelectronic era?

18 A. Yes.

19 Q. And is it fair to say you may have the information on the

10:43:30 20 ownership, but it would take a little while to determine it, so

21 the money would remain --

22 A. Yes.

23 Q. -- in the Special Deposit Account?

24 A. Yes.

10:43:38 25 Q. How long would this money remain in a Special Deposit

1 Account?

2 A. I believe -- and I'm trying to remember. This was clear

3 back in the '70s. We tried to set a time frame as to when these

4 special deposits could remain in there; however -- and I admit,

10:43:56 5 even at Colville we had times that they were overlooked. They

6 were placed in special deposits, and possibly not distributed.

7 And that's an ongoing project now, of distributing.

8 Q. Was interest credited to those beneficiaries whose funds

9 were in the Special Deposit Accounts?

10:44:18 10 A. No. Only up -- and I don't recall the date when monies were

11 placed in special deposits. Prior to a certain date, they did

12 not accrue interest.

13 Q. Do you know approximately when that date was?

14 A. I couldn't even say. It's been a long span of years that

10:44:38 15 I've worked. I can't remember.

16 Q. So for some period of time, the money remained in the

17 Special Deposit Account with no interest accruing to the

18 beneficiary?

19 A. Correct.

10:44:49 20 Q. Let me ask you about -- some questions about probate. You

21 indicated, over the years you worked at BIA, you handled probate

22 matters?

23 A. Yes, I did.

24 Q. And historically, has there been a bit of a backlog on

10:45:08 25 handling of probate estates?

1 A. Yes, there is.

2 Q. And based on your experiences, what were some of the factors

3 that contributed to that?

4 A. Prior to the electronic, we had to manually figure out,

10:45:21 5 compute what a decedent owned. If some of the agencies didn't

6 have the records, we would have to go back into each estate file

7 and figure out -- come up with an inventory, a manual inventory

8 of what a decedent owned. And that was very time-consuming. I

9 worked at that job, and it was very time-consuming.

10:45:47 10 Q. Based on your experience in probate, have you had situations

11 where an heir is receiving money under an estate -- from an

12 estate that comes from an allotment --

13 A. Yes.

14 Q. -- and questions the accuracy of that amount?

10:46:09 15 A. Well, I guess if you didn't have all of the ownership up to

16 date.

17 Q. Okay. Well, have -- excuse me, have heirs ever requested an

18 accounting of what they're getting out of the estate from an

19 allotment?

10:46:26 20 A. Yes. When I worked for the tribe within the last, I think

21 it was probably last -- the end of last year, we did have one

22 lady that was questioning the account in her deceased brother's

23 account. She felt that he should have had a lot more money.

24 And her son -- she allowed her son to do the contacting at the

10:46:50 25 agency.

1 Even though I was not -- I didn't work in the probate

2 department anymore, I had been there for so many years that a

3 lot of people still came to me. And they wanted an accounting

4 of the money that was in the estate account, and they could

10:47:08 5 never get it.

6 Q. So they couldn't get it as part of the probate process. Is

7 that fair?

8 A. Right.

9 Q. And what other sources, to your knowledge, do they look to,

10:47:18 10 to try to get an accounting of that?

11 A. Okay. I referred them to the new position, the Trust

12 officer at the agency, because OST is supposed to be responsible

13 for the money that is in the IIM account. So I referred that

14 individual to the Trust officer within the Office of Special

10:47:35 15 Trustee. They couldn't get any response. They went to the

16 superintendent, couldn't get a response.

17 I referred them to Ross Swimmer. I felt they needed to

18 go higher up to get an accounting of the monies from the estate

19 account. And from what I'm aware, that they never did get an

10:47:55 20 accounting.

21 Q. Thank you. Are you familiar with Youpee escheated

22 interests?

23 A. Yes, I am.

24 Q. And under BIA policy, how are Youpee escheated interests

10:48:15 25 supposed to be handled as part of the probate process?

1336

1   A. **During the probate process, when the Indian Land**
2   **Consolidation Act came into effect and the two percent or less**
3   **interests were escheated to the tribe, we were directed, since**
4   **there was a case filed to have this considered unconstitutional,**
10:48:37 5   **the land itself, the title went over to the tribe, and the money**
6   **was to be placed in a special account. So that way, if it was**
7   **declared unconstitutional, the land and the money would revert**
8   **to the heirs at law.**
9   Q. And once it was declared unconstitutional, what was the
10:49:01 10 process for getting that money back to the beneficiaries?
11   A. **Okay. We were informed that we were to get all of the**
12   **ownership back to the proper heirs, and then also get the money**
13   **back to the proper landowners.**
14   Q. And does that include the income that had accrued off of
10:49:19 15 those ownership interests?
16   A. **Yes.**
17   Q. To your knowledge, have all BIA agencies in fact done that?
18   A. **No. I don't believe -- it has been posed as a problem on**
19   **some of the -- within some of the meetings that I've gone to**
10:49:36 20 **nationally within the national realty conferences, that there**
21   **are some areas that they haven't been able to do all of this.**
22   Q. I want to turn the subject now to direct pay. You indicated
23   that the Colville Agency did handle situations where a lessee
24   makes a payment directly to an allottee. Is that correct?
10:50:00 25 A. **Yes.**

1337

1   Q. And what were your responsibilities at the Colville Agency
2   with respect to --
3   A. **When we were drawing up a lease, there would be a landowner**
4   **that had a relationship with the lessee. They would request**
10:50:13 5   **that the lease be a direct pay, whether they be a single**
6   **landowner, or whether they be a landowner of undivided interest.**
7   **So what we would do is, we would make provision within the lease**
8   **that there was direct pay on this individual.**
9   **And it was a provision of the lease that the lessee was**
10:50:36 10 **to provide us a copy of the canceled check, so that way we could**
11   **account for that payment.**
12   **And in IRMS there was -- IRMS, there was a code that**
13   **you could put in there that this landowner received direct pay.**
14   **And so therefore, when it calculated the rental payments, it did**
10:51:00 15 **not include that person because they received direct pay.**
16   Q. Okay. Great. So the lease, the direct pay lease, is that a
17   BIA lease?
18   A. **Yes. Yes, it is.**
19   Q. And BIA prepares that lease?
10:51:13 20 A. **Yes.**
21   Q. And under the terms of that lease, who is responsible for
22   enforcing that lease?
23   A. **The Bureau of Indian Affairs.**
24   Q. So in case a payment is not made, the BIA has to go out and
10:51:25 25 enforce it?

1338

1   A. **Yes.**
2   Q. And what is a lease compliance officer?
3   A. **There is a position that was established nationwide, there**
4   **was some funding that were identified within the budget of**
10:51:42 5   **the -- I guess the need for a lease compliance person. A lease**
6   **compliance position, I guess, made sure the contract was**
7   **complied with by collecting payments, by making sure that they**
8   **complied with the fencing; if it was a grazing lease, whether**
9   **they complied with the AUMs on that lease.**
10:52:16 10 **But the lease compliance, there was certain monies**
11   **identified for a lease compliance position.**
12   Q. And was this both for direct pay and indirect pay leases?
13   A. **Yes. Yes, it was.**
14   Q. Now, were the direct pay leases recorded on the electronic
10:52:35 15 systems at BIA?
16   A. **Yes.**
17   Q. And you say there's actually a provision in the IRMS
18   database for a notation of a direct pay lease?
19   A. **Yes.**
10:52:47 20 Q. And it was a responsibility of the agency to collect the
21   canceled checks when payments were made?
22   A. **Yes. We collected copies of canceled checks and placed them**
23   **in the file.**
24   Q. Now, what if any reporting was supposed to be made of direct
10:53:03 25 pay payments to lessees to the regional offices?

1339

1   A. **All agencies are required to report not only acreages --**
2   **there's different types of reports that are done, and one is the**
3   **annual report which identifies the acreage of Tribal land,**
4   **allotted land; the income of all of the transactions, which**
10:53:35 5   **include leases, land sales.**
6   **The agencies are required to do this reporting to the**
7   **regional office; the regional office then takes its report and**
8   **consolidates all of their agencies, and sends in a Northwest**
9   **Region report to the central office, BIA.**
10:53:57 10 Q. And based on your understanding of the policy, was that to
11   include direct pay transactions as well?
12   A. **Yes.**
13   Q. Let me turn the subject now to compacting tribes.
14   Colville --
10:54:12 15 THE COURT: Just a minute, before you move away from
16   direct pay.
17   This reporting that you're talking about, did you do
18   any of this reporting yourself?
19   THE WITNESS: Yes, I did.
10:54:28 20 THE COURT: Does it have a number, this report? All
21   reports have numbers.
22   THE WITNESS: I believe it's 5-147.
23   THE COURT: And how often is this report done?
24   THE WITNESS: Annually.
10:54:44 25 THE COURT: All right. And this report identifies

1 acreage, allotted land, the income of all the transactions,

2 which include leases and land sales, and direct pays, also?

3   THE WITNESS: Yes. Because your direct pay is

4 identified by lease, so you need to report also the direct pay

10:55:04 5 because it's included within your lease.

6   THE COURT: What did you say that account number is,

7 5-point what?

8   THE WITNESS: It used to be 5.147. It's a BIA report.

9 It's called "Annual acreages" or...

10:55:23 10   THE COURT: Is anybody going to show me a 5-147 report

11 in this case?

12   MR. SMITH: Your Honor, we'll see if we can find one.

13   THE COURT: All right. Go ahead, Mr. Smith.

14 BY MR. SMITH:

10:55:36 15 Q. Turning to compacting tribes, you were employed also by a

16 compacting tribe?

17 A. Yes.

18 Q. And that was the Colville Confederated Tribes?

19 A. Yes.

10:55:47 20 Q. And do you know when Colville began to handle

21 responsibilities as a compacting tribe?

22 A. Yes, it was in the latter part of the '80s.

23 Q. And is it just real estate transactions, or does it handle

24 disbursements as well?

10:56:10 25 A. Real estate transactions, which -- we did not contract IIM;

---

1 however, realty did do the distribution of Trust income.

2 Q. So realty did the distribution of Trust income?

3 A. Yes.

4 Q. Based on your understanding, when Colville undertook

10:56:31 5 compacting responsibilities, did it cease being a federal Trust

6 project?

7 A. No, it did not cease federal Trust.

8 Q. When Colville began working as a compacting tribe, did it

9 stop using Interior's electronic systems?

10:56:46 10 A. No.

11 Q. So did transactions continue to be posted to the IRMS

12 database?

