

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al. .
Plaintiffs, . Civil Action 96-1285
v. . Washington, D.C.
DIRK KEMPTHORNE, Secretary . Tuesday, June 10, 2008
of the Interior, et al. . 1:33 p.m.
Defendants. .

TRANSCRIPT OF TRIAL - AFTERNOON SESSION
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

01:21:06PM 1 COURTROOM DEPUTY: Please come to order and remain
01:21:06PM 2 seated.
01:41:11PM 3 MR. GINGOLD: Good afternoon, your Honor.
01:41:14PM 4 THE COURT: Good afternoon.
01:41:16PM 5 DR. BRADFORD CORNELL, WITNESS FOR THE PLAINTIFFS, PREVIOUSLY
01:41:16PM 6 SWORN
01:41:16PM 7 DIRECT EXAMINATION
01:41:21PM 8 BY MR. GINGOLD (continuing):
01:41:21PM 9 Q. Dr. Cornell, you were asked to before by the Court before
01:41:21PM 10 the lunch recess to explain what effect you observed
01:41:24PM 11 disbursement was with respect to 1926, I believe. Do you recall
01:41:29PM 12 that?
01:41:36PM 13 A. Yes, I do.
01:41:37PM 14 Q. What have you done in that regard?
01:41:41PM 15 A. I did the calculation.
01:41:42PM 16 Q. And what is the result of your calculation?
01:41:43PM 17 A. \$734 million in terms of the bottom line in 2008.
01:41:45PM 18 Q. If the observable disbursement in that document is correct?
01:41:53PM 19 A. Correct. The interest rates were a bit higher than I
01:41:59PM 20 remembered, particularly in that 1907 period when they get above
01:42:01PM 21 ten percent, so the compounding is quite important then.
01:42:05PM 22 MR. GINGOLD: In that regard, if this Court would
01:42:16PM 23 like, we can provide this Court and defendants with an Excel
01:42:17PM 24 version of what we are dealing with of Attachment A so
01:42:21PM 25

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01:42:27PM 1 calculations can be input. They would be linked and changes
01:42:32PM 2 could be made as a better or if better data is provided.
01:42:39PM 3 THE COURT: Well, I'm not asking for that now. But
01:42:41PM 4 thank you.
01:42:51PM 5 MR. GINGOLD: I'd like Plaintiffs' 41 to be back on
01:42:54PM 6 the screen, please.
01:42:54PM 7 BY MR. GINGOLD:
01:43:05PM 8 Q. I'd like you to turn to pages -- first page four of the
01:43:12PM 9 Plaintiffs' 41, which is Attachment A, and I'd like you to look
01:43:19PM 10 at the disbursement column. You have a yellow highlighted
01:43:25PM 11 figure in the disbursement column from 1988 through 2002 on this
01:43:31PM 12 page; is that correct?
01:43:32PM 13 A. Yes.
01:43:33PM 14 Q. And what does that mean?
01:43:34PM 15 A. Well, those were the years for which the actual CPNR data
01:43:41PM 16 was available and was used as the basis of the seventy percent
01:43:44PM 17 calculation, but in the particular years where I have that data
01:43:47PM 18 I plugged it in directly.
01:43:49PM 19 Q. And the seventy percent calculation means what?
01:43:52PM 20 A. Well, I think if we really need to go to the schedule, but
01:43:56PM 21 it's the ratio of disbursements to corrected revenue.
01:44:01PM 22 Q. Before we go to the schedule I'd like to turn to page five
01:44:09PM 23 of Attachment A. Once again, you have -- there are no other
01:44:17PM 24 disbursements calculated in that, correct?
01:44:19PM 25 A. Yes.

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01:44:19PM **1 Q.** Okay. Let's go to Plaintiffs' Exhibit 56, which is

01:44:23PM **2** Attachment C, individual Indian trust disbursement calculation.

01:45:10PM **3** Dr. Cornell, do you recognize this document?

01:45:12PM **4 A.** It looks like a black screen to me. I recognize this from

01:45:18PM **5** my home computer. There we go.

01:46:10PM **6 Q.** Do you recognize this document, Dr. Cornell?

01:46:12PM **7 A.** Yes. This is a document I prepared summarizing materials

01:46:17PM **8** sent to the plaintiffs by officials at the Department of

01:46:23PM **9** Treasury.

01:46:23PM **10 Q.** Did you review the data yourself?

01:46:26PM **11 A.** Yes.

01:46:27PM **12 Q.** Under Column A, what is Column A?

01:46:32PM **13 A.** Those are the number of checks issued out of AALC account

01:46:40PM **14** number 4844, which in the cover letter from the Treasury was

01:46:47PM **15** explained to be the individual Indians monies account.

01:46:56PM **16** MR. GINGOLD: Plaintiffs would like to identify an

01:46:59PM **17** exhibit admitted in trial 1.5, which is DX 272. DX 272 is a

01:47:16PM **18** letter from Charles Schwann, who is document production

01:47:21PM **19** coordinator, Department of the Treasury, Financial Management

01:47:24PM **20** Service, to Bert Edwards, executive director, Office of his

01:47:31PM **21** Historical Accounting, Office of the U.S. Interior, dated

01:47:33PM **22** November 4, 2003.

01:47:33PM **23** BY MR. GINGOLD:

01:47:35PM **24 Q.** Is this the letter you're referring to?

01:47:36PM **25 A.** Yes.

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01:49:24PM **1 Q.** The slight adjustment for what?

01:49:26PM **2 A.** For the fact that not all the checks that were issued were

01:49:30PM **3** cashed.

01:49:31PM **4 Q.** So what did you specifically include then in that total

01:49:36PM **5** with regard --

01:49:38PM **6 A.** Well, as I recall --

01:49:41PM **7 Q.** Let's go back to Attachment C. That's Plaintiffs' 56.

01:49:46PM **8 A.** I included the CPNR disbursements adjusted, which is Column

01:49:51PM **9** F.

01:49:51PM **10 Q.** What does Column C, corrected revenues, mean?

01:49:59PM **11 A.** Column C is just directly off of my schedule. That's

01:50:05PM **12** Column E from Attachment A, the corrected revenues.

01:50:10PM **13 Q.** And under Column D, checks paid, that is what you just

01:50:16PM **14** described as you took only the data from the checks that were

01:50:19PM **15** identified as paid or negotiated?

01:50:21PM **16 A.** Correct. Not all the checks issued were paid. Some were

01:50:24PM **17** never cashed.

01:50:26PM **18 Q.** I'd like to go back to DX 272 for a moment, please.

01:50:37PM **19** THE COURT: On this percentage of checks paid and

01:50:40PM **20** cashed --

01:50:44PM **21** MR. GINGOLD: Back to Attachment C, your Honor.

01:50:46PM **22** THE COURT: Well, whatever attachment you were just

01:50:49PM **23** on, if hypothetically there were \$200 million worth of

01:50:56PM **24** disbursement checks cut and let's say two hundred thousand

01:51:06PM **25** checks and ten percent of those checks were not cashed, what did

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01:47:37PM **1 Q.** I'd like you to turn to page two of this document, which is

01:47:43PM **2** identified as Bates 272-00032, and at the top of the page, the

01:47:56PM **3** first sentence states, Exhibit B provides the number and amount

01:48:01PM **4** of checks issued under symbol 4844 and captured in CPNR since

01:48:07PM **5** the implementation of CPNR on November 6, 1986. Is that your

01:48:13PM **6** understanding?

01:48:14PM **7 A.** Yes, it is.

01:48:15PM **8 Q.** I'd like to turn to page eighteen of this document, which

01:48:19PM **9** is at Bates 48. It's identified as Exhibit B, and it's

01:48:27PM **10** identified as CPNR information for symbol 4844 by calendar year.

01:48:35PM **11** Do you recognize this information, Dr. Cornell?

01:48:37PM **12 A.** Yes. That's the same information you'll find in my

01:48:40PM **13** Attachment C.

01:48:41PM **14 Q.** Okay. Under "number of records," what does that mean?

01:48:43PM **15 A.** Number of checks issued.

01:48:45PM **16 Q.** Under "dollar amount," what does that mean?

01:48:48PM **17 A.** The aggregate amount for all those checks.

01:48:50PM **18 Q.** And what did you take from this information, including

01:48:54PM **19** Attachment A?

01:48:55PM **20 A.** Well, 1987 turned out to be a partial year, so I excluded

01:49:01PM **21** it and then I took the rest of the information.

01:49:03PM **22 Q.** So is that the reason you have the highlighted disbursement

01:49:12PM **23** numbers in under Column F of Attachment A on page four?

01:49:16PM **24 A.** They're drawn directly from that schedule with a slight

01:49:23PM **25** adjustment.

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01:51:14PM **1** you do? Did you discount the total payment by ten percent?

01:51:17PM **2** THE WITNESS: Yes. In fact, you can see that. You

01:51:20PM **3** can in Column E you see the percentage of checks paid as a

01:51:24PM **4** fraction of the percentage of checks issued.

01:51:26PM **5** THE COURT: What do you do with the likelihood -- I'm

01:51:29PM **6** assuming it's a likelihood that most of the checks not cashed

01:51:32PM **7** are the checks for twenty-five cents or a dollar-and-a-quarter

01:51:36PM **8** or two-dollars-and-a-half, that kind that aren't worth cashing.

01:51:40PM **9** THE WITNESS: I did not make an adjustment for check

01:51:43PM **10** size. It's just prorated.

01:51:44PM **11** THE COURT: All right.

01:51:47PM **12** MR. GINGOLD:

01:51:47PM **13 Q.** Did you make any determination as to whether or not that

01:51:49PM **14** was a characteristic typically of checks that were not paid or

01:51:54PM **15** cashed?

01:51:54PM **16 A.** No. There was no data on that. This is the complete data

01:51:57PM **17** from the Treasury.

01:51:58PM **18 Q.** Now, if the checks weren't paid or cashed, do you know

01:52:02PM **19** where the money remained?

01:52:05PM **20 A.** Well, presumably it would remain in the Treasury account,

01:52:08PM **21** because it wasn't drawn down from it.

01:52:12PM **22 Q.** And the CPNR data, was that summary-level data?

01:52:16PM **23 A.** Yes.

01:52:16PM **24 Q.** So there was no checks that were provided to you that

01:52:21PM **25** supported the check disbursements, was there?

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01:52:23PM **1 A.** Yes.

01:52:24PM **2 Q.** Yes, there were none?

01:52:26PM **3 A.** Excuse me?

01:52:27PM **4 Q.** There were no checks provided to you?

01:52:29PM **5 A.** No, no. I got an output from a computer database that had

01:52:34PM **6** been accessed by the Treasury official.

01:52:36PM **7 Q.** And if you had checks which identified the amounts, you'd

01:52:40PM **8** be able to make a determination as to whether or not the checks

01:52:42PM **9** had a diminimus amount, correct, that were not paid?

01:52:46PM **10 A.** Correct.

01:52:46PM **11 Q.** But at this point in time you can't testify to that?

01:52:50PM **12 A.** That's right.

01:52:50PM **13 Q.** Now, there was data in the CPNR database for 1987, wasn't

01:53:02PM **14** there?

01:53:03PM **15 A.** Yes.

01:53:03PM **16 Q.** Did you use it?

01:53:04PM **17 A.** No. After looking at it, it turned out to be a partial

01:53:08PM **18** year, and rather than trying to annualize incomplete data, since

01:53:15PM **19** we had fifteen years of good data, I just used the full annual

01:53:20PM **20** data.

01:53:20PM **21 Q.** Is that appropriate for you to do when you're trying to

01:53:30PM **22** determine what a reasonable or reasonable approximation of the

01:53:36PM **23** check disbursements or other data?

01:53:41PM **24 A.** This is the first time I've ever dealt with this type of

01:53:44PM **25** check disbursement data, but when you have a large unambiguous

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01:55:34PM **1 A.** Correct. The government calculations of the Osage receipts

01:55:39PM **2** doesn't begin until 1909.

01:55:41PM **3 Q.** Now, you do have in Column D Osage corrected, and in Osage

01:55:48PM **4** corrected on this page and on the remainder of this document

01:55:55PM **5** it's highlighted, correct?

01:55:56PM **6 A.** Correct.

01:55:56PM **7 Q.** What does that mean?

01:55:58PM **8 A.** It's actual data that was made available by the Osage tribe

01:56:02PM **9** and is published on their website.

01:56:04PM **10 Q.** Is it your understanding that this is data regarding the

01:56:09PM **11** tribal money or individual Indian trust money?

01:56:13PM **12 A.** Individual Indian trust money data, but provided by the

01:56:19PM **13** Osage tribe.

01:56:20PM **14 Q.** Now, in 1909, which is the first year the government

01:56:26PM **15** provided -- seems to have provide the Osage data as identified

01:56:34PM **16** on Attachment A, Column C, you had Osage corrected with a point

01:56:46PM **17** seventy statement, correct?

01:56:46PM **18 A.** Correct.

01:56:47PM **19 Q.** And what does that mean?

01:56:48PM **20 A.** That means the Osage tribe reported \$700,000 worth of IIM

01:56:58PM **21** revenue that year.

01:56:59PM **22 Q.** And each one of the items in Column D reflects -- does it

01:57:05PM **23** reflect the reporting of information on IIM Osage data from the

01:57:12PM **24** tribe?

01:57:12PM **25 A.** Yes.

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01:53:47PM **1** sample, I think it's reason to not pollute it with one more

01:53:51PM **2** observation, which is not comparable.

01:53:53PM **3 Q.** Is that because it's incomplete data?

01:53:55PM **4 A.** Yeah. Because it's incomplete, it's not exact comparable,

01:54:00PM **5** and actually if I included it it would reduce my disbursement

01:54:05PM **6** rate, but I don't think it would be appropriate to include it.

01:54:08PM **7 Q.** So from the period of time 1988 to 2002, you had actual

01:54:17PM **8** disbursements data from the trust, from the individual named

01:54:23PM **9** trust by check, correct?

01:54:25PM **10 A.** Yes.

01:54:25PM **11 Q.** And is that the basis for your extrapolation on the

01:54:31PM **12** disbursement total for the remainder of the years that we're

01:54:36PM **13** dealing with here?

01:54:37PM **14 A.** Yes. I took this data as being based on conversation with

01:54:42PM **15** counsel and what I had been able to find as being the most

01:54:45PM **16** reliable data and extrapolated it.

01:54:49PM **17 Q.** Again, if you had data that was proven to be reliable, you

01:54:53PM **18** could easily use that in your model, correct?

01:54:55PM **19 A.** Correct.

01:54:57PM **20 Q.** Let's talk about the Osage issue Attachment A. Under

01:55:12PM **21** Column C you have Osage government calculated. Do you see that?

01:55:16PM **22 A.** I see that.

01:55:18PM **23 Q.** Let's go to page one of Attachment A. You have Osage

01:55:29PM **24** government calculated but you have nothing highlighted to 1908;

01:55:34PM **25** is that correct?

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01:57:12PM **1 Q.** And let's go to page two.

01:57:16PM **2** THE COURT: Mr. Gingold, can I ask you to back up for

01:57:20PM **3** a minute and explain to me again how these three columns work,

01:57:23PM **4** because I'm trying to figure out what "government corrected" and

01:57:27PM **5** "Osage corrected" means, and it seems to me that what you're

01:57:30PM **6** doing, at least what this chart does, is it adds Column B and

01:57:38PM **7** Column D and subtracts Column C, but I don't know why.

01:57:44PM **8** THE WITNESS: Here's the explanation, your Honor.

