UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.	:	Civil Action 96-1285
Plaintiffs	:	
	:	Washington, D.C.
V.	:	Tuesday, June 24, 2008
	:	
DIRK KEMPTHORNE, Secretary of the Interior, et al.	:	
	:	
Defendants	:	MORNING SESSION

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

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C O N T E N T S

E X H I B I T S

NUMBER	ADMITTED

(No Exhibits Moved into Evidence.)

P R O C E E D I N G S

COURTROOM DEPUTY: This is Civil Action 96-1285, Elouise Cobell, et al. versus Dirk Kempthorne, et al.

THE COURT: Good morning, Mr. Warshawsky.

09:55:05 MR. WARSHAWSKY: Good morning, Your Honor. If I may for a moment just advise the Court of a situation. There was a little slippage on the schedule over this weekend --

THE COURT: I've just added 15 minutes to it, so...

MR. WARSHAWSKY: We can live with that, Your Honor.

09:55:21 As the Court will recall, Thursday afternoon we were advised that the plaintiffs initially intended to provide their model to us on Friday, but they needed time to scan and copy the materials to get to us on Saturday.

In fact, the materials ultimately were e-mailed to us
09:55:40 at 1:41 a.m. on Sunday morning, the first set of the materials. The second part of the -- first set, I guess, was the early edition. We got the second set of the first set of materials at 1:30 p.m. Sunday afternoon.

Now, we can live with that. We spent all weekend and
09:55:58 of course all day yesterday working with it. We got the late edition last night at 10:30 p.m. by e-mail. The models have been apparently revised again.

We've looked at it, we'll certainly work -- hopefully -- I think everybody wants to be through today, and
09:56:15 we'll certainly attempt to conduct cross and get it done today,

but I did want to advise the Court ahead of time of where we were just in case after hearing Dr. Palmer's direct we need to ask the Court for additional time.

THE COURT: All right.

09:56:28 MR. WARSHAWSKY: Thank you.

THE COURT: Mr. Gingold?

MR. GINGOLD: Good morning, Your Honor.

THE COURT: Good morning.

MR. GINGOLD: Everything Mr. Warshawsky said is 09:56:48 correct. However, the model hasn't changed, it's the data that is the subject of the modifications, Your Honor.

Your Honor, plaintiffs would like to call Brian Palmer.

(Oath administered by Courtroom Deputy.)

MR. GINGOLD: If we can put on the screen, Antonio, 09:57:33 Plaintiffs' 182.

Your Honor, I will provide a brief background of Dr. Palmer and briefly state what he is going to be testifying to today.

Your Honor, Brian -- Dr. Palmer is testifying because 09:57:54 of the unavailability of Professor Cornell, who is involved in testifying in another litigation unrelated to this case, and scheduling conflicts precluded continuing to postpone the deposition. So Dr. Palmer is sitting in for Dr. Cornell.

THE COURT: All right.

09:58:16 MR. GINGOLD: Dr. Palmer has a Ph.D. in economics from

MIT, he has a BA in economics and a BS in economics, or a double major from Brigham Young University. He has been with CRA International for 19 years, he specializes in econometrics and statistics, and his expertise in economic and quantitative 09:58:46 analysis has been employed in anti-trust, intellectual property, and a variety of other litigation related to financial issues.

Page two of his CV identifies the fact that he has been a teacher in statistics at the Fletcher School of Law and Diplomacy, Tufts University, and he has been an instructor in 09:59:11 statistics at MIT.

Dr. Palmer is offered by plaintiffs as an expert in economics, econometrics and statistics. He's going to be explaining to this Court, based on his review of the testimony and hearing of the testimony of defendants and exhibits, the 09:59:36 flow of funds into the Trust, the flow of funds out of the Trust, his calculation for the benefit conferred, and, in the alternative, an interest calculation for interest that plaintiffs believe the government would be obligated to pay our clients.

10:00:01 Your Honor, plaintiffs offer Dr. Palmer for this purpose.

MR. WARSHAWSKY: Your Honor, subject to our preserving the rights to object to the admissibility of any of this opinion testimony, we certainly do not challenge Dr. Palmer's 10:00:20 credentials.

THE COURT: All right. Let's proceed.

MR. GINGOLD: Plaintiffs would like to identify Exhibit 189-A, which is Attachment A, analysis of benefit to the government.

(BRIAN PALMER, PLAINTIFF WITNESS, having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. GINGOLD:

Q. Dr. Palmer, can you please describe what this is?

10:00:47 A. Yes. This is Attachment A that Professor Cornell --

THE COURT: Can you speak up on that microphone a little bit, please?

A. This is Attachment A that Professor Cornell had presented earlier to this Court. The data in this attachment and for this 10:01:05 model has been revised.

BY MR. GINGOLD:

Q. Did you prepare or help prepare -- did you help develop the model that Dr. Cornell testified to in this litigation?

A. Yes, I worked closely with Dr. Cornell. We worked together 10:01:23 and I worked closely with him in developing the model that was originally prepared, and then worked to augment the data subsequently because of the information we learned in this litigation.

