UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL,   : Civil Action 96-1285
et al.   :
          Plaintiffs   :
                                : Washington, D.C.
     v.   : Tuesday, October 23, 2007
                                :
DIRK KEMPTHORNE, Secretary   :
of the Interior, et al.   :
                                :
          Defendants   : AFTERNOON SESSION

TRANSCRIPT OF EVIDENTIARY HEARING
DAY 8
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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

2   THE COURT: Mr. Guilder, I'm sorry to keep you

3   waiting. We'll continue, please.

4   MR. GUILDER: Good afternoon, Your Honor.

00:00:04 5   THE COURT: Good afternoon.

6   (The witness resumes the stand.)

7   DIRECT EXAMINATION (Continued)

8   BY MR. GUILDER:

9   Q.   Good afternoon, Mr. Fasold. When we left we were talking

00:00:10 10 about a NORC document that contains some BLM information from a

11 report that BLM issued. And you mentioned that you have read

12 other reports regarding BLM and cadastral surveys, and you noted

13 some of the errors in that information you read. If we could

14 look at 48-3-1, please.

00:00:34 15   And have you seen this document?

16 A.   Yes.

17 Q.   And if we could look at page 9, please. And if we could

18 zoom in on the top, the first highlighted portion. This is the

19 results of a BLM study. If you could read that to yourself.

00:00:56 20   (Witness reviewing document.)

21 A.   Yes.

22 Q.   And when you indicated that you had read studies that

23 indicated an error of up to 20 percent, is this the study you're

24 talking about?

00:01:06 25 A.   I think this is a study to which I referred. This is a

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1   number that I think I logged in my brain.

2   Q.   And if we could zoom in on the next highlighted portion,

3   and if you could read that for a second.

4   A.   Right.

00:01:24 5   Q.   And so this error was not necessarily typical of all of the

6   BLM documents, but they indicate here that they knew there were

7   large errors?

8   MR. WARSHAWSKY: Objection, Your Honor. The document

9   speaks for itself and Mr. Fasold is not here to testify about

00:01:41 10 statistical sampling.

11   THE COURT: I'll sustain that. I don't quite know why

12 you need this anyway, but go ahead. Sustained.

13 BY MR. GUILDER:

14 Q.   Based on this information, you decided you had to take an

00:01:54 15 alternative approach to what you characterized before as finding

16 the individual polygons of allottees' land. So you took a

17 different approach. And could you describe that approach that

18 you took?

19 A.   Right. The GIS identified reservations and then resources

00:02:10 20 within a reservation. The question then was obviously the total

21 resource income was not attributable to allottees. And through

22 the same kind of research of the same books we were able to plot

23 the percentage of allottee interest in a particular reservation

24 over time.

00:02:32 25   And that we applied interpolation where the data wasn't

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1 complete, which was I think in all cases, we don't have all the
2 years. We interpolated the data we had and applied it to the
3 revenues garnered off the reservation.
4   THE COURT: Can you tell me how you interpolated it?
00:02:57 5 I can understand straight-line interpolation of 6 to 10, 8 in a
6 year, but how did you interpolate allottee ownership of land in
7 a reservation?
8   THE WITNESS: We interpolated the percentage numbers.
9 In your example, Your Honor, you said if it's 6 and 8 and
00:03:16 10 there's an intervening year, we could put 7 in that number by a
11 straight line, what they call linear interpolation. Then for
12 that year, if it were 7 percent, we would apply the total
13 revenues times 7 percent to determine the allottee revenue.
14   THE COURT: Where did the percentages came from?
00:03:34 15   THE WITNESS: The same sources as other data, for
16 example leasing, and that is the numerous books, periodicals,
17 commissioners' reports and similar sourcing of that data.
18   THE COURT: Okay.
19 BY MR. GUILDER:
00:03:52 20 Q.   You said you took a percentage of the individual land
21 versus tribal land, and then you factored in the other revenue
22 sources?
23 A.   No. If I said that that wasn't right. I took a percentage
24 of the total revenues for a particular reservation and applied
00:04:06 25 the allottee ownership percentage.

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1 Q.   Okay. And you did that for each of the categories that we
2 discussed previously?
3 A.   Yes. Again, with one modification on oil and gas data,
4 but, yes, we applied the revenues by percentage from a
00:04:27 5 reservation.
6 Q.   And there was a difference you just noted with oil and gas.
7 Could you describe that?
8 A.   We did -- Oklahoma is unique in Indian history because
9 originally Oklahoma, with the exception of three counties in the
00:04:42 10 panhandle, were Indian territory, and of the remaining counties,
11 only three did not have oil and gas on them. So we have a huge
12 amount of territory there that was once all Indian lands. And
13 Oklahoma is very highly allotted. The percentage is very high.
14   And another exception is the Osage. The Osage tribe and
00:05:10 15 Osage County are the same thing. So that enabled us to treat
16 Osage differently because we weren't mixing up counties. So
17 that was the first exception. The second exception -- Osage
18 also, via headrights and so forth, is almost all allottee land
19 even today. Allottee interest.
00:05:36 20   The problem we had that was observable is I applied -- used
21 the same technique of a percentage times a reservation for
22 Oklahoma, and came out with expected revenues. But the BIA had
23 produced reports in the '70s and early '80s for selected
24 reservations and counties that told me exactly what the allottee
00:06:01 25 income was derived for there. So I compared it to my data and I

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1 was way low. And it sort if takes you back, because you say, I
2 can't be that far off.
3   And then it occurred to me through further research that I
4 was measuring surface rights to the land. And I found a BIA
00:06:20 5 study that said there was actually, when they sold their land
6 rights, they retained subsurface rights in over 50 percent of
7 the county. So I developed from the numerous reports that I had
8 data points that said in general what is the difference between
9 surface rights that I can measure versus subsurface rights where
00:06:44 10 the ownership apparently is no longer in the name of an
11 allottee?
12   So we got a factor that we applied to -- what we call a
13 subsurface factor. You have to mark up what would otherwise be
14 just the surface factor. So if there were, you know, a hundred
00:07:01 15 barrels on the surface, there may be 200 barrels if you counted
16 the subsurface rights still in the names of the allottees. So
17 we had to treat that one differently.
18 Q.   And you mentioned that you did research to evaluate the
19 Osage tribe. Did you look at not just yearly studies but also
00:07:18 20 statutes?
21 A.   I obviously -- I mean, I was informed by counsel of their
22 interpretation of the statutes, and I have read the statutes,
23 yes.
24 Q.   Could we look at PPX 0894. And can you tell the Court --
00:07:42 25 identify this document, please?

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1 A.   I believe -- yes. I've seen this document. Again it's not
2 something I'm real conversant with, but I've seen it, yes.
3 Q.   Okay. Could we turn to page 7 of this, please, and if we
4 could zoom in on the highlighted portion. And if you could read
00:08:03 5 that to yourself, Mr. Fasold.
6   (Witness reviewing document.)
7 A.   Yeah. I have read that.
8 Q.   And is this representative of some of the information that
9 Plaintiffs' counsel provided to you and that you also found in
00:08:32 10 your own research?
11 A.   Yeah. Again, this is a legal document. What reinforced
12 what I saw was, as I described especially in annual reports, the
13 way they subdivided revenues from various reservations, they
14 frequently had a column that would say "tribal" and a column
00:08:57 15 that said "individuals," and there are, at least the way they
16 were accounted for contemporaneously, there were monies in the
17 individual column and not very many or any monies in the tribal
18 column.
19 Q.   Could we look at Defendants' Exhibit 26, please. If you
00:09:18 20 could look at that. Have you seen this document also?
21 A.   Yes.
22 Q.   You were mentioning yearly reports. If we could turn to
23 page 4 of this document, and look at the top so we can identify
24 what this chart is. Does that appear to be the type of
00:09:40 25 information you were referring to when you said yearly reports?

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1 A. Right. This is in the same format that would -- same

2 format that the annual commissioner's report would take.

3 Q. Okay. If we could look at page 5 of this. Unfortunately,

4 when it's copied you can't tell exactly where the columns line

00:10:03 **5** up, but if you zoom in on the bottom for a second, you'll see

6 that that indicates Osage, and then if you could look at the

7 document, we're going to put them together so you can kind of

8 understand what one column is and what the other column is. And

9 now if you could --

00:10:19 **10** A. Right. It would appear in this document that they have

11 Osage Reservation designated with an $8.7 million, what you

12 realize over two pages is the column for individual funds.

13 Q. And do you see anything in the column for tribal funds?

14 A. Yeah. The tribal column fund contains no information.

00:10:46 **15** There is no zero or any information in that.

16 Q. You also said there were some other -- you were mentioning

17 some unique reservations in terms of percentages and when you

18 calculated. Were there other unique situations with the

19 percentage of allotted ownership versus the total reservation

00:11:06 **20** area in other oil-producing areas?

21 A. I'm sure there were, but it escapes me at this point, yes.

22 Q. Is it possible that in some instances your allotted figure

23 does not accurately represent the percentages?

24 A. Yeah. The methodology, if we ever had superior knowledge,

00:11:36 **25** we would use it. And one comes to mind, and that would be

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1 phosphates on the Nez Perce reservation. If you did our

2 methodology you would come up with one number. However, it was

3 documented in several sources that the allottee percentage was

4 much higher than my math would produce, so we used that number.

00:12:00 **5** Conversely, where we had, for example, a coal mine on a

6 reservation, and we knew from information from Pincock Allen &

7 Holt that the coal mine on the reservation was not an allotted

8 land. They knew that. So we would lower it to zero in that

9 particular case. So if we had particular knowledge, we would

00:12:31 **10** override what the formula would otherwise produce.

11 Q. So through your research you attempted to create the most

12 accurate picture.

13 A. Yeah. The most accurate with the data available, which

14 could change. As we get superior data, we would supplant the

00:12:47 **15** inferior data.

16 Q. If we could look at PPX 4208, and then look at page 3. If

17 we could look at the bottom highlighted portion, and could you

18 read that out loud? What is this portion of your report?

19 A. This is actually the last paragraph of my August 2007

00:13:16 **20** expert report, and it reads, "For the period 1887 to 1938, the

21 Nominal Dollar value of revenue derived from the sale or lease

22 of IIM trust assets is $1.5 billion. The nominal dollars,

23 including interest earned or accrued on such revenue through

24 2002 is $80.7 billion. For the period 1887 to 2002, the Nominal

00:13:49 **25** Dollar value of revenue derived from the sale or lease of IIM

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1 trust assets is $13.3 billion; the Nominal Dollars, including

2 interest earned or accrued through 2002 is $154.5 billion."

3 Q. And what do you mean by nominal dollars?

4 A. Nominal dollars is just our terminology to say if you

00:14:12 **5** receive a dollar in 1887, it's a dollar. And if you receive a

6 dollar in 2002, it's a dollar. In other words, its nominal

7 value at the point of origin. There's no saying that there's an

8 inflation factor or any other factor applied. Those were the

9 dollars as they existed in the time period collected.

00:14:34 **10** Q. Okay. And if we could look at PPX 4502, this is a document

11 that we exchanged with Government counsel yesterday and --

12 MR. WARSHAWSKY: Your Honor, I'm going to object to

13 the use of this document. It was exchanged with us at 10:30

14 last night. This document's obviously a summary document.

00:14:56 **15** We've never been provided any of the detailed data that supports

16 it. It's inadmissible. It doesn't qualify under Rule 1006.

17 MR. GUILDER: This is simply a summary of --

18 THE COURT: Let's see what it is.

19 BY MR. GUILDER:

00:15:12 **20** Q. Okay. Could you explain the right-hand column that says

21 "Plaintiffs' total receipts," and where those numbers come from?

22 A. Yes. There is a right-hand column on this exhibit that is

23 labeled "Plaintiffs' total receipts," and this is the product of

24 the model that I have just described to the Court. And I tried

00:15:29 **25** to reflect comparable data to the document which is labeled, I

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1 believe, AR-171, and displaying in comparable periods the data I

2 have from the data I derived --

3 Q. We'll talk about the left-hand column in a minute, but the

4 right-hand column, is that the same number we just discussed on

00:15:54 **5** page 3 of your report?

6 A. Yes, my expert report refers to 13.3 billion, and this is a

7 slightly more refined number.

8 Q. And on the left-hand side, you were saying that that is a

9 number that represents the Defendants' numbers from an Exhibit

00:16:08 **10** 171 that you were given by Plaintiffs' counsel.

11 A. Right. That was calculated from their document, yes.

12 Q. So this is just demonstrating their number that they've

13 entered into court and the number that you've already provided

14 in your expert report.

00:16:20 **15** A. That's correct.

16 THE COURT: Counsel, I am totally lost. I don't know

17 what any of these numbers are. I don't know how you got there.

18 You've shown me about 25 moving parts and all of a sudden, boom,

19 you're at the bottom line. You've left out something.

00:16:37 **20** MR. GUILDER: Okay. I'll clean it up for you.

21 BY MR. GUILDER:

22 Q. Could we go back to page 3 of 4802. I'll try to explain

23 how he got to the 13 billion. 13.3.

24 THE COURT: Well, let's start with the headings on the

00:16:59 **25** columns. "Plaintiffs' total receipts," "Defendants' total

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1 receipts." Let's have that thing back up in here again.
2 So on the left column, Defendants' total receipts is meant
3 to be a total of what?
4 MR. GUILDER: This is a total that reflects --
5 THE COURT: No. The witness is testifying. That's
6 part of my problem. You two are asking too many leading
7 questions. What is this?
8 THE WITNESS: If you recall the multicolored AR-171,
9 the document that was entered by I believe Ms. Herman, explained
10 that document. That document on the left-hand columns, she had
11 about five columns that added up to total receipts. The column
12 that displayed total receipts is not -- she didn't do that math
13 for you. And then she had disbursements, and then she had some
14 reconciliation items on the right-hand column of that
15 multicolored document.
16 What I did was total receipts from her document, and then
17 put them in these time breaks as can you see here. In other
18 words, 1909 to 1933. In her document you will see 886 in total
19 receipts for that period of time. And so on down the line,
20 meaning for each of these time breaks, her document, as you
21 recall, went through from 1909 to 2005. My model ends at 2002,
22 so I was subtracting three years off that, and then put them
23 into her time breaks that Ms. Herman shared with the Court. And
24 those are her numbers. And we later will have an exhibit, I
25 hope, that explains where that column belongs in her exhibit.
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1 THE COURT: Defendants' total receipts, 13 billion,
2 626.1 million, right?
3 THE WITNESS: Yes.
4 THE COURT: Plaintiffs' total receipts, 13 billion
5 333.9.
6 THE WITNESS: That is correct, sir.
7 THE COURT: Is that number netted out for some
8 purpose?
9 THE WITNESS: These are once again, in our parlance,
10 Your Honor, it's nominal dollars. These are the dollars that
11 that exhibit says were collected on behalf of individual Indian
12 allottees. They're very comparable to what my model produces.
13 And that is, when we say nominal dollars, a dollar in 1887 is a
14 dollar. It's not marked up for anything. It is what they
15 recorded as receipts versus what we found in our study as
16 receipts.
17 THE COURT: So the total at the bottom of the page,
18 what is that supposed to represent?
19 THE WITNESS: The second right-hand column that begins
20 with 3.832.1, is an attempt to explain what our "other" category
21 is. Our "other" category are those items that were not -- did
22 not have reconcilable totals, such as the rights-of-way as I
23 mentioned in the footnote, annuities and all of those other
24 items that we were unable to quantify. We have a category
25 called "other" that encompasses all of the categories not
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1 previously given a dollar denomination.
2 THE COURT: Okay. Go on.
3 BY MR. GUILDER:
4 Q. If we could look at AR-171. You mentioned a color
5 document. Is this that color document?
6 A. Yes, it is.
7 Q. And you mentioned collections. Could you describe that
8 further?
9 A. Right. She has an opening balance and she has each of
10 these columns lettered from A through K on what we see here.
11 She has an opening balance that is reflected in column A. Then
12 she has B, C, D, E, and F, which are interest, Osage Quarterly
13 Annuity, judgment/per capita, tribal IIM, and other receipts.
14 The sum of those columns per year is what is in the previous
15 exhibit.
16 THE COURT: All right. I don't know what we're going
17 to do with that other exhibit. Maybe you're about to show me
18 what you're going to do with that other exhibit.
19 MR. GUILDER: Okay. Hopefully.
20 BY MR. GUILDER:
21 Q. Could we look back at that other exhibit just to explain
22 some of these things. If we could zoom in. There we go. And
23 could you explain the two numbers, you said, briefly, that they
24 were taken from Defendants' exhibit and taken from your model.
25 Could you explain how they correlate in your mind.
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1 A. The two $13 billion numbers. As the Court noted, my
2 previous and attached study, where I went through the
3 methodology for trial 1.5, said I got to the point of adding up
4 all of the natural resources as I described, and then I had a
5 whole host of categories that did not have a value that I could
6 assign reliably. And that went into the "other" category in
7 quotes.
8 That "other" category, the best information I had at the
9 time was the 2002 report filed by the Defendants and a report to
10 Congress -- I believe that was July 2002 -- in which they said
11 the total receipts are $13 billion. So I trued up my number to
12 $13 billion as of that date. That report contained data through
13 2001.
14 Q. Okay. Could we look back at AR-171, please. Did you
15 notice anything -- did you make any observations about this
16 chart when you first looked at it?
17 A. Yes. First trying to understand, I didn't delve deeply
18 into the meanings of the various colors, but this court said I
19 want to know throughput, and from my loose interpretation,
20 throughput would be to show what the receipts are and what the
21 disbursements are.
22 So the first thing that they don't show you here is what's
23 confusing to the Court right now, is they don't have a column
24 that would be between F and G that says what are the total
25 receipts, so I could compare them to total disbursements. You
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1 can't -- I mean I can't possibly go through and add up columns B

2 through F and know what the total is for any year for receipts.

3 They do have a column that represents to be total disbursements

4 for each year, but they don't have a total receipts column.

00:24:51 **5**   Okay. That's one -- you would think that that would be a

6 logical thing to show.

7   The second item is I don't see, for the periods '09 through

8 '33 and '34 through '71, disbursements column, there are no

9 numbers entered there, it's blank, as if either there's no data

00:25:20 **10** or it was zero. We couldn't possibly believe it's zero. But

11 the problem there becomes, if you knew the total, which I did

12 the total, it's $14 billion if you add up columns B through F,

13 through 2005, it's about $14.3 billion.