01:57:46PM **9** Included in Column B is the government Osage data, so it's in

01:57:53PM **10** there in the revenues.

01:57:55PM **11** THE COURT: All right.

01:57:56PM **12** THE WITNESS: Plaintiffs believe and have argued to me

01:58:02PM **13** that the data provided by the Osage tribe, which is in Column D,

01:58:09PM **14** is more accurate and complete, so what I have done is I've

01:58:12PM **15** started with the government number, taken out their Osage

01:58:15PM **16** component and replaced it with the tribal component. That's why

01:58:21PM **17** I call Column E corrected revenue, so the government number

01:58:24PM **18** that's in B is taken out and then the Osage is put back in using

01:58:29PM **19** what plaintiffs believe is more accurate Osage data.

01:58:32PM **20** THE COURT: Thank you. That is succinct and

01:58:35PM **21** understandable.

01:58:39PM **22** BY MR. GINGOLD:

01:58:39PM **23 Q.** But at least through 1908 the government didn't provide

01:58:42PM **24** data; is that correct?

01:58:43PM **25 A.** There are some very early years. If we go up to the top

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01:58:49PM **1** I'll explain that too.

01:58:51PM **2 Q.** Page one, please.

01:58:56PM **3 A.** What the government did not provide Osage data explicitly

01:59:01PM **4** that I could then take out, so what I did was I noted in all the

01:59:05PM **5** years where there was data, 1909 to the present, the Osage

01:59:12PM **6** government was 41.4 percent I think it is of the Osage

01:59:18PM **7** corrected, so I plugged in 41.4 percent of the corrected as an

01:59:24PM **8** estimate of the Osage government and then did the same

01:59:28PM **9** technique, took it out and replaced it.

01:59:31PM **10 Q.** So you didn't double count the revenue, correct?

01:59:33PM **11 A.** I did not double count the Osage.

01:59:36PM **12 Q.** Is that a reasonable approach to take when you have data

01:59:41PM **13** that is missing, to be able to plug in the number based on the

01:59:45PM **14** percentage that you observed for the other information?

01:59:48PM **15 A.** Yes, I think that is.

01:59:49PM **16 Q.** With respect to Attachment A, you identified a column under

02:00:08PM **17** G that's labeled nominal benefit to the government. What does

02:00:14PM **18** that mean?

02:00:14PM **19 A.** That's just that year's revenues minus disbursements so

02:00:19PM **20** that you can see it and don't have to calculate it.

02:00:22PM **21 Q.** Does that include interest?

02:00:23PM **22 A.** No.

02:00:24PM **23 Q.** And with regard to Column I, which is identified as accrued

02:00:32PM **24** benefit annual, what does that mean?

02:00:36PM **25 A.** That is the interest earned on the balance at the beginning

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02:02:17PM **1** Indian money would be the last money you'd credit?

02:02:21PM **2** THE WITNESS: Well, I'm treating it as the mariginal

02:02:25PM **3** money, that everything else is held the same and the government

02:02:28PM **4** either has or does not have the Indian monies.

02:02:32PM **5** THE COURT: Okay.

02:02:34PM **6** MR. GINGOLD: Your Honor, plaintiffs would like to

02:02:35PM **7** identify Exhibit 59. It's identified as Treasury Debt,

02:02:44PM **8** Historical Debt Outstanding Annual, 2000 to 2007.

02:02:48PM **9** THE COURT: That's too depressing. I don't want to

02:02:50PM **10** see that exhibit.

02:02:54PM **11** THE WITNESS: It's more depressing when you divide by

02:02:56PM **12** the working population.

02:03:01PM **13** MR. GINGOLD: We won't ask any questions about that,

02:03:03PM **14** your Honor.

02:03:04PM **15** Plaintiffs would like to mark for identification

02:03:05PM **16** Exhibit 58. Exhibit 58 is entitled IIM Banking Policy, prepared

02:03:23PM **17** by Terence Kehoe, Morgan, Angel & Associates. This too was

02:03:29PM **18** produced in trial 1.5 by the government.

02:03:29PM **19** (Plaintiffs' Exhibit No. 58 was marked for

02:03:29PM **20** identification at about 2:03 p.m.)

02:03:29PM **21** BY MR. GINGOLD:

02:03:32PM **22 Q.** I'd like you to turn your attention to the second page of

02:03:35PM **23** this excerpted exhibit, which is Bates number it looks like

02:03:45PM **24** D1100034. The Court had asked you questions at the beginning of

02:03:54PM **25** your testimony about funds held on deposit in banks. Do you

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02:00:40PM **1** of the year, and I shouldn't say earned. It is really the

02:00:44PM **2** interest saved on the balance at the beginning of the year at

02:00:48PM **3** the government bond rate for that year.

02:00:49PM **4 Q.** And Column J, what is Column J?

02:00:55PM **5 A.** Column J is the accumulated benefit, which is the benefit

02:01:03PM **6** for that year plus the interest saving, plus the cumulated

02:01:10PM **7** benefits from previous years.

02:01:11PM **8 Q.** If you can turn to page five, please.

02:01:19PM **9** THE COURT: Are there any of these years in which the

02:01:21PM **10** government was not a net borrower?

02:01:24PM **11** THE WITNESS: It was always a debtor so it always was

02:01:27PM **12** in debt, but there were years where in that particular year they

02:01:30PM **13** were able to pay down part of the debt so they were not a net

02:01:34PM **14** borrower. I think there's a couple in the '20s and 1955, and

02:01:43PM **15** not many, but there are a few.

02:01:43PM **16** THE COURT: And should we be including interest for

02:01:45PM **17** those years?

02:01:45PM **18** THE WITNESS: Yes, because if the government -- in

02:01:48PM **19** order to not include the interest saved, the government would

02:01:51PM **20** have to not be a net borrower, so even if I'm paying down my

02:01:56PM **21** mortgage, as long as I have a mortgage outstanding I could save

02:02:01PM **22** interest if someone gave me some money and I could use it in

02:02:05PM **23** lieu of borrowing by paying down that borrowing further.

02:02:09PM **24** THE COURT: But by your theory, unless the national

02:02:14PM **25** debt got down below the accumulated amount, in other words, the

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02:03:58PM **1** recall that?

02:03:59PM **2 A.** I think so.

02:04:01PM **3 Q.** Do you recall listening to the testimony of Mr. Miller?

02:04:05PM **4 A.** Yes. There was extensive discussion of it there.

02:04:11PM **5 Q.** In your view or if funds are held in banks, is there still

02:04:15PM **6** a benefit if individual Indian trust funds are held in

02:04:19PM **7** commercial banks and not directly in the general Treasury, is it

02:04:24PM **8** your view there is a benefit conferred on the government?

02:04:33PM **9** MR. KIRSCHMAN: Objection; lack of foundation. He's

02:04:36PM **10** testifying based on his understanding about legal rights and

02:04:38PM **11** money held in banks.

02:04:40PM **12** MR. GINGOLD: Is there an economic benefit conferred?

02:04:43PM **13** THE COURT: I'll allow it. I can sort that out. I'll

02:04:46PM **14** hear his answer.

02:04:48PM **15** BY MR. GINGOLD:

02:04:48PM **16 Q.** Do you believe there would be an economic or financial

02:04:52PM **17** benefit conferred on the government if trust funds are held in

02:04:54PM **18** commercial banks?

02:04:55PM **19 A.** Well, the critical question from an economic standpoint is

02:04:59PM **20** not where the monies are held, but how they're used. If the

02:05:03PM **21** monies were put into bank accounts and held there and disbursed

02:05:06PM **22** entirely to individual Indians, there would be no benefit

02:05:09PM **23** conferred on the government. If they were held there and

02:05:12PM **24** allowed to accumulate and eventually used for some government-

02:05:16PM **25** related expenditure or returned to the Treasury, there would be

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02:05:20PM **1** a benefit to the government. And I should add one thing, that

02:05:23PM **2** at that time banks gave free services to parties holding funds,

02:05:31PM **3** so the Treasury would probably get free banking services because

02:05:35PM **4** of the Indian monies held there, which would be a benefit.

02:05:38PM **5** **Q.** That is what is --

02:05:40PM **6** THE COURT: What's that, a dollar a month? I mean,

02:05:42PM **7** what is it?

02:05:44PM **8** BY MR. GINGOLD:

02:05:44PM **9** **Q.** Is that what is referred to as compensating balances in

02:05:48PM **10** banking parlance?

02:05:50PM **11** **A.** What the government would be getting there is the clearing

02:05:53PM **12** services and the accounting services and so forth.

02:05:56PM **13** THE COURT: Are you putting in a claim for curing

02:05:59PM **14** services and accounting services?

02:06:01PM **15** MR. GINGOLD: Not yet, your Honor.

02:06:08PM **16** BY MR. GINGOLD:

02:06:08PM **17** **Q.** Now, if funds were removed from the banks and then pulled

02:06:12PM **18** back into the Treasury, it's a very direct issue, correct?

02:06:15PM **19** **A.** That would be a direct benefit to the government, or if the

02:06:19PM **20** funds were disbursed from the banks to pay for government

02:06:23PM **21** expenditures, such as to finance the Bureau of Indian Affairs,

02:06:26PM **22** for example.

02:06:27PM **23** **Q.** I'd like to point your attention to the highlighted section

02:06:30PM **24** of this exhibit, which says, In August 1934 acting centers

02:06:35PM **25** informed the controller general that, quote, except in five or

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02:08:07PM **1** inputs. As a financial economist I believe that the methodology

02:08:12PM **2** used in Attachment A is the correct approach for computing

02:08:18PM **3** benefits conferred on the government. As to the precise numbers

02:08:24PM **4** to input into it, I've used the best approximation that I could

02:08:29PM **5** come up with having worked on this matter for a couple of

02:08:32PM **6** months, but I was also told that much of the input would come

02:08:36PM **7** from the government's efforts to, for example, prove

02:08:40PM **8** disbursements, and I indicated that if the inputs were improved,

02:08:45PM **9** then I could input that into the model and get an improved

02:08:51PM **10** estimate of the bottom line.

02:08:52PM **11** **Q.** But in your model, as you stated based on CPNR data, you

02:08:58PM **12** used the seventy percent disbursement for the years that were

02:09:03PM **13** actually provided in summary form in the CPNR database, correct?

02:09:08PM **14** **A.** Well, in the years where the CPNR data were provided I used

02:09:14PM **15** that actual data, and in all the other years I used seventy

02:09:17PM **16** percent, which was the average disbursement rate from the CPNR

02:09:20PM **17** data.

02:09:21PM **18** **Q.** So just as the disbursements can, the percentage of

02:09:24PM **19** disbursements could increase with the additional data that's

02:09:28PM **20** considered a benefit, it is also possible that the seventy

02:09:33PM **21** percent number could decrease if, for example, checks were not

02:09:37PM **22** identified to support a percentage?

02:09:39PM **23** **A.** That would be possibility.

02:09:40PM **24** **Q.** But we don't know, do we?

02:09:41PM **25** **A.** I don't know.

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02:06:39PM **1** six instances all IIM checking accounts had been closed and

02:06:42PM **2** practically all disbursements of such funds are now made by

02:06:46PM **3** check on the treasurer of the United States. Have you seen this

02:06:52PM **4** information before?

02:06:53PM **5** **A.** Yes.

02:06:55PM **6** **Q.** So if all the accounts were closed and the funds were

02:06:59PM **7** disbursed to the Treasury, it's just a standard benefit

02:07:03PM **8** conferred analysis, correct?

02:07:05PM **9** MR. WARSHAWSKY: Objection; leading.

02:07:07PM **10** THE COURT: I thought your objection was going to be

02:07:08PM **11** "hearsay."

02:07:10PM **12** MR. WARSHAWSKY: I'll object, hearsay.

02:07:12PM **13** THE COURT: Sustained. Sustained. I mean, good idea,

02:07:22PM **14** Mr. Warshawsky.

02:07:24PM **15** MR. GINGOLD: Your Honor, the government filed this

02:07:25PM **16** report in this Court and it was admitted into evidence.

02:07:28PM **17** THE COURT: Look, this is almost a collateral issue as

02:07:33PM **18** far as this witness is concerned. Let's move on.

02:07:38PM **19** BY MR. GINGOLD:

02:07:38PM **20** **Q.** Your Attachment A is your best approach to providing an

02:07:51PM **21** approximation of the benefit conferred on the government, isn't

02:07:54PM **22** it?

02:07:54PM **23** **A.** I want to say two things in that regard with respect to

02:07:59PM **24** Attachment A because it really has two aspects. One is it's a

02:08:02PM **25** financial economic model, and two is it relies on specific

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02:09:42PM **1** **Q.** So based on the information you have, and based on your

02:09:46PM **2** analysis, subject to the modification that was raised based on

02:09:54PM **3** the \$734.33 million adjustment for 1926 I believe, you believe

02:10:05PM **4** your model accurately states the benefit conferred on the

02:10:10PM **5** government through the use of individual Indian trust funds; is

02:10:15PM **6** that correct?

02:10:15PM **7** **A.** I believe the model is appropriate, and given the

02:10:19PM **8** assumptions that I've testified to today, it takes those

02:10:23PM **9** assumptions and translates them into a benefit conferred.

02:10:26PM **10** **Q.** And to the extent that there's evidence to support the

02:10:31PM **11** \$734.33 million or more, that would also be included in your

02:10:36PM **12** model and the results would be adjusted; is that correct?

02:10:41PM **13** **A.** Yes. If you make the change in the model the spreadsheet

02:10:43PM **14** would automatically adjust the bottom line.

02:10:48PM **15** MR. GINGOLD: No further questions, your Honor.

02:10:51PM **16** THE COURT: Mr. Warshawsky?

02:10:51PM **17** CROSS-EXAMINATION

02:10:56PM **18** BY MR. WARSHAWSKY:

02:10:56PM **19** **Q.** Good afternoon, Professor Cornell. My name is John

02:11:18PM **20** Warshawsky from the Justice Department. I am going to ask you a

02:11:21PM **21** number of questions this afternoon.

02:11:22PM **22** You've testified a number of times before, correct.

02:11:24PM **23** **A.** Yes.

02:11:24PM **24** **Q.** So you know how the process works. If I ask you anything

02:11:27PM **25** and you'd like it clarified or rephrased, please let me know.

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02:11:31PM **1** I'll be happy to work with you, okay?

02:11:32PM **2 A.** Okay.

02:11:32PM **3 Q.** All right. I want to follow-up on the last exchange that

02:11:35PM **4** you just had with Mr. Gingold. You were talking about the

02:11:40PM **5** methodology in your model which you've represented is the proper

02:11:44PM **6** methodology, but you're also talking about making some

02:11:48PM **7** adjustments based on government data?

02:11:50PM **8 A.** Correct.

02:11:51PM **9 Q.** So to be sure we understand what you're testifying to

02:11:56PM **10** today, it's your opinion that the methodology is correct, right?

02:12:01PM **11 A.** Yes.

02:12:02PM **12 Q.** But you're not here today to tell the judge that this is

02:12:06PM **13** actually the precise measure of the government's benefit from

02:12:10PM **14** the government's alleged use of funds that couldn't be explained

02:12:15PM **15** from the accounting?

02:12:16PM **16 A.** Well, I think that requires work further than I've done.

02:12:26PM **17** For example, one of the first things I asked was to hear the

02:12:29PM **18** government's evidence regarding disbursements, and to the extent

02:12:33PM **19** that I hear that and it influences decisions about what

02:12:39PM **20** disbursements number to put into that spreadsheet, it's going to

02:12:43PM **21** change the bottom line.