13 A. Yes. And LRIS.

14 Q. And the reports we've discussed to the regional offices, do

10:57:00 15 those reports include transactions that fell under the

16 compacting tribe as well?

17 A. Yes.

18 Q. When Colville became a compacting tribe, did it stop using

19 Interior employees?

10:57:20 20 A. No.

21 Q. So was it a mixed Tribal employee and Interior employee?

22 A. Yes. The Colville Tribe entered into a cooperative

23 agreement, and within that cooperative agreement they had

24 federal and Tribal people working together.

10:57:39 25 Q. So is it fair to say you may have a Tribal employee actually

---

1 supervised by a federal employee?

2 A. Yes.

3 Q. I have two last questions. Are you familiar with

4 Whereabouts Unknown accounts?

10:57:58 5 A. Yes, I am.

6 Q. What are those?

7 A. Those are individual IIM account holders that they have not

8 been able to locate, and they have monies in their account.

9 Q. And so it's collections that have never been disbursed to a

10:58:15 10 beneficiary?

11 A. Yes.

12 Q. Have you ever seen a Whereabouts Unknown list?

13 A. Yes, I have.

14 Q. And for what agency was that?

10:58:24 15 A. I looked at Colville's ownership; I mean, Whereabouts

16 Unknown. I've looked at the nationwide listing, and I've looked

17 at Yakima, Umatilla, and the surrounding locations.

18 Q. When you've looked at those lists for the areas in which you

19 work and live, were you surprised by what was on that list?

10:58:52 20 A. Yes, I am very surprised.

21 Q. And why is that?

22 A. Because there's a lot of people on the Whereabouts Unknown

23 list that, they're easy to find. They're on the Tribal rolls.

24 Especially on the Yakima reservation and the Colville

10:59:04 25 reservation, we all receive dividend payments. And the tribes

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1 have those addresses because we receive money, so therefore,

2 Tribal rolls have the current addresses.

3 Q. And did you bring this to the attention of the people

4 handling the Whereabouts Unknown accounts?

10:59:24 5 A. Yes, I did, to the Trust officers. I brought it to their

6 attention that if they would go to the tribe and get the

7 addresses, the Whereabouts Unknown list would go down quite a

8 bit.

9 Q. Did you get any response?

10:59:38 10 A. No.

11 Q. One last question. The state of Washington is a big timber

12 country. Is that correct?

13 A. Yes, it is.

14 Q. And to your knowledge, are administrative fees charged on

10:59:51 15 timber?

16 A. Yes, there is an administrative fee charged on timber lands.

17 Q. Was that a percentage of the total?

18 A. It's a percentage.

19 Q. Do you know what that percentage was?

11:00:03 20 A. I did work a short time in forestry, and I believe it was

21 10 percent.

22 Q. So if timber is cut and there's a $100,000 transaction,

23 would BIA take its 10 percent off the top of that?

24 A. Yes.

11:00:20 25 Q. To your knowledge, do allottees ever get an accounting of

---

1 those administrative fees?

2 A. **No.**

3   MR. SMITH: Your Honor, I have no further questions.

4   THE COURT: All right. Mr. Stemplewicz?

11:00:39 5   **CROSS-EXAMINATION**

6 BY MR. STEMPLEWICZ:

7 Q. Good morning.

8 A. **Hi.**

9 Q. The timber fees you were just referring to, were they for

11:00:47 10 reseeding of the forest?

11 A. **Reforestation, yes.**

12 Q. Direct pays that you discussed, do those funds that go to

13 the individual payees, do they ever go through IIM accounts?

14 A. **No.**

11:01:04 15 Q. You gave an example of a person that was seeking an

16 accounting of a decedent's account, and you referred the person

17 to Ross Swimmer. Do you know if that person ever contacted

18 Mr. Swimmer?

19 A. **I am not aware that he did.**

11:01:22 20 Q. What time frame are we talking about? When did the decedent

21 pass away, do you recall?

22 A. **Okay. The decedent passed away, I recall it was probably**

23 **200 -- may have been 2005.**

24 Q. So that was after this lawsuit was filed?

11:01:47 25 A. **Yes.**

1 Q. Why is the manual inventory of a decedent's effects so

2 time-consuming?

3 A. **Because of the records. Some agencies did not keep a manual**

4 **posting of records.**

11:02:08 5 Q. And what did that necessitate, then?

6 A. **Okay. At Colville, I will talk specifically about Colville,**

7 **what we would do is, if a person passed away and had so many**

8 **heirs, we would have to go into the probate file, determine --**

9 **with the complicated fractionated interest, you can have one**

11:02:33 10 **landowner decedent that would own possibly 12 tracts of land.**

11 **And what you had to do is you had to go manually post on each**

12 **allotment or estate record that their new heirs were involved in**

13 **all of those tracts.**

14   **And so when I worked in probate in the 1970s, on one**

11:02:57 15 **allotment you would start with the original allottee, who his**

16 **heirs were, and then on down. And I could have an abstract**

17 **probate about that big, determining who the current landowners**

18 **are, and converting the ownership to the lowest common**

19 **denominator.**

11:03:20 20 Q. As part of the probate process, I think you indicated that

21 it's very important to determine whether or not any creditors

22 would get paid out of the estate?

23 A. **Yes.**

24 Q. Does that happen often?

11:03:34 25 A. **Yes, it does.**

1 Q. Is that true of the land, as well? Can creditors use the

2 Trust land to satisfy debts?

3 A. **It is on mortgages. When you have a piece of property - use**

4 **myself for an instance, that I have a home on my piece of land**

11:03:57 5 **that I went in and got a loan to buy that home - and so that**

6 **real estate mortgage was approved by the superintendent, and**

7 **becomes an encumbrance against the title.**

8 Q. So with respect to an IIM account, if the heirs are waiting

9 to see whether there's going to be any money coming to them out

11:04:18 10 of that IIM account, they have to wait and make sure that the

11 creditors get paid first. Correct?

12 A. **Yes.**

13 Q. And there's a possibility that, given the debts of the

14 decedent, there might not be any money left for the heirs?

11:04:34 15 A. **Right.**

16 Q. Cadastral surveys, is that a fairly recent phenomenon?

17 A. **No.**

18 Q. How long ago to your knowledge did the practice start?

19 A. **As far as I'm aware, it has existed for quite a few years.**

11:04:57 20 **Because when I was a realty officer in the '70s, there was a**

21 **cadastral survey program. However, the funding was very**

22 **limited.**

23 Q. But relative to the time going back to the initial

24 allotments, this is essentially to replace that older system?

11:05:16 25 A. **I believe it's to supplement that system.**

1 Q. But from the time of the initial allotments, it was the

2 old-fashioned style of surveying that determined, and determined

3 those boundaries over many, many years. Correct?

4 A. **Yes.**

11:05:35 5 Q. As part of the time-consuming process of the title plans and

6 the work they do, does Land-Into-Trust come into that at all?

7 A. **Not specifically. Mainly it is the fractionated interest**

8 **that is the problem.**

9   THE COURT: That question and answer lost me. I didn't

11:06:01 10 understand the question or the answer.

11 BY MR. STEMPLEWICZ:

12 Q. Well, could you explain what the Land-Into-Trust program is?

13 A. **Yes. Land into Trust is, if you have a piece of fee land,**

14 **if the tribe or an individual owns a piece of fee land that is**

11:06:16 15 **not under the jurisdiction of the United States, there is a**

16 **process that property can be converted into Trust status, where**

17 **title would be taken off the accounting rolls and placed within**

18 **the United States -- vested in the United States of America, in**

19 **Trust for the tribe or an individual.**

11:06:38 20 Q. And why do tribes or individuals apply for Trust status for

21 their land?

22 A. **Mainly for jurisdiction.**

23 Q. And for tax purposes?

24 A. **Not necessarily. Some states do not tax Tribal lands. And**

11:06:57 25 **on the Colville, we file for tax exemptions. It's mainly for**

1 jurisdiction issues.

2 Q. What kind of jurisdiction issues?

3 A. **I know that within the Colville reservation, it resides**

4 **within two counties. And when there is a crime committed on the**

11:07:16 **5** **reservation, the first thing that happens is, they contact the**

6 **branch of realty, determine if this is fee land or if it's Trust**

7 **land, because it determines who has jurisdiction over the crime.**

8 Q. You indicated you are an allottee. Correct?

9 A. **I'm, yes, an individual landowner.**

11:07:39 **10** Q. Do you know whether there are many BIA employees who are

11 also allottees?

12 A. **I would assume that there are, because if they're a Tribal**

13 **member, more than likely they own within that allotment.**

14   MR. STEMPLEWICZ: I have no further questions, Your

11:07:54 **15** Honor.

16   THE COURT: All right. Let's take our mid-morning --

17 there's no redirect, I assume?

18   MR. SMITH: No, Your Honor.

19   THE COURT: We'll take our mid-morning break.

11:08:01 **20** Ms. Red Thunder, thank you. You're excused.

21   THE WITNESS: Thank you.

22   (Recess taken at 11:05 a.m.)

23   THE COURT: Good morning, Mr. Gingold.

24   MR. GINGOLD: Good morning, Judge Robertson. Your

11:23:49 **25** Honor, our next witness is Dwight Duncan.

1   THE COURT: All right.

2   (Oath administered by Courtroom Deputy.)

3   MR. GINGOLD: Your Honor, in accordance with this

4 Court's instructions, I will provide brief background

11:24:27 **5** information of Mr. Duncan and state what the nature of his

6 testimony will be.

7   Your Honor, Mr. Duncan is an expert in economics,

8 finance, statistics, statistical sampling, and the analysis of

9 large databases. He has analyzed the statistical sampling

11:24:48 **10** procedures presented in the 2007 plan, and in part will rebut

11 the opinions of Drs. Lasater, Scheuren, and Hinkins.

12   Mr. Duncan has been qualified as an expert in this

13 litigation in Trial 1.5; he has concluded that defendants'

14 statistical sampling design and procedures, both implemented and

11:25:15 **15** currently proposed, do not support defendants' stated objective

16 of providing each IIM beneficiary reasonable conclusions and

17 adequate information regarding the adequacy of his or her

18 account transaction history and account balances as of

19 12/31/2000.

11:25:41 **20**   As such, defendants' statistical sampling planned

21 procedures cannot result in an accounting of all funds for each

22 beneficiary and cannot result in the establishment of accurate

23 account balances.

24   His opinion is based on five major problems with

11:25:58 **25** defendants' statistical sampling plan. They are as follows:

1   THE COURT: Maybe you ought to let him tell me what

2 those are.