14   That exhibit, then you would say, according to the totals

00:25:48 **15** at the bottom, they took in 14.3 and they paid out 10.6. And

16 I'm not purporting to tell you that's what the message of this

17 document is, but that's what the document says on its surface.

18 And that's odd that we wouldn't -- I searched the record and I

19 couldn't -- I didn't see anything that would give me a hint as

00:26:09 **20** to those early years -- and when I say early years, '09 through

21 '71 -- that we haven't recorded, at least on this document, any

22 disbursements whatsoever.

23   So you wind up with a disparity in totals, that it's

24 apparent in this document that it's, at least from my search of

00:26:31 **25** the transcript, I didn't see an explanation of that disparity in

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1 bottom, other receipts, it says 11,064. That is inclusive of

2 '09 through '71. If you take column G, where it's a negative

3 $10.7 billion, theoretically it would be only inclusive of '72

4 through 2005.

00:28:19 **5**   THE COURT: Okay.

6 BY MR. GUILDER:

7 Q. Okay. And when you looked at -- did you find out where

8 some of these numbers came from, other receipts or anything

9 else, in all years did you look at this chart?

00:28:32 **10** A. I mean, I've looked at this chart. I didn't spend a lot of

11 time trying to discern the source of each of these data as is

12 represented by the various colors, which system they may have

13 derived these from.

14 Q. Could we look at Bates 60-27-2. We were looking at this

00:28:55 **15** earlier, and this is the second page of the document. And we

16 were talking about the assumptions. If we could zoom in on the

17 bottom of the page. And if you could read that to yourself,

18 please.

19   (Witness reviewing document.)

00:29:37 **20** A. Yes. I've read that.

21 Q. And as an expert financial modeler, what do you take from

22 that statement?

23   MR. WARSHAWSKY: Objection, Your Honor. This is not

24 a -- by its own terms, this document is a statistical estimate.

00:29:51 **25** And this is not an area of expertise as to which Mr. Fasold's

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1 what we should think about it.

2   THE COURT: So your message to me about Exhibit 171 is

3 that on its face it shows that $4 billion less was paid out than

4 was taken in.

00:26:48 **5**   THE WITNESS: Yes, but I'm -- yeah. I am not here to

6 tell you anything other than that's what the document on its

7 face says. I don't upon know the materiality of why we wouldn't

8 have entered any disbursements. I couldn't say.

9   THE COURT: Okay.

00:27:02 **10** BY MR. GUILDER:

11 Q. How did you get to the number 14 billion again?

12   THE COURT: Does that extra $4 billion all come from

13 the top of the page?

14   THE WITNESS: Yes. It comes from the top of the page

00:27:18 **15** and it would be -- there's data entered into Osage Quarterly

16 Annuity plus tribal IIM plus other receipts. The sum of all of

17 those would be the missing -- the missing data, because we don't

18 have a column --

19   THE COURT: Oh. So the $4 billion is all up at the

00:27:38 **20** top.

21   THE WITNESS: Yeah.

22   THE COURT: Okay.

23   THE WITNESS: Well, may I revise that slightly? And

24 that is on the bottom you have 11 and 10, so they aren't showing

00:27:51 **25** comparable periods, like take the "other" column at the very

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1 been qualified.

2   THE COURT: I'm going to sustain the objection. As an

3 expert financial modeler, what do you take from that statement?

4 I mean -- you mean what does he understand it to mean? What

00:30:12 **5** does he use from it in his own model?

6 BY MR. GUILDER:

7 Q. The first sentence, that reads "Receipts and balances were

8 roughly the same," and that was one of their assumptions, in

9 your experience as a modeler, have you ever done that, used

00:30:24 **10** receipts and balances as an assumption for calculating receipts?

11 A. To me the point that I pointed out is that there is no

12 logical relationship from a balance to a receipt, and the

13 example would be if I told you my checking account balance had a

14 thousand dollar balance --

00:30:51 **15**   THE COURT: Counsel, I need to step back a little bit

16 and start asking a few questions myself, because frankly now

17 he's criticizing somebody else's work, and I still don't what

18 his own work says. I don't know what this man's conclusion is.

19 You've shown me all the moving parts of this model. I don't

00:31:10 **20** know what the bottom line is.

21   MR. GUILDER: I'm sorry, Your Honor. I can go back to

22 that.

23   THE COURT: He took this GIS -- if you mean that one

24 little paragraph at the end that says it's a billion dollars

00:31:20 **25** here and there, is that his conclusion?

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1   MR. GUILDER: Yes, it is, but we could explain it
2 further.
3   THE COURT: Well, let's explain it. Because we need
4 to get that down before we start criticizing somebody else's
00:31:30 5 work.
6   MR. GUILDER: Okay. Thank you, Your Honor. Sorry.
7 We'll move back to 48-02. And let's look quickly at page 3,
8 which is the results paragraph.
9 BY MR. GUILDER:
00:31:43 10 Q.   If you could describe -- we started with GIS software. If
11 you could just take us through how you got to this total number.
12   THE COURT: I think they put it in a big computer and
13 built a big spreadsheet and that's what he came up with, right?
14   THE WITNESS: You're correct, Your Honor.
00:31:59 15   THE COURT: Now let's look at those numbers again
16 because I need to understand what you think they mean. Is there
17 in fact a spreadsheet that supports all of this?
18   THE WITNESS: Yes.
19   THE COURT: Has it been printed out and has the
00:32:20 20 Government had access to it?
21   THE WITNESS: No, Your Honor. It comprises dozens of
22 spreadsheets that get summed up, yes.
23   THE COURT: How can the Government cross-examine this
24 conclusion if they don't have your worksheets, your work
00:32:36 25 product?

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1   MR. GUILDER: I believe they've had the conclusions,
2 just not the underlying formulas of the spreadsheet.
3   THE COURT: My math teacher didn't let me get away
4 with that. I give her the answer and she said well, I need to
00:32:55 5 have your worksheets. I mean, I have no idea how this -- well,
6 let's look at that paragraph again. You moved from all these
7 GIS data and -- there must be 30 or 40 moving parts in this
8 calculation, wouldn't you say?
9   THE WITNESS: Yeah. Maybe if I could describe to you
00:33:19 10 the subtotals and how they are arrived at toward these grandiose
11 totals you're seeing --
12   THE COURT: "Grandiose" isn't a bad word. Put the
13 numbers back on the screen. Let me look at them again. Just
14 that last bottom-line paragraph.
00:33:37 15   MR. WARSHAWSKY: Your Honor, if I may.
16   THE COURT: Let me look at the numbers before you may.
17   All right. The nominal dollar value of revenue derived
18 from the sale or lease of IIM trust assets you calculate as
19 $1-1/2 billion between 1887 and 1938, right?
00:34:00 20   THE WITNESS: That's correct.
21   THE COURT: Now, 80.7 more dollars are added on for
22 interest. Why? You assume this money was never paid out to
23 anybody?
24   THE WITNESS: That is under the assumption of zero
00:34:16 25 disbursements.

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1   THE COURT: Oh. Well, what's the basis of that
2 assumption?
3   THE WITNESS: That is what the Plaintiffs' counsel
4 assigned me to do, and that is identify receipts. What I did
00:34:31 5 is -- I don't know the valid disbursement numbers, Your Honor.
6 What I did in my model is there's a provision in there that says
7 you can assume, the user of my model can assume any number that
8 represents valid disbursements. If you were to assume zero,
9 this would be the number, the 80.7 would be under zero
00:34:57 10 disbursements. If you were to assume 100 percent, that 80.7
11 number that you see in this exhibit would be zero. It all got
12 paid out and there is no time value of money applied.
13   THE COURT: All right. And the interest you
14 calculated as earned, you plugged in actual interest earned and
00:35:17 15 whatever you couldn't find as earned you accrued it at what
16 rates of interest?
17   THE WITNESS: And this is --
18   THE COURT: Compounded over the years?
19   THE WITNESS: Right. Let me --
00:35:28 20   THE COURT: Never mind. That number just doesn't make
21 any sense in the context of this case. Does it, counsel?
22   MR. GUILDER: Well, we could explain how the interest
23 calculation works, if that would help.
24   THE COURT: No, but I want to know why? Why would you
00:35:41 25 use an interest calculation like that?

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1   MR. GUILDER: There's a certain period of time where
2 the -- I could take the witness through part of the thinking if
3 it would help.
4   THE COURT: Well, he says he got it from you.
00:35:54 5   MR. GUILDER: Well, we took a calculation of the
6 interest that was actually posted, and it tracked a certain
7 interest rate, which is the long bond rate, and that would
8 essentially be also the same rate that, if there were zero
9 disbursements, and this money were sitting in Treasury's general
00:36:13 10 account, that percentage would be what the Government would
11 derive a benefit from, because they would not have to borrow
12 that money, such that they wouldn't have to issue more long-term
13 bonds.
14   THE COURT: Of course, but my question is of what
00:36:31 15 utility is a number of $80.7 billion, which assumes that no
16 disbursements were made, when everybody knows that disbursements
17 were made?
18   MR. GUILDER: Yes, Your Honor. It was simply to say
19 that this model can show how much goes in from any percentage of
00:36:47 20 disbursements. So if it were to calculate that there were 40
21 percent disbursements or 60 percent, this model could
22 immediately calculate the total throughput there.
23   THE COURT: Well, just so we're all on the same page,
24 the only number in this paragraph that I can make any use of is
00:37:05 25 the number $13.3 billion, which is this witness's calculation,

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1 estimate, estimated calculation, spreadsheet bottom line of all

2 these moving parts, right?

3 THE WITNESS: Yes, Your Honor.

4 THE COURT: All right.

00:37:23 5 BY MR. GUILDER:

6 Q. What years is that through?

7 A. 1887 to 2002.

8 THE COURT: Awfully close to the numbers the

9 Government has come up with.

00:37:33 10 MR. GUILDER: Yes, Your Honor. That was what we

11 attempted to show in the earlier demonstrative. I can move on,

12 though.

13 THE COURT: Okay.

14 BY MR. GUILDER:

00:37:43 15 Q. If we could --

16 THE COURT: But the earlier demonstrative, the one

17 with the two columns that I got so confused about, I gather the

18 point of that is to show that this witness thinks that the

19 Government's number of 13 point whatever, 5 or 6 billion, is

00:38:03 20 actually about $4 billion low because of the other categories.

21 Is that right?

22 THE WITNESS: Yes. The sum of their exhibit from

23 Ms. Herman is 13.6, as you pointed out. Using my model to

24 reconstruct the same comparable data, is 13.3 billion.

00:38:23 25 THE COURT: Then you add another 4 billion.

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1 THE WITNESS: No, I don't. I'm trying to, if I might

2 divert a second, we subtotal oil and gas through the process

3 we've described to you, hard rock minerals, timber, we have land

4 leases, land sales, and then we ran into a bunch of categories,

00:38:46 5 rights-of-way being the most noteworthy, that we don't have

6 numbers to. And that is a number that we called other. I

7 cannot --

8 THE COURT: But if I'm trying to figure out

9 throughput, do I add that other number to your 13.3 billion?

00:39:06 10 THE WITNESS: No. It is one of the subtotals that

11 goes into the $13.3 billion that I am showing from my model.

12 THE COURT: So basically you and the Government are

13 $300 million apart.

14 THE WITNESS: On these exhibits, yes, sir.

00:39:20 15 THE COURT: Okay. Fine. Now I'm back on an even

16 keel.

17 BY MR. GUILDER:

18 Q. Can we -- did you look at any other documents? You looked

19 at AR-171, the color document. Did Plaintiffs' counsel provide

00:39:36 20 you with any other documents that the Defendants produced

21 regarding throughput?

22 A. Yes, but I can't tell you which individual one.

23 Q. If we could have DX 365. Does this -- can you identify

24 this document for the record, please?

00:39:54 25 A. Yes. I believe this document was discussed by Mr. Haspel,

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1 from what I read in the record.

2 MR. WARSHAWSKY: Could we have a page number?

3 MR. GUILDER: I'm sorry. This is Defendants' Exhibit

4 365.

00:40:16 5 BY MR. GUILDER:

6 Q. And could you explain your understanding of this document?

7 A. I guess I feel empathetic to Your Honor being confused by

8 financial documents. This document I have a hard time grasping

9 other than the fact that he apparently runs, I believe each page

00:40:38 10 represents a scenario that he is analyzing, and he has in each

11 scenario groups of data that are labeled A in the left-hand

12 column and B in the left-hand column.

13 And the difference I see is it appears that A deals with

14 total collections and B deals with estimated credits to IIM

00:41:06 15 accounts. Then the very bottom of that page, if we might go to

16 it, the very last sentence, it said, "Estimated credits into IIM

17 accounts is currently estimated as 77 percent of total

18 collections and is subject to change upon further analysis."

19 I went through the individual pages, there's nine pages to

00:41:34 20 this document, and that number, if you take the numbers from

21 the --

22 MR. WARSHAWSKY: Your Honor, I'm going to object again

23 to this testimony. This is, Mr. Fasold's offering expert

24 testimony, far beyond the scope of his expert report. We've had

00:41:50 25 no disclosure of his opinions.

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1 MR. GUILDER: This document was disclosed after both

2 affirmative and rebuttal expert reports were -- the deadlines

3 for those reports. And as you indicated earlier at a pretrial

4 hearing, Your Honor, that some things were going to come in

00:42:07 5 later and our experts would have an opportunity to respond to

6 them. This was provided to Plaintiffs' counsel well into trial,

7 this exhibit.

8 MR. WARSHAWSKY: Your Honor, the point is simply that

9 to the extent Mr. Fasold's offering new opinions, that should

00:42:20 10 have been disclosed to us in advance.

11 MR. GUILDER: I think he's not offering really an

12 opinion, just more reviewing this chart, and can he even express

13 an opinion from this chart is what I'm asking.

14 THE COURT: I'll let him answer that. Can you express

00:42:37 15 an opinion from this chart, about anything?

16 THE WITNESS: The only observation that I think I can

17 say validly from this chart is they make distinctions between

18 what was received -- in other words, and I believe the

19 terminology here is collections -- versus what they say are

00:43:02 20 receipts, which are estimated credits to IIM accounts.

21 And the point of this, Your Honor, would be I am trying to

22 measure what would be in the A column, in other words, the

23 receipts, as I said before, that came in the door to DOI. I am

24 not in my model trying to estimate the groups of numbers labeled

00:43:25 25 B, which would be those amounts credited to IIM accounts.

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1   THE COURT: Okay. Let's move on.
2   BY MR. GUILDER:
3   Q.   Okay. You mentioned earlier that you added up the numbers
4   that were in chart 171. What did you do with those numbers?
00:43:45 **5**   A.   **To help me understand what I was looking at on 171, I**
6   **inserted a column that did what the exhibit didn't do, and that**
7   **was merely adding up columns, I believe, A through H.**
8   Q.   Could we look at PPX 4501. This is another exhibit that we
9   exchanged with Government counsel last night, as -- the witness
00:44:08 **10**   can testify to what these numbers are. Could you explain what
11   that highlighted column is?
12   A.   **What I did, Your Honor, is enter the data that she had, and**
13   **merely provided a column that I could use for total receipts**
14   **because --**
00:44:25 **15**   THE COURT: Got it.
16   THE WITNESS: Total receipts are referred to in
17   footnote 1, but there was no column to reflect total receipts.
18   And this is the discrepancy I described earlier of the total
19   receipts of 14.3 billion. And if you summarize the total
00:44:40 **20**   disbursements, you get 10.7 billion. The logical difference is
21   there are no disbursement numbers for those earlier periods.
22   THE COURT: Understood.
23   MR. GUILDER: No further questions, Your Honor.
24   CROSS-EXAMINATION
00:45:04 **25**   BY MR. WARSHAWSKY:
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1   Q.   Good afternoon, Mr. Fasold.
2   A.   **Good afternoon, Mr. Warshawsky.**
3   Q.   I just have a few questions for you.
4   A.   **Okay.**
00:45:16 **5**   Q.   First question, and I don't want to belabor this point, but
6   it's in the transcript from the phase 1.5 trial, but just to put
7   it out there, you've had a business relationship with
8   Mr. Gingold for quite a few years, right?
9   A.   **Yes. I've known him since 1980, I believe.**
00:45:34 **10**   Q.   And you've been in business with him since then, basically?
11   A.   **Yes. Well, I have retained him as counsel on assignments,**
12   **and we also were partners on a project.**
13   Q.   Okay. And you were the subject of a story in Forbes in the
14   mid-'90s, right?
00:45:48 **15**   A.   **Yes.**
16   Q.   Do you remember what that was about?
17   A.   **Yes.**
18   Q.   Just tell Judge Robertson.
19   A.   **Mr. Gingold and I are old bankers, basically, and we for a**
00:46:01 **20**   **client came up with an idea for a new financial product, a**
21   **retail financial product, which would be an FDIC-insured deposit**
22   **that would have annuity features. I developed that for a client**
23   **of mine in common with Mr. Gingold, and they never used it.**
24   **Years later I came back and bought that product from them and**
00:46:28 **25**   **attempted to offer that product commercially. And in that**
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1   **project Mr. Gingold and I were partners.**
2   Q.   And do you remember the name of the article in Forbes?
3   A.   **I know that it gets typified as a get rich quick something**
4   **in either the article's heading or maybe one of the captions, I**
00:46:52 **5**   **don't know.**
6   Q.   Okay. Whatever. Let's move on to your expert report.
7   Plaintiffs' Exhibit -- it was PPX 4208, I believe. Is that
8   right? The premise of your analysis, if I'm not mistaken,
9   Mr. Fasold, was to generate revenue estimates, right?
00:47:11 **10**   A.   **That's correct.**
11   Q.   And you said, you told Judge Robertson you disregarded
12   Interior information wherever possible?
13   A.   **If we could get it in the first instance, we didn't use DOI**
14   **numbers.**
00:47:25 **15**   Q.   So you included estimates of production; is that correct?
16   A.   **It would depend on the category. For example, if you**
17   **regard the databases, the IHS database or PDS database, to**
18   **typify that as an estimate, in the industry it's not regarded**
19   **generally as an estimate. So I would say in that case, oil and**
00:47:56 **20**   **gas, the production values were probably not estimates as I**
21   **would call them estimates.**
22   Q.   But you certainly didn't have the values of production
23   associated with any individual allottee's interest?
24   A.   **That's correct.**
00:48:10 **25**   Q.   And you estimated prices that would be associated with
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1   those allottees' interest, right?
2   A.   **The quest of petroleum engineers. I didn't personally, but**
3   **yes, they were estimated or derived from historical documents**
4   **that they have.**
00:48:25 **5**   Q.   And your supporting engineers estimated royalty rates?
6   A.   **Yes.**
7   Q.   You derived -- you used some kind of an allocation process
8   to estimate the percentage of the reservation lands that would
9   be associated with individuals; is that correct?
00:48:38 **10**   A.   **Yes. There was a percentage applied to the total**
11   **reservation to represent allotted Indian interest.**
12   Q.   And you told Judge Robertson you came up with estimates for
13   land leases and land sales, right?
14   A.   **I took the historical data, yes.**
00:48:53 **15**   Q.   And you generated estimates for the subsurface rights of
16   the Osage?
17   A.   **Yes. The surface to subsurface ratio, yes.**
18   Q.   And in generating your estimates, basically you were trying
19   to come up with some way -- you were estimating total receipts,
00:49:12 **20**   right, into the trust?
21   A.   **As I explained, it's basically what crossed the door into**
22   **the DOI.**
23   Q.   How does your model take into consideration direct pay?
24   A.   **Let me explain my understanding of direct pay to make sure**
00:49:30 **25**   **it matches your question. Direct pay, I believe, was a**
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technique used to pay Indian beneficiaries from oil and gas
revenues without passing the monies through a trust. In other
words, the payment would go directly from the producer to the
beneficiary. That is my understanding of direct pays.