02:12:44PM **22 Q.** Professor Cornell, do you prefer "professor" or "doctor"?

02:12:50PM **23 A.** I think "professor." "Doctor" sounds too medical to me.

02:12:53PM **24 Q.** All right. Professor Cornell, when were you first hired to

02:12:56PM **25** work on the Cobell case?

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02:14:12PM **1** where you may have gotten information for your analysis.

02:14:16PM **2 A.** Well, two sources. To some extent the plaintiffs'

02:14:22PM **3** attorneys directly, but primarily via my staff who corresponded

02:14:28PM **4** extensively with plaintiffs' attorneys and documents float back

02:14:31PM **5** and forth, but most of those documents were sent to CRA opened

02:14:35PM **6** and examined by the staff and then presented to me.

02:14:38PM **7 Q.** Did you personally ask to speak with anyone besides

02:14:44PM **8** Plaintiffs' counsel, for example?

02:14:45PM **9 A.** I spoke with some of the other experts who have testified

02:14:51PM **10** today, Mr. Miller, Dr. Miller, Mr. Laykoc. That's about all I

02:15:02PM **11** recall.

02:15:02PM **12 Q.** Professor Cornell, what document did you review in the

02:15:05PM **13** context in preparing your opinion?

02:15:07PM **14 A.** Well, a lot. They were accumulated into more than a dozen

02:15:15PM **15** large binders. They were primarily historical documents,

02:15:23PM **16** reports, government documents, things of the nature that have

02:15:28PM **17** been introduced as exhibits to Attachment A.

02:15:32PM **18 Q.** And how did you obtain these documents?

02:15:34PM **19 A.** Well, I obtained them from Mr. Herschlifer who is working

02:15:39PM **20** with me, but I imagine Mr. Herschlifer obtained them from the

02:15:42PM **21** Plaintiffs' attorneys.

02:15:43PM **22 Q.** Aside from documents that you believe Mr. Herschlifer

02:15:50PM **23** obtained from Plaintiffs' counsel, do you know if you or any of

02:15:53PM **24** your associates obtained documents from any other source?

02:15:58PM **25 A.** Well, some of the information we, "we" being CRA, obtained

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02:12:57PM **1 A.** I don't know precisely, but recently, two, three months

02:13:03PM **2** ago.

02:13:03PM **3 Q.** And prior to your being hired to work on the case, did you

02:13:07PM **4** have any background or experience working with the individual

02:13:10PM **5** Indian trust system?

02:13:12PM **6 A.** No.

02:13:13PM **7 Q.** Approximately how many hours have you spent reviewing

02:13:18PM **8** materials in connection with your engagement on this case?

02:13:21PM **9 A.** I don't know exactly, but in the range of fifty to a

02:13:28PM **10** hundred.

02:13:28PM **11 Q.** And you mentioned during your testimony that you were

02:13:34PM **12** assisted by staff?

02:13:34PM **13 A.** Yes.

02:13:34PM **14 Q.** And approximately how many people were assisting you?

02:13:35PM **15 A.** There were three primary individuals who have worked on

02:13:42PM **16** this project from CRA International.

02:13:45PM **17 Q.** And that's your company, right, or that's the company

02:13:50PM **18** you're associated with?

02:13:51PM **19 A.** I'm a senior consultant to that company.

02:13:53PM **20 Q.** That's Charles River?

02:13:54PM **21 A.** It used to be Charles River, but it's renamed itself CRA

02:14:00PM **22** International.

02:14:00PM **23 Q.** Who's spoken to you in connection with your engagement on

02:14:06PM **24** this case? In other words, what I'm trying to learn is, since

02:14:09PM **25** we haven't met before, I'm trying to get an understanding as to

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02:16:03PM **1** because I happened to know the sources for that, like a long-

02:16:09PM **2** time series on Treasury bond data. That was obtained from

02:16:13PM **3** Professor Schiller's website. I'm trying to think if there were

02:16:23PM **4** any others. There were things like the Treasury debt schedule.

02:16:30PM **5** We obtained that directly from the U.S. Treasury.

02:16:33PM **6 Q.** Are you referring to the, it was I think Plaintiffs' 57,

02:16:37PM **7** the Treasury direct website shot?

02:16:41PM **8 A.** Yes, yes. And there were probably other documents that I

02:16:44PM **9** couldn't tell you which they are that CRA staff obtained

02:16:49PM **10** directly, such as the Treasury information from websites rather

02:16:53PM **11** than getting it through the Plaintiffs' attorneys, but by the

02:16:56PM **12** time it was shown to me its source wasn't noted, just it was a

02:17:01PM **13** document in the case.

02:17:02PM **14 Q.** Fair to say, though, that the overwhelming majority of

02:17:06PM **15** documents that you reviewed were the historical materials

02:17:09PM **16** provided by Plaintiffs' counsel; is that correct?

02:17:11PM **17 A.** I think that's correct.

02:17:13PM **18 Q.** And you've talked about reviewing, for example,

02:17:16PM **19** Commissioner of Indian reports, Indian Affairs reports in

02:17:21PM **20** connection with your analysis, correct?

02:17:22PM **21 A.** Yes.

02:17:22PM **22 Q.** Did you review any documents such as journal vouchers?

02:17:28PM **23 A.** I may have, but I'm not sure. I don't recall specifically.

02:17:33PM **24 Q.** In forming your opinions is it fair to say you've assumed

02:17:38PM **25** that money has been wrongfully withheld from the IIM trust

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02:17:42PM **1** accounts?

02:17:42PM **2 A.** Well, I didn't make that assumption, per se. I eventually

02:17:46PM **3** made the assumptions that went into Attachment A, but I did say

02:17:57PM **4** to counsel in this matter that I was not a historian and had not

02:18:02PM **5** been working on this matter long enough to have delved into the

02:18:06PM **6** nature of each number, so to some extent I would be operating at

02:18:10PM **7** a high level that may have to be refined.

02:18:13PM **8 Q.** Now, I know you were sitting in court part of yesterday and

02:18:17PM **9** this morning when Dr. Miller was testifying so you heard some

02:18:21PM **10** testimony about the Treasury general account. Prior to your

02:18:26PM **11** coming to court this week had you heard about the Treasury

02:18:28PM **12** general account?

02:18:29PM **13 A.** Yes.

02:18:29PM **14 Q.** And is that something you have a fair amount of familiarity

02:18:32PM **15** with from your work?

02:18:34PM **16 A.** Well, there's a great amount to know about Treasury

02:18:38PM **17** finance, but I worked on the Treasury bidding scandal for Warren

02:18:43PM **18** Buffett back in 1986, so as part of that assignment I spent some

02:18:47PM **19** time learning about government debt financing and the operation

02:18:50PM **20** of the Treasury, but it's been a while.

02:18:52PM **21 Q.** Okay. And aside from what you've heard this week, for

02:18:57PM **22** example, did you have a sense as to how much money typically was

02:19:01PM **23** in the Treasury general account?

02:19:02PM **24 A.** I didn't -- that \$5 billion number that I saw in a

02:19:08PM **25** document, that was the first time I saw that as working balance.

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02:20:26PM **1** A, but would you please describe the process that went into

02:20:31PM **2** preparing Attachment A? In other words, what was your role and

02:20:34PM **3** how did you all decide to undertake this approach?

02:20:39PM **4 A.** Well, the first thing I did was have extensive conversation

02:20:45PM **5** with Plaintiffs' counsel to understand the legal framework in

02:20:50PM **6** which a calculation would be done. And this would be somewhat

02:20:56PM **7** analogous to the damages versus restitution discussion that I

02:20:59PM **8** started with and Professor Laycok talked about in detail, and I

02:21:06PM **9** learned what they were looking for was a model that would

02:21:09PM **10** reflect benefits to the government, which I explained would be

02:21:14PM **11** damages to, let's say, a class of Indians, so once I understood

02:21:20PM **12** that, I said the benefits to the government, I pretty much then

02:21:24PM **13** knew what to do. The financial economics of Attachment A are

02:21:31PM **14** things that I've done in the past that I knew how to do and so I

02:21:35PM **15** basically developed the template for it and said that we're

02:21:41PM **16** going to have to do a lot of work to find the right numbers to

02:21:43PM **17** go in there.

02:21:44PM **18 Q.** So was it you that decided, and I'm going to have to ask if

02:21:49PM **19** we could have Plaintiffs' Exhibit 41 put up. We can just go to

02:21:55PM **20** the first page. Were you the person who actually made the

02:22:03PM **21** decision to have the various columns in Plaintiffs' Exhibit 41?

02:22:06PM **22 A.** Well, some, but not -- some I had to learn facts from

02:22:10PM **23** others. For example, I had no idea about this Osage calculated

02:22:16PM **24** or Osage corrected, but it was my view that the critical columns

02:22:23PM **25** would be you need a measure of revenues and you need a measure

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02:19:11PM **1** I didn't know that prior.

02:19:12PM **2 Q.** And you're referring to the GAO report that was reviewed

02:19:16PM **3** yesterday I believe with Dr. Miller?

02:19:19PM **4 A.** I think that was it, yes.

02:19:19PM **5 Q.** It was a GAO report about debt management?

02:19:22PM **6 A.** Yes.

02:19:23PM **7 Q.** I gather you've never published any articles or done any

02:19:28PM **8** research studies related to the Treasury general account; is

02:19:33PM **9** that correct?

02:19:33PM **10 A.** Not specifically, no.

02:19:34PM **11 Q.** Now, I'd like to talk about we've referred to -- you've

02:19:40PM **12** referred to Attachment A, Plaintiffs' Exhibit 41, and I may use

02:19:44PM **13** those terms interchangeably. We were up until today working

02:19:49PM **14** with a version of Attachment A which was attached to a brief

02:19:53PM **15** filed by the Plaintiffs' counsel. You're familiar with that

02:19:55PM **16** document, are you not, from a couple of months ago?

02:19:57PM **17 A.** I think so, yes.

02:19:59PM **18 Q.** This is slightly different. It appears that it's just some

02:20:03PM **19** numbers have been rounded, that is basically the only

02:20:06PM **20** difference?

02:20:06PM **21 A.** You know, there's been a couple versions of Attachment A.

02:20:11PM **22** For example, the CPNR data were not available a month or so ago,

02:20:15PM **23** so that's changed. You'd have to show me which particular

02:20:19PM **24** version you have before I could tell you for sure.

02:20:22PM **25 Q.** Well, if that's necessary we'll get to the old Attachment

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02:22:28PM **1** of disbursements, and in disbursements you would have to include

02:22:33PM **2** things like theft, because if we're doing a benefit to the

02:22:36PM **3** government analysis, then suppose somebody just wrote a check to

02:22:41PM **4** themselves or somehow fraudulently took money. That would be a

02:22:46PM **5** damage to the Indians but not a benefit to the government, so

02:22:50PM **6** disbursements would have to be net of all disbursements that did

02:22:55PM **7** not benefit the government.

02:22:58PM **8 Q.** By the way, you didn't actually see any evidence of fraud

02:23:00PM **9** when were you doing your disbursements calculation, did you?

02:23:03PM **10 A.** No, not per se, but, you know, I thought with

02:23:07PM **11** a-hundred-and-some years and processing being what they are, I

02:23:11PM **12** would be surprised if there wasn't some of that.

02:23:13PM **13 Q.** There may have been a crook somewhere, right?

02:23:16PM **14 A.** Right. I don't have any direct evidence of that.

02:23:19PM **15 Q.** Okay.

02:23:19PM **16 A.** At any rate --

02:23:20PM **17 Q.** And you certainly I gather in the materials that you

02:23:22PM **18** reviewed didn't see any evidence of systemic fraud, did you?

02:23:28PM **19 A.** No. But part of the problem is that everything that I saw,

02:23:32PM **20** it seems extraordinarily incomplete, so I didn't really see

02:23:39PM **21** evidence of systemic anything like clear evidence of systemic

02:23:43PM **22** payments to individual recipients. It's just, as I testified

02:23:47PM **23** before, pretty scattered data as far as I've seen to this point.

02:23:51PM **24 Q.** Did that surprise you looking back at a history of over a

02:23:54PM **25** hundred years?

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02:23:55PM **1** **A.** No. You had somewhat the same problem with Swiss banking
 02:24:01PM **2** records related to the Holocaust. There were -- and that was
 02:24:08PM **3** only since 1945. Changes had occurred, documents had been lost
 02:24:11PM **4** or destroyed. That is a problem with these long-run issues.
 02:24:17PM **5** **Q.** Now, you specifically referred to the Osage government
 02:24:22PM **6** calculated and the Osage corrected columns as being columns that
 02:24:27PM **7** you didn't decide I guess needed to be in there; is that
 02:24:31PM **8** correct?
 02:24:31PM **9** **A.** Correct. At the time I started I didn't know anything
 02:24:35PM **10** about any revenues earned by the Osage tribe.
 02:24:39PM **11** **Q.** And so how did you learn about the Osage revenues?
 02:24:43PM **12** **A.** Conversations with my staff and with counsel, looking at
 02:24:49PM **13** documents, having meetings, trying to put together what the
 02:24:56PM **14** total revenues earned for the IIM trusts were.
 02:25:00PM **15** **Q.** Now, in the course of your work have you gained any
 02:25:02PM **16** understanding as to why the Osage revenues might be treated as
 02:25:07PM **17** unique from other revenues?
 02:25:09PM **18** **A.** Just at a high level.
 02:25:12PM **19** **Q.** Well, give us your best high-level understanding.
 02:25:16PM **20** **A.** Well, the Osage tribe has occupied lands that have
 02:25:22PM **21** particularly large oil and gas reserves, and some of the
 02:25:25PM **22** individual Indian lands have wells on them and there's wellhead
 02:25:33PM **23** rights, so accounting for -- first of all, more dollars are
 02:25:36PM **24** involved than for most land, and second of all, accounting for
 02:25:40PM **25** them depend on how you treat those wellhead rights and so forth.