Q. Dr. Palmer, did you sit through the Defendant's 10:01:43 case-in-chief?

A. Yes, I was here for most of the witnesses.

Q. Did you hear the testimony of Michelle Herman?

A. I did.

Q. Did you hear the testimony of Dr. Angel?

10:01:55 A. Yes, I did.

Q. Did you hear the testimony of Dr. Kehoe?

A. Yes, I did.

Q. And did you hear the testimony of Dr. Scheuren?

A. Yes, I did.

10:02:05 Q. Did you review exhibits that were introduced by defendants in this proceeding?

A. Yes, I did.

Q. And did you also review the written testimony of defendants' exhibits?

10:02:17 A. Yes, I did.

Q. The modifications -- you stated there were modifications made in the data. Is that correct?

A. That is correct. The model itself has not changed, it's just the input data that were used for the model have changed, 10:02:40 from information learned.

Q. Information learned where?

A. During the course of this litigation that were previously unavailable to us.

MR. GINGOLD: Plaintiffs would like to mark for 10:02:49 identification Exhibit 190.

BY MR. GINGOLD:

Q. Exhibit 190 is identified as Attachment A, corrected revenues compared with Dr. Scheuren's estimated collections.

Dr. Palmer, did you prepare this exhibit?

A. I did.

Q. Could you explain to the Court what it is?

A. Yes. What I did was I took from the output of Dr. Scheuren's model his estimated collections, and then I graphed it or plotted it to compare against the attachment of corrected revenues so I could compare -- they had gone about a different procedure to get to their numbers, so I wanted to compare to see what they looked like after we finished with ours.

Q. And what is the red line on the graph?

A. The red line would be Dr. Scheuren's estimated collection numbers.

Q. And the black line, what is that?

A. The other line would be the revenues that are found in Attachment A.

Q. Generally speaking, do you have any assessment with regard to what is reflected in this chart?

A. That the revenues were quite similar.

Q. Are there differences?

A. Yes, there are.

Q. What are they?

A. Well, for example, Dr. Scheuren did not use the $121 million receipt revenue number in 1968 that, when presented to him during his cross-examination, he said he should have used that number, that would cause his numbers to be higher, I believe, during that period.

Also, there were some adjustments that we made to the data in terms of exclusion of interest and the inclusion of the entire Osage annuity, that adjustments were not made by Dr. Scheuren.

Q. Let's go back to Plaintiffs' 189-A, which is Attachment A, analysis of benefit to the government. Dr. Palmer, I would like to focus on the revenue or the flow of funds into the Trust aspect of this attachment. Could you generally explain what the columns refer to in the revenue component of this model?

A. The revenue, the corrected revenue, which is the ultimate revenue that we used, is comprised of estimated revenues, also an adjustment to the Osage annuity. The revenue column, which is Column B labeled here, we took available information that we received, sometimes had to adjust it, but we have that -- that's what's included here. Sometimes there were missing information and we also had to estimate for missing values.

MR. GINGOLD: Plaintiffs would like to mark for identification Exhibit 188.

BY MR. GINGOLD:

Q. Dr. Palmer, do you recognize this exhibit?

A. Yes, I prepared this to show the different time periods and different ways that disbursements and revenues were calculated or used to establish the numbers for inputs into the model.

Q. And will this help explain with some clarity precisely how you performed the calculations in your model?

A. It's helpful, at least for me, to see when we had reported evidence, when we had -- when we estimated for the missing data, and when we had adjusted other information that were available to us.

Q. You identify in the first column on the left period identifier. Correct?

A. Correct. The period identifier there was again just as an easy way, these are -- the periods were identified only by the change of information, and for example, you'll see here for the revenues, periods six, seven, and eight, we had the same basic information and methodology used, it's just that in 1945 there was no disbursement information. So that's why there was a break in there. But these periods were to identify the different ways that the revenues and disbursement information was used.

Q. And what is the first period that you've identified?

A. The first period there is 1987 to -- excuse me, 1887 to 1908. During the period -- during the first period there was no information available, so we had used the estimate procedure, as described by Dr. Cornell, a straight line interpolation. Based

upon the information from 1909 and starting with a balance of zero.

Q. And what does the second period reflect?

A. The second period we have reported information from documentary evidence, and so we used that for that time period. And then the third period is, again we didn't have information there, so estimates were provided through using a straight line interpolation between the information we had reported and the following period.

Q. When you state you didn't have information, was any information provided by defendants in the course of this proceeding?

A. Not for that time period. The time periods where estimates are listed in this column were neither plaintiffs nor defendants had any information during that period. When defendants did provide additional information, we used that information as well.

Q. Could you please explain period number four?

A. Period number four, the 1915 to 1920, the defendants did not use this information but we had found documentary evidence in the course of the litigation. It was -- Dr. Angel had mentioned that we had previously used both allotted and unallotted lands and he felt it was inappropriate to use the unallotted lands. So we did change our numbers there where we took out the unallotted lands and only included revenues for the allotted lands. That would cause the estimates between 1912 and 1914 also to change because they were interpolated. So if we change one end of the information used, the interpolated values would change as well.