00:49:51   **Q.**   Okay. So given your understanding of direct pay, how does
your model -- that never went into trust; is that correct?

A.   **That's my understanding, yes.**

Q.   How does your model exclude those revenues from your trust?

A.   **It does not. It would include those revenues.**

00:50:06   **Q.**   So your estimate would be overstated by that amount if
those monies don't actually go into trust?

      MR. GUILDER: Objection. Calls for speculation.

      THE COURT: Well, you could apply that to an awful lot
of what we just heard. The objection's overruled, but I want to

00:50:25   ask this witness a couple of questions before you proceed,
Mr. Warshawsky.

      MR. WARSHAWSKY: Yes, Your Honor.

      THE COURT: You told me that your bottom line and the
Government's bottom line are about $300 million apart.

00:50:39   THE WITNESS: Yes, Your Honor.

      THE COURT: Your conclusion is based on a whole series
of estimates, correct?

      THE WITNESS: Yes.

      THE COURT: Do you put plus and minus percentages on
00:50:55   those estimates?

      THE WITNESS: We have in the past, yes.

      THE COURT: What would you expect the bounds -- the
error bounds in your estimates to be with a $13.3 billion
estimate? 5 percent?

00:51:20   THE WITNESS: If I could answer probably not as
directly as you'd like, because it's a rather complex answer.
We don't pick, for example, each of these numbers and say what
is the high estimate for each of these categories, what is the
low estimate, and add up all the lows and then add up all the

00:51:43   highs. That clearly, if that were done, would equal a plus or
minus percentage of a very high number, Your Honor.

      THE COURT: Huge number, of course.

      THE WITNESS: There is a technique that we use that
sort of eliminates that sort of simplistic approach, which we've

00:52:02   done internally to try to get some estimates, but those
calculations are rather complex, and I use functions available
to me on a computer that I'm not really qualified to explain in
detail how they work to you.

      But the net result, Your Honor, is it gives you a plus or

00:52:27   minus and then a probability that occurs. In other words,
if the number is 13.3, we could say if you take plus or minus 5
percent, we would have 95 percent confidence that that number is
correct.

      THE COURT: What's 5 percent of $13.3 billion? Quick.
00:52:59   650 million, isn't it?

      THE WITNESS: Yes. That sounds correct, a little
more.

      THE COURT: Why are you cross-examining this witness,
Mr. Warshawsky? It's the same number you have.

00:53:08   MR. WARSHAWSKY: Well, there's more to Mr. Fasold's
model I'd like to bring out. And it really won't be very long.

      THE COURT: All right.

BY MR. WARSHAWSKY:

Q.   Mr. Fasold, let me ask you to look at PPX 4502. By the
00:53:44   way, Mr. Fasold, when was this exhibit -- when did you prepare
this exhibit?

A.   **It was originally prepared yesterday.**

Q.   Okay. When were you first asked to prepare it?

A.   **Actually, I prepared it and showed it to counsel saying**
00:54:02   **this is difficult information to absorb so we should have just a**
real brief summary page. So I gave it to counsel. And I don't
think I accomplished my objective.

Q.   Your Plaintiffs' "other" categories, specifically under
that you have an "other," and then a paren "3" after it. Do you
00:54:24   see that?

A.   **You mean components?**

Q.   Right. The $2.6 billion, right?

A.   **Oh, yes. Yes.**

Q.   You've never provided the Government with any of the detail
00:54:38   supporting that number, have you?

A.   **There is no detail supporting that number.**

Q.   Okay. Going back, is that the "other" category that you
had back in your 2003 analysis?

A.   **You're exactly right. The "other" category in the 2003**
00:54:56   **analysis would be the 3.8 number, if you can see that. 3.832.1.**
That's comparable to the "other" category about which we
testified by this methodology in trial 1.5.

Q.   Would you explain to Judge Robertson your methodology for
calculating the other amount under your 2003 report?

00:55:21   **A.**   **Right. What we have is a series of subtotals that we**
gleaned from experts and from my own work. Again, those
subtotals would be oil and gas, timber, hard-rock minerals, land
leases, land sales, and that total would be, I believe, 9.6
billion, in that range.

00:55:51   **We knew that we had an other category that was**
unquantifiable. So we took the historical accounting plan
submitted to Congress, I believe that's what it was typified as,
the 2002 July report submitted to Congress, which had the
Government's estimates, and so I took the same periods. They
00:56:15   **went through 2001. And they came up with slightly more, I**
believe, than 13 billion.

      So I said I know what I know. What I didn't know is the
other, and the other is what the Government said in their report
to Congress.

00:56:29   **Q.**   So your model in 2003 quantified it as the difference

1 between 13 billion and whatever you calculated for oil and gas

2 and hard rock and land sales and land leases, right?

3 A. That's correct.

4 Q. And if it had been 7 billion instead of 9.6, your model

5 would have calculated others as being 6 billion, right?

6 A. You're saying if my model -- I'm sorry, I would have to --

7 Q. We were never provided with any data for your calculations

8 that came to 9.6 billion, right?

9 A. That's correct. It was -- 1.5 was merely a trial on

10 methodology.

11 Q. But I'm asking you if, for example, your model had

12 generated a figure of 8 billion instead of 9.6 billion, your

13 model's calculation of other would have been 5 billion then,

14 right?

15 A. That's a hypothetical question. My model didn't do that.

16 Q. I'm asking you to assume that.

17 A. Then we would have to look and see is that 5 billion a

18 reasonable number to assume.

19 Q. Okay. But the answer is it would have at least initially

20 calculated it as 5 billion, right?

21 A. That's what the math would do. We'd have to make an

22 evaluation. If that case presented itself to me, I would have

23 to evaluate the appropriateness of that number.

24 Q. Okay. Last question for you, Mr. Fasold. Does your report

25 anywhere use the word "throughput"?

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1 A. I'm sorry, I didn't even hear you.

2 Q. Does the word "throughput" appear anywhere in your expert

3 report?

4 A. No. My particular report doesn't have that word.

5 MR. WARSHAWSKY: Thank you. Your Honor, I have no

6 more questions.

7 THE COURT: Mr. Guilder?

8 REDIRECT EXAMINATION

9 BY MR. GUILDER:

10 Q. Is there a reason why your expert report doesn't use the

11 word "throughput"?

12 A. Yes, because that --

13 THE COURT: Because he's an English speaker.

14 (Laughter)

15 THE WITNESS: I'm surprised you say that after my

16 testimony. Throughput implies to me, as I said, the receipts

17 and disbursements, and we weren't charged with quantifying

18 disbursements, so I couldn't address that subject.

19 BY MR. GUILDER:

20 Q. Could you address disbursements based on the information

21 you have?

22 A. The only way that we addressed disbursements is as a

23 percentage of receipts, and that's just merely a way to

24 mathematically quantify things.

25 Q. So your model only deals with inputs?

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1 A. Yeah. Of the throughput categories, I would say we dealt

2 with one subset, which is credits.

3 Q. You were asked some questions on cross-examination about

4 the confidence or the degree of difference. What's the Monte

5 Carlo simulation? Can you explain that?

6 A. I will explain it the way I use it, and again, it is a

7 statistical feature that is --

8 MR. WARSHAWSKY: Objection, Your Honor. This is

9 beyond the scope of cross. I didn't ask any of this.

10 THE COURT: Did you ask anything about Monte Carlo?

11 MR. WARSHAWSKY: No.

12 MR. GUILDER: This is a simulation about the error

13 rates that he was explaining to Your Honor. If it doesn't add

14 anything to the testimony, we don't have to --

15 THE COURT: He told me what I needed to know. He said

16 5 percent -- he said 95 percent confidence rate at 5 percent

17 plus or minus. That's close enough for me.

18 MR. GUILDER: Okay.

19 BY MR. GUILDER:

20 Q. And how would you describe your estimates of the total in

21 terms of percentage that -- I'm sorry. Can I rephrase that

22 question? Would you characterize your estimate as conservative?

23 A. Yeah. Absolutely. I mean, that is one of the reasons that

24 we feel comfortable with our "other" number is -- and I've used

25 the word, that's sort of the base that I believe is in the realm

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1 of probability.

2 Q. And one last point. Are you aware of whether the

3 Government, per the Court's direction after trial 1.5, if they

4 evaluated the methodology that you used?

5 A. I've seen they commissioned a group out of Boulder, I

6 believe, as I recall, because I had seen their work before, to

7 give them a report regarding the use of GIS techniques.

8 Q. And if we could look at Bates 60-4-1.

9 MR. WARSHAWSKY: Your Honor, I'm going to object.

10 Beyond the scope of cross.

11 THE COURT: Can't see it.

12 MR. GUILDER: I'm sorry, if we could zoom in, please.

13 During cross-examination Mr. Warshawsky was attempting to

14 characterize all the methodologies as estimates. I'm just

15 trying to understand what the Government's evaluation of his

16 methodology was.

17 THE COURT: I'll sustain the objection.

18 MR. GUILDER: All right. No further questions,

19 Your Honor.

20 THE COURT: All right. Thank you. Mr. Fasold, thank

21 you, sir. That completes your testimony. You may step down.

22 (The witness steps down.)

23 Mr. Harper.

24 MR. HARPER: Good afternoon, Your Honor.

25 THE COURT: Good afternoon.

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1   MR. HARPER: The Plaintiffs would like to call as our
2 next witness Mr. Robert McCarthy.
3   (The witness takes the stand.)
4   MR. HARPER: Good afternoon, Mr. McCarthy.
5 Your Honor, you have asked for a proffer for these witnesses,
6 and very briefly, Mr. McCarthy is presently the field solicitor
7 in Palm Springs, where, as we will get into in the testimony,
8 produces upwards of 10 percent of the income of the trust, or
9 approximately that amount, according to the Government's own
10 numbers, on Indian allottee land.
11   He will testify as to reliability of records, reliability
12 of data, failure to properly maintain records and general
13 mismanagement at Palm Springs.
14   THE COURT: All right.
15   **ROBERT MCCARTHY, WITNESS FOR THE PLAINTIFFS, SWORN**
16   DIRECT EXAMINATION
17 BY MR. HARPER:
18 Q.   Mr. McCarthy, could you please state your name and spell
19 your last name for the record, please.
20 A.   **Robert McCarthy. M-C-C-A-R-T-H-Y.**
21 Q.   What is your present position, Mr. McCarthy?
22 A.   **Palm Springs field solicitor in the United States**
23 **Department of the Interior.**
24 Q.   And what office do you presently work out of?
25 A.   **I presently work out of my home office.**

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1 Q.   And since when have you been working from your home office?
2 A.   **Since late April of 2007. Prior to that I worked out of an**
3 **office for three and a half years that was in the same complex**
4 **of offices as the Bureau of Indian Affairs Palm Springs Agency.**
5 Q.   So you were located for most of your tenure as a field
6 solicitor at Palm Springs at the BIA agency office in Palm
7 Springs; is that correct?
8 A.   **Correct.**
9 Q.   I'd just like to touch on some of your background before we
10 get into some of the substance, give the Court a sense of some
11 of the other things you've done. Prior to your position as Palm
12 Springs field solicitor, were you at the Department of the
13 Interior?
14 A.   **I joined the Department of the Interior in 1999 as -- my**
15 **first position was Tulsa field solicitor. And in that position**
16 **I supervised about a 12-person field office that served**
17 **Department of the Interior agencies in Oklahoma, Texas, and**
18 **Kansas, again primarily Bureau of Indian Affairs but also Bureau**
19 **of Land Management, Fish and Wildlife Service, mainly.**
20 Q.   And since your graduation from law school and prior to the
21 time you joined as field solicitor in Tulsa, what generally --
22 what was the nature of your practice?
23 A.   **For 12 years, for the 12 years prior, I worked for a number**
24 **of legal aid programs that provide legal services to low-income**
25 **Native Americans. And those programs were in Montana, Idaho,**

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1 **Oregon, Washington. And I served on the board of a program in**
2 **Oklahoma, and thus I'm admitted to practice in all those states**
3 **as well. I also during that time started Indian law clinics and**
4 **taught Indian law at the University of Idaho and the University**
5 **of Washington.**
6 Q.   So is it fair to say for your entire career you've
7 practiced Indian law?
8 A.   **That's fair to say.**
9 Q.   And what compelled you to take the field solicitor position
10 in Palm Springs?
11 A.   **After 12 years of legal services practice, as probably most**
12 **people know, legal services doesn't pay very well, so that was**
13 **one factor. I expected that the job would be an opportunity to**
14 **continue doing what I considered public service work. I**
15 **considered that the Department as trustee on behalf of Native**
16 **Americans performs a similar role to the role that I often**
17 **played as an advocate for my clients, sort of a trust counsel**
18 **position.**
19   **So I anticipated that in addition to making more money,**
20 **having more responsibility, managing an office, that I would**
21 **also probably have a lot more impact on the lives of Native**
22 **Americans.**
23 Q.   And when you say that as solicitor you saw your job as
24 trust counsel, what do you mean by that term?
25 A.   **Well, as I understand the duty of -- the Department's**

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1 **fiduciary duty, and for an attorney working for the Department**
2 **with respect to that duty, the duty goes to the beneficiary of**
3 **the trust, to the extent that the activities of the agency are**
4 **to further the trust responsibility. In addition to which, the**
5 **Government attorney in any event has a broader responsibility to**
6 **the public than to an individual client. Hopefully that**
7 **answered your question.**
8 Q.   With respect to those fiduciary duties, could you sort of
9 describe -- and your role in the management of the trust, could
10 you describe some of the responsibilities you have as field
11 solicitor?
12 A.   **In Tulsa, as I said, I supervised a 12-person office. We**
13 **were responsible for advising the Bureau of Indian Affairs,**
14 **Bureau of Land Management, and Fish and Wildlife Service on an**
15 **entire range of issues, from personnel matters to environmental**
16 **issues, public land use issues.**
17   **With respect to the Bureau of Indian Affairs in particular,**
18 **a lot of the work had to do with the Bureau's approval of land**
19 **leases, transactions involving Indian lands, so we would advise**
20 **with respect to that. Oklahoma also has a unique statutory**
21 **provision with respect to tribes in eastern Oklahoma, the**
22 **so-called five civilized tribes, where by statute the Tulsa**
23 **field solicitor's office appears in state courts for any leases**
24 **involving allotments of members of that tribe, mostly their oil**
25 **and gas leases.**

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1　　　When I transferred to Palm Springs, the nature of the work
2　changed pretty dramatically. I served two BIA offices, the Palm
3　Springs Agency and the Riverside Agency, which serves the rest
4　of the Southern California tribes, some 30-some tribes. The
5　Palm Springs Agency served the Agua Caliente Band of Cahuilla
6　Indians in Palm Springs.
7　　　The nature of the work there was much more specifically,
8　heavily involved in BIA lease approvals. There was some of all
9　the other issues, but by far the lion's share of the work was
10　advising the Bureau with respect to lease transactions and other
11　transactions affecting Indian lands.
12　Q.　And that would include the management of the assets. Is
13　that a fair statement?
14　A.　I'm sorry?
15　Q.　That would include the management of funds; is that
16　correct?
17　A.　It would include the collection of funds from leases, yes.
18　Q.　And could you give the Court a sense of some of the sort of
19　distinguishing characteristics of the Palm Springs Agency office
20　and their dealings with respect to individual Indian trust
21　assets and funds?
22　A.　Yes. When I first arrived in Palm Springs, it was November
23　of 2003. The first thing I learned was that 10 years, 12 years
24　earlier there had been a report developed -- an investigation
25　done by the Office of the Inspector General, and a report issued

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1　in 1992, that found that the agency had a very poor system of
2　recordkeeping, was grossly mismanaging the leases, was not
3　collecting funds as it should from the leases, was not
4　maintaining records with respect to collection of funds, and
5　generally was not enforcing the leases once they were written.
6　　　So that, for example, if a lease -- the regulations require
7　the rental to be revised every five years, so that it doesn't
8　get stagnant at an old level, because these are long-term
9　leases. They found that routinely the Bureau would not enforce
10　these rental increases, so these funds were never collected as a
11　pretty much routine matter. So that was what I learned when I
12　got there, that that was the history of the agency.
13　Q.　And these problems, did they serve to the benefit or the
14　detriment of individual Indians?
15　　　MR. KIRSCHMAN: Objection, Your Honor, to that
16　question. The question posed is beyond the scope of this
17　hearing, and the case for that matter. As just described by the
18　witness, it involves mismanaging leases, not collecting funds
19　from leases. This is asset management issues that is outside
20　the scope of this case. Might be another trial for another day,
21　but not here.
22　　　MR. HARPER: Your Honor, if I can clarify and ask if
23　it has to do with fund collection and other fund issues.
24　　　THE COURT: I'll overrule. We'll see where this is
25　going.