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02:27:40PM **1** government-calculated numbers.
 02:27:42PM **2** **Q.** Well, I know, and you referred to that in your direct
 02:27:45PM **3** examination, so I want to be clear. Is it your understanding
 02:27:49PM **4** that Columns C and D are simply two different measures of the
 02:27:56PM **5** same activity?
 02:27:56PM **6** **A.** Yes.
 02:27:58PM **7** **Q.** And so you, for example -- let me just give you a different
 02:28:09PM **8** view on Osage as a hypothetical. Assume that revenues from the
 02:28:16PM **9** Osage lands go into a tribal account, not an individual account.
 02:28:24PM **10** **A.** Yes.
 02:28:24PM **11** **Q.** And monies from that tribal account are disbursed directly
 02:28:31PM **12** to individuals, not to a trust account but to individuals who
 02:28:36PM **13** have what are called headright interests. Are you with me?
 02:28:40PM **14** **A.** Yes.
 02:28:40PM **15** **Q.** In that case, those monies would not flow through the IIM
 02:28:45PM **16** trust; is that correct?
 02:28:46PM **17** **A.** The way you've defined it, that sounds like that's correct,
 02:28:52PM **18** yes.
 02:28:53PM **19** **Q.** And if in fact you've included those types of revenues in
 02:28:57PM **20** the Osage corrected amounts in Column D, would you agree that
 02:29:02PM **21** those amounts should come out of the calculation?
 02:29:06PM **22** **A.** If the amounts never flowed into the IIM trust then they
 02:29:14PM **23** should not be in my calculation.
 02:29:15PM **24** **Q.** Okay. And have you ever done a calculation to get a sense
 02:29:28PM **25** as to how much of the \$58 billion that you showed us your bottom

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02:25:50PM **1** **Q.** Putting aside the Osage for a moment, have you ever heard
 02:25:53PM **2** the term land-based IIM accountholders or something like that?
 02:25:58PM **3** **A.** What's that?
 02:25:58PM **4** **Q.** Land-based, l-a-n-d hyphen b-a-s-e-d?
 02:26:02PM **5** **A.** No, I don't think so.
 02:26:03PM **6** **Q.** Do you have an understanding as to how most members of the
 02:26:09PM **7** class become entitled to collect revenues from their land
 02:26:17PM **8** interests?
 02:26:18PM **9** **A.** No, I don't think so.
 02:26:21PM **10** **Q.** So if in the case of the Osage do you have an understanding
 02:26:34PM **11** as to whether those revenues go directly from, say, the oil and
 02:26:43PM **12** gas producers to the individual accounts?
 02:26:48PM **13** **A.** No. It's my understanding they do not.
 02:26:50PM **14** **Q.** So what is your understanding about how the revenues from
 02:26:53PM **15** oil and gas go in the case of Osage?
 02:26:56PM **16** **A.** They are aggregated into an IIM trust and then the
 02:27:00PM **17** individuals are allocated payments out of that trust.
 02:27:06PM **18** **Q.** Now, and that's why you've gone ahead and calculated an
 02:27:10PM **19** Osage corrected column; is that correct? Sorry for the two
 02:27:16PM **20** "corrects."
 02:27:16PM **21** **A.** Well, I'm really not the detailed expert on the Osage
 02:27:19PM **22** accounting, but in conversations with plaintiff counsel it is
 02:27:29PM **23** their belief, and I believe they believe they can show that the
 02:27:33PM **24** data collected by the tribe are more accurate as to the actual
 02:27:38PM **25** receipts that would have gone into the trust than the

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02:29:35PM **1** line, how much of that is attributable to the difference between
 02:29:40PM **2** the use of Column D versus the use of the government's Osage
 02:29:46PM **3** calculation?
 02:29:47PM **4** **A.** I haven't, but if we went to the bottom, maybe we can see.
 02:29:54PM **5** **Q.** If you want to go --
 02:29:55PM **6** **A.** I don't know if the totals -- I need to see the totals.
 02:30:00PM **7** **Q.** You want to go to the last page. Thanks.
 02:30:03PM **8** Be careful with the back of the envelope. I
 02:30:13PM **9** embarrassed myself a little, I was off by a fact, but here I
 02:30:17PM **10** think we can see how that might work. You notice that the
 02:30:21PM **11** difference between the corrected revenues and disbursements is
 02:30:24PM **12** about \$4-and-a-half billion?
 02:30:26PM **13** **Q.** Right.
 02:30:27PM **14** **A.** And that translates up into when you consider the long
 02:30:32PM **15** period of time and the interest rate, about 58 billion. The
 02:30:36PM **16** difference between Osage corrected and Osage calculated looks to
 02:30:42PM **17** be about nine hundred million, so that's about 1/5 of the 4.5,
 02:30:50PM **18** about twenty percent. I would suspect that undoing that would
 02:30:53PM **19** reduce the number therefore by about twenty percent.
 02:30:57PM **20** **Q.** That's like about eleven-plus billion dollars?
 02:31:05PM **21** **A.** Yes.
 02:31:06PM **22** **Q.** I wanted to ask you a couple more questions about the
 02:31:08PM **23** methodology on Attachment A. I know your background includes
 02:31:15PM **24** statistics, you have a master's in statistics and you've
 02:31:19PM **25** obviously done work in statistics, correct?

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02:31:21PM **1** **A.** Yes.

02:31:21PM **2** **Q.** Okay. Does Attachment A represent a regression, the

02:31:26PM **3** product of a regression analysis?

02:31:28PM **4** **A.** I did regressions to, quote, fill in the blanks, but I in

02:31:33PM **5** fact didn't use them. I just used a simple linear

02:31:39PM **6** interpolation.

02:31:39PM **7** **Q.** Are there other ways to fill in missing data besides a

02:31:43PM **8** linear interpolation?

02:31:46PM **9** **A.** Yes. I looked at four or five, and there's probably many

02:31:49PM **10** more than the ones that I looked at, but I looked at some of the

02:31:51PM **11** standard techniques.

02:31:52PM **12** **Q.** What are some of those standard techniques?

02:31:54PM **13** **A.** Well, you can use a regression model, a standard linear

02:32:00PM **14** regression model. You could use a logrythmic aggression, you

02:32:04PM **15** could use an exponential smoothing model. I found that as long

02:32:09PM **16** as I focused on the 1887-to-1972 period the bottom line was not

02:32:16PM **17** very sensitive to how I filled in the blanks.

02:32:18PM **18** **Q.** Have you ever, and I'm sure you have, but I have to ask it

02:32:24PM **19** this way anyway, have you ever heard the term multi-variate

02:32:29PM **20** model?

02:32:29PM **21** **A.** Multi-variate regression.

02:32:31PM **22** **Q.** I'll take that one.

02:32:32PM **23** **A.** Yes.

02:32:32PM **24** **Q.** What is a multi-variate regression?

02:32:36PM **25** **A.** It's where you try to explain a variable, like, let's say,

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02:34:09PM **1** **Q.** All right. Now, let's go ahead and look at -- why don't

02:34:17PM **2** you go back to the first page of Plaintiffs' 41. As I

02:34:22PM **3** understand it, when you take your seventy percent, you look at

02:34:27PM **4** your total revenues for a particular year, like year, let's go

02:34:35PM **5** to the bottom, 1915, Column E; is that correct?

02:34:41PM **6** **A.** Yes.

02:34:42PM **7** **Q.** And that's the one that you multiply times .7?

02:34:45PM **8** **A.** Correct.

02:34:47PM **9** **Q.** To get disbursements of 5.7?

02:34:50PM **10** **A.** Yes.

02:34:51PM **11** **Q.** And then what happens to the remain -- the difference

02:34:55PM **12** between the 5.7? What is that, 2.46; is that right? What

02:35:03PM **13** happens to the difference?

02:35:03PM **14** **A.** It's assumed that that -- the model effectively assumes

02:35:07PM **15** that that difference is available to the government for use.

02:35:11PM **16** **Q.** Didn't get --

02:35:13PM **17** **A.** Except to the extent that it built up an external account.

02:35:18PM **18** **Q.** I'm sorry, except to the extent?

02:35:20PM **19** **A.** Except to the extent that it builds up in an external

02:35:23PM **20** account.

02:35:23PM **21** **Q.** What does that mean?

02:35:24PM **22** **A.** Well, if you go to the very end, and I talked about this in

02:35:29PM **23** my direct, but go to the last page, you have a balance of 423

02:35:34PM **24** million. If all of those funds, all of those two-point whatever

02:35:40PM **25** you said it was, 2.4.

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02:32:41PM **1** sales of iphones by a number of other variables such as GNP or

02:32:53PM **2** sales of other Apple products where you don't just use one

02:32:58PM **3** explanatory variable. You have several.

02:32:59PM **4** **Q.** Are there any advantages to using more than one variable?

02:33:04PM **5** **A.** As long as you have a reasonable basis for so doing, and

02:33:09PM **6** it's not data-fishing, there would be, yes.

02:33:12PM **7** **Q.** And what are those advantages?

02:33:14PM **8** **A.** Well, you typically increase the explanatory power by using

02:33:20PM **9** more variables.

02:33:22PM **10** **Q.** Okay. In the case of Attachment A how many variables did

02:33:27PM **11** you use?

02:33:28PM **12** **A.** I just used the actual data itself, though I suspect if I

02:33:33PM **13** had done a multi-variate model it would not have much impact

02:33:37PM **14** either.

02:33:37PM **15** **Q.** Now, I want to get to this 69.82 percent disbursement rate

02:33:45PM **16** that you utilized.

02:33:47PM **17** And you have to bear with me, your Honor. You stole

02:33:52PM **18** some of my cross-examination so I'll try not to be duplicative

02:33:56PM **19** on some of these points.

02:33:57PM **20** THE COURT: I'm sorry, Mr. Warshawsky.

02:34:00PM **21** MR. WARSHAWSKY: I wasn't, nor are my co-counsel.

02:34:04PM **22** BY MR. WARSHAWSKY:

02:34:04PM **23** **Q.** I'll just refer as a seventy percent disbursement rate, if

02:34:07PM **24** that's okay.

02:34:07PM **25** **A.** That's fine.

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02:35:42PM **1** **Q.** 2.46?

02:35:44PM **2** **A.** 2.46, if all of those had simply been dumped into another

02:35:49PM **3** account and not touched and just built up for a hundred years,

02:35:53PM **4** hundred plus years, I presume you'd have a number pretty close

02:35:56PM **5** to \$58 billion. That obviously did not happen because we don't

02:36:01PM **6** have that sort of money, so I don't know what happened to it,

02:36:05PM **7** but it is an assumption of the model that it was available for

02:36:08PM **8** use by the United States government.

02:36:10PM **9** **Q.** It's an assumption, is it not, that that thirty percent is

02:36:14PM **10** never disbursed to the plaintiffs?

02:36:18PM **11** **A.** Except to the extent that it builds up --

02:36:22PM **12** **Q.** Well --

02:36:23PM **13** **A.** -- so that is available for disbursement.

02:36:25PM **14** **Q.** Well, let's look then -- oh, we can probably do it with

02:36:30PM **15** this one here. Let me do my calculation real quick.

02:36:35PM **16** THE COURT: 58 million isn't money the government

02:36:37PM **17** spent, it's money the government didn't have to spend, isn't it?

02:36:41PM **18** It's basically the opportunity cost? I mean, it's interest that

02:36:47PM **19** did not have to be paid because the money did not have to be

02:36:50PM **20** borrowed.

02:36:51PM **21** THE WITNESS: Correct. But the point I was making is,

02:36:53PM **22** we can't ignore that some of the money, \$423 million, it hasn't

02:37:06PM **23** been used by the government, it is in the account, and it could

02:37:06PM **24** be disbursed tomorrow presumably to individual Indians.

02:37:07PM **25** BY MR. WARSHAWSKY:

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02:37:07PM **1 Q.** We can keep it on this page here.

02:37:09PM **2** We're on the last page of DX Exhibit 41. I'm looking,

02:37:13PM **3** for example, at 2003, fiscal year 2003, and we take your

02:37:17PM **4** corrected revenues of roughly 180 million, multiply it times 70

02:37:22PM **5** percent, and we get the disbursements of about 126 million,

02:37:26PM **6** right?

02:37:26PM **7 A.** Yes.

02:37:27PM **8 Q.** And then the thirty percent goes off somewhere. The next

02:37:32PM **9** year, 2004, you do the same thing again, right, we take 195 --

02:37:36PM **10 A.** Yes.

02:37:37PM **11 Q.** -- times .7, and we get the 136?

02:37:42PM **12 A.** Yes.

02:37:43PM **13 Q.** Isn't it correct, then, that implicit in your model that is

02:37:48PM **14** that thirty percent that's collected in a given year is never

02:37:54PM **15** disbursed for over a hundred years?

02:37:57PM **16 A.** Well, you can't say that any particular amount -- I think

02:38:03PM **17** Dr. Miller talked about this -- wasn't disbursed, because when

02:38:06PM **18** you disburse monies in 2004, are those new or are those for

02:38:13PM **19** prior years, but you are saying that thirty percent of the

02:38:17PM **20** money, except to the extent that it goes and builds up in the

02:38:21PM **21** account with a 423, disappears into the coffers of the Treasury

02:38:27PM **22** and goes who knows where to the benefit of the government.

02:38:32PM **23 Q.** Well, you're saying that this is money, thirty percent of

02:38:35PM **24** revenues collected for the beneficiaries each year never get

02:38:41PM **25** disbursed to the beneficiaries?

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02:40:19PM **1** revenue number was disbursed.

02:40:23PM **2 Q.** I beg your pardon?

02:40:24PM **3 A.** It's showing that thirty cents of every corrected revenue

02:40:27PM **4** dollar was disbursed.

02:40:29PM **5 Q.** Okay. It's showing that that's how you've calculated it on

02:40:33PM **6** Attachment C?

02:40:34PM **7 A.** That's correct.

02:40:35PM **8 Q.** When I say Plaintiffs', I forget what, 56?

02:40:39PM **9 A.** That's correct.

02:40:39PM **10 Q.** So this is Plaintiffs' 56 is the sole basis for your

02:40:44PM **11** conclusion that in a given year in every year thirty cents out

02:40:50PM **12** of every dollar collected for beneficiaries disappears somewhere

02:40:55PM **13** and never gets distributed to beneficiaries?

02:40:58PM **14 A.** That's correct.

02:40:59PM **15 Q.** Now, Judge Robertson asked some questions which I had in my

02:41:06PM **16** outline, but you are aware that the number in the pre-1972

02:41:15PM **17** years, you had actual data for disbursements. Judge Robertson

02:41:19PM **18** pointed out one for you, I believe, for 1926?

02:41:22PM **19 A.** There were mentions of disbursements in some of the

02:41:26PM **20** documents I reviewed, yes.

02:41:27PM **21 Q.** Okay. Can you pull up Attachment B, please? I misplaced

02:41:48PM **22** my version but it doesn't matter. All right. We're back at

02:41:54PM **23** Plaintiffs' Exhibit 55. Can you tell from reviewing Plaintiffs'

02:41:58PM **24** Exhibit 55 how many years outside the 1988 to 2002 period, how

02:42:05PM **25** many years you had actual disbursement data that failed to use

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02:38:45PM **1 A.** Net of the 423, that's correct.

02:38:47PM **2 Q.** Right. And we can confirm that, because if you take thirty

02:38:51PM **3** percent of your total corrected revenues, the fifteen-plus

02:38:57PM **4** billion dollars, we're going to get -- we'll get the

02:39:07PM **5** disbursements figure, the 10.6 billion, and that's how we're

02:39:11PM **6** going to get to the 4.6 billion that you show as a nominal

02:39:16PM **7** benefit to the government?

02:39:17PM **8 A.** Correct. Virtually all of this money in this model leaks

02:39:20PM **9** out to the benefit of the government. Some stays in the trust

02:39:23PM **10** and builds up, but it's only 423 million, which is a small

02:39:27PM **11** fraction of the total potential benefit.

02:39:30PM **12 Q.** Have you reviewed anything that provides with you a factual

02:39:35PM **13** basis to believe its reasonable to assume that thirty cents out

02:39:42PM **14** of every dollar collected for beneficiaries stays in the

02:39:45PM **15** government and never gets paid to beneficiaries?

02:39:48PM **16 A.** I literally couldn't tell you one way or the other.

02:39:52PM **17 Q.** But that's an assumption implicit in your model, isn't it?

02:39:55PM **18 A.** That is an assumption. The only thing I have direct

02:39:58PM **19** evidence on that is the CPNR data that I looked at.

02:40:02PM **20 Q.** And how --

02:40:03PM **21 A.** That's what that indicates.

02:40:06PM **22 Q.** The CPNR dated indicated -- you're not saying it indicated

02:40:11PM **23** that thirty cents out of every dollar failed to get disbursed to

02:40:14PM **24** plaintiffs, are you?

02:40:14PM **25 A.** Well, it's showing that only seventy cents of the corrected

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02:42:08PM **1** it?

02:42:09PM **2 A.** No.