3   MR. GINGOLD: Okay, Your Honor.

4   THE COURT: Otherwise, I'll hear it twice.

11:26:09 **5**   MR. GINGOLD: I was not going to do anything other than

6 just outline it.

7   THE COURT: That's fine. Let's just hear it from him.

8 I think I'll be able to catch up with that.

9   MR. GINGOLD: Your Honor, we would like to offer

11:26:21 **10** Mr. Duncan as an expert in economics, finance, statistics,

11 statistical sampling, and the analysis of large databases.

12   THE COURT: Any objection?

13   MR. WARSHAWSKY: Your Honor, the only report that we

14 received has been with regard to statistics and statistical

11:26:32 **15** sampling, but we have no objection.

16   THE COURT: All right. I'll hear the testimony.

17 Proceed, sir.

18   MR. GINGOLD: Thank you, Your Honor. I would like to

19 note that in part Mr. Duncan is responding to what was provided

11:26:44 **20** in the September 30, 2007 DCV, which this Court, as I understand

21 it, has allowed us to address subsequently.

22   So that was not in his report because they were

23 submitted prior to the --

24   THE COURT: Understood.

11:27:01 **25**   MR. GINGOLD: Thank you, Your Honor.

1 **(DWIGHT DUNCAN, PLAINTIFF witness, having been duly sworn,**

2   **testified as follows:)**

3   **DIRECT EXAMINATION**

4 BY MR. GINGOLD:

11:27:03 **5** Q. I would like to first -- let me ask you some questions about

6 your background a little bit. Who is your current employer,

7 Mr. Duncan?

8 A. **I'm employed by EconLit.**

9 Q. What is EconLit?

11:27:15 **10** A. **EconLit is a group of economists and MBAs that are involved**

11 **in the analysis of economic data, financial data, performing**

12 **statistical analyses of different sorts. And oftentimes that**

13 **includes analysis of large databases or large data sets.**

14 Q. So the type of work you've done with respect to your expert

11:27:31 **15** report --

16   MR. GINGOLD: Which I'd like to call up, which is

17 PPX-4284.

18 BY MR. GINGOLD:

19 Q. Mr. Duncan, can you just state whether or not this is the

11:27:50 **20** expert you filed on August 23 -- or plaintiffs filed on

21 August 23, 2007?

22 A. **It appears to be the cover page of that report. It was**

23 **somewhat more voluminous, but, yes.**

24 Q. You don't need to review it to make that statement at least

11:28:06 **25** at this point in time. Correct?

1   A.   **That's correct.**

2   MR. GINGOLD: And I'd like to also call up your

3   rebuttal report, which is PPX-4484.

4   BY MR. GINGOLD:

11:28:18 **5**   Q.   Mr. Duncan, does this appear to be -- this is the cover of

6   your rebuttal report, is it not?

7   A.   **That's correct.**

8   Q.   And you presume this is the report that has been filed with

9   this Court?

11:28:28 **10**   A.   **Yes.**

11   Q.   And provided to defendants?

12   A.   **Correct.**

13   Q.   Mr. Duncan, you've identified in your report and rebuttal

14   report various problems with defendants' statistical sampling

11:28:48 **15**   plan, have you not?

16   A.   **Yes, I have.**

17   Q.   What are they?

18   A.   **Well, the major problems that we've identified. First off,**

19   **is that there's missing data underlying the data that's going to**

11:29:01 **20**   **be analyzed. It's pretty clear that there's a missing data**

21   **problem.**

22   **There's a sample selection problem that has to do with**

23   **identifying from where the sample was drawn. There's a sample**

24   **design problem as well, just how the sample was designed, what**

11:29:19 **25**   **it was going to be used for.**

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1   **We also have a problem with the error rate. The way**

2   **that the error rate is defined doesn't support being able to**

3   **make the kinds of statements that are anticipated under**

4   **defendants' plan.**

11:29:34 **5**   Q.   Now, these are major problems, are they not?

6   A.   **Yes, they are.**

7   Q.   And just generally, why do you believe they are major

8   problems?

9   A.   **Well, they fundamentally impair the exercise, the**

11:29:46 **10**   **statistical sampling exercise. They impair that ability to**

11   **reach the kinds of conclusions that are identified in the 2007**

12   **plan.**

13   Q.   And what is your understanding of the conclusions that are

14   identified that are going to be stated?

11:29:59 **15**   A.   **From my read of the 2007 plan, it appears that the objective**

16   **is to provide accuracy statements regarding the account**

17   **transaction history and the account balances as of 12/31/2000 to**

18   **each beneficiary of the Indian Trust.**

19   Q.   Do you have an understanding of what the role of statistical

11:30:21 **20**   sampling is in the accounting plan?

21   A.   **From my read of some of the documents in the administrative**

22   **record, it appears that the sampling exercise was actually**

23   **designed to try to substantiate the recorded histories that do**

24   **exist, to try and substantiate that those are correct.**

11:30:43 **25**   Q.   And that's it?

---

1   A.   **That's my read.**

2   Q.   So you view the sampling as a very narrow aspect of what the

3   accounting is. Is that fair to say?

4   A.   **Well, the sampling that was performed is even narrower than**

11:30:54 **5**   **that. It only applies to a certain portion of the electronic**

6   **ledger era.**

7   Q.   I would like to ask you a question about one of the exhibits

8   that was prepared by NORC. It is Bates number 40-2-one, and it

9   is -- if you can see the exhibit on the screen, Mr. Duncan, it

11:31:18 **10**   is the reconciliation of the high dollar and national sample

11   transactions from land-based IIM accounts, all regions,

12   litigation support accounting project for the electronic records

13   era, 1985 to 2000.

14   Do you see this is dated September 30, 2005,

11:31:38 **15**   Mr. Duncan?

16   A.   **Yes, I do.**

17   Q.   Have you had a chance to review this document?

18   A.   **Yes, I have.**

19   Q.   I'd like you to turn to page Bates 3 of this document, which

11:31:46 **20**   is the preface. As you note, the head note states, "this is the

21   role of statistical sampling in a reconciliation effort."

22   Correct?

23   A.   **Yes, it does.**

24   Q.   I'd like you to turn your attention specifically to the last

11:31:59 **25**   paragraph on this page. And if you see the last sentence reads,

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1   "If the IIM transaction and documentation matches are good,

2   parens, (i.e., there are few differences and those that are

3   exist are minor), it can be confidently concluded that the

4   recorded histories as a whole are supported by the underlying

11:32:21 **5**   documents."

6   Now, is that your understanding of what the role of

7   statistical sampling in the 2007 plan is?

8   A.   **That's my understanding.**

9   Q.   And is that the narrow approach that you referenced a moment

11:32:35 **10**   ago in response to my question?

11   A.   **Well, what I referenced in response to your question was**

12   **that what was actually done will not even be able to obtain**

13   **this. We're talking about recorded histories. That goes beyond**

14   **just those that are recorded in the electronic -- in the sliver**

11:32:53 **15**   **of the electronic ledger era that was subject to sampling.**

16   Q.   And in the course of your testimony, you're going to

17   identify, are you not, what can be said or will be said and

18   won't be said, correct, by defendants as a result of this

19   statistical sampling exercise?

11:33:07 **20**   A.   **I've tried to compile what I think would be reasonable**

21   **statements that could be made based on the sampling exercise**

22   **that has been performed.**

23   Q.   Now, I'm going to ask you, Mr. Duncan, what defendants are

24   going to be able to say if and when the statistical sampling

11:33:26 **25**   exercise is completed.

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1   And in that regard, I'm going to use two

2 demonstratives. There are four demonstratives in PPX-4485; only

3 the first two will I ask you about with regard to the question

4 of what defendants will be able to say once the statistical

11:33:48 5 sampling exercise is completed.

6   MR. GINGOLD: PPX-4485.

7   If you can bear with us, Your Honor, we're having a

8 technical difficulty.

9   Your Honor, this is identified for purposes of the

11:34:36 10 questioning as PPX-4485. It's a demonstrative.

11 BY MR. GINGOLD:

12 Q. Mr. Duncan, the head note is "Potential Extrapolations of

13 Debits." Could you explain this exhibit?

14 A. Well, this is an attempt to try to articulate, based on what

11:34:54 15 was actually done in the sampling, what sort of statements would

16 likely be able to be made.

17   And as I'm looking at this -- the statements, there's

18 one correction we would need to make, which is on the first. It

19 says, "for debit transactions less than $100,000", which that

11:35:13 20 was the portion of the transactions that were subject to the

21 statistical sampling, "and in the electronic ledger era only."

22 Then the statement that follows would apply.

23 Q. And this is your understanding of what statements defendants

24 will be able to make with regard to debit extrapolations.

11:35:35 25 Correct?

1 A. Correct.

2 Q. And please explain this.

3 A. Well, the topical content --

4   THE COURT: Excuse me. Let me just make sure I

11:35:44 5 understood that correctly. This ought to read "for debit

6 transactions less than $100,000"?

7   THE WITNESS: Yes, Your Honor, that's correct.

8   THE COURT: But it says "greater."

9   THE WITNESS: Correct.

11:35:53 10   THE COURT: Okay.

11   THE WITNESS: The transactions that were greater were

12 not subject to the statistical sampling.

13   THE COURT: Who do we charge that error to?

14   THE WITNESS: That would be to one of my former staff.

11:36:05 15   THE COURT: Go ahead, Mr. Gingold.

16 A. Okay. So basically, the point of this exercise is really to

17 properly specify, based on what was done, what would be able to

18 be said. And here the statement would be that it would be

19 anticipated, based on the sampling that's being performed is

11:36:25 20 that the DOI is 99 percent confident, that 99 percent of the

21 recorded and available transactions - we'll talk more about why

22 that limitation is there, here debits - either lacked directly

23 supporting documentation and was assumed to be without error;

24 lacked directly supporting documentation and was determined to

11:36:45 25 be without error via some alternative procedure; or there was

1 some level of supporting documentation that existed and was

2 located, and on that basis, there was a mean underpayment of

3 less than one percent.

4 Q. Why do you say this? What is the basis of these statements

11:37:00 5 that you're making here?

6 A. These statements really are the result of the other -- the

7 criticisms that I have of the sample design and the sample

8 selection. Those flaws, if you will, in the plan, result in the

9 limitations that we see here.

11:37:18 10   So it's my opinion that the plan won't -- the objective

11 of the plan, the stated objective of the plan of providing these

12 accurate and complete transaction histories and account balances

13 will not be obtained, but rather these are the kind of

14 statements that will be able to be made given what was done.