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1　BY MR. HARPER:
2　Q.　Mr. McCarthy, in general, did these problems inure to the
3　benefit or the detriment of individual Indians?
4　A.　Well, certainly to the detriment.
5　Q.　And part of the mismanagement identified had to do with
6　those assets and the funds collection in other aspects of the
7　fund management. Is that a fair statement?
8　A.　The essential problem identified was that the Bureau was
9　not collecting -- was not properly identifying the funds that
10　were owed under these leases, was not collecting the proper
11　amount of funds that was owed under these leases, and was not
12　maintaining really any system of documentation or records that
13　could be used to verify that the funds -- how much funds were
14　owed to a particular allottee and how much funds were collected
15　pursuant to those leases.
16　Q.　So even if the funds were collected, because of the lack of
17　documentation --
18　　　THE COURT: We're still talking about the report 10
19　years ago?
20　　　MR. HARPER: Yes, Your Honor. And we will -- I'm
21　sorry. I thought you were asking me.
22　　　THE COURT: Right?
23　　　THE WITNESS: The report 10 years ago said all of
24　those things. I guess I'm also saying that that situation has
25　not changed in the slightest.

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1　　　THE COURT: Well, but we're going to get to a
2　foundation for that. That's a sweeping statement. I want some
3　detail on that before you go there.
4　　　MR. KIRSCHMAN: Your Honor, of a similar nature, I
5　also object to the leading nature of these questions.
6　　　THE COURT: Sustained. This is one witness who should
7　not be led, Mr. Harper.
8　BY MR. HARPER:
9　Q.　Mr. McCarthy, let me turn your attention if I could to
10　Plaintiffs' Exhibit 4497. Do you recognize this document?
11　A.　Yes, I do.
12　Q.　And what do you recognize it to be?
13　A.　This is a draft audit by the Office of the Special Trustee
14　at the Palm Springs Agency that was published in draft form on
15　July 20, 2007, that was conducted in specific response to
16　disclosures that I had made regarding the allegations that the
17　problems that existed in 1992 continued in exactly the same
18　fashion.
19　Q.　So those things that occurred in 1992, you had
20　discovered -- well, what did you discover about those problems
21　that were set forth in the OIG report from 1992?
22　A.　Well, the OIG report recommended essentially three
23　remedies. The three remedies were that the agency establish an
24　office of the field solicitor there. The agency did that. The
25　second one was that they would ensure that all leases were

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1 negotiated at fair market value, and that they included these
2 required escalation clauses. And the third one was that they
3 would actually enforce the leases, that they would have a
4 system, develop a system and put it in place, to ensure that the
01:17:21 5 funds were actually collected in the proper amounts.
6 And what I found was that, from my very first days there,
7 as I said, I became familiar with this report. Obviously, they
8 had done the first thing. I could find no system of records
9 that would indicate that there was any procedure or policy in
01:17:54 10 place any different than existed in 1992 with respect to the
11 collection of the income, the identification of the income and
12 the collection of the income.
13 In particular -- well, in fact the Department at the time
14 in 1992 agreed to do all these three things. In addition, the
01:18:17 15 Department issued a press release and a six-point plan and they
16 added some other things that they promised to do to fully
17 automate the lease collection process so that, for example,
18 default notices would be sent out within, I think it was three
19 weeks of when a default occurred; that they would actively
01:18:42 20 market the leases. A couple of other things like that.
21 Virtually, the only thing that I found existed was the fact
22 that there was a field solicitor's office there. There was no
23 automated lease management system. There was no -- getting
24 carried away, I guess.
01:19:04 25 MR. KIRSCHMAN: Your Honor, I renew my objection as

1 outside the scope of this case based on the witness's answer to
2 that last question.
3 THE COURT: So far you're right. Mr. Harper?
4 MR. HARPER: Your Honor, I think Mr. McCarthy is
01:19:16 5 testifying as to the failure to collect funds, and also other
6 mismanagement of funds. But I'm trying to lay the foundation
7 for him to get to those things. The fact is that he's
8 describing in his experience the pervasive nature of the lack of
9 documentation, but it implicates all aspects of mismanagement.
01:19:39 10 THE COURT: All right. He's come here to say it. Go
11 ahead. I'll allow it.
12 THE WITNESS: Your Honor, may I respond to your --
13 THE COURT: No. Answer his next question.
14 BY MR. HARPER:
01:19:54 15 Q. Mr. McCarthy, this report, if we can turn your attention to
16 the second page of this report, Plaintiffs' Exhibit 4497. In
17 the top paragraph, if you can read that top paragraph, and it
18 says: "We initiated this review because of recent allegations
19 of mismanagement." Whose allegations were those, if you know?
01:20:23 20 A. They were mine, and the report also says so.
21 THE COURT: What is the status of this report? He's
22 called it a draft.
23 MR. HARPER: Your Honor, all we have is the draft
24 report. This is a special trustee's report, and so I think even
01:20:40 25 in draft form, we would argue that it's not hearsay because it

1 falls within the admission of a party opponent.
2 THE COURT: Well, I'm not sure about that, but go
3 ahead. Just as long as we're clear this is a draft. Go ahead.
4 BY MR. HARPER:
01:21:02 5 Q. If we could turn to the third paragraph of that report, if
6 you can just read that to yourself.
7 (Witness reviewing document.)
8 And that is consistent with what you were reporting to the
9 Department?
01:21:29 10 A. That's a pretty good summary of the disclosures that I had
11 been making to the Department over the course of the prior two
12 or three years.
13 Q. And if I can turn your attention to page 6 of the report,
14 but page 7 on the pdf. You heard the Government's objection
01:21:53 15 that this was outside the scope. If I can ask you to turn your
16 attention to the first full paragraph, beginning "Our review."
17 If you can read that just to yourself and then tell me whether
18 that's consistent with your understanding.
19 MR. KIRSCHMAN: Objection. Consistent with his
01:22:15 20 understanding of what?
21 MR. HARPER: Of the facts.
22 THE WITNESS: What this says is that -- they pulled a
23 file, which is a major lessee, the Mission Hills Country Club.
24 They found that one of the landowners, the lessors, it was a
01:22:44 25 unitized lease with a number of lessors, somehow came to have a

1 debt of $58,000 to the lessee, Mission Hills, so instead of
2 making the normal lease payment, Mission Hills deducted the
3 $58,000 from the amount owed.
4 And when the BIA received the payment, instead of docking
01:23:11 5 that particular owner the 58,000, they spread the shortage out
6 among all the owners. So that they all received less than they
7 should have, except for this one individual, who received more
8 than he should have.
9 Q. And so just to synopsize, they actually took in and
01:23:34 10 collected by the Department a certain amount, but then failed to
11 properly distribute that amount.
12 MR. KIRSCHMAN: Objection. Leading.
13 THE COURT: Sustained. I get it, Mr. Harper. You
14 don't have to ask him what this means. I understand it.
01:24:02 15 BY MR. HARPER:
16 Q. Mr. McCarthy, if I can turn your attention to Plaintiffs'
17 Exhibit 4498. This is the cover page of Plaintiffs' Exhibit
18 4498. Do you recognize this document?
19 A. Yes, I do.
01:24:20 20 Q. And it says "From field solicitor, Palm Springs." Is that
21 during your tenure?
22 A. Yeah. I wrote this document.
23 Q. And could you tell the Court what this document sets out?
24 A. Well, in a last-ditch effort, I guess, to try and persuade
01:24:47 25 the regional solicitor and others in the Department that there

1 was a complete lack of recordkeeping of income, identification
2 of income that needed to be collected, and failure to have any
3 system to record the collection of income, I appended to this
4 short, one-page memo a document that was given to me by the BIA
01:25:12 5 staff and represented to me to be their recordkeeping system.
6 And as I say in the short memo, the document lists 135
7 master leases. It's my understanding there are more than a
8 thousand. And it purports to be a kind of a spreadsheet about
9 who the lessee is, how much money is owed in rent on an annual
01:25:47 10 or monthly basis, when the payments are due, how much has been
11 collected, if there's a cost of living adjustment, that sort of
12 thing.
13 But as you can see by the last line, the document was
14 essentially without any substantive information. There was a
01:26:06 15 little bit of information filled in by hand in some of the
16 columns, but it was basically a useless tool that would have
17 been inaccurate the day after it was filled in by pencil because
18 all of the -- even for those limited number of leases for which
19 the information was provided.
01:26:24 20 Q. And you had mentioned that the OIG in '92 had asked that an
21 automated system be put in. Was one ever put in?
22 A. In 1998 the office acquired an automated lease management
23 system known as PC Lease, and that system was intended to be the
24 automatic system that would be sort of an electronic tickler
01:27:01 25 system that would automatically issue invoices, default notices,

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1 that would keep track of cost of living increases, that would
2 keep track of how much money was owed on a lease, how much was
3 collected. The system, however, was never put into use.
4 Q. Did you ask anybody about that system?
01:27:24 5 A. Well, it took -- when I first got there, I searched high
6 and low for what kind of a system. This is what I found. At
7 some point I also learned about this PC Lease system, and I
8 found that it was in a locked room in the back of the office
9 that no one accessed. It was not plugged in. It had no --
01:27:45 10 essentially it had no data in it.
11 Q. And so then, as you say, the only system was the manual
12 system. This file here that's up says 135 master leases. Is
13 that how many master leases are in existence in this agency?
14 MR. KIRSCHMAN: Objection. Lack of foundation.
01:28:10 15 THE COURT: I'm going to sustain the objection and
16 we're going to take a break. But could I see Mr. Harper and
17 Mr. Kirschman at the bench, please.
18 (Bench conference off the record.)
19 (Recess from 3:14 p.m. to 3:28 p.m.)
01:41:54 20 THE COURT: Go ahead, Mr. Harper.
21 THE WITNESS: Thank you, Your Honor.
22 MR. HARPER: Your Honor, when we left we were talking
23 about Exhibit 4498, and I realized that was the nonredacted
24 version. There's some controversy regarding whether it should
01:42:32 25 or shouldn't be redacted. So I'm just going to go ahead and use

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1 the redacted version, which is 4455.
2 THE COURT: All right.
3 BY MR. HARPER:
4 Q. Mr. McCarthy, you say in this document that there's listed
01:42:48 5 135 master leases. How many master leases are there actually in
6 the Palm Springs Agency, approximately?
7 A. There is no list. To this day there is no complete list of
8 master leases, but it numbers in my estimation over 1,000, just
9 over 1,000, plus 25,000 subleases.
01:43:18 10 Q. To the best of your knowledge is there a master list of
11 subleases?
12 A. I don't believe there is.
13 Q. If we can turn to page 2 of the document. As you can see
14 in this document, there are redactions on the left. Who made
01:43:39 15 those redactions?
16 A. You know, frankly, I am not sure whether I did or I have --
17 I typically redact identifying information on documents, and I
18 honestly don't know whether I did that before I gave that to you
19 or whether your staff did it. I don't know.
01:43:57 20 Q. Okay. And do you know -- is there supposed to be
21 information on these pages?
22 A. Well, the only information that's redacted is the name of
23 the lessee, and as we saw on the cover memo, there were a
24 hundred and some lessees listed.
01:44:14 25 The idea was that this was the lease management system.

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1 This was going to show how much -- this was going to identify
2 for each lease how much rent was owed, when it was supposed to
3 be paid, how frequently, when the next due date was, whether it
4 was paid, for what term, whether there's a cost of living
01:44:38 5 adjustment, when that's supposed to kick in, which would be a
6 wonderful tool to stay up-to-date on how much money is owed for
7 which lease and whether it's been collected. But as you can
8 see, there's no data entered. It was entered only on a few
9 sheets.
01:44:53 10 Q. And if we turn to page, say 5, we can see here there is
11 some data for some of these leases, correct?
12 A. Right.
13 Q. And this represents -- what does this represent as far as
14 in concern -- with relation to the leases?
01:45:13 15 A. Well, on this sheet it's a point in time for, say the top
16 lease, it indicates that they're supposed to pay quarterly, and
17 I can't quite read what it means. Oh, it's the term, how many
18 years the lease is for. You can tell on the second one it's a
19 65-year lease. Cost of living, that looks like it says -- I
01:45:42 20 can't tell what that says. Looks like 15 years. It's supposed
21 to be every five years. It does say 15 years. It's supposed to
22 be every five years. It doesn't have anything for the percent
23 due date.
24 So really the next period, next quarter, next month,
01:45:58 25 however periodic it is, this information, if it was filled in,

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1 would be outdated since it's being filled in by hand. It's not
2 an automated system.
3 Q. These problems that you identified, did you report them to
4 anybody at the Department of Interior?
5 A. Well, as you saw on the cover memo, I provided this to the
6 regional solicitor after years of trying to bring the problem to
7 his attention. And this I thought would do the trick, that this
8 is the lease management system, this is how they know how much
9 money is owed and what's been collected, and it obviously is not
10 adequate.
11 Q. And I'm going to just put up one other document and just
12 ask you to identify it and say what it is without -- we won't go
13 into any of the specifics of it. Plaintiffs' Exhibit 4494. Do
14 you recognize this document?
15 A. Yes.
16 Q. And what is it?
17 A. On April 22 of 2005, I wrote to the acting assistant
18 secretary for Indian Affairs, Mr. James Cason, elevating the
19 types of concerns that I had been expressing in countless
20 memoranda over the previous couple of years at lower levels of
21 the agency. And so I basically described that the agency was --
22 had not implemented the '92 OIG recommendations, did not have an
23 automated lease management system, did not know how much income
24 was owed on leases, did not know -- was not collecting the
25 proper amounts, had no records to show how much money was

1 collected, when it was due, how much was due.
2 And then I included in this memo I think more than a dozen
3 specific examples with lease numbers, and then I would describe
4 what was wrong. If an auditor came in and looked at that file,
5 what they could look for to see that the income was underpaid.
6 Q. And if we can turn to page 3 of this document. And if we
7 can go down to the second paragraph. This mentions the PC Lease
8 program that you discussed. And can you talk about what the
9 problem identified here is?
10 A. This dealt with -- I was quite insistent that the agency
11 needed to at least try to use the PC Lease program. And so
12 finally it was placed -- brought out of the back room and it was
13 placed on the desktop of a new employee. The issue at the time
14 was there were I think 56 billboard permits, which are similar
15 to leases, although technically they're terminable at will and
16 they don't have a term, but the agency tended to use them
17 interchangeably.
18 So there were 56 of these leases or permits. The company
19 that held all of them was getting out of the business in
20 California and wanted to assign them all to another company.
21 The second company was eager to take them over because they also
22 had a big batch of these types of billboard leases, but they
23 balked at taking over these leases, because they had a pretty
24 good idea that a lot of money had not been collected on these
25 leases.

1 MR. KIRSCHMAN: Objection.
2 THE COURT: Sustained. There's no jury here, but I
3 will let it be known that I'm disregarding that last part about
4 what pretty good idea they may or may not have had or why they
5 balked.
6 BY MR. HARPER:
7 Q. If we can turn to page 8 of this document. Not the
8 highlighted but under the highlighted. The next paragraph. If
9 you can read that to yourself, Mr. McCarthy.
10 Can you tell me what this specific issue is with respect --
11 could you talk about that specific issue that you've identified?
12 A. There's been some testimony I think in the last couple of
13 days about special deposit accounts. I think Ms. Redthunder in
14 particular talked about how sometimes the agency would put money
15 into a special deposit account if it couldn't quickly tie it to
16 a specific allotment and allottee, and thus a specific IIM
17 account.
18 In this case funds were put in this special deposit
19 account. The amount at the time that I saw the file was
20 $130,000. It turned out that the account had been established
21 in 1977, so this was -- '87, '97 -- this was about 25 years
22 later, 20 years at least later. And by looking at some lease
23 records I was able to identify fairly easily who the account
24 belonged to, which business lease it came from, and who it
25 should have been paid to.

1 In fact, it was a very prominent tribal official. It was
2 no trouble at all to identify who that money should have been
3 paid to in 1977, or 1983 when the lease was canceled.
4 Q. If I can turn your attention back to some larger picture
5 issues, could you sort of -- could you tell me about how much
6 money in lease income the government estimates is involved at
7 Palm Springs Agency for individual Indians?
8 A. The government says that they collect $30 million a year at
9 the Palm Springs Agency from leases.
10 Q. And do you know whether today there is a system for lease
11 management?
12 MR. KIRSCHMAN: Objection. Outside the scope of this
13 case. Irrelevant.
14 MR. HARPER: Your Honor, it involves collections of
15 funds.
16 MR. KIRSCHMAN: This case isn't about the collection
17 of lease funds, Your Honor.
18 THE COURT: I'm going to allow it.
19 THE WITNESS: I'm sorry. Could you repeat the
20 question?
21 BY MR. HARPER:
22 Q. Do they have a system for lease collections, for accounts
23 receivable system?
24 A. In the last year or so -- we've also had testimony I think
25 about the TAAMS system, and I'll probably butcher what the

1 acronym stands for, but trust accounting asset management
2 system. The Palm Springs Agency was supposed to kind of convert
3 its system of information to the -- and populate the TAAMS
4 program with the asset information. And so as of this point,
01:53:28 **5** sometime within the last year, presumably there is such a system
6 and it is TAAMS. I haven't seen it myself.
7 Q. But prior to that point --
8 THE COURT: Just before we move on past this point,
9 and in further response to Mr. Kirschman's objection that this
01:53:50 **10** trial is not about the collection of lease funds, he's right
11 about that, but this trial is about the adequacy of the
12 accounting and the question of whether the accounting is
13 reaching into the question of lease funds is I think part of
14 this case. Proceed, Mr. Harper.
01:54:10 **15** MR. HARPER: Thank you, Your Honor.
16 BY MR. HARPER:
17 Q. Prior to that point, had there been any accounts receivable
18 system at the Palm Springs Agency?
19 A. None whatsoever.
01:54:22 **20** Q. And so how were -- how were agency officials -- how do they
21 know to go out and collect funds?
22 A. Essentially fund collection was on the honor system. The
23 agency depended entirely on the lessee to report how much money
24 it owed, to report any increases because of cost of living
01:54:49 **25** increases, to report if it was a percentage of income rental

1 where the lessee would get a percentage of income, they would
2 depend entirely on the lessee to report how much income there
3 was. They had no proactive way of invoicing payments even when
4 they were in default. I saw files that were years in default
01:55:18 **5** and no action was taken to issue even default notices, let alone
6 invoices.
7 Q. You mentioned for a moment, and could you further explain
8 what you meant by leases that required percentage-based
9 payments?
01:55:36 **10** A. The percentage -- the typical rental would be established
11 according to an appraisal of the fee value of the land, and then
12 typically in Palm Springs the appraisers say that the annual
13 rental value is about 10 percent of the fee value. And so that
14 would -- most often that would be the rent that would be agreed
01:56:08 **15** on.
16 In a lot of cases, and probably more often than not these
17 days, there is in addition to that a percentage of income
18 provision in the lease whereby the lessor, the allottee, the
19 Indian landowner, receives a percentage of the revenues from the
01:56:31 **20** business that is operated on the leased land
21 Q. And so how does the trustee here determine that the
22 beneficiary receives sufficient funds?
23 A. The Bureau does not play any role in monitoring the
24 payments, auditing the revenues, even measuring, comparing the
01:57:06 **25** amounts paid to the amounts that the lease would call for.