02:42:17PM **3 Q.** Okay. Can you estimate at all? I mean, any recollection?

02:42:24PM **4 A.** I don't remember from looking at the individual years. The

02:42:28PM **5** individual years, three or four mentioned disbursements, and I

02:42:33PM **6** brought this to the attention of plaintiffs' counsel. I said

02:42:37PM **7** there is numbers here claimed as disbursements which I could use

02:42:42PM **8** as a disbursement number, and they said they believe that that

02:42:48PM **9** disbursement data was particularly questionable and that Mr.

02:42:56PM **10** Pallais -- do I have the name right?

02:42:57PM **11 Q.** Mr. Pallais, it would be.

02:43:00PM **12 A.** Mr. Pallais would be testifying that that was unreliable

02:43:03PM **13** data, and I said okay, in that case if that's the position, I

02:43:08PM **14** won't use that individual data. I will extrapolate backward

02:43:14PM **15** from the CPNR.

02:43:14PM **16 Q.** When you had that conversation were you told why Mr.

02:43:16PM **17** Pallais believed that data was unreliable?

02:43:20PM **18 A.** I was told that it was part of a 70-page memo. It was a

02:43:23PM **19** detailed and complex analysis.

02:43:27PM **20 Q.** Okay. And in fact, isn't it true every time you saw a

02:43:31PM **21** disbursement figure that you could have used instead of your

02:43:36PM **22** seventy percent imputed value, that disbursement figure was

02:43:41PM **23** actually larger?

02:43:41PM **24 A.** Several of them were right around seventy percent and

02:43:44PM **25** several others were substantially larger, and one was less than

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02:43:49PM **1** seventy percent, as I recall.

02:43:50PM **2 Q.** Okay. So sitting here today you don't know how, for

02:43:53PM **3** example, your model would have been impacted had you used all of

02:43:58PM **4** the available disbursement data rather than simply plugging in

02:44:03PM **5** the seventy percent calculation?

02:44:05PM **6 A.** No. I'd have to go back and carefully get that data and

02:44:09PM **7** substitute it.

02:44:10PM **8 Q.** Did you ever review any audited figures related to the

02:44:15PM **9** individual Indian money accounts?

02:44:17PM **10 A.** When you say "audited," I mean, they aren't a private

02:44:23PM **11** company so I don't really quite know what you mean by "audited."

02:44:28PM **12 Q.** I'm actually referring to the audit of the IIM system.

02:44:35PM **13** Why don't we go ahead and pull up for example

02:44:38PM **14** Defendants' Exhibit 438.

02:44:55PM **15** MR. WARSHAWSKY: Your Honor, would you like a copy of

02:44:57PM **16** that?

02:44:57PM **17** THE COURT: No.

02:44:58PM **18** BY MR. WARSHAWSKY:

02:44:58PM **19 Q.** Professor Cornell, I've placed before you what we've had

02:45:21PM **20** marked as Defendants' Exhibit 438. This actually was also part

02:45:26PM **21** of the administrative record from our prior hearing, but it's

02:45:32PM **22** captioned Independent Auditors' Report of the Tribal and Other

02:45:35PM **23** Trust Funds and Individual Indian Monies Trust Funds, and this

02:45:40PM **24** is for the fiscal years 2006 and 2005. Have you ever seen a

02:45:44PM **25** document like this before?

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02:47:47PM **1 Q.** So it was a hundred million dollars more, roughly; is that

02:47:53PM **2** correct?

02:47:53PM **3 A.** Yes.

02:47:54PM **4 Q.** And then 2005, since you have the numbers right in front of

02:47:58PM **5** you, what's the difference there?

02:48:00PM **6 A.** We're comparing 202.7 with 278.4.

02:48:06PM **7 Q.** So again, about 75 million?

02:48:08PM **8 A.** Yes.

02:48:10PM **9 Q.** In retrospect, do you think it would have been more

02:48:15PM **10** reasonable to use audited disbursement figures in your analysis

02:48:20PM **11** than the seventy percent that you imputed for those two years?

02:48:23PM **12 A.** I don't think even in retrospect that as a financial

02:48:29PM **13** economist I'm in the position to do the detailed trust

02:48:33PM **14** accounting. I can develop a model, which I have done, but I'm

02:48:40PM **15** going to need help from the Court and from both parties to make

02:48:46PM **16** sure that the most accurate figures go in there.

02:48:48PM **17 Q.** Okay. Fair enough. Let me ask you another question. Why

02:48:55PM **18** don't we go, we're looking again at Attachment A, and you can go

02:49:00PM **19** to the first page if you'd like so we don't have all these

02:49:05PM **20** footnotes in front of us. Now, again, assume, remember we

02:49:25PM **21** talked earlier about Osage and I asked you to assume that

02:49:29PM **22** payments were made directly from -- well, strike that.

02:49:35PM **23** Your total revenues figure?

02:49:38PM **24 A.** Corrected revenue is actually the word I use.

02:49:40PM **25 Q.** I'm sorry, yes. Right. Your corrected revenue figures,

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02:45:45PM **1 A.** It looks familiar, but not precisely familiar.

02:45:58PM **2 Q.** Okay. Well, let's go to page 24 of this document. Why

02:46:06PM **3** don't you blow up --

02:46:08PM **4 A.** How are the pages Bates number 24 on the bottom?

02:46:11PM **5 Q.** I'm sorry. Right in the lower right-hand corner, or if you

02:46:15PM **6** want you can actually look on the screen.

02:46:17PM **7 A.** I'm pulling it up here as well. I've got it.

02:46:19PM **8 Q.** And I have pulled up a statement of changes in trust fund

02:46:22PM **9** balances for the years ended September 30th, 2006 and 2005. And

02:46:30PM **10** as you'll see from the top of this, this is with respect to the

02:46:33PM **11** individual Indian monies trust funds. Do you see that, sir?

02:46:36PM **12 A.** Yes.

02:46:37PM **13 Q.** Okay. And if you look on, there's a line there under

02:46:43PM **14** Decreases, disbursements to and on behalf of accountholders for

02:46:48PM **15** 2006, 3.74.5 million; for 2005, 278.4 million. Do you see that?

02:46:56PM **16 A.** Yes.

02:46:56PM **17 Q.** And what numbers did you use for disbursements in

02:47:00PM **18** Attachment A?

02:47:01PM **19 A.** Well, we'd have to go back and look.

02:47:04PM **20 Q.** Would you mind pulling up Attachment A, the last page, and

02:47:09PM **21** you can compare it to the hard copy there. So, for example, for

02:47:28PM **22** 2006 your disbursements figure was how much?

02:47:31PM **23 A.** 271.1 million.

02:47:37PM **24 Q.** And what was it in the audited report?

02:47:42PM **25 A.** It appears to be the 374.5 million.

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02:49:45PM **1** that includes all of the Osage payments, all the amounts

02:49:56PM **2** collected by Osage, right?

02:49:56PM **3 A.** All the ones reported on their website, yes.

02:49:58PM **4 Q.** I'd like you to -- let's see. I'm sorry. Bear with me a

02:50:18PM **5** moment. If we can go to the disbursement figure in Column F,

02:50:27PM **6** does that include disbursements to Osage headright owners under

02:50:33PM **7** your model?

02:50:33PM **8 A.** I'm hesitating because I don't have the -- I've testified

02:50:47PM **9** before that, you know, the checks, it would be my understanding

02:50:51PM **10** I think that it would.

02:50:52PM **11 Q.** Okay. Let me see something here.

02:50:59PM **12** So bear with me, your Honor.

02:51:00PM **13** I just want to compare this, the Attachment C that we

02:51:05PM **14** had, to the current one. Okay. Why don't we -- now, the

02:51:16PM **15** disbursements data, again, you've explained that that came from

02:51:19PM **16** the CPNR data, right?

02:51:21PM **17 A.** Yes.

02:51:21PM **18 Q.** And what is your understanding of what CPNR is?

02:51:27PM **19 A.** Check reconciliation and payment accounting produced by the

02:51:32PM **20** Treasury.

02:51:33PM **21 Q.** Okay. And I'm looking at Attachment C now. Your

02:51:43PM **22** Attachment C which is Plaintiffs' Exhibit 56, sorry, you had

02:51:54PM **23** your footnote two -- I'm sorry. Attachment A, Column E, so is

02:52:02PM **24** it fair to say that to the extent disbursements were made to

02:52:07PM **25** headright owners, that would -- you're assuming it's encompassed

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02:52:15PM **1** within the CPNR data, correct?

02:52:18PM **2 A.** Yes.

02:52:18PM **3 Q.** Okay.

02:52:19PM **4 A.** I'm assuming that the Osage money went into the general IIM

02:52:25PM **5** account and then would be paid out, so it would be included in

02:52:28PM **6** both the revenues and the disbursements.

02:52:30PM **7 Q.** Are you familiar with, have you ever heard about something

02:52:33PM **8** like something called Treasury disbursing symbol 4844?

02:52:38PM **9 A.** Yes.

02:52:39PM **10 Q.** And what is your understanding of what that is?

02:52:41PM **11 A.** That that's an account number related to the individual

02:52:45PM **12** Indian trust.

02:52:48PM **13 Q.** Okay. And the CPNR data that is utilized, was that simply

02:52:54PM **14** for 4844?

02:52:55PM **15 A.** That's my understanding, yes.

02:52:57PM **16 Q.** So if in fact the payments made to headright owners go

02:53:06PM **17** through a different Treasury disbursing symbol, your

02:53:10PM **18** disbursements data wouldn't capture that; is that correct?

02:53:13PM **19 A.** I believe that's correct.

02:53:14PM **20 Q.** Are you familiar with the terms, and they both refer to

02:53:20PM **21** basically the same thing, ACH, EFT, the acronyms?

02:53:26PM **22 A.** Electronic funds transfer.

02:53:29PM **23 Q.** Exactly, or ACH, automated clearing house?

02:53:33PM **24 A.** Yes, I'm familiar with those.

02:53:34PM **25 Q.** Okay. And are you a -- have you been made aware whether

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02:55:31PM **1** Professor Cornell, you recall we were reviewing a number of

02:55:36PM **2** these commissioner Indian affairs reports earlier today,

02:55:42PM **3** specifically Plaintiffs' Exhibit 45 to Plaintiffs' Exhibit 50

02:55:45PM **4** related to the years 1915 to 1920?

02:55:49PM **5 A.** Yes, I remember that.

02:55:50PM **6 Q.** And if you recall talking about how you utilized the total

02:55:54PM **7** income figures on the right-hand side?

02:55:57PM **8 A.** Correct.

02:55:57PM **9 Q.** And I'm sorry, I should have actually -- we're going to

02:56:01PM **10** have to bring it down a little bit so you can see the years, and

02:56:05PM **11** you can see over on the left-hand side the first year is 1920

02:56:09PM **12** and then there's 1919, 1918 on down like that. Do you see that?

02:56:12PM **13 A.** Yes.

02:56:13PM **14 Q.** Now, let's go back to where I was before under the last

02:56:17PM **15** caption. Do you see there are two categories, allotted and

02:56:23PM **16** unallotted?

02:56:23PM **17 A.** Yes.

02:56:26PM **18 Q.** Do you have an understanding as to the distinction between

02:56:30PM **19** those two categories?

02:56:30PM **20 A.** I think I did when we originally went through this. I

02:56:35PM **21** don't recall it now.

02:56:35PM **22 Q.** Let me see. Would it refresh your recollection if I were

02:56:43PM **23** to suggest that the unallotted referred to tribal trust as

02:56:51PM **24** opposed to individual trust, individual Indian trust, does that

02:56:54PM **25** sound familiar?

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02:53:39PM **1** any disbursements from the Indian -- to the individual Indian

02:53:45PM **2** beneficiaries are made electronically as opposed to by checks,

02:53:49PM **3** being made by checks?

02:53:50PM **4 A.** Well, you can make it electronically and still have a,

02:53:56PM **5** quote, check number. You get a nonnegotiable check. That's the

02:53:59PM **6** way CRA pays me, for example, but I'm not aware of the details

02:54:03PM **7** of how these are distributed.

02:54:06PM **8 Q.** Well, do you know whether the CPNR data includes payments

02:54:12PM **9** made by EFT or ACH?

02:54:17PM **10 A.** I interpreted it to be all payments made out of 4844, so if

02:54:23PM **11** some of those were electronic I would think it would include the

02:54:26PM **12** electronic. That would have been my interpretation.

02:54:30PM **13 Q.** Have you ever heard of a system called PACER with

02:54:34PM **14** respect -- not the judicial one, but with respect to electronic

02:54:39PM **15** payments?

02:54:39PM **16 A.** No.

02:54:40PM **17 Q.** So if in fact the CPNR data did not include the electronic

02:54:47PM **18** transfers that we've been talking about, would you agree with me

02:54:50PM **19** that your disbursement rate is artificially low?

02:54:53PM **20 A.** It might be. I would have to understand, I don't want to

02:54:58PM **21** draw a conclusion until I've looked at the actual data and

02:55:02PM **22** understood it, but I couldn't rule out that possibility.

02:55:07PM **23 Q.** I'd like to refer to Plaintiffs' Exhibit 50. If you could

02:55:14PM **24** pull that up, please. And I'll tell you what. I'm going to try

02:55:22PM **25** to make this easier. If I can step over here and show --

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02:56:55PM **1 A.** That might be right, but I'm not sure.

02:56:57PM **2 Q.** Well, I don't want you to guess here. Suffice it to say if

02:57:02PM **3** in fact the unallotted amounts should not have been included as

02:57:08PM **4** income for the individual Indian monies trust accounts, is it

02:57:14PM **5** fair to say that your revenue figures have been overstated to

02:57:18PM **6** the extent you've utilized unallotted revenues?

02:57:23PM **7 A.** I think that follows by definition from your assumptions.

02:57:26PM **8** I'm trying to get out the total receipts into the individual

02:57:29PM **9** Indian trust, and if there is a number that was included in

02:57:32PM **10** that, it was not a receipt for that trust, it would indeed be

02:57:35PM **11** overstated.

02:57:36PM **12 Q.** Have you ever heard the expression tribal IIM?

02:57:42PM **13 A.** Yes.

02:57:42PM **14 Q.** And what is your understanding of what tribal IIM referred

02:57:46PM **15** to? You know, it's been a long day. Let me see if we can

02:57:59PM **16** refresh your recollection.

02:57:59PM **17 A.** I'm trying to remember, yes.

02:58:01PM **18 Q.** This might help. You stated very eloquently -- would you

02:58:04PM **19** pull up Cobell 20, please?

02:58:06PM **20** This is Judge Robertson's opinion from January 30th of

02:58:13PM **21** this year. We're going to go specifically to, the citation is

02:58:17PM **22** 532 F Supp 2d at page 84. So go to the 41st page of this

02:58:36PM **23** document.

02:58:36PM **24** And would you blow up the yellow section here? Blow

02:58:40PM **25** it up a little bit more. It's been a long day. Okay.