11:37:38 15 Q. And does that in your opinion comport with the stated

16 objectives of the May 31st, 2007 accounting plan?

17 A. I don't believe that it does.

18   MR. GINGOLD: I would like to call up the second

19 demonstrative in PPX-4485, which is credits.

11:37:55 20 BY MR. GINGOLD:

21 Q. And I'd like to note that this also says greater than

22 $100,000.

23 A. Correct.

24 Q. And I suppose this is the same former employee who did this?

11:38:09 25 A. Yes.

1 Q. Could you please explain the potential extrapolations with

2 respect to credits?

3 A. Here, without being overly redundant, we're now talking

4 about the other side, we're talking about credit transactions.

11:38:21 5 And really the only difference here is in the last statement,

6 the underpayment rate here, rather than being one percent, the

7 assurance that would be made is that it would be less than four

8 percent.

9 Q. And why is that?

11:38:33 10 A. That's a result of the statistical sampling that was

11 performed, the conclusions of that sampling resulted in being

12 able to make a statement at a four percent underpayment rate.

13 Q. And is it your opinion that as a result of what the

14 defendants will be able to say at the conclusion of the

11:38:55 15 statistical sampling exercise, that they will not be able to

16 meet the stated objectives of the 2007 plan?

17 A. That's my opinion.

18 Q. I would like to talk to you and elicit information,

19 Mr. Duncan, concerning the first major problem that you

11:39:16 20 identified, which is missing data.

21   Before we go into the documents that I'll ask you to

22 review, can you explain why missing data is a problem?

23 A. Well, from the standpoint of conducting statistical

24 sampling, if there is missing data, it's simply data that is not

11:39:36 25 going to be available from which to draw the sample.

1   And as a concept in statistical sampling, and maybe

2 there's a demonstrative that I have from my expert report that

3 illustrates this, having missing data limits the kinds of

4 statements or what we call statistic extrapolations. It limits

11:39:58 5 what extrapolations you can make based on the sample that is

6 drawn.

7 Q. In other words, would you like to review the demonstrative,

8 which I believe is the sample population that does not represent

9 the target population, or would you like to defer that until we

11:40:15 10 discuss the sample selection problems?

11 A. I think this is an important foundation for why we're

12 talking about missing data at all.

13 Q. Is this the demonstrative that you referenced in your

14 testimony?

11:40:26 15 A. It is. And here, what motivates my concern about missing or

16 omitted information is --

17   THE WITNESS: At the top of that chart, Your Honor,

18 you'll see that this is the target population.

19 A. There's a group of accounts, I've limited it here to

11:40:41 20 transactions because that's the component that they're sampling,

21 and we'll talk about why I don't think that's the right unit.

22   But to be consistent with the plan that NORC and DOI

23 has presented, the target population is going to cover

24 transactions that are missing. If that, in fact, bears itself

11:41:03 25 out to be true - and I testified on this exact issue in 2003,

1 that there was concern that there would be missing

2 transactions - what happens then is you're only able to sample

3 from this box of recorded transactions.

4   And if that's the case, when you draw the sample, as we

11:41:18 5 see on the bottom, the sample, you're only able to make an

6 inference back to that you drew the sample from; in this case,

7 the recorded transactions that still exist on the system. But

8 because you didn't have available the missing transactions,

9 you're not able to make an inference about that group of missing

11:41:38 10 transactions.

11   So that's the motivation, that's why it's important to

12 understand why we have a missing data or omitted transaction

13 problem.

14 Q. So therefore, it's important to be able to accurately define

11:41:49 15 the target population. Correct?

16 A. It's important to understand the characteristics, and

17 particularly to understand, if you want to make an inference

18 about a population, you need to make sure you have some ability

19 to sample from that population.

11:42:01 20 Q. Does adaptive sampling cure that problem, Mr. Duncan?

21 A. No. You can continue to draw larger and larger samples from

22 the recorded transactions. That has some positive attributes to

23 it from a statistical standpoint, but it doesn't fix this

24 problem, which is there are still missing or omitted

11:42:21 25 transactions.

1 Q. And does it matter whether or not you're using variable or

2 attribute sampling?

3 A. Those concepts are really just going to depend on what

4 questions you pose and what answers you get. But it won't

11:42:33 5 really address this issue.

6 Q. So is it fair to say that missing and omitted data, whether

7 it's transactions or accounts, is essential to a sound

8 statistical analysis?

9 A. It's essential to understand the extent of missing and/or

11:42:48 10 omitted transactions.

11 Q. Now, are you assuming there are missing transactions here,

12 or do you have any basis for making the statement about missing

13 and omitted transactions or accounts, for example?

14 A. Well, for the scope of my testimony that I provided in 2003,

11:43:02 15 that was an assumption. But in the interim, I've been provided

16 with a substantial body of information that substantiates that

17 assumption, that, in fact, there is missing and/or omitted

18 transactions.

19 Q. And let's call up PPX-4468 as a first exhibit I would like

11:43:20 20 to ask you about.

21   Have you reviewed this document, Mr. Duncan?

22 A. Yes, I have.

23 Q. I'd like you to turn -- I'd like to turn to page 51 of this

24 document. And it is entitled, "The Treasury Department's role

11:43:38 25 in the administration of Tribal Trust funds, 1946 to 2002," and

1 it's a document prepared by Morgan, Angel & Associates on

2 April 16th, 2004.

3   On page 51 I've highlighted the bottom of the first

4 paragraph on the page. Have you read that highlighted portion

11:44:01 5 before?

6 A. Yes, I have.

7 Q. And what is your understanding from reading that,

8 Mr. Duncan?

9 A. Well, consistent with what I had read in other places, and

11:44:10 10 my understanding in reading from the Arthur Andersen work, this

11 is basically expressing the notion that Andersen, when asked to

12 do a --

13 Q. Excuse me. You mean Arthur Andersen?

14 A. Yes. When Arthur Andersen was asked to do a complete audit

11:44:29 15 and reconciliation in accordance with the standards that Arthur

16 Andersen would normally apply, that it was their opinion that a

17 complete audit and reconciliation was not possible or

18 practicable, and they cited this issue of lack of available

19 documents.

11:44:44 20 Q. I'd like you to turn to the next page, which is page 52 of

21 this same report. And the first paragraph, most of the first

22 paragraph is highlighted. I'd like to focus on that.

23   Mr. Duncan, have you read this before?

24 A. Yes, I have.

11:44:59 25 Q. And what does this tell you?

A. It basically just expands on this notion that even though
Arthur Andersen was hired to do this work, my understanding -
again, was confirmed here - that they continued to revisit what
they were going to be able to do in the context of providing an
accounting, and that ultimately their conclusion was that it was
not going to be something that was possible or practical.

Q. Now, is it your understanding it was not just Arthur
Andersen that reached that conclusion?

A. Correct. This section goes on to talk about some of the GAO
staff that were monitoring the effort that was being done by
Arthur Andersen, and they had the same conclusion.

Q. I'd like you to look at the next paragraph on this page with
the highlighted portion. And does this confirm your
understanding of GAO's position with regard to missing records?

A. Yes. Again, this was confirmatory in nature, that the GAO
again believed that a reconciliation was not possible because
there were missing records and system limitations.

Q. Mr. Duncan, I'd like to ask you about another document that
was provided to plaintiffs in the administrative record. It is
56-22-one.

    Can you read it, Mr. Duncan, or do we need this a
little more clear?

A. That's better.

Q. Have you reviewed this document before?

A. Yes, I have.

Q. And this is a September 3rd, 2002 memorandum from a public
accounting firm, Chavarria, Dunne & Lamey, and it's from Caren
Dunne to files.

    I would like to turn to page Bates number 18 of this
document. Now, I would like to ask you what this document tells
you about missing data.

A. Well, basically here they were trying to pose and answer
some questions as it related to potentially doing an accounting.
Here this paragraph is headed by the same questions that we
answered above for account holders with allotments need to be
determined for all account holders. And it was their conclusion
that it would be entirely speculative to even estimate how many
accounts there had been all together since the inception. There
wasn't even adequate data to opine the gross number of accounts
from which they were going to be doing the sampling.

Q. What difference does it make if defendants are not able to
state the number of accounts, if the defendants are only
sampling transactions?

A. Well, again, this just goes back to the notion that it
limits the extrapolation that can be done. We can't say
anything about the accounts from which there was no ability to
draw the sample.

Q. Is it possible to make a statement about account balances,
the accuracy are inaccuracy, if you don't even know the number
of accounts?

A. There's a compound problem there. The first is that we're
not actually sampling accounts. In the exercise that was done
by NORC, they were actually sampling transactions.

    So kind of ignoring that and stepping up to could we
try and do it and just draw from a sample of accounts, you'd
have the same problem; you don't know whether or not you're able
to draw from all of the accounts.

    So at the end of the day, you can't make a statement
about all of the accounts based on the sample.

Q. Are you able to name a target population if the number of
accounts is speculative?

A. You would not be able to do that in this case.

Q. How would you provide a sample of the target population?

A. Well, you can only sample from what you can sample from.
And in this instance, you don't have these in what we call a
sampling framework. They're not available to sample from, so
you're going to be limited as to what you can say.

Q. Now, with regard to missing data and information, are you
also aware that information with regard to the collection of
Trust funds is not being sampled?

A. From my review of the administrative record, that's
consistent.

Q. And is it your understanding based on reviewing the
administrative record that there may have been collections and
deposits in Treasury that may not have been paid properly over

to the IIM accounts?

A. That's my understanding.

Q. I'd like to ask you questions about Exhibit 54-27-one from
the administrative record. Mr. Duncan, have you reviewed this
document?

    MR. WARSHAWSKY: I'm sorry, Mr. Gingold, what's the
number on that?

    MR. GINGOLD: Oh, sorry. It's 54-27-one.

A. Yes, I have.

BY MR. GINGOLD:

Q. I'd like you to turn to Bates number 4, and I'd like you to
first pay attention to the first paragraph where it is
highlighted, where it states, "both the interest and system
level issues represents potential vulnerabilities for the
January plan."

    Do you see that?

A. Yes, I do.

Q. And what's your understanding of, first of all, the January
plan?

A. My understanding is this is the 2003 plan.

Q. Are interest in system level issues in the January plan are
to your knowledge any different from the interest and system
level issues in the 2007 plan?