1 Q. And what kind of percentages are we talking about,
2 Mr. McCarthy?
3 A. You know, it could be anything. It could be a percentage
4 of gross revenue, it could be a percentage of net revenue, it
01:57:26 **5** could be anything from 2 percent to, the highest one I've ever
6 seen was within the last few years. It was an amazingly
7 generous, from the lessee's perspective, lease, where there was
8 a guaranteed -- in all leases -- and I should back up a moment,
9 there is a guaranteed minimum annual rent, so that the rent
01:57:47 **10** never falls below that. The percentage is always going to be
11 above that amount. In this case 42 percent of gross revenues
12 was the amount that the developer agreed to paid to the
13 landowners.
14 Q. What kind of business was that?
01:58:05 **15** A. It was a very large golf course, hotel, business complex,
16 still under construction, although the business complex parts of
17 it are done and generating income.
18 Q. If I can turn your attention, Mr. McCarthy, to Plaintiffs'
19 PPX 508. Have you seen this document before?
01:58:43 **20** A. Very briefly. I have a general idea of what it is.
21 Q. I will represent to you it's one of the two Government
22 plans submitted to this court in January 6, 2003, before the
23 trial 1.5. And if I can turn your attention to page 12 of the
24 document, but page 15 of the pdf. If we can go to that first
01:59:14 **25** highlight. I'm going to read a couple of these and then ask you

1 some questions about it.
2 It says, "Interior's trustee is mindful of the importance
3 of recognizing the unique circumstances of the beneficiaries and
4 the management of this trust. The trust that Interior manages
01:59:29 **5** is" -- "The trust that Interior manages is not a typical corpus
6 managed by private sector trustees where fees are charged as
7 part of a normal business practice in the services delivered."
8 Do you see that?
9 A. Yes.
01:59:45 **10** Q. And then if you go to the first paragraph, the next
11 paragraph, excuse me, the first sentence, it says "The federal
12 government bears the entire cost of administering the Indian
13 trust." Do you see that?
14 A. Yes.
01:59:58 **15** Q. In your experience, is that accurate?
16 A. Well, it's legally inaccurate, and it's factually
17 inaccurate. There's statutory authority for the federal
18 government to charge fees for a wide range of services that it
19 provides in the administration of Indian lands. And those fees
02:00:26 **20** are charged in Palm Springs, to my personal knowledge, on every
21 lease.
22 Q. And could you give us a sense of how high these fees can
23 get?
24 A. Well, by regulation the highest lease fee for a given
02:00:49 **25** lease, say a lease approval, is $500. For the sale of land,

1 it's $22.50, I think. However, those are not the fees that are

2 charged in Palm Springs. Palm Springs charges 1 percent of the

3 sale price, so if land sells for $600,000, the fee would be

4 $60,000. They essentially completely disregard the regulations

02:01:28 5 in terms of the limits that are there.

6 Q. And if I can turn your attention, Mr. McCarthy, to

7 Plaintiffs' Exhibit 4489, and the last page of that exhibit. Do

8 you recognize this document?

9 A. Yes.

02:01:57 10 Q. And if we turn to the second paragraph. "Regarding a newly

11 negotiated sale between the heirs of Ms. Andreas and the new

12 purchaser, the realty officer indicated there is a 1 percent

13 administrative fee, which in this case I understand to be some

14 $60,000." Do you see that?

02:02:25 15 A. Yes.

16 Q. Was that in conformity with the regulations, the $60,000

17 fee?

18 A. No. The maximum fee in that case would have been $22.50 by

19 regulation.

02:02:35 20 Q. And you saw -- how often were fees charged above what they

21 were allowed?

22 A. In virtually every case for virtually every type of

23 administrative act, the BIA, there was another statute -- if I

24 may explain that. There's another statute that permits tribes

02:02:56 25 to set a fee schedule where the tribe performs the

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1 administrative act with tribal funds. Then the tribe then

2 collects the fees, and it can set those fees under statute and

3 regulation at whatever levels it wants.

4 The BIA uses the tribal fee schedule, even though the tribe

02:03:17 5 is not performing the functions, and then when it collects the

6 fees, it turns them over directly to the United States Treasury.

7 Q. So this $60,000 when collected would be deposited in the

8 United States Treasury?

9 A. Yes.

02:03:34 10 Q. If I can turn your attention to Plaintiffs' Exhibit 4488.

11 Mr. McCarthy, do you recognize this document?

12 A. Yes.

13 Q. If we can turn your attention to the third -- well, maybe I

14 can just ask you, what do you understand this document to be

02:04:07 15 about?

16 A. Essentially it is a memorandum written by the Palm Springs

17 Agency superintendent to the tribe's director of planning

18 shortly before August 31 of 2006 -- the document itself doesn't

19 appear to have a date -- asking for the assistance of the tribe

20 because of the looming deadline to install land data into the

21 TAAMS system. The Agency determined that it needed assistance

22 in particular because it discovered that of 900 rights-of-way

23 that it had approved, I think the term it used is that a great

24 many have inaccurate legal descriptions.

02:05:04 25 Q. And let's look at the fourth paragraph beginning "The staff

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1 has conducted." "The staff has conducted an assessment of

2 rights-of-way and unfortunately they have discovered that there

3 are errors with many of the legal description records." What

4 could be the result of such errors?

02:05:28 5 MR. KIRSCHMAN: Objection. Relevance. Outside the

6 scope.

7 THE COURT: Overruled.

8 THE WITNESS: The possibility is of course if you have

9 the wrong legal description, then you're getting paid for a

02:05:42 10 right-of-way, the potential is that you're then paying out that

11 income to somebody who owns the legal description property that

12 is described in the right-of-way, but that's not the property

13 where the right-of-way is going through.

14 BY MR. HARPER:

02:06:04 15 Q. If I can turn your attention to Plaintiffs' Exhibit 4487.

16 Mr. McCarthy, you can see this is a document from the director

17 of Office of Trust Records at the Office of Special Trustee, to

18 the acting director of Office of Trust Review and Audit. And it

19 states that it contains as an attachment a letter from you,

02:06:34 20 correct?

21 A. Yes.

22 Q. And if we could turn to the next page. And is that your

23 memorandum?

24 A. Yes.

02:06:41 25 Q. Can we look at the first sentence of that memorandum. And

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1 based on your information that first sentence is accurate,

2 correct?

3 A. Yes.

4 Q. I just have a couple of more questions for you,

02:07:05 5 Mr. McCarthy. If you can turn to Plaintiffs' Exhibit 4499.

6 Mr. McCarthy, do you recognize this e-mail?

7 A. Yes, I do.

8 Q. And who is Mr. Matthew Kirkland who's sending this e-mail?

9 A. Mr. Kirkland is a realty specialist on the staff of the

02:07:29 10 Palm Springs BIA agency.

11 Q. Can you see the date of this e-mail?

12 A. September 12, 2006.

13 Q. This is addressing some of the changes that are happening

14 regarding TAAMS. Is that a fair statement?

02:07:49 15 A. Yes. And given the date, this would have been after the

16 date that the previous document indicated was the deadline for

17 converting the system to TAAMS.

18 Q. If you can go down to No. 4, and is this what you were

19 talking about earlier, about not having this capability?

02:08:20 20 A. Well, what the author of the memo is saying is that what

21 the agency, even after the implementation of TAAMS, still lacks,

22 among other things on this item, is a tickler system that lets

23 the staff know of changes that a lease provision requires, so

24 that, for example, the rent is supposed to go up after every

02:08:44 25 five years, or there's a term of development. The development

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1 has to be done within three years. Well, they should have a
2 tickler within three years that says, okay, this lease should
3 have been developed by now. If it's not developed they're in
4 default. So that's the point that he's making.
02:08:59 5 Q. And if we can turn down to the highlighted sentence. I'm
6 going to read that and ask you a question about it. "Without
7 this capability, TAAMS is little more than a database of
8 misinformation that does not allow us to effectively manage the
9 revenue stream." Do you see that?
02:09:28 10 A. Yes.
11 Q. Is that statement there consistent with your understanding?
12 THE COURT: Counsel, the words "this capability" have
13 no referent in what you've shown me. I don't know what
14 capability this is talking about.
02:09:46 15 MR. HARPER: Your Honor, it's going through a list of
16 the missing items.
17 THE COURT: Without these primary tools.
18 MR. HARPER: Precisely. I was trying to --
19 THE COURT: Okay.
02:10:00 20 BY MR. HARPER:
21 Q. Is this consistent with your understanding of the present
22 conditions?
23 A. Yes. What the author I think is saying is they took some
24 data that did not exist in any organized fashion, somehow
02:10:18 25 populated TAAMS with some data about leases that does not

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1 contain any real and reliable information about income owed,
2 income collected, income paid, and then they put this data into
3 this TAAMS system. And I think that explains the database of
4 misinformation part.
02:10:41 5 And the second part of the phrase I think reflects more
6 directly to the fact that TAAMS doesn't do any of these other
7 things. It doesn't help them to better manage, to better
8 identify funds that need to be collected, to collect the funds,
9 to document the collection of funds.
02:11:03 10 MR. HARPER: Thank you, Mr. McCarthy. Your Honor, I
11 have no further questions.
12 THE COURT: Mr. Kirschman.
13 MR. KIRSCHMAN: Thank you, Your Honor.
14 CROSS-EXAMINATION
02:11:23 15 BY MR. KIRSCHMAN:
16 Q. Good afternoon, Mr. McCarthy.
17 A. Good afternoon.
18 Q. I'd like to turn first if I could to Plaintiffs' Exhibit
19 4498. This was previously shown to you, Mr. McCarthy, both in
02:11:34 20 redacted and unredacted form.
21 A. Yes.
22 Q. I would like to use PX 4498 for purposes of my cross, just
23 so we can see what's actually on the pages. Do you remember
24 reviewing this document with Mr. Harper?
02:11:55 25 THE COURT: You mean 10 minutes ago?

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1 MR. KIRSCHMAN: I'm sorry?
2 THE COURT: You mean 10 minutes ago?
3 MR. KIRSCHMAN: Yes.
4 THE WITNESS: Of course.
02:12:03 5 BY MR. KIRSCHMAN:
6 Q. The cover page and also then Mr. Harper showed you two
7 specific pages --
8 A. Yes.
9 Q. -- from the attached tables. Do you recall Mr. Harper
02:12:14 10 showed you a single page with no information on it? Do you
11 recall that?
12 A. Perhaps. I don't recall. I think there are about 20 pages
13 in the document.
14 Q. Okay. He also showed you page 10 of the document, with
02:12:35 15 limited information in the top right-hand corner. Do you
16 remember he showed you this document?
17 A. Yes.
18 Q. And you said just now that it's approximately a what,
19 20-page document?
02:12:48 20 A. I don't -- you have it, but as I recall.
21 Q. Okay. What I'd like to do is go through the document so
22 that we can see actually what is in here and what's not. Could
23 we please go to the second page of the exhibit?
24 Was there a reason you and Mr. Harper discussed only a
02:13:09 25 blank page and a page with very little information in the top

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1 right-hand corner?
2 A. I answered the question I was asked.
3 Q. Do you think those two pages were representative of even
4 this document that's attached to your memo?
02:13:22 5 A. I think they are -- well, I think my cover memo states very
6 clearly that -- I mean, it defines exactly how many entries
7 there are for each lease that's listed. There's maybe 10
8 percent of the total number of leases even listed, and for those
9 there's very paltry information except on a couple of pages.
02:13:46 10 Q. What I asked you was whether you thought those two pages
11 you reviewed with Mr. Harper were representative of the document
12 that you put before the Court?
13 A. And I think I answered that --
14 Q. It's yes or no. Do you think those two pages are
02:13:56 15 representative of the rest of the document?
16 A. They are part of the document. The document, I mean it
17 speaks for itself. They show that most of the pages are blank,
18 as I recall.
19 Q. Okay. Well, let's refresh your memory. Do you recognize
02:14:14 20 this on the screen as the first page? There's a No. 1 on the
21 bottom. Do you see that?
22 A. I see it.
23 Q. Is it blank?
24 A. Many of the columns are blank.
02:14:27 25 Q. Is the page blank, sir?

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1   **A.**   **No.**

2   **Q.**   Okay. Second page, please. Is that page blank, sir?

3   **A.**   **Again, many of the columns are blank. The page itself is**

4   **not blank.**

02:14:42 5   **Q.**   Third page. And this indicates the terms, doesn't it, of

6   these individual leases, as did the two previous pages. The

7   "from" and "to." Do you see that?

8   **A.**   **It indicates -- well, it's -- it has a date on the top and**

9   **then it has a number of years.**

02:15:08 10   **Q.**   Okay.

11   **A.**   **For whatever that means.**

12   **Q.**   Let's go to the next page. Is that page blank?

13   **A.**   **Same answer. Many of the columns are blank. The page**

14   **itself is not completely blank.**

02:15:19 15   **Q.**   Next page. Is that page blank?

16   **A.**   **Same answer.**

17   **Q.**   Okay. Next page?

18   **A.**   **Same answer.**

19   **Q.**   And here there's a second column after "rental amount" of

02:15:31 20   "yearly, semi, quarterly or monthly." Do you see that?

21   **A.**   **Yes.**

22   **Q.**   And on this page all of those are filled out, correct?

23   **A.**   **No. The second to last one is blank.**

24   **Q.**   And do you know why that is? Do you know what TESA is?

02:15:48 25   **A.**   **Yes. I know what TESA is.**

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1   **Q.**   Okay. What is that?

2   **A.**   **TESA is the tribal -- or not tribal, the trust enforcement**

3   **support activities. It's a tribal entity.**

4   **Q.**   Okay. Let's go to the next page. Is that page blank?

02:16:04 5   **A.**   **Not completely.**

6   **Q.**   The next page? Is that page blank?

7   **A.**   **Same answer.**

8   **Q.**   Next page?

9   **A.**   **Same answer.**

02:16:13 10   **Q.**   Next page. That's a page you looked at with Mr. Harper

11   with just some information in the top right-hand corner,

12   correct?

13   **A.**   **Correct.**

14   **Q.**   Okay. Next page? That page is in fact blank, isn't it?

02:16:25 15   **A.**   **No, it has -- it lists all the lessees by name and it lists**

16   **all the lease numbers.**

17   **Q.**   I see. Next page.

18   **A.**   **Same answer.**

19   **Q.**   And the next page.

02:16:35 20   **A.**   **Same answer.**

21   **Q.**   Next page? That's the last page of the exhibit. Now,

22   having reviewed the entire document with you, let me ask you

23   again, do you believe a blank page and that one page, page 10,

24   with information in the top right-hand corner, is representative

02:16:53 25   of the document that was attached to your cover memo?

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1   **A.**   **It represents the inadequate state of the document.**

2   **Obviously, the blank page has less information than some of the**

3   **other pages. I don't know how to answer your question, is it**

4   **representative. It is similar to the other documents. It**

02:17:20 5   **contains less information than each of the other pages.**

6   **Q.**   Okay. I'd next like to draw your attention to Plaintiffs'

7   Exhibit 4494. And up on your screen, sir, is the first page of

8   that exhibit. You'll recall, I believe you testified this was

9   the April 22, 2005, memorandum you prepared for who you believed

02:17:53 10   to be the acting assistant secretary for Indian Affairs, James

11   Cason?

12   **A.**   **True.**

13   **Q.**   And in the first paragraph of this memorandum, you note

14   what you believed a continuing breach of trust with respect to

02:18:16 15   the management of Indian trust assets. And that's what this

16   document generally addresses, isn't it?

17   **A.**   **Well, I think the document speaks for itself, but it**

18   **includes quite a bit of discussion of failure to collect income**

19   **and failure to document the amount of income owed and the amount**

02:18:35 20   **of income collected.**

21   **Q.**   On leases.

22   **A.**   **On leases.**

23   **Q.**   Okay. And in fact, on the second page of this exhibit, you

24   have a heading that talks about trust asset management, correct?

02:18:45 25   **A.**   **That's in the heading.**

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1   **Q.**   Do you see it there?

2   **A.**   **Yes.**

3   **Q.**   Mr. -- well, let me ask you. You provided this information

4   to Mr. Cason, and you also provided similar information to the

02:19:04 5   Inspector General, correct?

6   **A.**   **Correct.**

7   **Q.**   Similar examples?

8   **A.**   **Pretty similar.**

9   **Q.**   And in presenting this information, would you agree with me

02:19:15 10   that you should have presented the status of these matters as

11   accurately as possible?

12   **A.**   **Absolutely.**

13   **Q.**   Sending this memorandum to James Cason and to the Inspector

14   General, those are two important people within the Department of

02:19:30 15   the Interior, correct?

16   **A.**   **Correct.**

17   **Q.**   Both -- well, let's just focus on this memorandum,

18   Plaintiffs' Exhibit 4494. There is one mention on page 8 of the

19   document to a trust account, and Mr. Harper picked that one out

02:19:50 20   and discussed it briefly with you. You'll see it under the

21   heading "Failure to protect trust accounts," and it's the small

22   paragraph, the second paragraph under that heading. Do you see

23   that?

24   **A.**   **Yes.**

02:20:02 25   **Q.**   Now, you testified regarding the special deposit account

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1 mentioned in this paragraph, SDA No. 81, that the agency

2 couldn't quickly tie it to an allotment and then to an IIM

3 account. Correct?