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02:58:45PM **1** Can you see the highlighted section where Judge
02:58:49PM **2** Robertson was discussing tribal IIM accounts and tribal IIM
02:58:54PM **3** money, and he states, Tribes utilized IIM accounts as
02:59:01PM **4** convenience as a relatively easy way to obtain checks from the
02:59:06PM **5** IIM system. Such accounts oxymoronically are referred to as
02:59:11PM **6** tribal IIM accounts containing tribal IIM money, and citing to
02:59:17PM **7** Kathy Ramirez's testimony. Does that refresh your recollection
02:59:26PM **8** as to what tribal IIM money is?
02:59:28PM **9** **A.** I think so, and if I read above it, it refreshes me better
02:59:34PM **10** that tribal IIM money is money owned by or the tribal unit has
02:59:43PM **11** the right to that gets deposited into the IIM account.
02:59:46PM **12** **Q.** How does Attachment A treat tribal IIM money?
02:59:51PM **13** **A.** It doesn't break it out.
02:59:57PM **14** **Q.** And so for example, to the extent you've included
03:00:04PM **15** collections within your collections figure tribal IIM money,
03:00:07PM **16** that overstates revenues; is that correct?
03:00:09PM **17** **A.** That sounds correct, but again, sitting here under oath I
03:00:19PM **18** wouldn't want to say for sure.
03:00:20PM **19** **Q.** Okay. Did you ever become aware of circumstances where
03:00:26PM **20** revenues into the IIM system include amounts that subsequently
03:00:30PM **21** were transferred to the tribal trust?
03:00:36PM **22** **A.** I became aware of instances of that, yes.
03:00:40PM **23** **Q.** And how did those -- how were those transfers accomplished?
03:00:45PM **24** I mean, in other words, mechanically? Was a journal entry
03:00:49PM **25** prepared?

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03:02:16PM **1** **Q.** Have you become aware of instances -- strike that actually.
03:02:24PM **2** Are you aware that some of the amounts collected
03:02:28PM **3** within the IIM system represented deposits made by unsuccessful
03:02:37PM **4** bidders?
03:02:38PM **5** **A.** Yes.
03:02:39PM **6** **Q.** Okay. And for example, why don't we go ahead and -- let's
03:02:45PM **7** go to Defendants' Exhibit 33. This is actually, I believe this
03:02:55PM **8** is actually -- I believe this is from one of the same reports
03:03:01PM **9** you looked at earlier with Mr. Gingold, but why don't we go to
03:03:09PM **10** page two, and if you look in the upper right-hand corner you see
03:03:16PM **11** there's under disbursement amounts returned to unsuccessful
03:03:21PM **12** bidders, do you see that?
03:03:23PM **13** **A.** Yes.
03:03:23PM **14** **Q.** And that represented in that particular year about a third
03:03:29PM **15** of the disbursements?
03:03:32PM **16** **A.** Yes.
03:03:33PM **17** **Q.** That's very rough, but 2.7 million out of 7.6, 7.7 million,
03:03:39PM **18** right?
03:03:39PM **19** **A.** Yes.
03:03:39PM **20** **Q.** And how does your model treat disbursements and collections
03:03:46PM **21** related to unsuccessful bids?
03:03:49PM **22** **A.** Unsuccessful bids, because it would not -- if they were
03:03:54PM **23** earned it would not accrew as a benefit to the government and
03:03:58PM **24** should be debunked out.
03:04:00PM **25** **Q.** That's happened in your days?

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03:00:49PM **1** **A.** I don't know.
03:00:51PM **2** **Q.** Well, let's take a look at, I had this marked as
03:00:55PM **3** Defendants' Exhibit 480. This is actually a much larger
03:01:00PM **4** exhibit. We're just going to go to the last page, page nine, if
03:01:03PM **5** you can pull that up, please. Page nine, the last page. And
03:01:17PM **6** why don't you focus on the top half first. Have you ever seen a
03:01:25PM **7** document like this before?
03:01:26PM **8** **A.** No, I don't believe so.
03:01:29PM **9** **Q.** Okay. And you see on the left-hand side a reference to
03:01:34PM **10** 14X63039?
03:01:35PM **11** **A.** Yes.
03:01:36PM **12** **Q.** Do you know what that is?
03:01:37PM **13** **A.** No.
03:01:38PM **14** **Q.** And over on the right-hand side obviously then you wouldn't
03:01:42PM **15** know what the 14X7433 and on down is?
03:01:46PM **16** **A.** No, I don't believe so.
03:01:47PM **17** **Q.** So you don't know whether this represents money being
03:01:51PM **18** transferred from the IIM account to the tribal trust accounts?
03:01:54PM **19** **A.** I couldn't testify that I do today, no.
03:01:57PM **20** **Q.** If that's what this is, though, am I correct that your
03:02:01PM **21** disbursement calculation wouldn't have captured such a transfer
03:02:06PM **22** because this wouldn't have been something included in the CPNR
03:02:09PM **23** data?
03:02:11PM **24** **A.** I believe that's correct, but I'd have to understand it
03:02:14PM **25** more fully to be sure.

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03:04:03PM **1** **A.** Well, it's hard to say, because with just applying the
03:04:08PM **2** thirty, it isn't clear exactly what's in that thirty percent.
03:04:14PM **3** **Q.** Okay. Now, you talked a little bit this morning and
03:04:21PM **4** earlier this afternoon about your calculation and the benefit to
03:04:25PM **5** the government. In connection with that, there is discussion --
03:04:32PM **6** THE COURT: Mr. Warshawsky, let's not leave that last
03:04:35PM **7** point. I thought the question was does the thirty percent
03:04:41PM **8** number of monies that was disbursed include these funds returned
03:04:47PM **9** to unsuccessful bidders or not, and your answer was you don't
03:04:52PM **10** know. Why is it you don't know?
03:04:56PM **11** THE WITNESS: Because I don't have a detailed audit of
03:04:58PM **12** what the actual payments are or where they went. I'm trying to
03:05:04PM **13** operate at a very high level without understanding the micro-
03:05:10PM **14** data.
03:05:10PM **15** BY MR. WARSHAWSKY:
03:05:12PM **16** **Q.** So you don't know, and if the if thirty percent
03:05:15PM **17** disbursement does not include money that was returned to
03:05:21PM **18** unsuccessful bidders, then you're way off, aren't you?
03:05:26PM **19** **A.** I'm off by whatever the return to the unsuccessful bidders.
03:05:40PM **20** THE COURT: If it were a third, as in this case, it
03:05:42PM **21** would wipe out the delta.
03:05:44PM **22** THE WITNESS: Well, that's a third of the
03:05:45PM **23** disbursements, not a third of the revenues, but it would take a
03:05:50PM **24** big chunk out of it, yes.
03:05:54PM **25** THE COURT: Okay.

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03:05:55PM **1** BY MR. WARSHAWSKY:
 03:06:02PM **2 Q.** By the way, Professor Cornell, and while we're having that
 03:06:07PM **3** exchange, which I recall in particular you did this afternoon
 03:06:11PM **4** talk to Mr. Gringold this afternoon about monies held in banks as
 03:06:18PM **5** opposed to held in the Treasury. Do you recall that?
 03:06:20PM **6 A.** Yes.
 03:06:20PM **7 Q.** And so, for example, and this was even discussed I believe
 03:06:24PM **8** during your direct, we looked again at this Defendants' Exhibit
 03:06:32PM **9** 33, total balance on hand June 30th, 1999, of 10.9 million out
 03:06:39PM **10** of about 959.6 million is reported being held in bonded banks to
 03:06:46PM **11** credit individual Indians, right?
 03:06:48PM **12 A.** Yes.
 03:06:49PM **13 Q.** How does your model -- strike that.
 03:06:56PM **14** Isn't it true that your model, however, treats those
 03:06:59PM **15** monies as though they were held in the Treasury?
 03:07:02PM **16 A.** The government, like an individual, can have many different
 03:07:16PM **17** Treasury accounts. It could have been prior bank accounts. The
 03:07:21PM **18** critical question is when money leaves the bank where does it
 03:07:24PM **19** go.
 03:07:24PM **20 Q.** What's your understanding of the term there to credit
 03:07:29PM **21** Indians.
 03:07:33PM **22 A.** I don't know exactly what that means.
 03:07:36PM **23 Q.** Implicit in your calculation, though, is an assumption that
 03:07:39PM **24** the government has free access to it, that the individual have
 03:07:43PM **25** no right to it?

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03:09:32PM **1** should be considered disbursements and they would be -- how they
 03:09:40PM **2** were drawn I don't know.
 03:09:42PM **3 Q.** Do you know what years IIM monies were deposited in banks
 03:09:49PM **4** rather than the Treasury?
 03:09:50PM **5 A.** Well, there was a document put up this afternoon I believe
 03:09:54PM **6** that continued up until the early 1930s.
 03:09:57PM **7 Q.** So the basis for your understanding is the Terry Keyhoe
 03:10:03PM **8** document that Mr. Gringold showed you?
 03:10:06PM **9 A.** Yes.
 03:10:07PM **10 Q.** Now, let me ask you about the interest calculations. Why
 03:10:17PM **11** don't we go back to Column H? I think it's Column H. It was
 03:10:22PM **12** Column H of Plaintiffs' Exhibit 41. Have you checked the
 03:10:37PM **13** interest rates that were included in this column?
 03:10:39PM **14 A.** Yes.
 03:10:39PM **15 Q.** Okay. And the reason I ask is the last two interest rates
 03:10:44PM **16** or the ones I should say for 2000 -- let's go to 2005, 2006, and
 03:10:49PM **17** 2007. They're all on the same page. Do you see 2005 is 4.22
 03:11:03PM **18** percent and 2006 went up a hundred basis points to 5.22 percent?
 03:11:08PM **19 A.** Yes.
 03:11:11PM **20 Q.** And then to 6.22 percent in 2007?
 03:11:14PM **21 A.** Yes.
 03:11:15PM **22 Q.** I'll tell you, I checked the Schiller Data on the website,
 03:11:18PM **23** and we can pull that up if you want. Why don't we do that just
 03:11:23PM **24** to make sure we're comparing it to the right one? We saw a
 03:11:26PM **25** slightly different interest rate and I want to make sure we're

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03:07:45PM **1 A.** No, I don't think so.
 03:07:47PM **2 Q.** How is it that the government can tap it just like it could
 03:07:52PM **3** tap money into the Treasury?
 03:07:54PM **4 A.** We have the opinion the Treasury, the government should be
 03:07:59PM **5** disbursing funds according to the appropriate rules, but if
 03:08:05PM **6** there's a deposit at a bank, and I understand that the
 03:08:09PM **7** government would have the rights to recall those funds if it
 03:08:12PM **8** chose to.
 03:08:22PM **9 Q.** If in fact the government didn't have free access to those
 03:08:27PM **10** funds that were held in credit for individual Indians, your
 03:08:30PM **11** model would overstate the benefit to the government; is that
 03:08:34PM **12** correct?
 03:08:34PM **13 A.** Well, my model would still work. What you'd basically be
 03:08:40PM **14** saying, if the government could not take any of the monies that
 03:08:44PM **15** went into the bank accounts, let's take an extreme hypothetical.
 03:08:48PM **16** Ones it goes into a bank it cannot be used for the benefit of
 03:08:52PM **17** the government. It's either got to be disbursed to Indians or
 03:08:59PM **18** pilfered by some corrupt officials. Those are the
 03:09:03PM **19** alternatives. In that case the disbursement rate by definition
 03:09:07PM **20** would be a hundred percent.
 03:09:08PM **21 Q.** Well, let's look a little bit higher on this exhibit under
 03:09:12PM **22** disbursements, the third line, checks drawn by Indians on bank
 03:09:18PM **23** accounts. Can you draw any inference from that as to who had
 03:09:24PM **24** the right to the funds in those bank accounts?
 03:09:27PM **25 A.** If those funds were drawn by individual Indians, those

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03:11:30PM **1** going to the right source. And go to the last year's. Oh, boy,
 03:11:46PM **2** not that.
 03:12:05PM **3 A.** I don't think you want that page either.
 03:12:07PM **4** MR. WARSHAWSKY: Your Honor, if I may approach the
 03:12:09PM **5** witness. I've got a hard copy. May I, your Honor?
 03:12:12PM **6** THE COURT: You may approach the witness, please.
 03:12:25PM **7** BY MR. WARSHAWSKY:
 03:12:25PM **8 Q.** Why don't you try the third page and see if that does it.
 03:12:29PM **9** There we are. Okay. No, don't go that small, please. You see
 03:12:35PM **10** there, that's good.
 03:12:36PM **11** The column, it looks like it's one. You've got the
 03:12:40PM **12** years and then one, two, three, four, fifth column over.
 03:12:43PM **13 A.** Yes, I see that.
 03:12:44PM **14 Q.** The 4.22 and then 4.42 and 4.76?
 03:12:49PM **15 A.** Yes.
 03:12:49PM **16 Q.** Are those the figures that should have appeared in
 03:12:51PM **17** Attachment A?
 03:12:53PM **18 A.** As I look at this, it makes me think I think so, but I can
 03:13:00PM **19** check that during the break.
 03:13:02PM **20 Q.** How did you determine that the ten-year Treasury bond rate
 03:13:06PM **21** was the appropriate way to gage interest here?
 03:13:09PM **22 A.** Well, I believe that the government borrowing rate was, and
 03:13:12PM **23** as I testified directly, I thought the average of the ten-year
 03:13:17PM **24** rate over the one-hundred-and-some-year period would be a good
 03:13:20PM **25** approximation of the average government borrowing rate.

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03:13:23PM **1 Q.** Now --

03:13:24PM **2 A.** And it's also a number that you have available. For

03:13:28PM **3** example, the government hasn't issued 30-year bonds throughout

03:13:32PM **4** the time period.

03:13:33PM **5 Q.** Are you familiar with the factors that a money manager

03:13:38PM **6** would consider in making borrowing decisions?

03:13:40PM **7 A.** When you say a money manager, are you talking about a

03:13:45PM **8** government money manager or just any money manager?

03:13:49PM **9 Q.** We can take any money manager first.

03:13:51PM **10 A.** Okay. Yes, I think I am.

03:13:53PM **11 Q.** And what are those factors?

03:13:56PM **12 A.** Expected borrowing costs; risk. Those would be the two

03:14:04PM **13** most important.

03:14:05PM **14 Q.** Okay. You look at the time that you're going to need to

03:14:09PM **15** borrow; is that correct?

03:14:10PM **16 A.** If you're a very long-lived entity that just continually

03:14:13PM **17** roles over that's less important. The U.S. government never

03:14:19PM **18** really pays back its debt. In fact, it just gets bigger.

03:14:23PM **19 Q.** We'll talk about that. Then let's talk about the people

03:14:27PM **20** that make borrowing decisions for the United States. What do

03:14:32PM **21** you know -- I'm sorry. Let me ask it differently. What's the

03:14:34PM **22** basis for your understanding about how those decisions are made,

03:14:38PM **23** how much to borrow, say, at Treasury?

03:14:41PM **24 A.** Are you talking about how much to borrow, or how to borrow

03:14:45PM **25** it? How to borrow, I mean what term of securities to issue.

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03:16:16PM **1 A.** No. I interpreted as the intermediate. There's '20s and

03:16:22PM **2** '30s.

03:16:22PM **3 Q.** But you said that data wasn't available for the entire --

03:16:24PM **4 A.** Not continuously.

03:16:25PM **5 Q.** Okay. But of the available data, the ten-year was on the

03:16:29PM **6** high end, right?

03:16:33PM **7 A.** A little bit, but I felt the ten-year was a reasonable

03:16:36PM **8** approximation of the government's borrowing costs.

03:16:38PM **9 Q.** Have you undertaken any efforts to become informed about

03:16:41PM **10** how the government actually does make decisions as to how much

03:16:44PM **11** to borrow?

03:16:45PM **12 A.** As to how much?

03:16:46PM **13 Q.** Right.

03:16:47PM **14 A.** Other than the general point that I spoke of a moment ago,

03:16:51PM **15** no.