Q. So in the original model, was the unallotted income included in the data?

A. It was. It was included, but again, because of the testimony during the course of litigation, we took it out.

Q. With regard to period identifier number six?

A. Period identifier number six, there were Morgan Angel data that were provided, again during the course of the litigation, that we did not have available to us when we prepared Attachment A for Dr. Cornell. It says "adjusted" here, because also in the litigation Dr. Angel, I believe, testified and there was also a footnote in Ms. Herman's backup material that said that the revenues during this period were understated. So we adjusted the revenues upward during this period.

MR. GINGOLD: Let's call up Defendant's Exhibit 372, please. If we can go to page 10. If you can focus in on the highlighted footnote, please.

BY MR. GINGOLD:

Q. Doctor, have you seen this footnote before?

A. Yes, I have. This is what I was referring to.

Q. This is what you were referring to with respect to what?

A. That here she had said that because the information that was

used by Dr. Angel were reports that did not include -- as it says, the proceeds did not include any sources that were not paid into the General Treasury Account, so that the information was incomplete, and it would understate receipts. And the testimony during the trial was that the receipts would be understated.

Q. Did you review the legislation that was referenced in this footnote?

A. I believe I did look at it at some point.

MR. GINGOLD: Could you please mark for identification the 1906 statute, please?

BY MR. GINGOLD:

Q. Dr. Angel -- sorry, Dr. Palmer, if you can focus in on the highlighted section of this statute. Have you read this before?

A. Yes, I have.

Q. Is this a statute that you just testified to that you've read related to the footnote?

A. That's correct.

Q. Thank you. Now, you say -- what is identified in this column is adjusted MA. Correct?

A. That is correct.

Q. And what exactly is adjusted MA?

A. Again, we used the information that was the data reported by Dr. Angel, and then because it was understated, the question -- we tried to find an estimate to scale it up, as it were, to what

an appropriate level would be. There was -- as I recall, there was a comment that was made in the January 30th decision by the Court, and went and found the document that related to that, and there it talked about collections were a fraction -- or that the monies that went into the Trust were a fraction of the total collections, and there's a number that they used of around 77 percent.

So I used that number to adjust up the revenues. Once I did that, then I looked at the disbursement ratio, just as kind of a sanity check, to see if the number was what we had observed elsewhere, and it seemed to be in line. So, the best information we had and that's what we used.

MR. GINGOLD: Antonio, could you please put on the screen Defendant's 365? If we can focus in on the footnote, please.

BY MR. GINGOLD:

Q. Dr. Palmer, the last two lines of the footnote reference estimated credits. Do you see that?

A. I do.

Q. Have you read this before?

A. Yes. This is indeed where we got the 77 percent that we used as an adjustment factor for the Morgan Angel data.

Q. Thank you.

MR. GINGOLD: Let's go back to Plaintiffs' 188.

BY MR. GINGOLD:

Q. With respect to period seven?

A. Well, periods six through eight, we used the same procedure, where we took the Morgan Angel data and adjusted it. Then, after we used that, the next data point we had was in 1955, so we used linear interpolation between 1950 to '54 time period to estimate those. The '55 data point would have been identical to what we had before.

In this litigation we learned about the 1923 to 1949 data, so our estimates during that period of '50 to '54 for the missing data would be different because the estimation procedure is using different data.

Also, I guess I do want to point out for 1922, is an estimate, that Dr. Angel did provide data for 1922. It was substantially different than the rest of the data. Dr. Scheuren called it an outlier and disregarded it in his analysis, and I believe Dr. Angel also said it was unusual as well. So we treated that as a missing data year.

Q. So did you treat that the same as Dr. Scheuren and Dr. Angel have treated it?

A. I treated it exactly the way Dr. Scheuren did. So anyway, that takes us back to 1955. The next data point that we had from reported information was in 1968. The defendants did not use 1968. Dr. Angel was asked about it and had said he was unaware of it or didn't use it, at least, and then came back the following day, I believe it was, and said that he viewed it as a run rate, or an average of several years.

So arguably we could have put that amount of, I think it was $121 million for several years, but we were conservative and only used it for 1968, and then estimated, again the linear interpolation, for the missing data between those two points.

One other distinction that is different from the data here from what we used before, is that all of -- because of the model, we take out interest that was included kind of in the inflows, and before we did not have any information about interest in 1968 or interest in other years, we don't have an interest breakout for the information during the year, so we used the Morgan Angel data. So we estimated an implicit interest amount to take out.

So we've actually, in comparing the new Attachment A versus the earlier one, although some of the data points themselves haven't changed, the numbers would be lower because we've taken interest out. We don't know what it would be, so what we did is estimate it based upon the balances that were provided by I think Dr. Angel, and estimated what the entire amount of interest would be using a 10-year Treasury bond rate, and subtracted that out.

Q. And why did you subtract it out, Dr. Palmer?

A. Again, because of the way the model works, the model looks at inflows without interest so that it can calculate what the totals would be in terms of benefit, and then subtracts out at

the bottom any interest or other things that would have accrued because it's sitting in the balance of the Trust.

The next period after the information that we had in 1968, we have data starting in 1972 provided by the defendants. So again, there's an estimation that's done between 1969 and 1971. Those years were estimated by linear interpolation again.