4 **A.   I testified that a previous witness said that that is a**

02:20:27 5 **frequent practice in BIA. I don't know if that's exactly how**

6 **this money wound up in a special deposit account, but I**

7 **speculate -- I implied that that's a likely cause.**

8 Q.   In fact, Mr. McCarthy, you know, don't you, that this SDA

9 account was resolved and closed out well before you ever sent

02:20:49 10 this memorandum to Mr. Cason?

11 **A.   It was resolved and closed out as a result of -- well,**

12 **that's what it says, the field solicitor, referring to me,**

13 **determined from lease records that the account -- I figured out**

14 **whose money it was. That's what I told him.**

02:21:08 15 Q.   And in fact, that money was paid well before you ever

16 presented your memo to Mr. Cason, wasn't it?

17 **A.   I don't know if the money was paid or not.**

18 Q.   You don't have a recollection that the account was then

19 paid and closed?

02:21:26 20 **A.   I wouldn't have any -- I wouldn't know that. I wouldn't**

21 **see that record. I wouldn't have that record.**

22 Q.   Wouldn't you follow up on it, considering you just

23 presented it as a problem to the acting assistant secretary and

24 the Inspector General?

02:21:39 25 **A.   I didn't say that it wasn't paid. The implication is that**

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1 **it was paid. I said that I had determined that after 20 years,**

2 **25, however long it was, I had identified whose money it was.**

3 **And to me the implication is that I'd identified the owner and**

4 **therefore the agency would pay the money out at that point.**

02:22:03 5 Q.   You're not implying that no one knew who owned this account

6 for 25 years, are you?

7 **A.   Oh, absolutely. That's exactly what I'm saying.**

8 Q.   Okay. What is the name of the vice chairperson of the

9 tribe that you referenced?

02:22:19 10 **A.   Barbara Gonzalez Lyons.**

11 MR. KIRSCHMAN: Your Honor, I'd like to present the

12 witness with an exhibit for impeachment purposes.

13 THE COURT: Go ahead.

14 MR. KIRSCHMAN: I'm sorry?

02:22:55 15 THE WITNESS: Go ahead.

16 BY MR. KIRSCHMAN:

17 Q.   Your Honor, we have marked this as Defendants' Exhibit 368

18 just for identification.

19 Now, have you had a chance to review that?

02:24:05 20 **A.   Yes, I'm familiar with it.**

21 Q.   And this is a September 16, 2004, memorandum you prepared?

22 **A.   Correct.**

23 Q.   And it relates to this SDA account, the Date Palm

24 Commercial Association account?

02:24:18 25 **A.   Correct.**

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1 Q.   And I believe you may have heard, and I'm not quoting him

2 exactly, but the Court mentioned that in this case we're

3 concerned about accounting reaching into lease funds. Is that

4 your understanding of why we're here today?

02:24:34 5 **A.   My understanding is that I -- my understanding from prior**

6 **rulings of the Court and what I've heard today is that the**

7 **government must match up the leases to the allottee and to the**

8 **allotment, identify the amount of income that is owed, and have**

9 **records that show that the income was collected and paid.**

02:25:03 10 Q.   Okay. Now, this document indicates, does it not, that you

11 received and used BIA's lease records and also journal vouchers

12 to determine the correct ownership.

13 **A.   Correct.**

14 Q.   It also indicates that there were no Bank of America

02:25:28 15 records available to document the source of the funds

16 originally?

17 **A.   That's what it says.**

18 Q.   Okay. How did you come upon the journal vouchers and the

19 BIA lease records that you used to determine ownership?

02:25:49 20 **A.   They were not in -- they had no -- they were not in the**

21 **same place and in no way connected to the file dealing with**

22 **special deposit account 81.**

23 Q.   Where were they?

24 **A.   They were in the leasing files.**

02:26:11 25 Q.   Whose leasing files?

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1 **A.   The BIA's leasing files.**

2 Q.   And where were they located?

3 **A.   In the leasing files room in the back of the BIA.**

4 Q.   I'm sorry, geographically.

02:26:24 5 **A.   Palm Springs Agency.**

6 Q.   And how far is that from you?

7 **A.   I was in the agency.**

8 Q.   So they were down the hall?

9 **A.   Yes.**

02:26:33 10 Q.   And you didn't collect these documents.

11 **A.   The lease documents?**

12 Q.   Or the journal vouchers.

13 **A.   The Bureau -- I think we've had testimony that there was a**

14 **cleanup of special deposit accounts project, and a Bureau**

02:26:55 15 **employee presented this special deposit account to me and asked**

16 **for my assistance to determine, after 20 or 25 years, who the**

17 **money belonged to. And so I advised the Bureau employee how we**

18 **would go about determining that, which involved identifying**

19 **whatever records would help to track this to a specific lease,**

02:27:24 20 **and therefore we could identify who owned that property and thus**

21 **who the money should have been paid to.**

22 Q.   Okay. And after reviewing the BIA lease records that were

23 right down the hall and the journal vouchers that you mentioned

24 on the second page of this memo, you concluded that it is clear

02:27:45 25 that those deposits consist of payments made by the lessees

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 1   under PSL-205, as well as PSL-205A and 205B. Correct?
 2   A.   I'm looking for that language.
 3   Q.   It's on the very last line.
 4   A.   Okay. Yes.
 5   Q.   And you also were able to determine that the owner was in
 6   fact Ms. Gonzalez, correct?
 7   A.   Correct.
 8   MR. KIRSCHMAN: Your Honor, to continue this
 9   impeachment I'd next like to show the witness DX 367. May I
10   approach?
11   THE COURT: You may.
12   BY MR. KIRSCHMAN:
13   Q.   Before I leave your two-page memo dated September 16, 2004,
14   the previous document, I received last night about nine
15   documents from you that I had been told was produced by you to
16   Plaintiffs. Was there a reason I did not receive this September
17   16, 2004, memorandum?
18   A.   Not that I'm aware of.
19   Q.   Did you bring it with you to Washington?
20   A.   I think I did.
21   Q.   You did?
22   A.   I believe I did. I don't know. I think it's in the files
23   that I gave to Plaintiffs' counsel.
24   Q.   But you don't know if it was provided to us or not.
25   A.   I wouldn't have any idea.

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 1   Q.   Looking at the next exhibit, it's a journal voucher dated
 2   11/15/2004. Do you see that?
 3   A.   Yes.
 4   Q.   Are you familiar with this type of document?
 5   A.   You know, I probably have seen this document, but as a
 6   rule, no, I wouldn't be familiar with any kind of a payment
 7   voucher.
 8   Q.   But you've seen this document, correct, because it related
 9   to SDA 81?
10   A.   I assume that I did.
11   Q.   Okay.
12   A.   I don't know if I did. The date on it is 11/15/04. So
13   it's after the date of my memo.
14   Q.   Approximately two months after your memo.
15   A.   So I don't know if I would have seen it.
16   Q.   And approximately six months before your memorandum to
17   Mr. Cason, correct?
18   A.   Correct.
19   Q.   Do you know who Ollie Bird is who signed this as acting
20   director?
21   A.   It's Ollie Beyal, B-E-Y-A-L.
22   Q.   And who is Ollie Beyal?
23   A.   According to the signature that she used that day, she's
24   the acting director, which was the same as the acting field
25   solicitor -- I mean, agency superintendent. They changed the

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 1   name. It used to be called a director of the Palm Springs BIA
 2   office, and they changed it to superintendent. So at that time
 3   it was called director. So she signed as director.
 4   Q.   Physically, where was she located at this time? Where was
 5   her office?
 6   A.   In the same complex of offices that I'm in, not very far
 7   from me.
 8   Q.   And this document, does it not, refers back to SDA No. 81
 9   that you referred to in your memorandum to Mr. Cason?
10   A.   Yes.
11   Q.   That is the Date Palm Commercial Association SDA, correct?
12   A.   True.
13   Q.   And it indicates, does it not, that a payment was being
14   made to Barbara M. Gonzalez plus interest, correct?
15   A.   Yes.
16   Q.   And it also indicates at the very bottom that the account
17   was closed, correct?
18   A.   It says "close account" and "yes" is circled, so it looks
19   like it was a direction to close the account. But I have not --
20   I don't know that I've ever seen this. I don't know -- when you
21   first handed it to me, I assumed it was a document that I used
22   as part of reconciling this, but I see the date is well after my
23   memo. So I think it's very likely that I've never seen this
24   document.
25   Q.   So what you're saying is you presented Mr. Cason and the

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 1   Inspector General with a situation and never checked to see if
 2   the account was actually paid to the beneficiary?
 3   A.   I assumed that it had, and I don't think my memo says
 4   anything otherwise.
 5   Q.   Why would you assume it had? Because it was followed up
 6   on?
 7   A.   Because I wrote a memo to the superintendent and identified
 8   who the money was owed to, and that was fairly soon after I had
 9   started there, and I had assumed that, knowing who the account
10   belonged to, that they would pay the funds out.
11   MR. KIRSCHMAN: Your Honor, I have two more exhibits
12   I'd like to show the witness on this same issue.
13   THE COURT: Yes. Fine.
14   BY MR. KIRSCHMAN:
15   Q.   This is a one-page printout. It is marked as DX 366 for
16   identification. Do you know what this document is, sir?
17   A.   I've never seen it before, but it appears to be a report of
18   a transaction indicating funds, if I understand it correctly,
19   being paid out of that special deposit account.
20   Q.   Yes. Let's look at the top part, the top portion of the
21   document, if we could. Do you see where in the first section it
22   makes reference to the account 584S0000?
23   A.   Yes.
24   Q.   I'm having trouble reading it. 81?
25   A.   Yes.

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1 Q. And it's the Date Palm SDA, correct?

2 A. **Correct.**

3 Q. And you'll see it mentions as of 10/3/3 the balance similar

4 to what you stated in your memo, correct? Principal cash

02:35:30 **5** 130,000, right?

6 A. **Correct.**

7 Q. And for the sake of time, just cut to the bottom. You will

8 see that two disbursements were made, correct? One in the

9 amount of -- if I can read this, $98,290, and another in the

02:35:52 **10** amount of $35,570?

11 A. **Yes. I see that.**

12 Q. And if we go back to the top of the memorandum, it does in

13 fact say account closed 11/18/04, correct?

14 A. **Yes.**

02:36:13 **15** Q. Do you know who prepares these type of documents?

16 A. **No. It looks like it came from the Pacific Region which**

17 **would be somebody in Sacramento, I assume.**

18 Q. So you're not familiar at all with the accounting that goes

19 on behind this type of document, are you?

02:36:28 **20** A. **I don't really have any involvement with payouts,**

21 **disbursements. I think I said that before.**

22 Q. The last document I'm going to show you, sir, is marked for

23 identification as DX 369. Sir, this is an eight-page document.

24 It is an account statement. Or as it says here, transactional

02:37:28 **25** history with a NAAN, an N-A-A-N. Do you see that?

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1 A. **Yes.**

2 Q. Sir, do you have any idea what this document is?

3 A. **Well, I presume that it's a history of transactions**

4 **involving this account that we've been talking about.**

02:37:52 **5** Q. Have you ever assisted in preparing or providing

6 information for something like this?

7 A. **No.**

8 Q. So now, getting back in conclusion to SDA 81, in fact when

9 it comes to the accounting reaching into the lease funds, isn't

02:38:17 **10** it correct to say, sir, that these payments were made at least

11 six months before your memorandum to Mr. Cason?

12 A. **Following my memo 25 years after the account was set up and**

13 **after I identified the owner, then apparently the payments were**

14 **made.**

02:38:41 **15** Q. So that's a yes?

16 A. **Yeah.**

17 Q. And do you think that's information that should have been

18 provided to Mr. Cason?

19 A. **The reason that I identified --**

02:38:53 **20** Q. That's a yes or no. Do you think that information should

21 have been provided to Mr. Cason?

22 A. **I believe it was. The reason, if I may answer, the reason**

23 **that I identified by account number every lease, every specific**

24 **example I gave, was so that officials could follow up and go to**

02:39:07 **25** **those files and do their own follow-up to see exactly what was**

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1 **going on. In fact, I said so in the memo.**

2 Q. The memo to Mr. Cason?

3 A. **Yeah.**

4 Q. But sir, that was issued five months after the account was

02:39:22 **5** paid and closed. Your memo of April 2005 didn't cause the

6 payment in November 2004, did it?

7 A. **No, but my memo of September 16, 2004 did.**

8 Q. The one that you didn't provide to the Court today.

9 A. **I provided it to --**

02:39:42 **10** MR. HARPER: Objection, Your Honor. Mr. McCarthy

11 didn't provide anything to the Court today.

12 BY MR. KIRSCHMAN:

13 Q. The last issue I'd like to address with you, sir, relates

14 to Plaintiffs' Exhibit 4489. And counsel showed you the last

02:40:12 **15** page of this exhibit, but are you aware that this exhibit is a

16 number of memorandums on the issue of administrative fees?

17 A. **No, I haven't seen the whole exhibit, but I can assume that**

18 **I know which -- I mean, I wrote all the memos if it's what I**

19 **think it is.**

02:40:33 **20** Q. Well, sir, I'll tell you what. Let me, if I may,

21 Your Honor, get him just a paper copy of this whole thing.

22 (Document handed to the witness.)

23 MR. KIRSCHMAN: Your Honor, would you like a hard copy

24 also?

02:40:53 **25** THE COURT: No.

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1 BY MR. KIRSCHMAN:

2 Q. Now, let's start with the last page that Mr. Harper showed

3 you of Plaintiff's Exhibit 4489. It is an April 19, 2005,

4 memorandum from you regarding a land sale. And you addressed

02:41:18 **5** the 1 percent administrative fee and, according to your memo,

6 that amounted to $60,000. Is it fair to say that this was a

7 tribal fee?

8 A. **No.**

9 Q. Who received this fee?

02:41:36 **10** A. **United States Treasury, if in fact it was collected.**

11 Q. Let's go to the first page of this memorandum. Well, one

12 moment, Your Honor.

13 So in fact you don't know if this fee of $60,000 was paid?

14 A. **I don't recall if I know -- I don't recall if the sale went**

02:42:42 **15** **through. It's possible the funds were returned to the purchaser**

16 **if in fact the sale wasn't finalized. I don't know.**

17 Q. The funds could have been returned to the purchaser?

18 A. **I was aware of some situations where the landowner would**

19 **make an agreement to sell the land to one party, that party**

02:43:19 **20** **would pay the administrative fee of 1 percent of the purchase**

21 **price, and really, I think I can only really recall one such**

22 **situation, I'm sure there were more, where the -- and then they**

23 **got a better offer before the deal closed. And so they -- or**

24 **for some reason the sale didn't go through, in which case the**

02:43:50 **25** **administrative fee -- depending on how much -- if it was fairly**

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1 early in the process and they had not deposited it in the
2 Treasury, because I don't know whether they'd get the money back
3 if they had, but if it was fairly early in the process, I
4 believe, and I saw at least one case where they did refund a fee
02:44:07 5 to a purchaser who got -- when he got beat out by another offer
6 like fairly quickly after he made his deposit.
7 Q. Okay.
8   MR. KIRSCHMAN: Your Honor, one moment, please.
9 We have no further questions for this witness.
02:44:29 10   THE COURT: Mr. McCarthy, your memorandum of September
11 2004 begins with the words, addressed to the superintendent of
12 the Palm Springs Agency: "You have requested an opinion
13 regarding beneficial ownership." Did you dig this up on your
14 own motion or were you asked to look it up?
02:44:47 15   THE WITNESS: I'm sorry, Your Honor. I don't know
16 which --
17   THE COURT: September 16, 2004.
18   THE WITNESS: I don't know if I have that document.
19   THE COURT: Put it up on the screen, would you,
02:45:05 20 please?
21   THE WITNESS: Oh, I see. You're referring back to
22 Date Palm Commercial Association?
23   THE COURT: Yes.
24   THE WITNESS: I understand. No, I was requested.
02:45:14 25   THE COURT: And why is it that you're working from

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1 home since April 2007?
2   THE WITNESS: I was kicked out of my office after I
3 made my disclosures to the -- well, beginning with the assistant
4 secretary, within the next couple of days a hundred law books
02:45:39 5 were removed from my library. Everyone stopped talking to me.
6 I was shunned almost completely for the next several months.
7 That continued. I made my disclosures to the Inspector General.
8 It worsened.
9   Ultimately a redacted copy of the OIG memo appeared in a
02:45:58 10 newspaper article, and at that point, within a couple of days, I
11 was told to vacate my office within 24 hours, and that I would
12 no longer have any responsibilities with respect to the BIA.
13   THE COURT: Are you still being paid?
14   THE WITNESS: I'm still being paid, although the day
02:46:13 15 after I notified my employer that I was going to be a witness in
16 this case, they issued a proposal to fire me.
17   THE COURT: And is there any litigation going on
18 between you and the Department of the Interior about your
19 employment situation?
02:46:30 20   THE WITNESS: I have filed a number of appeals with
21 the Merit System Protection Board regarding the earlier action,
22 the kicking me out of my office, that sort of thing. And I
23 actually petitioned the Federal Circuit Court of Appeals for
24 mandamus to try and get a decision on that. There was quite a
02:46:52 25 bit of litigation. It was all *pro se* on my part.