03:16:51PM **16 Q.** Well, and you were here this morning of course for Dr.

03:16:55PM **17** Miller's testimony. So let's try to go through it this way. In

03:17:01PM **18** Attachment A, if you want to pull up Attachment A again, Exhibit

03:17:08PM **19** 41, for 2007, I'm going to take your corrected -- well, nominal

03:17:20PM **20** amount to the government. That's the net amount of revenue over

03:17:23PM **21** disbursements as you've calculated it, right?

03:17:31PM **22 A.** Yes.

03:17:31PM **23 Q.** And that's what you applied the interest rate to, correct?

03:17:36PM **24 A.** Correct.

03:17:36PM **25 Q.** So 102 million, and we'll divide it by 52 weeks, it's about

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03:14:49PM **1 Q.** I'll take either one. I have a suspicion it's a more

03:14:54PM **2** complicated question than I understand. So why don't you

03:14:57PM **3** answer?

03:14:58PM **4 A.** Well, how to borrow, I think Dr. Miller was the better

03:15:01PM **5** witness to answer that, but they basically have got to borrow

03:15:06PM **6** enough to meet the operations to which the United States

03:15:08PM **7** government has committed itself, which includes all the

03:15:10PM **8** programmatic undertakings of the government, plus paying the

03:15:16PM **9** interest and the principal on the maturing debt.

03:15:20PM **10 Q.** Is there a reason you didn't for example in putting

03:15:23PM **11** together your analysis in Attachment A, a reason you didn't try

03:15:28PM **12** to come up with some kind of weighted cost of capital or

03:15:32PM **13** weighted cost of borrowing rather than just picking a particular

03:15:35PM **14** debt instrument like the ten-year bond?

03:15:37PM **15 A.** Because you're not going to have data on that back a

03:15:40PM **16** hundred years and I didn't think it was a material consideration

03:15:46PM **17** to go through this massive analysis for what would have been a

03:15:49PM **18** marginal change.

03:15:49PM **19 Q.** Long-term rates, and I understand that there can be times

03:15:53PM **20** when the yield flips, but typically long-term rates are larger

03:15:59PM **21** than short-term rates, right?

03:16:01PM **22 A.** Somewhat. That's a very hotly researched and disputed

03:16:05PM **23** issue, but typically that's been the case, yes.

03:16:07PM **24 Q.** Okay. But for purposes of your choices, the ten-year bond

03:16:11PM **25** was the long-term rate, right?

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03:17:49PM **1** roughly \$2 million a week coming in net to the government; is

03:17:55PM **2** that correct?

03:17:55PM **3 A.** Based on those numbers, yes.

03:17:58PM **4 Q.** And I'd like you to assume since I understand you don't

03:18:05PM **5** have any knowledge about this, assume that the government, that

03:18:09PM **6** the Treasury on a weekly basis looks at its borrowing needs and

03:18:14PM **7** makes determinations of how much to borrow in the billions.

03:18:21PM **8 A.** Oh, it would easily be in the billions.

03:18:24PM **9 Q.** So \$2 million, that is going to be material to a borrowing

03:18:31PM **10** decision?

03:18:32PM **11 A.** Well, I think you're making the famous mistake the Greek

03:18:38PM **12** mathematicians made, which is because a number is small, say

03:18:41PM **13** that you can't consider it that way.

03:18:42PM **14** Let me give you an analogy. I paid my taxes in April

03:18:48PM **15** and I wrote a check to the government. It's a lot smaller even

03:18:52PM **16** than that. I can say, well, this isn't material, it doesn't

03:18:55PM **17** affect their borrowing decision, how about if the government and

03:18:58PM **18** I just forget it and I won't pay my taxes this year. It

03:19:02PM **19** wouldn't affect anything. Unfortunately, if a hundred million

03:19:08PM **20** people thought the same way it would affect the government in a

03:19:10PM **21** very real way so every little bit affects them. It's just that

03:19:15PM **22** when you look at any little bit in isolation it seems

03:19:19PM **23** unimportant, but to the extent that they don't have two million

03:19:23PM **24** here they are going to have to get it elsewhere.

03:19:25PM **25 Q.** Well, that's the question I want to ask. Let's take that

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03:19:29PM **1** two million. Assume further, though, that when the government
 03:19:34PM **2** makes the decision about how much to borrow, they don't borrow
 03:19:38PM **3** based on a projection of, well, we need an extra two million.
 03:19:43PM **4** They say we're going to borrow, we're going to use a half
 03:19:48PM **5** billion dollars as the threshold. Say we calculate, we need 2.2
 03:19:53PM **6** billion coming up, we're going to borrow two billion. If we
 03:19:57PM **7** need 2.8 billion we're going to borrow three billion. Are you
 03:20:01PM **8** with me?
 03:20:01PM **9** **A.** Yes.
 03:20:02PM **10** **Q.** If that's the actual -- and I'm sure I've oversimplified
 03:20:06PM **11** it, but if that's basically the decision-making process that
 03:20:09PM **12** goes on, isn't it true that that \$2 million isn't going to tip
 03:20:13PM **13** the borrowing decision one way or the other?
 03:20:15PM **14** **A.** I don't think that's correct logic because that could be
 03:20:19PM **15** true of any \$2 million receipt and yet in the aggregate they do.
 03:20:27PM **16** So no, that's incorrect. \$2 million means \$2 million of added
 03:20:30PM **17** borrowing. The way it flows through the actual decision making
 03:20:35PM **18** may be complex but the only way to think about it is it would
 03:20:38PM **19** increase the borrowing needs by \$2 million.
 03:20:42PM **20** **Q.** And with whom are you going to aggregate the \$2 million of
 03:20:46PM **21** income from the IIM trust here?
 03:20:48PM **22** **A.** With all the other sources that the government has in
 03:20:51PM **23** revenue.
 03:20:57PM **24** MR. WARSHAWSKY: Your Honor, may I take a short break?
 03:20:59PM **25** THE COURT: A short break?

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03:22:57PM **1** **A.** Yes. The seventy percent was applied across the board from
 03:23:01PM **2** the aggregate data.
 03:23:02PM **3** **Q.** Now, in the series of Osage hypotheticals asked by Mr.
 03:23:07PM **4** Warshawsky, he asked you to assume that the funds were held
 03:23:13PM **5** outside the IIM trust. Do you recall that?
 03:23:15PM **6** **A.** Yes.
 03:23:17PM **7** **Q.** And he asked you a question if the funds were held outside
 03:23:23PM **8** the IIM trust, would you include those funds in Attachment A,
 03:23:30PM **9** correct?
 03:23:30PM **10** **A.** In the what?
 03:23:31PM **11** **Q.** In Attachment A in your model.
 03:23:33PM **12** **A.** Yes.
 03:23:34PM **13** **Q.** And what was your answer to that?
 03:23:35PM **14** **A.** Well, I said that if they never entered the IIM funds then
 03:23:40PM **15** they should not be in IIM receipts.
 03:23:43PM **16** **Q.** If the funds are held in trust in Treasury for the
 03:23:47PM **17** individual Indians, should they be included in your model?
 03:23:51PM **18** **A.** Well, then in my understanding they would be included and
 03:23:55PM **19** they should be.
 03:23:56PM **20** **Q.** So is it important as to whether they're held in a
 03:23:59PM **21** particular system in your opinion or whether they're held in the
 03:24:03PM **22** Treasury?
 03:24:03PM **23** **A.** The importance as I understand it is that they'd be held in
 03:24:12PM **24** the IIM trust for the benefit of individual Indians, not for the
 03:24:15PM **25** particular account.

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03:21:01PM **1** MR. WARSHAWSKY: Well, just take a moment to confer.
 03:21:03PM **2** THE COURT: Yes. Okay.
 03:21:04PM **3** (There was a pause in the proceeding.)
 03:21:15PM **4** MR. WARSHAWSKY: Professor Cornell, thank you very
 03:21:17PM **5** much.
 03:21:18PM **6** Thank you, your Honor.
 03:21:18PM **7** THE COURT: Thank you, sir.
 03:21:20PM **8** Any redirect?
 03:21:22PM **9** MR. GINGOLD: Yes.
 03:21:22PM **10** REDIRECT EXAMINATION
 03:21:25PM **11** BY MR. GINGOLD:
 03:21:25PM **12** **Q.** Professor Cornell, Mr. Warshawsky asked you several
 03:21:59PM **13** hypothetical questions, one of which is if in fact the Osage
 03:22:06PM **14** individual Indian trust funds did not have a 4844ALC, would you
 03:22:13PM **15** be able to conclude that seventy percent of the funds
 03:22:17PM **16** represented in the CRA database were disbursed or not?
 03:22:21PM **17** **A.** I remember that line of questioning.
 03:22:24PM **18** **Q.** If in fact the Osage individual Indian trust beneficiaries
 03:22:33PM **19** checks did not have the 4844 ALC, do you have any evidence that
 03:22:37PM **20** any of those funds were disbursed to the individuals?
 03:22:39PM **21** **A.** No.
 03:22:42PM **22** **Q.** So the seventy percent disbursement you applied to the
 03:22:48PM **23** Osage individuals was applied even though you didn't have a
 03:22:53PM **24** single shred of evidence that any money went to the Osage,
 03:22:56PM **25** correct?

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03:24:16PM **1** **Q.** So if the account is labeled something other than the IIM
 03:24:20PM **2** trust but the funds are held in trust in the Treasury, should
 03:24:24PM **3** they be included in your model?
 03:24:26PM **4** **A.** I think so, but I'd want to make sure I understand it a
 03:24:31PM **5** little further.
 03:24:31PM **6** THE COURT: I want to make sure I understand it a
 03:24:33PM **7** little further too. I thought this whole thing was premised on
 03:24:36PM **8** the TGA.
 03:24:38PM **9** BY MR. GINGOLD: Yes, it is, your Honor. Would you
 03:24:40PM **10** like me to explain it?
 03:24:41PM **11** THE COURT: I'd like you to ask sharper questions so
 03:24:43PM **12** that we know whether the money is in the TGA or some other
 03:24:46PM **13** place.
 03:24:48PM **14** BY MR. GRINGOLD:
 03:24:48PM **15** **Q.** Are you aware of what happens when a check is cut on funds
 03:24:53PM **16** held by the Treasury? Let's say in the 14X6039 account, what
 03:24:59PM **17** happens to the funds when a check is actually written?
 03:25:01PM **18** **A.** Well, when it's written, you mean when it's cleared?
 03:25:04PM **19** **Q.** No. When a check is actually written do you know what
 03:25:07PM **20** happens to the funds?
 03:25:07PM **21** **A.** No.
 03:25:07PM **22** **Q.** Let me give you a hypothetical. If a check is written for
 03:25:13PM **23** an individual Indian that comes out of the 14X6039 account, if
 03:25:16PM **24** the funds are then immediately transferred to Treasury, general
 03:25:23PM **25** account, and they stay in the general account until the checks

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03:25:29PM **1** are negotiated or paid, is it your understanding those funds are

03:25:35PM **2** being held in the general account until such time, if my

03:25:41PM **3** hypothetical is true, until such time as the check is actually

03:25:45PM **4** paid?

03:25:45PM **5** **A.** Yes.

03:25:46PM **6** **Q.** Whatever amount of time that would take, correct?

03:25:49PM **7** **A.** Correct.

03:25:50PM **8** **Q.** Now, if the Osage funds were held in an Osage account and

03:25:56PM **9** the Treasury cut checks to the individuals and their funds were

03:26:04PM **10** similarly transferred into the general Treasury account, under

03:26:09PM **11** those circumstances that I described in the hypothetical

03:26:12PM **12** wouldn't they too remain in the general Treasury until the

03:26:14PM **13** checks were paid?

03:26:15PM **14** **A.** The way you've described it, yes, it sounds so.

03:26:22PM **15** **Q.** Now, if in fact all of the funds of the Osage that are held

03:26:25PM **16** in that account, or no, 98-and-a-half percent, assuming

03:26:31PM **17** 98-and-a-half percent of the funds held in the Osage account are

03:26:38PM **18** solely the only rights to those funds are solely in the

03:26:42PM **19** individuals, would you assume that those funds are the

03:26:48PM **20** individuals' funds? If all rights to those funds are the

03:26:52PM **21** individuals' rights, would you assume those funds are the

03:26:54PM **22** individuals' funds?

03:26:54PM **23** **A.** Yes.

03:26:55PM **24** **Q.** If in fact the individuals paid taxes on those funds would

03:27:00PM **25** you assume that they're the individuals' funds?

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03:27:02PM **1** **A.** Yes.

03:27:02PM **2** **Q.** If you assume that the government used to issue K-1s to the

03:27:07PM **3** individuals whose funds were held in that account, would you

03:27:09PM **4** assume that's from the individuals' funds?

03:27:12PM **5** **A.** Yes.

03:27:13PM **6** **Q.** And today if you assumed that the government issued 1099

03:27:16PM **7** forms for those funds that are held in that account, would you

03:27:20PM **8** assume that the individuals' funds --

03:27:21PM **9** **MR. WARSHAWSKY:** Your Honor, I'm going to object. I'm

03:27:23PM **10** far beyond Professor Cornell's expertise.

03:27:26PM **11** **THE COURT:** Oh, he's making a lot of assumptions. I'm

03:27:30PM **12** happy to hear them. What I want to know is whether the

03:27:39PM **13** Plaintiffs' position is that all Native Americans are entitled

03:27:39PM **14** to an undifferentiated share of all the money that may have been

03:27:41PM **15** held for the Osage.

03:27:46PM **16** **BY MR. GINGOLD:** Your Honor, because we're looking at

03:27:48PM **17** restitution, which is a benefit conferred on the government and

03:27:53PM **18** not the injury sustained by the individual, and as Professor

03:27:58PM **19** Laycock stated in his testimony, if in fact Professor Laycock is

03:28:03PM **20** correct in his understanding of the law, the only thing that

03:28:07PM **21** would happen on this is whatever the benefit conferred to the

03:28:10PM **22** individual an as allocated to the Osage, so long as it did not

03:28:16PM **23** receive whatever injuries they sustained they could also recover

03:28:19PM **24** in damages on that which remains if they chose to bring that

03:28:23PM **25** action in the proper court.

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03:28:24PM **1** **THE COURT:** I didn't understand that. You're asking

03:28:28PM **2** for a sum of money that is restitution.

03:28:33PM **3** **BY MR. GINGOLD:** That's correct.

03:28:33PM **4** **THE COURT:** You're asking for this restitutionary sum

03:28:36PM **5** of money to be given to a plaintiff class.

03:28:39PM **6** **MR. GINGOLD:** That's correct.

03:28:40PM **7** **THE COURT:** Are owners of Osage headrights members of

03:28:47PM **8** the plaintiff class?

03:28:48PM **9** **MR. GINGOLD:** Yes, they are. They're individual

03:28:49PM **10** Indian trust beneficiaries in accordance with February 4th,

03:28:54PM **11** 1998.

03:28:55PM **12** **THE COURT:** Okay. And is it your position that if

03:28:58PM **13** this money, that this hypothetical award of restitution is made

03:29:04PM **14** to the plaintiff class, that it will be distributed equally

03:29:07PM **15** among all Native Americans?

03:29:09PM **16** **BY MR. GINGOLD:** What we've said in our briefs is this

03:29:11PM **17** Court can make a determination on how the funds should be

03:29:15PM **18** distributed. We believe, however, it's within the discretion of

03:29:17PM **19** this Court, your Honor. We believe, however, because we're

03:29:21PM **20** seeking benefit conferred, it is proper to distribute the funds

03:29:27PM **21** on a per capita basis. To the extent that an individual --

03:29:31PM **22** **THE COURT:** Have you told the Osage about that?