Q. With regard to 1972 to 1987?

A. 1972 to 1995, for revenues we used information from -- that's provided on AR-171, and then subsequently in the years 1996 to 2007, we used the qualified audit report information.

Q. Is the information you used from 1972 to 1995 the same or different from the information the government has used?

A. Well, it was -- the information the government used in October. It's different from the information that the government used in the trial that is currently proceeding. I believe it was DX-371 was the exhibit that Michelle Herman used that had different information for those years.

Q. And why didn't you use that information?

A. The information -- the new information that Michelle Herman had used had been reduced from the earlier years on her cross-examination. As I recall, she wasn't able to identify what that information was or why she had done a procedure, but was really unable to identify why the information had changed. There was also some other concerns with some of the underlying data, so he used the earlier data.

Q. And then from 1996 to 2007, you've stated you used qualified audit data. Correct?

A. That is correct.

MR. GINGOLD: Let's go back to Attachment A, which is Plaintiffs' 189-A, please.

BY MR. GINGOLD:

Q. So in the discussion of revenues and how you calculated them, where is that reflected on Attachment A?

A. Well, the discussion we just had would be the Column B that talks about all the different adjustments that were made to the individual years for new information.

Q. At any point in time when you reviewed documents and you found revenue data in those documents, did you use that data?

A. We tried to use as much reported information as was available for the IIM Trust as a whole. So for example, the 1915 period that we talked about a little earlier, we used that information, the defendants did not. We used it because we added up some areas that we thought would be -- for example, grazing and timber, mineral rights, other things like that to try to get up at a number, so we tried to use that as an estimate.

Q. Were there documents that reported revenue information and disbursement information where you didn't use disbursement information?

A. Not that I'm aware of.

Q. Was there any issue in 1955 in that regard?

A. For 1955 the disbursement information we did adjust, and we can talk about that now or we can talk about it later when we talk about disbursements.

Q. We'll talk about it later. I'm just asking whether or not you used the information?

A. The information was used.

Q. Let's go to page two of Attachment A. In all these periods that we've identified and you've discussed in your period identifiers, is the information in Column B the calculation that you made based on what you just explained to the Court?

A. That is correct.

Q. And that's on page two, page three -- well, throughout Column B, revenues, the information that is contained in these revenues through 2007, how does that relate to the discussion or explanation you've just provided to the Court?

A. Again, we just walked through the document that describes each of the individual ways that we obtained the revenue and used the information that is put into the Attachment A, Column B.

Q. And that relates directly to the periods or the years that you identified. Correct?

A. 1887 through 2007.

Q. Was there any change in your total revenue calculation as a result of the modifications you made?

A. Yes, there was.
Q. What was the result?
A. The total went down, I'm trying to remember the exact number, but the total went down because of the new data and information we had received that we utilized.
Q. Let's talk about the next column, which is Column C in Plaintiffs' 189.
THE COURT: We don't have any of this on our screen. I don't think the witness --
MR. GINGOLD: We're getting it.
BY MR. GINGOLD:
Q. Let's talk generally about a couple of the issues that we have in Attachment A. Attachment A, Column C is identified as "Osage Government Calculated." Could you please provide the Court with a general discussion of what that means.
A. Consistent with what we had done before, the Osage government calculated information is taken -- the government's estimate of how much of the Osage annuity went into the IIM Trust.
Q. Is there a difference between the government's calculation and yours?
A. Between -- I'm sorry?
Q. Is there a difference between the government's calculation of the annuity that went into the IIM Trust from your calculation of the flow of funds?

A. That is correct. The government estimated -- there's a couple of different things. The government estimated the amount of the annuity that they believed was -- had gone into the Trust. That estimate was also based upon headright -- a constant number of headright shares, 2,229. Dr. Angel had testified that the number of headright shares before 1906, I believe, were different, and that the -- in fact, at the beginning his estimate was it was around 1,500, and that in 1906 I believe it was around 2,100.
So we adjusted accordingly to make -- based upon his testimony, we tried to adjust the total value of the Osage annuity based on those number of shares. And then also we then took out what the government's estimate was of revenues, so subtracted it out, and then took the total value of the annuity. So add that back in. So it was kind of taking out and adding in.
We also adjusted the total value of the annuity by one-and-a-quarter percent based upon information that -- there was an earlier case that one-and-a-quarter percent was actually going to the tribe, so it was not available to the individual Indians.
Q. Was that information presented by defendants in this proceeding?
A. That information was actually from an earlier litigation, and it was -- my recollection is it was a brief by the

government that they had claimed that the tribal amount of the Osage headright was one-and-a-quarter percent.
Q. Doctor, did you yourself review that brief?
A. I did.
MR. GINGOLD: Could you please mark for identification Plaintiffs' Exhibit 183?
BY MR. GINGOLD:
Q. Dr. Palmer, do you recognize what is identified as Defendant's motion to dismiss?
A. Yes, I do.
Q. What is it?
A. This is the source of the information for the one-and-a-quarter percent. This is the defendant's motion, United States of America, and the date on this is in 2001.
Q. I would like to turn to page 39 of this brief, please.
MR. GINGOLD: If we can focus in on the highlighted section at the bottom of the page.
BY MR. GINGOLD:
Q. The statement in the brief is, there is one exception to the last statement. The tribe itself is also a headright owner, in fact, approximately one-and-a-quarter headright.
Is that the information you relied on to make the adjustment with regard to your Osage data?
A. Yes. We reduced the amount of the annuity that would have been going to the individual IIM by the one-and-a-quarter