A. I don't believe that has changed in any material way.

Q. And as you understand it, is it true, Mr. Duncan, that your

1 understanding that --

2 THE COURT: Mr. Gingold, I'm going to ask you --

3 there's been no objection to this, but I'm just asking you as an

4 exercise in making sure the judge understands what's going on,

11:50:47 5 that you not blow these leading questions by quite so quickly.

6 Because what I'm hearing from the witness is yes, no,

7 yes, that's my understanding, and it requires me to go back and

8 replay what your question was. If I get -- if I can get more of

9 the content from the witness, frankly, I would understand it

11:51:05 10 more clearly.

11 MR. GINGOLD: Your Honor, I was just trying to move

12 this rapidly.

13 THE COURT: I understand. And it may take a little

14 longer, but just in the interest of getting the Q&A embedded

11:51:16 15 where you want it embedded, ask fewer leading questions.

16 BY MR. GINGOLD:

17 Q. What is your -- do you have any understanding of whether or

18 not there are interest issues that are potential vulnerabilities

19 in the 2007 plan?

11:51:29 20 A. Yes. There's a couple different facets to this, but the

21 main one from the standpoint of missing data is that there were

22 potentially transactions that were occurring at Treasury that

23 were not being posted over to the individual accounts.

24 And my understanding is that as part of the

11:51:50 25 reconciliation and the sampling exercise, there's been no effort

1 to go back and make sure that if Treasury, in fact, collected

2 monies from a lease, and those monies were actually going to be

3 paid out to say a BIA office for a government lease, and to a

4 tribe, and to individuals, my understanding is there's been no

11:52:11 5 effort to make sure what the reconciliation that occurred at

6 that point was correct. All that's being analyzed is the

7 transaction that was ultimately deposited into the IIM account.

8 So here we have a missing or corrupt data or incorrect

9 data issue that has just not been substantiated from the

11:52:31 10 collection of the monies for the lease, from that point that it

11 made it all the way to the individual account correctly.

12 Q. Let me ask a few questions about that just so there is a

13 full understanding of what you're talking about. Let's assume

14 the hypothetical: Minerals Management Service collects on a

11:52:51 15 monthly basis, for purposes of this discussion, let's say

16 $one million in gross from the government lands, Individual

17 Indian Trust lands, and Tribal lands, and that money is

18 deposited -- collected and deposited in the Treasury.

19 Is it your understanding that the amount of money that

11:53:12 20 was to be allocated for the individuals did not necessarily get

21 posted to the account at Treasury, which is the 14X-6039

22 account?

23 A. That would be structurally how the transaction that I talked

24 about would work. There's not been a testing to see whether or

11:53:28 25 not that allocation and that deposit were done correctly.

1 Q. And so there are two elements; one is the amount of funds

2 that were actually collected for Individual Indian Trust

3 beneficiaries out of that aggregate deposit. Correct?

4 A. That would be the first piece at Treasury; once $one million

11:53:45 5 came in, was it collected and then was it allocated correctly.

6 And the second issue then deals with whether or not it

7 was posted to the individual Indian accounts.

8 Q. So we're dealing with right now a system level issue. Is

9 that fair?

11:53:59 10 A. Correct. I believe that's what they were referring to in

11 this memo.

12 Q. And is it fair to say that the statistical sampling plans

13 and opinions that you've reviewed have not addressed those

14 issues at all?

11:54:10 15 A. That's correct.

16 Q. And when we're talking about the system level issue,

17 specifically with regard to the collection and deposit, what is

18 your understanding as to what type of information is necessary,

19 if you have any knowledge, to make the allocations properly for

11:54:28 20 the funds to be deposited in the IIM account?

21 A. Well, based on my review of the administrative record, there

22 would have to be an understanding of the land ownership.

23 Because in order to divvy that out, you need to know what

24 proportion of the lease was owned by each one of the

11:54:47 25 individuals, what proportion was owned by the tribe and whatever

1 other entities, before there can be an allocation of the lease

2 income.

3 In an MMS example, you'd have to understand what

4 proportion of that land was owned by the individual.

11:55:02 5 Q. Do you have any understanding of what a communitized lease

6 is?

7 A. Just from my experience in this case. I have not dealt

8 directly with communitized leases.

9 Q. Could you tell me what your understanding is?

11:55:15 10 A. Basically, that there have been instances where they take a

11 lease across more than one individual account holder, and those

12 leases are negotiated on an aggregate basis.

13 Q. So funds are -- and the account holder or tribes can also be

14 part of that communitized lease. Correct?

11:55:34 15 A. That's my understanding.

16 Q. So an aggregate amount of money is collected and deposited.

17 Correct?

18 A. Correct.

19 Q. Now I would like you to look at the last paragraph on this

11:55:43 20 page. And I'd like to focus in what is identified as risk of

21 loss. And did you read this before, Mr. Duncan?

22 A. Yes, I did.

23 Q. And this states, "Deposits made into Treasury may not have

24 been credited to the IIM accounts." Correct?

11:55:59 25 A. Right. This really goes to the second notion of what we

1 talked about, is once it was collected and allocated, was it
2 posted over to the IIM account or not.
3 Q. And that is a system level issue. Correct?
4 A. Correct. And that would deal with -- again, it goes to the
11:56:16 5 underpinning of there being missing data. If these transactions
6 were not posted to the IIM account, they wouldn't be available
7 to draw a sample from to check and see whether or not those
8 postings were correct.
9 Q. But it does say in this document deposits were still made
11:56:31 10 into Treasury. Correct?
11 A. Well, I think what they're doing is just identifying a
12 particular component of this risk. It's an open question as to
13 whether or not it was deposited into the Treasury.
14 Q. And that is a data omission, as far as you're concerned?
11:56:51 15 A. Correct. It would be one of the components of missing data.
16 Q. And you don't know how significant that problem is, do you?
17 A. As far as I can tell from reviewing the record, I don't
18 think anyone knows how significant this problem is.
19 Q. And that's not part of the accounting plan, is it?
11:57:09 20 A. Not according to my review.
21 Q. So let me ask you this question in that regard: The money
22 posted to an Individual Indian Trust account in the IRMS system
23 is not based on the amount of money deposited into the Treasury
24 for Individual Indian Trust beneficiaries, is it?
11:57:31 25 A. My understanding is that those two could be very different.

1 And as it relates to my opinion, it goes to the sampling was
2 drawn from the IRMS and the TFAS system. So as a statistician,
3 my only comment here is you can only then make an extrapolation
4 back to that same population from which you sampled.
11:57:50 5   So the statistical sampling that was done would not be
6 able to make an inference about the monies that were deposited
7 at Treasury.
8 Q. I would like you to turn your attention to a document which
9 is Bates number 8-2-one. Can you read this document,
11:58:12 10 Mr. Duncan?
11 A. Yes, I can read it, and I have reviewed this before.
12 Q. Now, this is a document that is a memorandum from Susan
13 Hinkins of NORC dated December 20, 2002 regarding the sampling
14 plan.
11:58:28 15   And I would like you to turn your attention to first on
16 page four, Bates number 4 of this document. And if you see in
17 the middle of the page, which is isn't highlighted, the head
18 note is, "Statistical Sampling of IIM Transactions." Correct?
19 A. Correct.
11:58:51 20 Q. Now, I'd like you to got to the bottom of the page, and it
21 will carry over to Bates number 5, and it identifies a weakness
22 with regard to the statistical sampling of IIM transactions,
23 doesn't it?
24 A. Yes, it does.
11:59:04 25 Q. It states as follows: "The approach is unable to detect

1 erroneous omissions on the IIM account, parens, (receipts that
2 have never been posted to a recipient's account), close parens.
3 It will also be difficult" - we're carrying over to the next
4 page - "to find all supporting documentation, parens, leases,
11:59:34 5 vouchers, close parens, for a given selected transaction."
6   Can you please tell me what your understanding of that
7 weakness is?
8 A. This just goes really to the notion of missing data. I
9 think NORC recognized early on as they were outlining some of
11:59:54 10 the alternatives to sampling transactions or sampling accounts,
11 they identified the sampling of transactions, in fact, would not
12 address these transactions that had not been posted as one
13 example, but it acknowledges that if there's missing data, it is
14 a weakness of this approach. And specifically, it's the
12:00:12 15 weakness that I've identified that you can't extrapolate to that
16 portion of the population that was not available to sample.
17   In this instance, they're identifying one example of a
18 missing document, which is one that simply had never been posted
19 to the account.
12:00:25 20 Q. And is that one of the reasons that your opinion is that
21 Trust beneficiaries and account holders cannot be provided, at
22 the conclusion of the statistical sampling, statements of
23 accurate account balances?
24 A. Correct. All that would be able to be done is that the
12:00:43 25 transactions that did occur and that were recorded and that were

1 available to be sampled from, then there would be some statement
2 made about that portion of their accounts.
3 Q. Now, this is a design limitation, is it not?
4 A. It is.
12:00:55 5 Q. I'd like to identify for purposes of your testimony document
6 Bates stamp number 38-one-one. Can you read this clearly,
7 Mr. Duncan?
8 A. Yes.
9 Q. Have you reviewed this document before?
12:01:16 10 A. I have. This is a fairly recent document in March of 2007
11 as it relates to the litigation support accounting project.
12 Q. So notwithstanding the fact the previous document that you
13 reviewed is a December 20, 2002 document regarding weaknesses as
14 to omissions, is it your view that problem continues five years
12:01:40 15 later, today?
16 A. Yes, I believe NORC accurately identified this potential
17 weakness of this approach early on in the engagement, and
18 continues to be forthright in their memorandum that this is
19 still an issue.
12:01:55 20 Q. And I'd like to turn your attention to the first paragraph.
21 And the question I'm going to ask you is with regard to the last
22 sentence of the paragraph. And is this what you were referring
23 to when you said that NORC candidly acknowledged this design
24 limitation in the statistical sampling plan?
12:02:18 25 A. Correct. They simply note here that because the starting

1 point was these recorded transactions -- and maybe I just modify

2 that. It's really the ones that were recorded and still

3 available, because I think it's pretty clear there were

4 documents that were recorded that are no longer available.

12:02:34 5 So with respect to the ones that are recorded and are

6 still available, that's where they started on the LSA project.

7 And they're acknowledging that they're only going to be able to

8 extrapolate to that same population.

9 So again, in 2007, it's reiterated that failures to

12:02:47 10 collect, deposit, and record collected transactions would not

11 have been discovered in the LSA project testing. What that

12 means is that the results from the LSA project are limited in

13 their use.