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1   When I got the proposal to fire me, I retained counsel and
2 counsel is in the process of -- we've responded to the proposal
3 and we, as I understand it, are in negotiations.
4   THE COURT: All right. Thank you.
02:47:12 5   MR. HARPER: Your Honor, couple questions on redirect.
6   THE COURT: Mr. Harper.
7   MR. HARPER: Thank you, Your Honor.
8   REDIRECT EXAMINATION
9 BY MR. HARPER:
02:47:19 10 Q. Mr. McCarthy, on cross-examination, counsel asked you
11 questions about the $60,000 administrative fee. Do you recall
12 those?
13 A. Yes.
14 Q. Are those kinds of fees routinely charged for sale in
02:47:31 15 leasing?
16 A. The 1 percent fee is charged for every sale. The other
17 fees are charged according to the tribal fee schedule that was
18 part of your exhibit, I believe. Those are not the amounts set
19 forth in the regulation, but those are the amounts charged by
02:47:51 20 the BIA for each and every administrative action. Say it's an
21 amendment of a lease or an assignment or whatever.
22 Q. And are those routinely above what is allowed in the law?
23 A. Well, every sale one is, because $22.50 is the maximum for
24 sale. There are some fees that can be as high as $500. I think
02:48:17 25 it's tied to a percentage of the annual rental value of the

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1 lease in question, say, for example, for approval of a lease.
2 But there's an absolute maximum fee for any activity of $500.
3 And most of these fees, as you can see, are above $500.
4 Q. With respect to -- you recall counsel asking you questions
02:48:39 5 with respect to the account for Ms. Gonzalez Lyons?
6 A. Yes.
7 Q. Would there be any reason, to your knowledge, say she's a
8 minor or *non compos mentis*, that they would hold her money for
9 that period of time?
02:48:57 10 A. No. Presumably if they knew who the money belonged to, who
11 the account belonged to, they would have paid her. She was
12 present in the community the entire 20 years.
13 Q. And she served on the tribal council, in fact, correct?
14 A. Very prominent person in the community.
02:49:15 15 Q. Counsel also asked you about the example for that special
16 deposit account. And you listed other examples in both the OIG
17 memo and the memo to Mr. Cason. Is that accurate -- of
18 mismanagement?
19 A. Yes.
02:49:31 20 Q. Were those examples or were those all of the and the only
21 issues at the agency?
22 A. Oh, no. They were examples. They were examples from files
23 that I was familiar with. I certainly never saw all thousand
24 master leases. The files that I became aware of where there
02:49:54 25 were serious problems with documentation of collection of income

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1 in the proper amounts, penalties, bonds, late fees, those kinds

2 of things, I selected I think about a dozen or maybe a little

3 more examples.

4 **Q.** And counsel asked you also about the exhibit that was the

02:50:18 5 only sort of documentation for leases. Do you recall that

6 testimony?

7 **A.** Yes.

8 **Q.** With the blank pages?

9 **A.** Yes.

02:50:27 10 **Q.** Or some blank pages and some with partially blank pages.

11 Do you recall that?

12 **A.** Yes.

13 **Q.** There's a number of leases listed on there. Do you know

14 about what percentage of leases are listed on there as to the

02:50:41 15 total percentage of leases?

16 **A.** I can't remember what my memo said. I believe there were

17 what, 130 or something. I can't remember how many were listed

18 on there. The memo says. I'm going to guess it was 130. So if

19 there are a thousand master leases, then it's a little over 10

02:50:58 20 percent, maybe 12 percent, 13 percent of all of the leases are

21 listed.

22 **Q.** And where are the other 90 percent of leases listed?

23 **A.** They're not listed anywhere. The OST report, the June '07

24 OST report says that the agency still does not have a complete

02:51:15 25 list of master leases anywhere.

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1 MR. HARPER: Thank you, Mr. McCarthy. Thank you, Your

2 Honor.

3 THE COURT: Mr. McCarthy, you're excused. You may

4 step down.

02:51:24 5 THE WITNESS: Thank you, Your Honor.

6 (The witness steps down.)

7 THE COURT: Next witness.

8 MR. KIRSCHMAN: Your Honor, regarding --

9 THE COURT: Plaintiffs, your next witness.

02:51:36 10 Mr. Kirschman?

11 MR. KIRSCHMAN: Regarding Mr. McCarthy's testimony,

12 Defendants would like to offer into evidence DX 368. That is

13 Mr. McCarthy's two-page memorandum that he drafted and

14 discussed.

02:51:54 15 MR. HARPER: No objection, Your Honor.

16 MR. KIRSCHMAN: September 16, 2004, memorandum.

17 THE COURT: It's received.

18 (Defendant Exhibit No. DX 368

19 received into evidence.)

02:52:01 20 MR. KIRSCHMAN: Also, Your Honor, the others, 366, 367

21 and 369.

22 THE COURT: All received.

23 (Defendant Exhibit Nos. 366,

24 367 and 369 received into

02:52:20 25 evidence.)

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1 MR. HARPER: Your Honor, for the record we'd like to

2 say we do object to 366, as it seems that the numbers on here

3 aren't even internally consistent.

4 THE COURT: Which one is 366?

02:52:36 5 MR. HARPER: It's the Pacific Region document.

6 MR. KIRSCHMAN: It's the one-page printout,

7 Your Honor.

8 THE COURT: Well, you can make what you want of that

9 in final argument if anybody remembers this document by the time

02:52:52 10 we get to the end of this case.

11 Mr. Smith, call your next witness.

12 MR. SMITH: Your Honor, our next witness is Ms. Mona

13 Infield.

14 (The witness takes the stand.)

02:54:15 15 MR. SMITH: Your Honor, Ms. Infield is a 25-year

16 employee of BIA. She's worked both at the agency level and at

17 the regional level. She will testify specifically about the

18 computer systems at Osage, and also her work on the data cleanup

19 project with Mr. Homan, problems with the electronic systems and

02:54:36 20 the paper records as well.

21 **MONA INFIELD, WITNESS FOR THE PLAINTIFFS, SWORN**

22 DIRECT EXAMINATION

23 BY MR. SMITH:

24 **Q.** Ms. Infield, can you state your full name for the Court,

02:54:44 25 please?

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1 **A.** Mona Infield, I-N-F-I-E-L-D.

2 **Q.** Where do you live, Ms. Infield?

3 **A.** I live in Corrales, New Mexico.

4 **Q.** You actually drove here from New Mexico for trial?

02:54:55 5 **A.** Yes, I did.

6 **Q.** Arrived last night?

7 **A.** Yes, about midnight.

8 **Q.** What is your tribal affiliation?

9 **A.** I'm a member of the Citizen Potawatomi Nation of Oklahoma.

02:55:14 10 **Q.** And where are you employed?

11 **A.** I'm employed at the Bureau of Indian Affairs. I work in

12 the Office of Information Operations in Albuquerque, New Mexico.

13 **Q.** And how long have you been employed by the Bureau of Indian

14 Affairs?

02:55:27 15 **A.** With a brief stint working for the Osage tribe, since June

16 2, 1982.

17 **Q.** And at what locations at BIA have you worked?

18 **A.** I worked at the Osage Agency for both the Bureau and the

19 tribe. I worked at Muskogee, at that time it was the area

02:55:45 20 office. I've also worked at the data center in Albuquerque, New

21 Mexico. I did a three-year stint at home with no duties after

22 providing testimony in this case. And now I'm back in the data

23 center in Albuquerque where I perform as the manager for

24 disaster recovery services for the computer systems.

02:56:03 25 **Q.** Is it fair to say that a lot of your work over that 25-year

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1 period dealt with the computer systems?
2 A. Yes. I worked with the computer systems since I was
3 about -- after the first three years I was at Osage, so probably
4 the last 22 years.
5 Q. And would that include the IRMS system?
6 A. Yes.
7 Q. And the RDRS?
8 A. Yes.
9 Q. And you worked as well with Mr. Homan on the data cleanup
10 effort?
11 A. Yes, I did.
12 Q. And when was that?
13 A. That was in the mid-'80s, 1985, '86.
14 Q. Would that be the '90s?
15 A. I'm sorry. '95, '96. You're correct.
16 Q. I want to talk first about your work at the Osage Agency.
17 The Osage Agency is in Oklahoma.
18 A. Yes.
19 Q. And during what period were you at the Osage Agency?
20 A. I was at the Agency in either capacity, as a BIA employee
21 or a tribal employee, on a 638 contract, where the government
22 contracts the tribe to perform certain services, from 1982, June
23 of '82, to October of '87.
24 Q. What services were contracted to the tribe?
25 A. When I worked on the 638 contract, it was on the computer

1 systems, services that the tribe provided.
2 Q. Okay.
3 A. Mostly to the minerals branch.
4 Q. Is it fair to say that at the Osage Agency it's hard to
5 distinguish the tribal employees from the Bureau employees?
6 A. Yes, it is, because other than who signs your paycheck,
7 there really is no distinguishable difference. Everybody
8 answers to the superintendent and everybody works together as a
9 team in the agency.
10 Q. Okay. When you started at the Osage Agency, were there any
11 electronic systems there?
12 A. There was. The tribe had an IBM System 34 installed, where
13 they kept their oil accounting information, production
14 information and royalties that were collected, and where they
15 calculated and distributed the headright share annuity payments
16 by quarter.
17 Q. You said the tribe had a system. Did the Bureau have a
18 system?
19 A. No.
20 Q. Did the Bureau use the tribe's system?
21 A. They did for oil and gas accounting purposes and tracking
22 and recording that, and for the distribution of those quarterly
23 annuity payments.
24 Q. Were there other lease interests besides oil and gas at
25 Osage?

1 A. Yes, surface leasing.
2 Q. How were those handled at the Agency?
3 A. We did all those manually.
4 Q. Does MSN have anything to do with the Osage Agency, even
5 though it's oil and gas?
6 A. I'm sorry?
7 Q. MSN.
8 A. MMS?
9 Q. I'm sorry, MMS.
10 A. No. MMS came into being after the Osage -- the Osage has
11 been doing their own oil and gas accounting for years.
12 Q. Is it fair to say that the Osage tribe is treated a little
13 bit differently than some of the other allottees?
14 A. I think so.
15 Q. In what manner is it different?
16 A. Well, not only do they not use MMS for their oil and gas
17 accounting, they don't use BLM for their field operations. They
18 have their own field operations staff. As well as making those
19 annuity payments. There's a different payment process for
20 collecting that income from the oil and gas royalties, and then
21 distributing the income amongst the shareholders, which are
22 called the annuitants, and their share is one headright share,
23 an allotment. They were all allotted, each member of the tribe
24 was allotted one headright share.
25 Q. How many headright shares are there?

1 A. 2,229.
2 Q. The money that's collected on the oil and gas, where is
3 that deposited to?
4 A. Into the treasury. Into the tribal account's treasury.
5 Q. So it's actually deposited into an Osage tribal account?
6 A. Yes, it is.
7 Q. How long does it remain in the tribal account?
8 A. Well, if my memory is serving me correctly, for instance,
9 the December quarterly payment that would be paid out the first
10 part of December is for money that was collected from the March
11 through June time frame. Or I'm sorry, April through June time
12 frame. So it's about six months. There's about a six-month lag
13 time after the money's collected before it's actually
14 distributed.
15 Q. And where is it distributed from the tribal account to?
16 A. Into a special deposit account in IIM, and then it's
17 distributed from there out to, for Osages and other Indians now,
18 distributed into their IIM accounts. If there are non-Osage or
19 non-Indian members, or non-Indian owners of headright shares,
20 those people are cut a check from the Regional Disbursing Office
21 in San Francisco Treasury.
22 Q. How would non-Osage get headright shares?
23 A. Well, now they can encode into -- we send an interface file
24 over to TFAS, and it's all interfaced into the TFAS account for
25 that non-Osage Indian. Back in the old days, whenever we had

1 all the separate databases for each region or area, Indians that
2 were not Osage were paid directly through RDO in San Francisco.
3 Q. Okay. So would non-Osage get headright interests
4 through -- over time would they be perhaps willed or otherwise
03:01:18 5 as descendants?
6 A. For instance, my mother was a headright shareholder by
7 virtue of the fact that she inherited it from an aunt who was
8 married to an Osage who had left it to her. Now my father is
9 now a headright shareholder in his wife's estate since my mother
03:01:32 10 passed.
11 Q. When you were there, were the bulk of the headright owners
12 Osage?
13 A. Yes.
14 Q. And is the great bulk of the money collected on oil and gas
03:01:44 15 actually distributed to members of the Osage tribe?
16 A. Distributed to the shareholders, not members of the tribe.
17 There's a distinction there.
18 Q. Right.
19 A. Yes. There's a bit of money that they can hold back by
03:01:58 20 statute for the operations of the mineral council.
21 Q. Now, you mentioned, I believe it was an IBM 34 system that
22 was used while you were there?
23 A. Yes.
24 Q. And was that later upgraded?
03:02:09 25 A. Yes, we did. When I went to work in the computer room in

1 about 1985, we upgraded in '85 or '86 to a System 36, IBM System
2 36.
3 Q. And to your knowledge is that system still there?
4 A. As far as I know. I don't know if they've upgraded it
03:02:25 5 since then or not.
6 Q. At some point in time was the Osage Agency required to use
7 the IRMS system?
8 A. They were, in 1988.
9 Q. Okay. And did that include using it with respect to the
03:02:40 10 headright interests as well?
11 A. Well, no, because IRMS didn't handle the annuity payments
12 in the way that headright shares are distributed.
13 Q. At some point in time did the information from the System
14 36 computer get transferred to the IRMS computer?
03:02:56 15 A. The balances -- we were doing manual posting for IIM
16 accounts up until about '86, and at that point in time the
17 person who worked for the tribe, who was my boss in the computer
18 section, wrote a program that was much like IIM, and the Agency
19 started using that for their IIM accounts.
03:03:16 20 And then in 1988 they were instructed to move on to IRMS
21 IIM, so the balances in those accounts were transferred to the
22 B1900 machine over at Anadarko area.
23 Q. But just the balances were transferred?
24 A. As far as I remember, yes, it was just the balances.
03:03:37 25 Q. If you wanted to look at Osage collections in an historical

1 basis, could you just look at IRMS?
2 A. No.
3 Q. Where would you have to look?
4 A. You'd have to go to paper ledgers. You'd have to go to the
03:03:49 5 IBM system. You would have to go to IRMS IIM, and then you'd
6 also have to go to TFAS.
7 Q. Okay. What about tribal accounts?
8 A. Tribal accounts you'd have to look at all the Treasury
9 reports, you'd have to look at the old, what we call the old
03:04:03 10 finance system in the Bureau that used to do our accounting for
11 the appropriated funds. But when the Bureau moved off of that
12 to a new accounting system, the trust funds were still using
13 that accounting system for their accounts that were in Treasury
14 for the general accounting, general ledger accounts.
03:04:21 15 Q. Have you had experience with the manual ledger cards?
16 A. Yes.
17 Q. In what context did you have that experience? And at the
18 Osage Agency?
19 A. At the Osage Agency in the mid-'80s I was tasked with
03:04:31 20 trying to close some special deposit accounts that had been
21 opened for years, and to close tribal accounts. And so I
22 started down the list and started going back in time looking
23 through the manual ledgers to determine what deposit opened the
24 account and where it came from, what it was for.
03:04:49 25 So I looked through a lot of account ledgers trying to find

1 the origin of the money. Some I found, some I didn't. Most of
2 the ledgers that I did find, either in the vault at the agency
3 or over in one of the tribal buildings in what they call the
4 archives, which was actually a basement of one of the buildings,
03:05:07 5 went back to the '50s, but there were some accounts that I never
6 could even find where the beginning balance came from, never saw
7 a beginning transaction that opened the account.
8 Q. And that was using the manual paper --
9 A. Manual ledger cards, yes.
03:05:20 10 Q. In 1987 did you move from the Osage Agency?
11 A. Yes.
12 Q. And where did you move?
13 A. October of '87 I went from the Osage Agency to Muskogee
14 area.
03:05:30 15 Q. And what tribes is the Muskogee area responsible for?
16 A. The Muskogee area is responsible for servicing the Five
17 Civilized Tribes and the Osage Nation and eight Miami tribes.
18 Q. And what office did you work at the Muskogee area?
19 A. I worked for the trust officer in the Muskogee office, even
03:05:53 20 though I was a computer specialist.
21 Q. Did the Muskogee office use LRIS?
22 A. No. Well, no, they didn't. The Muskogee office didn't use
23 LRIS. One of the Muskogee agencies, which was a Miami agency
24 for those eight tribes, sent their data for LRIS to the Anadarko
03:06:12 25 title plant, where it was encoded into LRIS. But Muskogee area

1 never had their own title plant until after 1991 or so.

2 Q. So if you wanted to look at ownership records for the other

3 tribes, the Osage and the Five Civilized Tribes, where would you

4 have to go?

03:06:32 5 A. You'd go to a county courthouse for wherever the land was.

6 Q. So prior to those records being placed on LRIS, they were

7 filed with the courthouse?

8 A. That's correct.

9 Q. And how many counties are we talking about?

03:06:44 10 A. There's 77 counties in Oklahoma. So minus the eight Miami

11 tribes, which would encompass about five counties. So somewhere

12 around 70.

13 Q. Was Muskogee the only regional office that didn't use LRIS?

14 A. No. There were several others that didn't use the title

03:07:03 15 plants.

16 Q. When did the Muskogee office begin using IRMS?

17 A. In the late '80s, sometime around '88, '89, Ross Swimmer

18 was the Assistant Secretary of Indian Affairs and he sent a

19 memorandum out to everybody that said you will use IRMS to its

03:07:23 20 fullest. So we started a project to get everybody to start

21 encoding their data into IRMS.

22 Q. Had other regional offices used IRMS prior to that time?

23 A. Yes.

24 Q. When is the first time IRMS was used?

03:07:35 25 A. My understanding is IRMS was first installed in the

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1 Billings regional office, Rocky Mountain region now, in the late

2 '70s. When I first came to Osage in '82, one of my first

3 training sessions was on IRMS. Back then we didn't even have

4 GUI interface screens. We just put in an 80 character string of

03:07:58 5 characters across the screen, and that's how you encoded.

6 Q. When you used the IRMS system at Muskogee, was this what's

7 called a B1900 system?

8 A. Yes. It was on a B1900 in the Anadarko information

9 management center.

03:08:14 10 Q. How many B1900 systems were there across the country?

11 A. There were six information management centers, and each one

12 with its own B1900.

13 Q. And were those systems later consolidated?

14 A. They were. In the early '90s we started consolidation into

03:08:29 15 the Albuquerque area, or Albuquerque data center, onto a Unisys

16 Series A10.

17 Q. Do you know what the capacity of these computers was?

18 A. I don't know what the capacity of the B1900s was. I'm not

19 sure I can remember. It seems to me like we had about 40

03:08:47 20 gigabytes of space on the A10s put together, and we had two A10s

21 at the data center.

22 Q. To your knowledge, to what extent was the information on

23 the IRMS system retained?

24 A. In '91 when I got to the data center in Albuquerque and

03:09:08 25 started looking at IRMS, when I started looking at the IIM

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1 databases, and we had the master portion of the database and the

2 trans portion of the database held six months worth of

3 transactions. Those were the most previous transactions to

4 today. And then we had the his-trans portion of the database,

03:09:29 5 which went back six years.

6 Q. Why only six years?

7 A. My understanding was the B1900s didn't have enough space to

8 hold more than that data, so every month-end process -- every

9 time a month-end process was run for IIM, any transaction that

03:09:43 10 was more than six years old was deleted from the database.