percent.
Q. Did you apply that one-and-a-quarter percent throughout the history of the IIM Trust?
A. Yes, for every year from 1887 through 2007 we reduced the annuity by one-and-a-quarter percent.
Q. And why did you do that?
A. It was the best available information we had, so we used it for all time.
Q. Do you know whether or not the tribe had a one-and-a-quarter headright at any time prior to the date of this brief?
A. I do not. I believe that I read something that the original annuity was set up for individual members, so I would imagine that at the time it was set up the tribe had zero headright. But this is the best available information, so we used it for all time.
Q. And let's go back to Attachment A, please.
THE COURT: Mr. Gingold, this might be -- I'm sorry to interrupt your Q&A here, but this might be an opportune time to have at least a brief discussion of a motion that was filed last week, as you undoubtedly know and as the government knows, by the Osage to intervene. Do the plaintiffs have a position on that motion, and if so, are you prepared to articulate it?
MR. GINGOLD: If you give me about 10 seconds, Your Honor. We have not focused on the motion, but we're prepared to address it.

THE COURT: Anybody here representing the Osage?

MR. GODFREY: Yes, Your Honor. Merrill Godfrey from Akin, Gump, Strauss, Hauer & Feld, on behalf of the Osage Nation.

(OFF THE RECORD.)

MR. GINGOLD: Your Honor, as I stated, we have not focused on that because we've been preparing the litigation. We have informed the Osage tribe that we oppose, and we oppose for several reasons, one of which is that the proceeds from the mineral estate are identified by statute as the funds of the individual Osage Indians.

Secondly, the Mineral Council for the Osage tribe itself has identified in a resolution that the litigation that it has brought, and there are two separate actions, Your Honor, one in this court and one in the United States Court of Federal Claims, is for the benefit of the individual headright owners. That is consistent, Your Honor, with the statute itself, which identified all the proceeds of the mineral estate as the rights and property of the individual headright owners.

Our class was certified on February 4th, 1997, for all past and present Individual Indian Trust beneficiaries, and it has been interpreted by this Court as for funds held in Trust.

It is plaintiffs' position that the funds have been continuously held in trust, that those funds are the individuals', and that the right, title, and interest in those

funds in a beneficial way is in the members of the tribe, not in the tribe itself.

There is, as was testified to by Dr. Palmer, an acknowledged one-and-a-quarter interest in that particular pool of funds. Those funds are held at the Treasury, and the Treasury itself disburses those funds. It is in a different ALC, but they are still individual Indian funds held in trust. It's characterized as an annuity, Your Honor, but in fact it's not an annuity as that is defined as a matter of law.

But it is a fund; all right, title, and interest is to the beneficiaries, the individuals themselves, and not to the tribe. But the tribe does, Your Honor, as a result of the legislation, have a right to a percentage of the interest earned on that pool for the 3 months that it's held in the Treasury. That plus the one-and-a-quarter interest, to the best of our knowledge, is the only right that the tribe has in that regard.

Consequently, Your Honor, we believe the interests of the tribe are protected if the one-and-a-quarter interest is deducted from whatever is discussed here, and the interest issue, to the extent it applies, is not included in this litigation. And Your Honor, we brought this action not for purposes of damages litigation, as we've stated from the beginning and repeated frequently in this proceeding. The action brought in the Claims Court, Your Honor, is a damages case.

To the extent the tribe is seeking damages, and it is within whatever the rules are in the Court of Claims, for itself or, if possible, the individuals -- and Your Honor, we understand there's a lot of controversy in that regard that we're not involved in -- or for the action brought by the tribe in this court that was filed several years after the class was certified, we think whatever claims the tribe has have been independently litigated, they do not involve the claims in this litigation, and to the extent they do involve the claims in this litigation, the class certification order trumps the effort made by the Osage tribe.

So, Your Honor, it is our position that since we're not seeking damages in this proceeding, the tribe is seeking damages in the Claims Court, the tribe is seeking damages for whatever its interest is, as I understand it, in this court, and filed several years after we filed our case, it is very well protected and there's no need for it to intervene in this proceeding.

And it's as simple as that, Your Honor, and we believe it's a question of law as stated in the governing statute, and as the government itself represented to the U.S. Court of Claims in the brief that was just referenced by Dr. Palmer.

THE COURT: Mr. Quinn, do you want to be heard?

MR. QUINN: Yes, thank you, Your Honor. Michael Quinn for the United States.

We had anticipated responding in writing to this, but I

can address the United States's position with respect to the motion to intervene by the Osage Nation. Frankly, we don't have any objection to the Osage Nation intervening for the purpose, a narrow purpose, which would need to be specifically stated by the Court, with respect to the Tribal interests that the Osage Nation expresses concern about in their motion to intervene.