14 Q. Is that a serious problem, as far as you're concerned?

12:03:03 15 A. I believe it is a serious problem, because it goes to the

16 notion of what the 2007 plan is stated as trying to accomplish,

17 and how the results of the LSA project have been used in

18 different documents. There have been discussions that it

19 addresses the entire electronic ledger era, and, in fact, it

12:03:22 20 does not. It only addresses this population from which the

21 sample was drawn, and that's a significant subset of the

22 electronic ledger era, which is a subset of the entire time

23 period that is at issue.

24 Q. Do you have any understanding as to what the entire

12:03:42 25 electronic ledger era is?

1 A. Well, that's a concept that is -- the definition of

2 electronic ledger era has been used differently by different

3 people at different times on the DOI and the NORC team.

4 My understanding is the electronic ledger era is

12:04:02 5 confined to 1985, really to present, but for a lot of the

6 purposes it's limited to December 31st, 2000.

7 Q. When you say confined to that temporal period, is it your

8 understanding that the actual electronic ledger era may be

9 longer than that?

12:04:21 10 A. Well, my understanding of how the electronic ledger era was

11 selected is really an artifact of the point in time that records

12 were no longer purged off of the system.

13 So in 1991, my understanding is that there was a

14 decision that the rolling six-year purges that had been done to

12:04:45 15 the data since back in the early 70's, that stopped in 1991-ish.

16 And what that meant was that electronic data was available back

17 to 1985.

18 If they had made a decision to stop purging that data

19 in 1986, my understanding is that the electronic ledger era

12:05:07 20 would extend all the way back to 1980. It was really an

21 artifact of that purging process.

22 Q. But if that purging occurred, there was several years of

23 data that was purged from the computer systems. Correct?

24 A. My understanding is that there were several years that had

12:05:22 25 been purged on the rolling six-year program.

1 Q. Now, independent of the rolling six-year purge program,

2 you've seen documents and you've heard testimony regarding the

3 missing data that has been quantified. Correct?

4 A. Yes, I've read some of the trial transcripts and I've

12:05:42 5 reviewed some of the other documentation in the administrative

6 record on that point.

7 Q. I would like to review with you the document which is Bates

8 stamped number 3-2-one. Have you reviewed this document before,

9 Mr. Duncan?

12:06:02 10 A. Yes, I have.

11 Q. I would like -- this is a document which is identified as

12 OHTA accountants conference, U.S. Department of the Interior,

13 Office of Historical Trust Accounting, July 22nd to 23, 2003

14 Albuquerque, New Mexico.

12:06:22 15 I'd like you to turn to Bates page number 156. And I

16 would like to focus in on the highlighted portion of this page.

17 Have you read this before, Mr. Duncan?

18 A. Yes, I have.

19 Q. Let me read it just for purposes of asking questions. It

12:06:45 20 states in the first bullet point, "Accounts were the system" -

21 accounts, I think it means where - "the system balance does not

22 equal the transactional balance, parens, (estimated difference),

23 close parens."

24 "And then to date, KPMG has performed the validation

12:07:03 25 for accounts that have a balance file in IRMS, 374,443 of

1 569,927 accounts, and found that 120,812 accounts tested do not

2 agree with the balance file at the first point of comparison.

3 This represents approximately 32 percent of the accounts

4 tested."

12:07:29 5 What does that mean to you, Mr. Duncan?

6 A. Well, my understanding is at some point in time, I don't

7 recall exactly when, I believe it was in the late 90's, but at

8 some point in time there were balance files that were

9 maintained, or retained. There's certain pieces of the

12:07:51 10 information that are contained in different files, and the

11 balance information is contained in one of the -- there's two

12 files, the hist trans file is one of them, and in these files

13 there's balance containing information.

14 Now, the transactional information is contained in a

12:08:08 15 different file. So the day-to-day ins and outs that are coming

16 in these files are recorded separately.

17 My understanding is that the information with the

18 balances had over some time period been destroyed, but was kept

19 at one point in time. And then I believe subsequently has been

12:08:26 20 kept.

21 And my understanding of this particular exercise was to

22 look at those balance files. In theory, this is really not much

23 different than trying to balance your personal bank account

24 statement. You have a balance and there's a whole series of

12:08:41 25 transactions, and at the end of the day, all of the ins and the

1 outs should be able to explain the end of the balance from last

2 month's statement to this month.

3 And my understanding of this test was that when that

4 process was done, the transaction files were still around, but

12:08:54 5 they were able to glean from some of the balance files how many

6 of the accounts had things -- you know, taking it back to your

7 personal account statement, if you walk through and do a

8 point-of-sale purchase with your debit card and swipe it, you

9 might not be as likely to write that into your check register;

12:09:13 10 you find that out at the end of the month when you get your

11 checking account statement.

12 What happened here is exactly that. It looked and said

13 32 percent of its accounts have transactions that must be

14 missing because it's out of balance. Last month's balance, this

12:09:28 15 month's balance aren't explained by the transactions that are

16 still in the system, so there must be something missing in the

17 system.

18 And my review of this and other portions of the

19 administrative record indicate to me that roughly a third of the

12:09:40 20 accounts that they've tested had that condition, an

21 out-of-balance condition.

22 Q. Now, is that out-of-balance condition an error, as you

23 understand it?

24 A. I really wouldn't know how it would not be an error. What

12:09:53 25 it means is there's a transaction missing, or it could be that

1 there had been a reposting that had been made. But the first

2 inkling in my mind is that there's an error in the transaction

3 listing.

4 Q. And again, this is identified, though, with respect to a

12:10:08 5 review and validation of accounts, not transactions. Correct?

6 A. Correct.

7 Q. And a validation of accounts is not being done in this 2007

8 plan, is it?

9 A. My understanding is that it is focused on transactions, not

12:10:21 10 account balances.

11 Q. Does it make a difference to you?

12 A. As it goes to an understanding of what's trying to be

13 provided to the Indian beneficiaries, the Trust beneficiaries,

14 is an accurate and complete statement regarding the transactions

12:10:33 15 and the account balance, yeah, it makes a difference whether or

16 not you're addressing the account balances.

17 Q. Is that one of the reasons it's your view at the conclusion

18 of this process there cannot be a reliable statement made about

19 the accuracy of account balances?

12:10:47 20 A. This is one of the components of that conclusion.

21 MR. GINGOLD: I would like to identify for purposes of

22 further discussion a document with Bates number 3-4-34. This

23 document is entitled, "Office of Historical Trust Accounting,

24 Eastern Region non-judgement accounts, August 22, 2002."

12:11:16 25 BY MR. GINGOLD:

1 Q. Now, do you see, it appears to have been prepared by

2 Deloitte & Touche?

3 A. That's my understanding.

4 MR. WARSHAWSKY: Mr. Gingold, the Bates number on that

12:11:28 5 again?

6 MR. GINGOLD: I'm sorry, I have 3-4-34.

7 MR. WARSHAWSKY: Got it. Thank you.

8 MR. GINGOLD: Sorry, Your Honor.

9 BY MR. GINGOLD:

12:11:45 10 Q. I would like you to turn to Bates number 39, and this again

11 in the context of quantifying missing or omitted data, I'd like

12 you --

13 THE COURT: You're going to a different Bates number

14 now? Oh, excuse me. This is Bates number within this number

12:12:06 15 3-4-34?

16 MR. GINGOLD: That's correct, Your Honor.

17 THE COURT: Go ahead.

18 BY MR. GINGOLD:

19 Q. Do you see the head note on this page is, "Significant

12:12:11 20 issues and lessons learned." Correct?

21 A. Yes, I do.

22 Q. Now, have you read the highlighted section before?

23 A. I have.

24 Q. It states with regard to significant issues: "Missing

12:12:22 25 electronic data, a reconciliation of net transactional activity

1 to account balances indicates that data is missing for 25 of the

2 37 accounts."

3 What does that mean to you, Mr. Duncan?

4 A. Well, this study by Deloitte & Touche relates to the Eastern

12:12:44 5 Region, and this was central to a lot of our analysis, because

6 this is one of the -- well, it is. It's the only portion of the

7 reconciliation activity where we have really detailed

8 information. We have the listing of what was done by Deloitte &

9 Touche, we have where they actually show what the account amount

12:12:59 10 was, what the reconciled amount was, and the accounting code for

11 each one.

12 We don't have the supporting documentation that would

13 help us understand how they made their decisions, but this is

14 the most detail that we have.

12:13:10 15 So the Eastern Region was of particular importance to

16 me in my analysis. So when we reviewed this document, this

17 provided even more specific information than what KPMG provided,

18 where they estimated that almost a third of those transactions

19 were out of balance.

12:13:26 20 When Deloitte & Touche did that same kind of analysis

21 in the Eastern Region as part of the national sample, they

22 determined that here almost two-thirds of the accounts had this

23 same condition, the out-of-balance condition.

24 Q. Did that surprise you when you read that, Mr. Duncan?

12:13:40 25 A. Not really at all. From the beginning of this, it's really

1 been my understanding from all the documents that I've reviewed,

2 that there is a significant missing data problem. This really

3 just substantiated what I testified in 2003, that there's a big

4 missing data problem, and that significantly limits what can be

12:13:59 5 done from a sampling standpoint.

6 Q. But a percentage this high would not astonish you. Correct?

7 A. Not given the body of documents that I've reviewed. This

8 seems consistent.

9 Q. And as you noted, the previous document, which was Bates

12:14:16 10 number 3-2-one, and this document, which is 3-4-34, were both

11 prepared by independent certified public accounting firms.

12 Correct?

13 A. Correct. One by KPMG and the other by Deloitte & Touche.

14 Q. I'd like to review with you Defendant's Exhibit 152, DX-152.

12:15:13 15 MR. GINGOLD: Your Honor, am I going slowly enough?

16 THE COURT: Yes.

17 MR. GINGOLD: Thank you.

18 BY MR. GINGOLD:

19 Q. Have you seen this exhibit before?

12:15:22 20 A. Yes, I have.

21 Q. I'd like you to focus your attention on the bottom of the

22 page. There are highlighted numbers. Do you see that?

23 A. Yes, I do.

24 Q. And the first highlighted number is the total under a column

12:15:41 25 which is identified as IRMS TRXS. Correct?

1 A. Correct.

2 Q. Do you have an understanding of what that means?

3 A. My understanding is that this is part of the late-breaking

4 work on the DCV that we've been provided, and specifically, this

12:15:59 5 addresses the number of transactions that have been restored to

6 the IRMS system as a result of the DCV work performed by

7 Ms. Herman.

8 Q. Do you have an understanding of what restored means in this

9 context?