11 Q. Are we talking about a single agency or --

12 A. No. That was routinely and it was across the board. It

13 was nationwide.

14 Q. And that's what you discovered in 1991?

03:09:55 15 A. Yes.

16 Q. And by this time you were working in Albuquerque?

17 A. Yes, at the data center.

18 Q. What did you learn when you discovered the data was being

19 deleted after six years?

03:10:05 20 A. I'm sorry?

21 Q. What did you do when you learned that the data was being

22 deleted?

23 A. I went to the director of the data center and said look, I

24 have been through this and I have tried to research accounts

03:10:15 25 where I couldn't find data, and we can't keep dropping these

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1 transactions off and have a full accounting for these accounts,

2 because if you have an IIM clerk out there that's trying to

3 research an account and you're losing transactions every month,

4 how are they going to know what's there?

03:10:29 5 So we've got to stop doing this. Well, they didn't have

6 space in the 1900s, we have space on the A10s, let's stop doing

7 this now. So at that point we stopped deleting records at the

8 month-end cycle time.

9 Q. So this was 1991. What was your earliest information on

03:10:47 10 IRMS?

11 A. 1985.

12 Q. When you got to Albuquerque, did you investigate IRMS

13 further?

14 A. Well, it came to our attention that at some point in time,

03:11:00 15 I think it was when we were doing an interest recalculation

16 project, that we were missing whole months of transactions for

17 certain regions. For instance, for Albuquerque, Eastern and

18 Navajo, there were complete months, if we ran a stratification

19 report that showed by year and month how many transactions were

03:11:19 20 in the his-tran database, we would have zeros in some months for

21 those three regions. And that went on for several years.

22 Q. Okay. Were you able to discover why that data was missing?

23 A. We couldn't really trace it back to any cause except that

24 the month-end process wasn't finished appropriately. So,

03:11:39 25 because one of the last steps in the month-end processing was to

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1 move transactions out of the transactions database into the
2 his-tran database. So if the job ended abruptly before that
3 step happened, then it never occurred. Those transactions never
4 got moved to his-trans.
5 Q. At that time, what if anything did you do to try to fill
6 the holes in the system?
7 A. I had a programmer that I assigned to go back and look at
8 all the tapes that we could gather from anywhere across the
9 nation. If we had them in our library, fine, if we had to pull
10 them from the IMCs, or if we didn't have their libraries in yet,
11 that was fine, we'd get them wherever we can, find them, let's
12 get them loaded back into the database.
13 And we were successful with about 50 percent of the data at
14 that point.
15 Q. What was the condition of the mag tapes?
16 A. The mag tapes were -- we still have some of them. I am in
17 charge of the tapes library now for the off-site recovery. And
18 we have tapes in the library that are 30-plus years old, old
19 magnetic reel tapes. Some of them couldn't even be read then,
20 back in the early '90s, mid-'90s.
21 Q. What happened to the magnetic tapes from the Phoenix
22 office?
23 A. Well, when we were moving, consolidating off the B1900s to
24 the A10s, one of the last things we did was to move the tape
25 libraries from those information management centers across the

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1 country into the Albuquerque data center. And one of those
2 information management centers was in Phoenix.
3 They loaded up the tape library in Phoenix, they put all
4 the tapes in a rental truck, and they headed down I40, or up 17
5 to Flagstaff and across I40 to Albuquerque. And they got into
6 eastern Arizona and the rental truck broke down. And this was
7 the middle of the summertime. So by the time they got a tow
8 truck out there, all of the tapes in the back of the rental
9 truck had melted.
10 Q. So you couldn't get any data off of those --
11 A. Couldn't read those tapes. They were gone forever.
12 Q. You did re-create some of the transactions, though.
13 A. Pardon me?
14 Q. You did re-create some of the transactions.
15 A. We did find some tapes in some instances where we could put
16 transactions back out on the database from them, yes.
17 Q. So if someone looked at the IRMS system in 2001, it should
18 include your work as well in trying to fill those gaps?
19 A. Right.
20 Q. Now, we've heard testimony about IM-500s in this case, and
21 how long are IM-500s retained?
22 A. IM-500 is a print file that's created at month-end time, so
23 it would be retained on the system for five working days, five
24 to 10 working days at that time. Then they would be put on a
25 backup tape, and those backup tapes were kept for five weeks I

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1 believe. And then they were reused.
2 Q. Okay. So if you didn't print your IM-500 within five
3 weeks, what happens to it?
4 A. It's gone. The tape's already been written over and you
5 can't get it back.
6 Q. I'm going to turn your testimony to the RDRS system.
7 THE COURT: How long is this going to go?
8 MR. SMITH: We probably have another 30 minutes, so
9 perhaps --
10 THE COURT: Let's finish. This lady's come all the
11 way here from Oklahoma. Let's do it.
12 MR. SMITH: Okay. That sounds good.
13 BY MR. SMITH:
14 Q. The RDRS system, what is that system?
15 A. That's the royalty distribution and reporting system.
16 Q. Okay. And have you been involved with that system as well?
17 A. When I went to Albuquerque in '91 I was the programmer for
18 RDRS. That was my first position.
19 Q. And when did BIA start using an RDRS system?
20 A. They were using it in Muskogee when I went there in 1987.
21 I had no exposure to it before then. So it was already in use
22 in October of '87.
23 Q. Did all of the regions use the RDRS system?
24 A. No. There are seven regions that have oil and gas leasing,
25 and the Minneapolis region did not use RDRS. They only had a

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1 handful of leases, so they distributed that income manually.
2 Q. So if you wanted the RDRS records, you'd have to look both
3 at the RDRS system and at paper ledgers?
4 A. That's correct. Well, not just for Minneapolis. There
5 were some leases in the Muskogee region that were distributed
6 manually as well.
7 Q. And why is that?
8 A. Because they had a problem with matching the lease number
9 in the MMS system with the lease number in RDRS. So when they
10 came down to us in a distribution file from MMS, the computer
11 would not -- would throw them into what we call an error recycle
12 file. So it wouldn't distribute the money for that transaction.
13 Q. And what would happen to that recycle file?
14 A. Well, once the people of the region would do the manual
15 distribution, then they would send us a fax at the data center
16 and say please zero out my recycle file, because I've done my
17 manual distributions for those records.
18 Q. Okay. By the way, how long would lease ownership records
19 be maintained before they were overwritten?
20 A. Well, on a daily backup at least as an owner -- or a
21 snapshot in time, because there's no historical database
22 established for lease or owner. And so your daily backups are
23 kept for 10 working days and then they're recycled. Weekly
24 backups are kept in perpetuity now. Back in the old days, they
25 were only kept for five weeks. And if you caught them on a

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1 monthly backup, they were kept for 13 months. All of our weekly
2 backups now are kept forever. We don't write over weekly
3 backups.
4 Q. When did that policy start?
5 A. I think we started that in 2003 when I came back in the
6 office.
7 Q. Okay. So prior to that time, unless you printed a copy of
8 the lease ownership record at that point in time, it would be
9 gone after 13 months?
10 A. Exactly. If you caught it in a snapshot, and if you caught
11 it in a snapshot in time on a month-end backup. If it was only
12 on a daily backup, it was only good for two weeks. Two weeks
13 later it was gone.
14 Q. You mentioned that you began working with Mr. Homan in his
15 trust reform efforts in the mid-'90s. What is the Federal
16 Tribal Task Force?
17 A. It was a task force that we put together that was comprised
18 of BIA, OTFM or OST, and tribal and allottee association
19 members. I think there was about 40, maybe 40 to 50 people all
20 together. And what we did was we came together for a meeting in
21 Albuquerque, and we talked about how we were going to discover
22 what the problems were out there in Indian country, and what
23 this group wanted the Office of the Special Trustee and the new
24 Special Trustee for American Indians, Mr. Homan, to address in
25 his first strategic plan.

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1 So we decided to go around the country and take testimony
2 and do consultation with tribes and individual Indians. We did
3 that. I think we had five or six stops across the country
4 within a year's time. Then we gathered testimony and we talked
5 about problems and gathered information from individual Indians
6 and allottee associations and tribes and even agency
7 superintendents, and regional directors and lease clerks, or
8 whoever had a testimony to give. We were doing consultation so
9 we had a court reporter in the session and we had a recording of
10 everything that was given.
11 Q. And what were your principal conclusions from that --
12 A. From all of that testimony we distilled everything down to
13 a list of issues that needed to be addressed. And then we
14 brought the task force back together in Albuquerque. We went
15 through the list of issues. We had the tribal people caucus
16 amongst themselves to determine what their priorities would be
17 in addressing this list. We had the government people caucus to
18 put in priority their priority order, how to address these
19 issues.
20 Then we brought them both back together again and worked on
21 coming to consensus about what the priority list should be. And
22 that's what we handed over to Mr. Homan.
23 Q. And based on your evaluation, what were some of the
24 principal concerns that you had?
25 A. Lack of information. The biggest concern for all the

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1 allottees that I heard all over the country was I don't know
2 what's in my account. When I get a check in the mail, I don't
3 know what that money's from. Nobody tells me unless it's an oil
4 and gas. And at that time we were sending out an explanation of
5 payment with oil and gas checks.
6 But if they got a lease check, sometimes the clerk would
7 have put on there what it was for, what lease number it was, and
8 sometimes they didn't. And some allottees didn't even know what
9 land they owned or whether it was leased or not.
10 Q. Okay. There's been discussions in this case about whether
11 any accounting should include the hard assets. Did you have any
12 thoughts about that?
13 A. Well, how do you come up with an accounting for the money
14 if you don't know what generated the money and whether it was
15 right?
16 Q. Were you also involved in a project called Tiger Team?
17 A. Yes.
18 Q. And what was Tiger Team?
19 A. It was a group of, I think there was about 20 of us in
20 OTFM, BIA, MMS, and it was led by one of the managers out of the
21 MMS, Minerals Management Service. And we had a specific charge
22 to look at, I think there were three different kinds of issues,
23 which was are there policies and procedures currently in place
24 designed to give us a -- are we doing things correctly based on
25 the current policies and procedures. Are the accounting systems

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1 adequate for what it is our job is and what we need to be doing,
2 and are we providing appropriate information? Are we working
3 through this -- through the different Interior agencies together
4 in order to provide this information and to get this right?
5 Q. If we could see Plaintiffs' Exhibit 607. Ms. Infield, is
6 this a copy of the Tiger Team report that was prepared on August
7 1995?
8 A. Yes, it is.
9 Q. And if you could look at page 2 of that document and focus
10 in on the area marked "Problems." And does this identify the
11 problems you and your team identified after your investigation?
12 A. That's true. That's correct.
13 Q. Number 1, automated systems are costly to run and maintain
14 and segments are inadequate. 2, data records are outdated
15 and/or inaccurate. And No. 3, poor internal controls and
16 inconsistent practices exist.
17 MR. STEMPLEWICZ: Objection, Your Honor. This area
18 goes into trust reform, not historical accounting.
19 THE COURT: I'll allow it. Go ahead.
20 THE WITNESS: Yes. Those are the problems that the
21 team consolidated down to.
22 BY MR. SMITH:
23 Q. And this is a fairly lengthy document so I'm not going to
24 ask you that much about it. Do you recall specific concerns
25 that were had regarding MMS?

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1　A.　Well, some of the things that -- some of the problems with
2　MMS is that we were never sure that when they got money it was
3　being sent to us for distribution. For instance, they relied on
4　the honor system with the oil companies to pay in royalties. So
03:23:45　5　the oil companies would report to MMS how much oil they sold and
6　how much royalty they were supposed to pay, and they would pay
7　that.
8　　　And then MMS would try to verify that back to a lease
9　number and create the file that they would send to BIA for
03:24:00　10　distribution for Indian allottees and tribes. And so they
11　relied on the honor system to do that. And then if they
12　couldn't verify that back to a particular lease, that got held
13　in abeyance or in an error file up in MMS, and it never was sent
14　to us for distribution, until they could clear it from their
03:24:19　15　system.
16　Q.　What if any concerns were raised regarding whether what MMS
17　collected was actually reported to BIA?
18　A.　We couldn't tell. There was no mechanism in place to
19　determine whether or not, if MMS collected $5 here, did they
03:24:33　20　send $5 to us for distribution.
21　Q.　Okay. And if we could look at page 8 of this document,
22　please. And focus in on the highlighted section at the bottom
23　of the page. And did you also identify problems with the real
24　estate system, the LRIS system?
03:24:59　25　A.　That's correct.

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1　Q.　And what were generally the nature of those problems?
2　A.　Well, LRIS was so far backlogged with encoding data, there
3　were lands that were sold or bought or moved from fee to trust,
4　or had been distributed in estates, and they just -- the people
03:25:17　5　that were in the LRIS business in the title plants just couldn't
6　keep up with the volume of records that needed to be recorded.
7　　　And then not everybody had an LRIS activity going on. For
8　instance, Five Civilized Tribes and Osage, none of their
9　documents were ever recorded to LRIS.
03:25:38　10　Q.　The last sentence says, "Instead, many office staff relied
11　on their cuff records." What are cuff records?
12　A.　Cuff records. In my experience, cuff records were either
13　our manual records we kept, for instance at the Osage Agency, or
14　the IRMS lease and owner, or if you were in Aberdeen it was MAD,
03:25:56　15　if you were at Great Lakes Agency it was GLAD, and supposedly if
16　you were at Palm Springs, it was PC Lease. So that's what we
17　termed cuff accounts or cuff records, were all these different
18　systems.
19　Q.　Were your conclusions from the Federal Tribal Task Force
03:26:16　20　and the Tiger Team input into a high-level implementation plan?
21　A.　Yes, they were.
22　Q.　And if we could see Exhibit 4154. This is a notice of
23　filing by the government of the HLIP. If we could turn to page
24　5 of that document. Is that a copy of the high level
03:26:38　25　implementation plan?

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1　A.　I believe it is, yes.
2　Q.　And what were your responsibilities under this plan?
3　A.　Under this plan I was responsible for data cleanup, and
4　that would have been realty data cleanup at that time.
03:26:56　5　Q.　Did you actually do some pilot agency studies on data
6　cleanup?
7　A.　We did on the IIM data cleanup. I'm sorry, this is July --
8　yeah, that would have been realty. When I was at OTFM in '95
9　and '96 we did some pilot work in the Billings region for IIM
03:27:20　10　data cleanup.
11　Q.　What are the areas of the country you did those pilots?
12　A.　Just in the Billings area is when we did the pilots, just
13　for those agencies.
14　Q.　And what did you discover when you did those pilot studies?
03:27:34　15　A.　Well, we went out to Flathead Agency and we brought the
16　records back to Albuquerque to work on because the tribe was
17　compacting the agency's function. So we brought all the IIM
18　records into OTFM. And what we discovered was that they had
19　jacket folders in file cabinets in the agency, but they also had
03:27:50　20　mounds of records out in garages, that we had to have like six
21　feet of drifts of snow moved in order to get to so that we could
22　tape up what was left of the box so we could get it on a truck
23　and ship it to Albuquerque.
24　　　When we got it down to Albuquerque, we started pulling
03:28:04　25　reports in the system and trying to match the jacket folders to

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1　the accounts on the system.
2　Q.　And when you say jacket folders, you're trying to compare
3　the paper records to the electronic records?
4　A.　That's correct. Only for the master records, for the
03:28:17　5　master file database. Because these jacket folders had
6　information in them about the account holder, name, date of
7　birth, and they may have changed over time with a marriage or
8　divorce or whatever. And whether or not they were a minor, and
9　those kinds of things. And they had a lot of correspondence in
03:28:34　10　them.
11　　　And some of them were controlled accounts so you would see
12　some social services records in there where social services had
13　approved expenditures out of the account for certain things. So
14　that's what we were looking at. We were trying to determine if
03:28:46　15　the data on the system in the master records was consistent with
16　the paper records that were in the jacket file.
17　Q.　Is that what is meant by data cleanup?
18　A.　Yes. We were cleaning up the data in the systems based on
19　the paper records.
03:28:57　20　Q.　And did you find jacket files regarding account holders
21　with no information on the electronic system?
22　A.　We did.
23　Q.　How about electronic records with no corresponding jacket
24　file?
03:29:08　25　A.　We did.

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1   Q. So if you only looked at the electronic record, was it
2   complete?
3   A. No, because we found jacket folders that had no electronic
4   records.
03:29:21 5   Q. And if you looked at the jacket file, those would not be
6   complete either?
7   A. No, because we had accounts on the system that didn't have
8   a jacket folder.
9   Q. One final point. Have you had the opportunity to read
03:29:37 10   testimony from Ms. Herman regarding her completeness study?
11   A. Some of it, yes, I have.
12   Q. What were your thoughts after reading that testimony?
13   MR. STEMPLEWICZ: Objection. Relevance.
14   THE COURT: Sustained.
03:29:49 15   BY MR. SMITH:
16   Q. If you went to look at collections on behalf of individual
17   Indians, would you just look at IRMS?
18   A. Just look at IRMS? No.
19   Q. Where would you look?
03:30:04 20   A. Well, you'd have to look at MMS if it was oil and gas.
21   You'd have to look at Treasury if it was oil and gas for Osage.
22   You would have to look at lease and owner to see how the money
23   was brought in and distributed, because some agencies don't use
24   special deposit accounts to hold the money until they distribute
03:30:21 25   it or find out who the owners are.

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1   That's done in some instances, but in some instances the
2   day the check comes in the door the distribution is made through
3   lease and ownership. So you'd have to look at ownership to
4   determine how that distribution was made and whether or not a
03:30:35 5   hundred percent of the money was paid out to individuals.
6   Q. Okay. And then after that you'd have to get down to the
7   paper records?
8   A. Exactly.
9   Q. And based on your experience, are those paper records --
03:30:47 10   A. Not all those paper records exist.
11   MR. SMITH: Your Honor, I have no further questions.
12   THE COURT: Thank you.
13   MR. STEMPLEWICZ: No cross.
14   THE COURT: All right. Ms. Infield, you are excused
03:31:22 15   and we're through for the day. We will see everybody here at
16   9:30 tomorrow morning. Thank you.
17   THE WITNESS: Thank you, Your Honor.
18   (Proceedings adjourned at 5:17 p.m.)
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Bryan A. Wayne, RPR, CRR
Official Court Reporter

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Bryan A. Wayne, RPR, CRR

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CERTIFICATE

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

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BRYAN A. WAYNE

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