03:29:33PM **23** **MR. GRINGOLD:** Yes, as a matter of fact we did. We

03:29:34PM **24** went down to the Osage when we filed this action in 1996. We

03:29:38PM **25** met with the Osage individuals in the Osage tribe and they

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03:29:41PM **1** endorsed us, and Ms. Cobell and I and others were down there.

03:29:46PM **2** Yes, we did, your Honor.

03:29:47PM **3** **THE COURT:** Okay. Proceed.

03:29:49PM **4** **MR. GINGOLD:** But your Honor, one of the most

03:29:54PM **5** important aspects of this is, and when we filed in litigation in

03:29:57PM **6** response to your question we looked at this issue quite

03:30:00PM **7** carefully, we looked at whether or not we believed there would

03:30:03PM **8** be any preclusion with regard to the damages claims to the

03:30:06PM **9** extent that an individual would be damaged and otherwise

03:30:09PM **10** wouldn't be able to be, let's say, obtain justice in this court

03:30:15PM **11** because we're well aware of all the issues and we concluded and

03:30:20PM **12** we believe the law is quite clear as Professor Laycock

03:30:25PM **13** explained.

03:30:25PM **14** **BY MR. GINGOLD:**

03:30:25PM **15** **Q.** There is no preclusion, there is no barring as long as

03:30:27PM **16** you don't obtain a double recovery, so we looked at that issue,

03:30:32PM **17** and again Dr. Laycock confirmed that in review. So we're

03:30:39PM **18** dealing with a situation where we, Plaintiffs' counsel asked you

03:30:45PM **19** to apply a seventy-percent rate across the board without regard

03:30:48PM **20** to what tribe any individual is a member of?

03:30:52PM **21** **A.** Correct.

03:30:52PM **22** **Q.** And was there a reason Plaintiffs' counsel asked you to do

03:30:57PM **23** that, do you know?

03:30:58PM **24** **A.** I don't recall.

03:30:59PM **25** **Q.** Was there any issue with respect to the reliability of the

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03:31:04PM **1** data that otherwise exists?

03:31:06PM **2 A.** Oh, oh, oh, I thought were you asking a different question.

03:31:08PM **3** Yes, as I testified earlier, that Plaintiffs' counsel said that

03:31:14PM **4** the bits and pieces of disbursement data that were available

03:31:17PM **5** were highly unreliable and there would be testimony as to that,

03:31:22PM **6** and I therefore said, well, the most reliable thing I have is

03:31:27PM **7** the CPNR data and I will use that pending further word from the

03:31:32PM **8** government.

03:31:33PM **9 Q.** Now, Mr. Warshawsky identified DX438, which is the

03:31:39PM **10** Independent Auditors' Report of Tribal and Other Trust Funds and

03:31:42PM **11** Individual Indian Monies Funds Financial Statements for fiscal

03:31:47PM **12** years 2006 and 2005. Do you recall seeing a page?

03:31:53PM **13 A.** Yes. I still have that up here in fact.

03:31:55PM **14 Q.** And I believe Mr. Warshawsky pointed you to page 438. If

03:32:01PM **15** you can please look at that.

03:32:02PM **16 A.** I actually still have it open there.

03:32:04PM **17 Q.** Okay. Now, this is for both fiscal years 2006 and 2005,

03:32:10PM **18** correct?

03:32:10PM **19 A.** Yes.

03:32:11PM **20 Q.** I'd like you to turn your attention to DX438 at page 31.

03:32:21PM **21 A.** 31?

03:32:22PM **22 Q.** Yes, that's correct. And if you see it says tribal and

03:32:30PM **23** other trust funds and individual Indian monies trust funds

03:32:34PM **24** managed by the U.S. Department of the Interior independent

03:32:39PM **25** auditors' report of internal conform on financial reporting and

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03:33:51PM **1** as of September 30, 2006 and 2005. It goes on almost the entire

03:33:58PM **2** paragraph. Do you see that?

03:33:59PM **3 A.** Yes.

03:33:59PM **4 Q.** So this is a qualified audit, correct?

03:34:02PM **5 A.** It looks like it, yes.

03:34:04PM **6 Q.** Okay. I'd like you to turn your attention to the next

03:34:07PM **7** page, the first paragraph in the next page. It states, Our

03:34:21PM **8** consideration of internal control over financial reporting

03:34:23PM **9** resulted in a following condition being identified as a

03:34:26PM **10** reportable condition. Reliance and processing of trust

03:34:30PM **11** transactions at the Bureau of Indian Affairs and unresolved

03:34:34PM **12** financial reporting matters from prior periods, we consider this

03:34:37PM **13** reportable condition to be a material weakness. Do you have any

03:34:42PM **14** understanding of what that means?

03:34:43PM **15 A.** It means that they're not comfortable with the financial

03:34:49PM **16** controls and reporting.

03:34:52PM **17 Q.** I'd like you to turn to the next page, page 34. Under the

03:35:00PM **18** paragraph that's identified as condition, the second paragraph

03:35:04PM **19** under that, I'd like to read this to you. If you can, is this

03:35:10PM **20** clear enough on the screen?

03:35:11PM **21 A.** Yes, I'm there.

03:35:12PM **22 Q.** The financial information systems and internal control

03:35:15PM **23** procedures used --

03:35:17PM **24** THE COURT: Mr. Gingold?

03:35:20PM **25** MR. GINGOLD: Yes.

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03:32:44PM **1** compliance with other matters. Do you see that?

03:32:47PM **2 A.** Yes.

03:32:47PM **3 Q.** And it's dated 2006, correct?

03:32:49PM **4 A.** Yes.

03:32:50PM **5** MR. GRINGOLD: Your Honor, would you like us to have

03:32:51PM **6** this brought back?

03:32:52PM **7** THE COURT: Yes, please, on the screen.

03:32:58PM **8** BY MR. GRINGOLD:

03:32:59PM **9 Q.** You've stated you're not an auditor, correct?

03:33:01PM **10 A.** Correct.

03:33:01PM **11 Q.** And you've stated you're not a C.P.A., correct?

03:33:04PM **12 A.** Correct.

03:33:04PM **13 Q.** Do you have any understanding of what it means if an audit

03:33:07PM **14** is qualified?

03:33:10PM **15 A.** Well, if an audit is qualified it usually means that the

03:33:11PM **16** auditor does not feel that they have adequate information to

03:33:15PM **17** provide their normal audited opinion.

03:33:17PM **18 Q.** Please turn to page 32.

03:33:23PM **19 A.** Okay.

03:33:23PM **20 Q.** If we can focus in on the paragraph which is a summary

03:33:28PM **21** paragraph. The first sentence begins in that paragraph, Our

03:33:37PM **22** audit reports on the trust funds financial statements were

03:33:39PM **23** qualified because it was not practical to extend our auditing

03:33:44PM **24** procedures sufficiently to satisfy ourselves as to the fairness

03:33:48PM **25** of trust fund balances and the trust fund's financial statements

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03:35:20PM **1** THE COURT: This litany we've heard a number of times.

03:35:23PM **2** What you're doing now is asking this witness to affirm the

03:35:30PM **3** instructions you gave him about what to use. He's already said

03:35:36PM **4** if the data are correct my methodology is correct; if not, it's

03:35:42PM **5** not. He's not vouching for these numbers. I don't understand

03:35:46PM **6** him to be vouching for this decision to use the seventy percent.

03:35:49PM **7** That was your decision. That's what he told us. Now, right now

03:35:56PM **8** what you're trying to do is to get him to agree that the

03:35:58PM **9** instructions you gave him were the correct instructions, and

03:36:01PM **10** that's out of bounds.

03:36:02PM **11** MR. GINGOLD: No, sir, that's not what I'm doing. Mr.

03:36:05PM **12** Warshawsky introduced this exhibit and identified particular

03:36:09PM **13** disbursement information on the page that he identified and

03:36:12PM **14** basically asked him if he saw that information. He said he did

03:36:14PM **15** not. One of the things that I was going to be pointing out in

03:36:20PM **16** here, since Mr. Warshawsky opened the door, was the auditors

03:36:24PM **17** themselves said you cannot rely on the information.

03:36:27PM **18** THE COURT: I thought that's what yesterday was all

03:36:29PM **19** about.

03:36:30PM **20** MR. GINGOLD: Your Honor, I don't recall this report

03:36:32PM **21** being introduced.

03:36:32PM **22** THE COURT: Not this report but this general subject.

03:36:35PM **23** We went through all of the Arthur Andersen qualified audits. I

03:36:42PM **24** mean, let's move on. I don't understand what door opening

03:36:48PM **25** you're talking about. This gentleman's testimony is about a

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03:36:57PM **1** methodology and the disbursement numbers he used were the
 03:37:00PM **2** numbers you gave him. He's told us that the Osage should not --
 03:37:05PM **3** he's told us he isn't sure whether the Osage should be in there
 03:37:09PM **4** or not. He's told us that he didn't use real disbursement
 03:37:12PM **5** numbers. He told us there was no adjustment for the size of
 03:37:15PM **6** checks that were not cashed. He told us that, you know, if you
 03:37:22PM **7** want to get back to what he told us and do redirect on that,
 03:37:27PM **8** fine, but to bring back this whole litany of unreliable data to
 03:37:33PM **9** support the instructions you gave him, I don't buy it, so as far
 03:37:37PM **10** as I'm concerned --
 03:37:38PM **11** MR. GINGOLD: I wasn't doing that.
 03:37:40PM **12** THE COURT: -- I can either tune out or you can move
 03:37:43PM **13** on.
 03:37:43PM **14** MR. GINGOLD: I'm going to move on, your Honor, but
 03:37:45PM **15** that wasn't the purpose of this being introduced.
 03:37:51PM **16** BY MR. GINGOLD:
 03:37:51PM **17** Q. Do you recall Mr. Warshawsky asked you questions about
 03:37:55PM **18** funds held outside the Treasury and in banks?
 03:37:58PM **19** A. Yes.
 03:37:58PM **20** Q. And whether or not they're considered in the decisions,
 03:38:03PM **21** borrowing decisions of the Treasury, correct?
 03:38:05PM **22** A. Yes.
 03:38:08PM **23** Q. And whether or not they should be considered as funds held
 03:38:12PM **24** by the Treasury anyway since they're outside the Treasury and
 03:38:15PM **25** the banks, do you recall that?

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03:40:03PM **1** With regard to the seventy percent disbursement
 03:40:06PM **2** figure, did you testify that you assumed that all disbursements
 03:40:10PM **3** by check are included in that figure?
 03:40:12PM **4** A. Yes. I believe all disbursements by check are included in
 03:40:18PM **5** that figure.
 03:40:19PM **6** Q. So if a check was paid to an unsuccessful bidder, it would
 03:40:23PM **7** be included in that figure?
 03:40:24PM **8** A. Yes.
 03:40:24PM **9** Q. And if a check was paid to a tribe, it would be included in
 03:40:28PM **10** that figure?
 03:40:28PM **11** A. That would be my understanding.
 03:40:30PM **12** Q. And even if a check was a fraudulent check, it would be
 03:40:33PM **13** included in that figure, correct?
 03:40:34PM **14** A. Yes.
 03:40:35PM **15** Q. So did you assume that one hundred percent of the checks
 03:40:39PM **16** were disbursed without regard to whether or not they were paid
 03:40:44PM **17** to the individual Indian trust beneficiaries?
 03:40:46PM **18** A. Yes.
 03:40:47PM **19** Q. And that's the reason you excluded them from your
 03:40:49PM **20** calculation of benefits conferred, correct?
 03:40:51PM **21** A. Yes.
 03:40:51PM **22** Q. So there was no assumption that the funds were actually
 03:40:54PM **23** paid to individuals, was there?
 03:40:56PM **24** A. I couldn't prove that, no.
 03:40:58PM **25** Q. Well, no evidence has been presented to you in that regard,

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03:38:16PM **1** A. Yes.
 03:38:17PM **2** Q. I'd like to identify a case, U.S. versus \$277,000 U.S.
 03:38:30PM **3** currency, and you testified that you're not familiar with budget
 03:38:38PM **4** issues, did you not?
 03:38:39PM **5** A. Not in any real detail.
 03:38:42PM **6** Q. I'd like to turn to page six of this decision. You did
 03:38:55PM **7** listen to Dr. Miller's testimony, correct?
 03:38:58PM **8** A. I did.
 03:38:58PM **9** Q. And your understanding of Dr. Miller's testimony is what?
 03:39:06PM **10** THE COURT: About everything?
 03:39:06PM **11** MR. GINGOLD: No. With regard to the funds held in
 03:39:10PM **12** banks, not in the Treasury, their use by the Treasury with
 03:39:15PM **13** respect to the borrowing decisions or the ability to have
 03:39:18PM **14** control over those funds.
 03:39:18PM **15** BY MR. GINGOLD:
 03:39:20PM **16** Q. Do you have an understanding of that at all?
 03:39:22PM **17** A. Well, I think both Dr. Miller and I agreed that the
 03:39:28PM **18** fundamental issue was whether or not those funds were available
 03:39:29PM **19** to the government. And if they were it doesn't matter whether
 03:39:32PM **20** they were held in commercial banks or at the Treasury. If they
 03:39:35PM **21** were not, it's the same thing as well.
 03:39:40PM **22** Q. It's the same thing from the point of view of an economic
 03:39:43PM **23** impact, correct?
 03:39:44PM **24** A. Correct.
 03:39:46PM **25** Q. We don't need to go into that issue.

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03:41:04PM **1** correct?
 03:41:04PM **2** A. Correct. I just know they were paid out of that account.
 03:41:16PM **3** MR. GINGOLD: If I could have one minute, your Honor.
 03:41:20PM **4** (There was a pause in the proceedings.)
 03:41:29PM **5** MR. GINGOLD: Your Honor, we have no further
 03:41:30PM **6** questions.
 03:41:30PM **7** MR. WARSHAWSKY: Nothing further.
 03:41:31PM **8** THE COURT: If there's nothing further for Professor
 03:41:34PM **9** Cornell, thank you, sir. That completes your testimony and
 03:41:37PM **10** you're excused.
 03:41:38PM **11** THE WITNESS: Thank you, your Honor.
 03:41:39PM **12** (Witness excused at about 3:42 p.m.)
 03:41:42PM **13** THE COURT: As I understand it, we're out of witnesses
 03:41:44PM **14** for today; is that correct?
 03:41:45PM **15** MR. KIRSCHMAN: That's correct, your Honor.
 03:41:47PM **16** THE COURT: And tomorrow morning, as I have indicated,
 03:41:50PM **17** we will be dealing with another matter in court and so I think
 03:41:56PM **18** we will reconvene tomorrow afternoon let's say at 1:45. And
 03:42:04PM **19** then the witness will be who?
 03:42:08PM **20** MR. DORRIS: It will be Mr. Pallais.
 03:42:10PM **21** THE COURT: Mr. Pallais. All right. We're adjourned
 03:42:13PM **22** for the day. Thank you very much, counsel.
 03:42:17PM **23** (Proceedings adjourned at about 3:42 p.m.)
24 - - -
25

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1 CERTIFICATE

2 I, JACQUELINE M. SULLIVAN, Official Court Reporter,

3 certify that the foregoing pages are a correct transcript from

4 the record of proceedings in the above-entitled matter.

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JACQUELINE M. SULLIVAN

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