At page three of their brief they express concern about an argument by plaintiffs that the Osage mineral estate income is at all times the vested property interest of individual Osage headright owners. And they go on to say that according to the plaintiffs, when the United States collects Osage mineral royalties and deposits them, it, quote, collects the trust funds of Osage headright owners and deposits them into the Treasury.

The Osage Nation, to the extent it has responsibilities over the mineral assets and initial collection of funds for later disbursement to headright owners, may have a collective organizational and entity interest with respect to the monies at that period of time. Plaintiffs in this case have certified a class, and Mr. Gingold likes to talk about it, but the definition is clearly stated in the February 4, 1997 order, and it isn't exactly as Mr. Gingold articulates it.

If we could put it up on the screen. The definition is actually a class of present and former beneficiaries of Individual Indian Money accounts. And it has been the United States' position throughout this litigation that unless a beneficiary, an individual has had an Individual Indian Money account, there's no possibility that they could be in this class, regardless of whether they receive other monies, including tribal monies that are paid out of the Tribal Trust.

The Osage headright interests for the most part are paid to individuals and disbursed directly out of the Tribal Trust. That has been the historical experience. Monies disbursed in that fashion that never enter into the IIM system in the first place are not even part of this case, regardless of what plaintiffs argue here and do so in effect in their model that we're taking examination on today.

The only plaintiffs in the class and the only aspect of the Osage annuity that's at issue before the Court are the amounts, the fractions of headright payments that are paid into the IIM system for deposit into individual accounts. Those are primarily people who are minors at the time of receipt, or incompetents who have a guardianship relationship, and the money is deposited into the account for their benefit.

The tribe, however, may have a collective interest in certain early aspects of the money flow, but once it is disbursed to individuals, those are individual interests. The individuals who are not in this class, that is, all the people who received direct payments who have never had an IIM account, have no standing in this class, they're not even part of the plaintiff group, they can't be represented by the plaintiffs'

counsel here. Also, we would submit they cannot be represented by the Osage Nation.

In another case -- and forgive me, I don't have the cite here. We can provide it to the Court later today. In a March decision by the Court of Federal Claims, where an attorney representing individual headright owners sought to intervene in an Osage litigation involving the United States, the Osage opposed that intervention but opposed the attorney because he had previously represented the tribe. And the Court went into some extended discussion about the different interests that individual headright owners hold vis-a-vis the Osage Nation.

So with respect to anything that the Osage Nation would wish to assert on behalf of headright owners who are receiving money who are not in the class, we would -- our position is that they are not in a position to represent or speak for those individuals, but they may have a limited role in protecting the interest of the tribe overall, in terms of the early stages of the revenue generation before disbursement to individuals.

THE COURT: All right. Well, I certainly succeeded in interrupting the direct examination of Dr. Palmer, and you both responded on the fly with interesting and complex arguments that I'm frank to say I'm not sure I entirely follow at this point. But I think I need to -- I think we need to deal with the motion to intervene of the Osage Nation just for the record.

This began with a motion by the Osage for leave to file

papers amicus curiae, and I said no, we don't do amicus curiae in this case. But I sort of invited the intervention for the limited purpose for which they have moved for leave to intervene.

Intervention, at least permissive intervention, is, I think, liberally granted in a case in which a party asserts an interest, and I will grant the motion of the Osage Nation to intervene. I'll call it permissive intervention. I do not anticipate that the Osage Nation will take any active part in the examination of witnesses or the presentation of evidence, but they certainly will be heard at the briefing stage when they want to be heard on the question of exactly how Osage money should be treated.

So the motion is granted for the limited purpose asserted in the motion for leave to intervene. And this may be an appropriate time, since I've already interrupted the testimony, to take a brief recess so we can handle the two brief criminal matters that we have. We'll be in recess, I think it will take us about 15 minutes.

(Recess taken at 10:41 a.m.)

THE COURT: All right, Mr. Gingold. Proceed. Thank you.

MR. GINGOLD: Thank you, Your Honor.

BY MR. GINGOLD:

Q. Dr. Palmer, prior to the break you were discussing in

Attachment A, analysis of benefit to the government --

MR. GINGOLD: If we can put Attachment A back up. It's 189-A. Thank you, Antonio.

BY MR. GINGOLD:

Q. The Osage government calculated Osage corrected columns?

A. That's correct.

Q. These columns are C and D of your attachment?

A. That is correct.

Q. Just briefly, could you please restate what you identified as what you corrected with regard to the Osage revenue numbers?

A. There were two corrections. The one correction that we had just talked about before the break was a reduction of the annuity by one-and-a-quarter percent for the tribal headright share. Also a correction we had made was to adjust for the early years -- this would be 1887 to 1906 -- for a different number of headright shares. Again, we're trying to calculate the value of the total annuity.