12:16:14 10 A. Discovered, found, and put back into the system.

11 Q. Now, the next number to the right of -- and this number is

12 451,875. Is that correct?

13 A. That's correct.

14 Q. And that's transactions. Correct?

12:16:28 15 A. That's the number of transactions.

16 Q. The net amount is the next column. Correct?

17 A. Correct.

18 Q. And that amount is 29,908,238? Do you have an understanding

19 of what that means?

12:16:40 20 A. Yes. That is the dollar amount associated with the roughly

21 452,000 transactions. That's the dollar amount that was

22 restored as a result of the DCV work.

23 Q. And what is your understanding of the dollar amount being

24 restored?

12:16:57 25 A. That's where there's correction to the IRMS system that for

1 some reason that data was missing from the IRMS system, and they

2 discovered it and have gone back and restored it.

3 Q. Do you have any knowledge as to whether or not this is a net

4 amount or a gross amount?

12:17:14 5 A. My understanding is from looking at the transactions above

6 it, it is a net amount.

7 Q. And what does that mean, as you understand it?

8 A. Well, just simply the summation line, the 29.9 million, is a

9 result of some adds to the system and some subtractions from the

12:17:33 10 system.

11 Q. So this doesn't necessarily mean it's the entire amount,

12 credits that should have been posted that were not. Correct?

13 A. No. From a nominal standpoint, you can see that it would be

14 the 30.8 million and then the roughly .9 million would be the

12:17:52 15 nominal -- ignoring the ups and downs, would be the nominal

16 amount that has been restored.

17 Q. On this page, let's move further to the right under all

18 systems. Do you see that?

19 A. Yes, I do.

12:18:01 20 Q. And on the first total, under column TRXS, is 458,520. What

21 does that mean to you?

22 A. That's simply the summation of all of the information to the

23 left. There's -- the first three columns under the ledger

24 period, the next three relate to the IRMS period, IRMS system,

12:18:27 25 and the last TFAS. This is simply a summation of the all of the

1 number account of transactions that have been restored to the

2 system.

3 Q. And if you move to the last column, the total is 29,950,177.

4 Correct?

12:18:40 5 A. That's correct. And that's the total dollar amount, just

6 summing across the previous columns.

7 Q. Now, you're aware, are you not, based on your reading of the

8 September 30, 2007 DCV, and also the testimony that you've

9 reviewed of Ms. Herman, that there are a number of months of

12:19:00 10 missing transactions in the IRMS database?

11 A. Correct. This is a portion of those missing months that

12 have already been restored.

13 MR. GINGOLD: For purposes of this discussion,

14 plaintiffs would like to use a demonstrative, and we'd like to

12:19:16 15 identify it as Plaintiff's 4486.

16 BY MR. GINGOLD:

17 Q. Mr. Duncan, have you seen this before?

18 A. Yes, I have. This is something that was prepared at my

19 direction by my staff. We completed this last evening.

12:20:26 20 Q. And how was this prepared?

21 A. Well, perhaps if we can get to the note, if it's helpful,

22 but perhaps we can just isolate it to the part above the notes

23 on the screen so we can actually see the numbers.

24 This is basically an estimate of -- we understand how

12:20:49 25 much -- we understand from the previous document how many

1 transactions, call it roughly 450,000, and we understand how

2 many dollars, roughly 30 million, have been restored to this

3 system as a result of the DCV.

4   As part of the DCV, it has been determined how many

12:21:05 5 months of data are missing in total. This was simply an

6 estimate to try and translate -- based on what has been done to

7 date in that restoration effort, and based on how many months

8 are still missing, this is an estimate to try and quantify how

9 many dollars would likely exist in those missing months. So we

12:21:24 10 know that they have restored roughly 450, 460 thousand.

11   And just to cut to the bottom line of looking over all

12 the agencies and the average throughput, what we did is looked

13 at the average dollar amount for each one of those transactions,

14 we figured out how many transactions happened in the average

12:21:44 15 month, so we're able to estimate an average dollar amount that

16 would be missing in each one of those months, and summed it

17 across the agencies that are still subject to the DCV.

18   THE WITNESS: And as you can see, Your Honor, in the

19 far right column, based on our analysis of what's been provided,

12:22:01 20 roughly $1.5 billion is still missing from this portion of the

21 electronic ledger era, and that would be constituted by

22 approximately 6.2 million transactions.

23 A. So what that tells me is, to date, they have restored

24 roughly 7.5 percent of the missing data during those months that

12:22:23 25 they've identified as being missing from the electronic ledgers,

1 and they have restored approximately two percent of the dollars

2 thus far in the course of the DCV.

3   So in short, this substantiates the underpinning of my

4 opinion that there's a lot of missing data here. Even though

12:22:43 5 the DCV has been able to restore a small fraction, in total, it

6 would be my estimate that there's $1.5 billion associated with

7 those missing months, of which only 30 million has been

8 restored.

9 Q. Now, when you're talking about missing months, they're not

12:23:01 10 your estimates of missing months, are they?

11 A. No, this is directly from Ms. Herman's schedule in the DCV.

12 They know how many missing months there are during the time

13 period; the only calculation here was to estimate the dollar

14 amount associated with those missing months.

12:23:19 15 Q. And we're dealing with area offices or regional offices.

16 Correct?

17 A. That's correct. It's been estimated by region, excluding

18 the Central Region. There's a lot of administrative and SDA

19 accounts and different things going on in the Central Region, so

12:23:36 20 we set that aside. And that's explained in the footnotes. But

21 this is simply limited to the regions that are listed here.

22 Q. And this does not at all purport to state the validity of

23 the information, it's just that this is the sort of information

24 that is missing. Correct?

12:23:53 25 A. Correct. This is one estimate of how much missing data

1 there is.

2 Q. And as a matter of fact, based on your earlier testimony,

3 unless the systemic issues can be investigated, the postings

4 themselves have questions about validity. Correct?

12:24:13 5 A. Correct. This just deals with the posting piece. There's

6 no information during certain months. My understanding is that

7 the reason that those aren't there is it has to do with this

8 purging that we talked about before, this rolling six-year

9 purging. There were also, if certain procedures weren't

12:24:31 10 followed in the month-end closing, it would result in that month

11 not being contained on the IRMS system.

12   So there were reasons that those time periods are

13 missing. The DCV thus far has identified a number of months, a

14 large number of months that are missing, have restored some

12:24:50 15 small fraction, less than 10 percent of those months, but we

16 have an educated guess here how big that problem still is. And

17 it looks to be approximately a billion and a half dollars.

18 Q. And again, based on your understanding of what FTI did in

19 the DCV, they narrowed their focus to the IRMS database.

12:25:16 20 Correct?

21 A. And the TFAS, those two systems. But they were just looking

22 really at that sub portion of the electronic ledger era.

23 Q. And not the direct pay module in that database. Correct?

24 A. Correct.

12:25:29 25 Q. And not RDRS, which is the oil and gas and minerals

1 information from MMS. Correct?

2 A. From my read of Ms. Herman's testimony, that was not part of

3 their analysis.

4 Q. So you do not have any idea what a review of that

12:25:44 5 information would do to your estimates, do you?

6 A. I don't. We don't have the information available to do

7 that.

8 Q. It's purely speculative. Correct?

9 A. It would be.

12:25:53 10 Q. Problem number two that you identified is a sample selection

11 problem, is it not?

12 A. Correct.

13 Q. Now, what do you mean by the sample selection issue?

14 A. Well, we talked a little bit about this as to why it matters

12:26:06 15 that there's missing data. The sample selection problem in my

16 opinion stems from the use of this information once it's been

17 completed.

18   And the sampling information -- as we talked about

19 before, the sampling information is limited in its use back to

12:26:24 20 the population from which the sample was drawn, and based on my

21 review of some of the rebuttal reports on this issue, I don't

22 really think that that's going to be contested in this 2007

23 trial.

24 Q. And why is that?

12:26:38 25 A. Dr. Hinkins' rebuttal report of my expert work basically

1 said that I didn't understand the target population, and she's
2 right. I thought the target population was everything that --
3 all of the account beneficiaries and all of the funds; what she
4 clarified for me is that the use of their statistical sampling
12:27:00 5 is actually limited to this population from which the sample was
6 drawn.
7 So whatever the source of that misunderstanding, we
8 agree, it appears that they will acknowledge that the sample
9 that was drawn, the analysis that can be made from that is
12:27:18 10 limited to back to the population from which the sample was
11 drawn, and it cannot be applied to the missing transactions that
12 were not subject to the sampling.
13 Q. So is it true, then -- is 28 million a number that you
14 recall at all?
12:27:33 15 A. I believe it was 28.8 million. It's almost 29 million. But
16 that's the population from which the sample was drawn, and the
17 analysis that was done by NORC would only apply to that
18 population of accounts, that sub population.
19 Q. And you don't know how many -- how much of the population is
12:27:50 20 omitted, do you?
21 A. I don't. Although, we know from the DCV it's substantial.
22 Q. And what is your recollection from the DCV?
23 A. Really just what we just talked about, that we're talking
24 about six plus million transactions that are missing, a billion
12:28:06 25 and a half dollars in throughput, as Ms. Herman has defined it,

1 that's missing.
2 Q. Now, isn't it possible, however, for data gaps to be filled
3 using alternative procedures?
4 A. Well, I think that the DCV has been an attempt at that, but
12:28:28 5 I think it begs the question, the DCV is limited to a very
6 narrow time period. There's information where these paper
7 records, these printouts, were maintained and they can be
8 compared to the electronic ledger era.
9 But I think if you'll recall from the demonstrative
12:28:44 10 that showed how many transactions had been restored in the paper
11 ledger era, there were very, very few. The reason for that is
12 that the DCV is not really designed to go back and restore
13 records from the paper ledger era. There's no mechanism by
14 which to do so. The DCV is this comparison of these printouts
12:29:05 15 from an electronic system that was then subsequently purged, but
16 then to try and compare that with what still exists in system.
17 So the ability to go back and say anything about the
18 paper ledger era in that regard is highly questionable based on
19 the DCV analysis.
12:29:20 20 Q. For additional clarify, I'd like you to review a document
21 which is Bates number 51-4-one.
22 THE COURT: 50 what?
23 MR. GINGOLD: 51-4-one.
24 THE COURT: Before you go there, Mr. Gingold, I'm glad
12:29:40 25 that Mr. Duncan reminded me that the 29 million odd dollars