Q. Was that calculation based on information provided by Dr. Angel?

A. During his testimony he provided that information, and that's the basis for that adjustment.

Q. Did you make any corrections as a result of Ms. Herman's testimony?

A. There were changes to what we had used here and what we had previously used because Ms. Herman had changed -- I believe

changed her estimate of how much of the Osage was actually in the IIM Trust.
Q. As a result of your calculations, what occurred with regard to your totaling the Osage revenue?
11:10:25 A. I'm not sure I understand.
Q. Did the revenues go up or down?
A. Oh, the revenues would have gone down.
Q. Let's turn to page four of this exhibit.
MR. GINGOLD: If we can focus in on the total column on
11:10:48 page four of Attachment A, "Analysis of Benefit to Government."
BY MR. GINGOLD:
Q. Do you see the totals under "Osage Corrected"?
A. I do.
Q. Is that the total that you've just testified went down as a
11:11:09 result of your calculations?
A. That's a nominal total, and I believe it's lower. I don't remember the exact number of the earlier, but I believe it's lower.
Q. With regard -- while we're focusing on this total column on
11:11:23 page four, if we can look at the revenues under Column B, please.
A. Yes.
Q. With regard to those revenues, are they also stated in nominal terms?
11:11:36 A. They are.

Q. I would like to now talk to you about disbursements.
A. Okay.
MR. GINGOLD: If we could go to page one of Plaintiffs' Exhibit 189. If we can please focus on the disbursement
11:12:12 columns. That's the last five columns on this page, please.
BY MR. GINGOLD:
Q. Were you asked to calculate disbursements as well?
A. Yes, we did.
Q. And generally, before you go into detail, what did you do
11:12:35 with regard to the calculation of disbursements?
A. The calculation of disbursements changed from what we had previously used. Again we had additional information that we received, and so we incorporated that information. Previously we had taken an average over the entire time period and used
11:12:53 that average throughout. Here we tried to incorporate any reported information we had, again, sometimes subject to an adjustment, but we tried to use as much available data as possible.
Q. And with respect to the available data, when you sat through
11:13:11 this proceeding for the last two weeks or so, is that where you gathered a lot of your new information?
A. That's correct. There is new information that we received that we didn't previously have.
Q. Now, one of the items that is related -- may be related to
11:13:30 disbursements may be the IIM Tribal issue. Are you familiar

with that?
A. I'm familiar somewhat with it, yes.
Q. What is your understanding of that issue?
A. The defendants identified a separate amount of IIM Tribal
11:13:44 monies. We looked at the IIM Tribal monies, and something we'll talk about soon, I believe, is disbursement information, and the checks and the electronic fund transfers were all the information that were identified as going out of the account, so we included all of that.
11:14:06 Also, as I understand, there are -- at least the tribal monies were not supposed to be in the IIM Trust at this point, and in the calculation at the very end we subtract out everything that's in the Trust so that it was really not an issue in our calculation.
11:14:23 Q. Were you able to identify Tribal IIM money in any of the documents that you reviewed?
A. What I recall from the documents I reviewed said that often the Tribal monies were combined with the individual monies, and it couldn't exactly be identified. The government did provide
11:14:46 an estimate of what they thought were Tribal monies. I believe Dr. Angel had provided a number to Ms. Herman of 10 to 15 percent for different years. That was his understanding, and upon I believe cross-examination some documents were pointed out of much smaller percentages, one or two percent as I recall, so
11:15:05 that there wasn't really information, precise information that

we could examine in that regard.
MR. GINGOLD: Plaintiffs would like to mark for identification Exhibit 83.
BY MR. GINGOLD:
11:15:25 Q. Exhibit 83 is GAO testimony dealing with Indian Trust funds Tribal account balances. This is dated Thursday, February 7th, 2002, and it is stated -- it is reported as a statement of McCoy Williams, acting director, Financial Management and Assurance. Plaintiffs would like to turn to page six of PX-83.
11:15:56 Dr. Palmer, I would like you to focus on the highlighted section of this report. Have you read this before?
A. Yes, I have.
Q. What is your understanding of this highlighted language?
A. Well, in the middle it says, due to missing records and the
11:16:13 lack of an audit trail throughout IRMS, Tribal transactions could not be efficiently isolated from the individual transactions, and therefore, because of this, Tribal IIM accounts maintained in IRMS were not reconciled to source documents.
11:16:28 So essentially they weren't able to distinguish the two.
Q. So that confirms your understanding of the testimony -- there was testimony but no documents presented?
MR. WARSHAWSKY: Objection. Leading.
11:16:41 BY MR. GINGOLD:

Q. Sorry. Were there documents presented during the testimony of Dr. Angel?
A. From what I remember from Dr. Angel's testimony is that he was not able to identify precisely his feeling of what those percentages were, but since we didn't have really precise information, we did not make any separate distinction.
Q. Were you able to verify any of the estimates of Dr. Angel?
A. No.
MR. GINGOLD: Plaintiffs would like to have Exhibit 188 back on the screen, please. I would like to isolate the disbursement section of Plaintiffs' 188.
BY MR. GINGOLD:
Q. Dr. Palmer, did you prepare the disbursement column in this exhibit?
A. Yes, I did.
Q. Okay. Could you please explain what the disbursement column means, beginning with the periods in question?
A. Well, again, there were several periods for which information was missing, and for the missing information -- for the periods of missing information we used what reported documentary evidence we had and adjusted -- and used an average rate for the periods surrounding that time frame. There's one period early that we relied on the 1909 to 1911 documents, there's also a later time period that we had the CP&R and EFT data so we could identify and examine precisely what went out of