1 identified in this Defendant's Exhibit 152 is a throughput
2 number defined as Ms. Herman defined it.
3 THE WITNESS: That's correct, Your Honor.
4 THE COURT: Which I have come to understand is a
12:30:02 5 completely different idea of throughput than -- it's really an
6 addition of transaction numbers, maybe credits, debits, but it's
7 not real dollars, it's just transactions, the total number of
8 transactions. Right?
9 THE WITNESS: Correct.
12:30:16 10 THE COURT: So am I to understand your billion and a
11 half dollars also to be that same type of throughput?
12 THE WITNESS: Yes, Your Honor. In order to be fair, I
13 put both those numbers on the page and expressed it as a
14 percentage. I wanted to be fair and have them be on the same
12:30:31 15 basis.
16 THE COURT: Okay. Understood. Thank you. You were at
17 51-4-one.
18 MR. GINGOLD: Yes, Your Honor.
19 BY MR. GINGOLD:
12:30:37 20 Q. This document is another NORC document and it's entitled, "A
21 Statistical Evaluation of Preliminary Eastern Region Sample
22 Results, March 2004."
23 Have you read this document?
24 A. Yes, I have.
12:30:53 25 Q. With respect to the questions I'm going to be asking you, I

1 want you to first turn to what is Bates number 14, page
2 Bates 14. You see at the bottom of the page there's a
3 highlighted paragraph?
4 A. Yes, I do.
12:31:16 5 Q. And it reads, quote, "Two of these transaction have not been
6 reconciled, and these two missing transactions without
7 supporting documents are particularly troubling, as it could be
8 argued that such transactions pose the greatest risk of errors.
9 This point is returned to below."
12:31:34 10 Do you have an understanding of what is meant by this
11 statement?
12 A. Yeah. Perhaps it would be helpful, though, to have just a
13 little bit of preface here. In the course of conducting the
14 analysis, the sampling in the Eastern Region, Deloitte & Touche
12:31:51 15 discovered transactions, 11 specifically, that weren't part of
16 the original sampling frame. So in other words, they drew their
17 list, NORC had provided the means for doing so, but they pulled
18 a list of sample transactions and they went out and started
19 reconciling those.
12:32:05 20 And in the course of that, they discovered, hey, here's
21 a transaction, another and another, until in totality they had
22 11 transactions that aren't anywhere in the database from which
23 we drew the sample originally.
24 So in the first instance, again, this is another
12:32:20 25 confirmation that we've got a missing data problem.

1 Then the question is, could those be reconciled? And
2 the answer, this quote goes to this notion that -- and I won't
3 get too down a side path here. We'll talk about the
4 reconciliation, what is defined as a reconciliation later. But
12:32:38 5 here they were subject to the ASM, and they were either
6 determined to be reconcilable or not. Two of them were not.
7 Well, that would cause some significant concern on the
8 part of NORC, because now the question is, we have some glimpse
9 as to what our missing documents problem looks like, and it
12:33:01 10 appears that two of 12 of those missing documents can't be
11 reconciled. There's no available information. That has a huge
12 implication as it relates to missing documents.
13 Because if you can't reconcile, you don't have any idea
14 whether or not that transaction was entered correctly. And that
12:33:20 15 poses -- they're correct, it does pose one of the greatest risks
16 in this analysis, is that, if those can't be reconciled, that
17 poses a big problem.
18 Q. And that again, I think you pointed out, is a concern raised
19 by Deloitte & Touche. Correct?
12:33:36 20 A. Correct.
21 Q. A certified public accounting firm. Correct?
22 A. That's correct.
23 Q. Now, I'd like you to turn to Bates 4 of this same document.
24 And in the middle or towards the bottom of the page, there's a
12:33:55 25 bullet point. And have you read this before?

1 A. Yes, I have.
2 Q. Now, this, remember, is a NORC document, although on
3 Bates 14, Deloitte & Touche was referenced. Correct?
4 A. That's correct. These are the conclusions that NORC made
12:34:11 5 from conducting this exercise in the Eastern Region.
6 Q. And NORC's statement is, quote, "At a final sample size of
7 289, it is possible to make a 98 plus percent assurance
8 statement that the error rate is less than one percent, since no
9 errors were found," period, closed quote.
12:34:31 10 A. Correct.
11 Q. What does that mean to you?
12 A. Well, we need to be careful in talking about error rates.
13 There's a couple of different areas in which error rates are
14 discussed.
12:34:41 15 THE WITNESS: And I'm sure, Your Honor, you've heard
16 the context of attribute sampling and variable sampling. Just
17 in real simple terms, attribute sampling is yes/no; we go look
18 at a transaction, is it okay, is it not, and there's criteria
19 upon which you define that.
12:34:57 20 A. But just for simplicity, let's just say it's matched to a
21 source document that substantiates the dollar amount is correct
22 exactly. That's the yes/no piece.
23 The second piece is, is there a dollar mistake
24 associated with that.
12:35:11 25 So in this example, what was exactly right on the

1 attribute sample question of yes/no, the variable sampling
2 question, which is how much is it off; the answer to that
3 question is zero.
4 What we're talking about here is the final sample size.
12:35:26 5 They determined that they looked at these transactions -- and
6 we'll come back to this when we talk about the error rate
7 notion, we'll talk about exactly what was considered and what
8 wasn't. But the important concept here is the information that
9 was not reconciled, we know there were transactions that they
12:35:45 10 could not reconcile. The conclusion here is that no errors were
11 found.
12 So for purposes of this attribute question, yes/no,
13 they're saying we can be 98 percent that the error rate is less
14 than one percent because we didn't find any errors. We know
12:36:00 15 there were transactions that were not able to be reconciled.
16 So what this tells me is they're treating these
17 unreconciled transactions as okay. We don't know, we can't
18 source them to anything, but they're being treated as okay.
19 Q. And unreconciled transactions, as you understand them,
12:36:17 20 include what?
21 A. This gets back to the notion of the error rate. It's very,
22 very narrowly defined what an error is in this yes/no.
23 So the transaction could be off by some small dollar
24 amount, could be off by $0.50, $0.90. That's not considered a
12:36:37 25 yes/no error.

1 If you look at the information, as we will in more
2 detail, the ASM defines the standards to which something can be
3 reconciled. And so here when we're saying that 90 percent plus
4 assurance, that's really driven by the reconciliation notion,
12:36:56 5 that we were able to reconcile it. But that is subject to
6 either a directly supported document, what I would normally
7 considered reconciled, but it could also be something that is
8 the judgement of the auditor and it could also be something that
9 what they call alternative procedures.
12:37:12 10 And in my view, and I have pored through the
11 administrative record, I've looked through the ASM manual, I
12 have not seen anywhere where anyone has explained to me, nor in
13 reading the trial transcripts, has anyone explained to me what
14 these alternative procedures are. But that's considered
12:37:30 15 reconciled.
16 So I wouldn't anticipate -- and we'll talk about this
17 at some other point here, but this goes to the error rate. It's
18 all interlinked. I wouldn't anticipate that from what I
19 understand about the alternative procedures, that you would be
12:37:43 20 expected to see any error.
21 And, in fact, when Deloitte & Touche went through this
22 process, NORC was able to conclude that they didn't find any
23 errors at all. And that's really based on this definition of
24 what the error rate is.
12:37:58 25 Q. Is it also based on what your understanding of the role of

1 statistical analysis is in this particular exercise?

2 A. Well, given the role of substantiating that the recorded

3 histories, that which exists, is okay, that would be consistent

4 with defining the errors as narrowly as we have, or as NORC has.

12:38:22 5   It has to rise to a pretty high level to be considered

6 an error in that documentation.

7   So from the standpoint of designing the sample design,

8 it will be highly likely to accomplish that objective, but it's

9 really pinned on the notion of what the definition of that error

12:38:42 10 is.

11 Q. And pinned on the notion that the error rate is zero, or

12 close to zero. Correct?

13 A. That underlies everything that we're talking about, is how

14 you select that sample size depends on what you think the error

12:38:54 15 rate's going to be. So as the error rate gets larger, and I

16 think from reading the transcripts, His Honor understands this,

17 he articulated back to someone something about the trade-off

18 between the assurance level and the sample size. So if, in

19 fact, the error rate is larger, some of those other levers are

12:39:12 20 going to move around.

21   So the assurance level is going to drop, or the sample

22 size is going to need to increase significantly.

23 Q. So you read Dr. Scheuren's testimony that his tasks are

24 defined and determined by the client. Correct?

12:39:29 25 A. Yes, that's correct.

1 Q. So if the task is to substantiate the postings that continue

2 to exist in the system, that would be relatively easy to do,

3 wouldn't it?

4 A. Given that the error rate as defined is agreeable to the

12:39:47 5 Court, then this would be a highly efficient way to do that.

6 Q. How long would it take you to do that, Mr. Duncan?

7 A. Well, the error rate has been so narrowly defined, and the

8 task in my opinion has been so narrowly limited, that the

9 statistical sampling is not really required.

12:40:06 10   It's really something that if all you want to be able

11 to do is say there's such a low likelihood that something is an

12 error, that something that -- if you're most interested in cost

13 and time efficiencies to just say that the recorded histories

14 are correct, it seems to me that's something that could be

12:40:26 15 accomplished in very short order.

16 Q. And how long do you think it would take you to do it,

17 Mr. Duncan?

18 A. I would be surprised if it took me a week.

19 Q. So you don't need 50,000 hours a year to do it, do you?

12:40:39 20 A. Not given the error rates as they've been define. You're

21 not going to find any mistakes, because if the documents are

22 missing, there's not a mistake. I mean, under that notion, if

23 you walked in and there were absolutely no records of any kind

24 anywhere, everything had been erased, then given the sampling

12:40:58 25 program as it's been designed, you'd be able to reach the

1 conclusion that everything was okay and you'd be done.

2 Q. I'd like to turn your attention to what is the historical

3 accounting project itself, which is Bates number --

4   THE COURT: Well, why don't we do that after lunch?

12:41:14 5 Good time for a lunch break?

6   MR. GINGOLD: Yes, Your Honor.

7   THE COURT: We'll be in recess until 1:40.

8   (Recess taken at 12:40 p.m.)

1   **CERTIFICATE OF OFFICIAL COURT REPORTER**

2

3   I, Rebecca Stonestreet, certify that the foregoing is a

4 correct transcript from the record of proceedings in the

5 above-entitled matter.

6

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9 _____   _____

10 **SIGNATURE OF COURT REPORTER**   **DATE**

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