the Trust. And so we used that average for a later time period. And then there were some time periods in between where we took an average of those two.
So that was what we did for the missing information periods. Also we had some disbursement information that was provided by Dr. Angel that we previously didn't have. We utilized that. And then for some of the periods we did an adjustment to the information that defendants had provided for disbursements.
Q. Let's start with period one, 1887 to 1908.
A. Okay. That was a period where there was no information available. Also from the 1912 to 1922 period, there was no information available. So we took from 1909 to 1911, we had documentary evidence and used those reported numbers for the time periods around then.
Q. With respect to 1909 to 1911, you identified documents?
A. That's correct.
Q. What does that mean?
A. There's some annual reports that we looked at that reported at the time what the receipts into the Trust and disbursements for individual monies were.
Q. Do you know whether those are the same documents that Dr. Angel relied on?
A. Yes. The 1909 to 1911 numbers are the same that both the government and we are using.

Q. So did you use the same reported data that Dr. Angel used?
A. I believe so.
Q. With respect to 1923 to 1944, what does MA signify in the disbursements column?
A. Again, that's the Morgan Angel data. Morgan Angel data were provided for 1923 to 1949. They happened to have one year missing of 1945, so we supplied, consistent with what we had done in other areas, that missing data with an average from the documentary evidence that we had.
Q. You don't identify this as adjusted, do you?
A. In terms of the Morgan Angel data, we did not adjust it, that's correct.
Q. 1945, what issue is associated with 1945?
A. 1945 was a period during the Morgan Angel data that they did not have any disbursement information, so we estimated that missing year.
Q. And 1946 to 1949 you have MA as well. Correct?
A. That's correct.
Q. And does that mean that you used the same data that Morgan Angel used?
A. That is correct.
Q. For 1950 to 1954?
A. During that period, again, we took an average of -- it's somewhat between the earlier period, 1909 and 1911, and the later period, which was 1988 to 2002. So we took the average

rate of those two and averaged it.
Q. With respect to 1955?
A. 1955 we had some information -- we had information, both -- the same information that defendants were using. In looking at that information there was -- that particular document in 1955, there was a lot of concern raised in the document about disbursements not having been documented, not having an audit trail. There was just an awful lot of concern about the disbursements during that time, so we had adjusted the disbursement number there based upon information that we had calculated in Attachment C.
MR. GINGOLD: Plaintiffs would like to mark for identification Exhibit 53. If you can focus in a little more clearly, please.
BY MR. GINGOLD:
Q. Plaintiffs' Exhibit 53 is an audit report to the Congress of the United States, Administration of Individual Monies by Bureau of Indian Affairs, Department of Interior, November 1955. And this is by the comptroller general of the United States.
I would like to turn your attention to page eight of this exhibit. I would like to focus on the left-hand side of the page, the last paragraph, if we can, where it begins: Following is a summary of deficiencies.
Have you read this document before?
A. Yes, I have.

Q. Is the information that's identified on this page -- and if we can go to the next page when you're finished reviewing that -- the information that led you to be concerned about the disbursement data?

MR. WARSHAWSKY: Objection. Leading.

THE COURT: I'll allow it.

A. As I mentioned, there was a document that I had identified that I had seen that discussed concerns at the time about the disbursement data and issues with the disbursement data, so we had adjusted that year, the information for that year that was reported.

MR. GINGOLD: So for purposes of making sure the record is clear, we have this as page eight of the exhibit, but it was actually page 10 and page 11 of the document itself.

Plaintiffs would also like to mark for identification Exhibit 181. This is identified as an audit report to Congress of the United States, Bureau of Indian Affairs, for the fiscal years ended June 30, 1952 and 1953, by the comptroller general of the United States.

BY MR. GINGOLD:

Q. I would like you to turn your attention to page 19 of this document -- or page 12 of this document, please. This is identified on page 19 of the original document itself, but it's page 12 of our exhibit.

Have you read this before?

A. I believe so.

Q. Could you please tell me whether or not you've read this and what effect it had on your calculation of disbursements?

A. Well, again, this expresses concern at the time about the handling of disbursements and the information that was available, so therefore, as it says, there's weaknesses and deficiencies, is when we looked at the reported information, we adjusted for, in 1955, we adjusted that year, this being close to it.

THE COURT: But how did you use -- I mean, these are words like "deplorable conditions", "little concern regarding the deplorable conditions", "completely inadequate" and so forth. I mean, did you use words like this to come up with any quantitative adjustment, or did this just color your view of the data?

THE WITNESS: I can't quantify --

THE COURT: Is this a 15 percent discount, or what is this?

THE WITNESS: We will get to that. In Schedule C we actually estimate an amount of adjustments, and from information we actually have in terms of checks and EFTs for a time period where we can look at what actually was disbursed from the Trust, and then we can compare that with other reported information at the time, and from that we get a ratio, we can compare it.

THE COURT: So there's a ratio for deplorable and a

ratio for pretty bad?

THE WITNESS: No, I'm sorry, we only have one ratio.

THE COURT: All right. I can't wait.

MR. GINGOLD: Thank you, Your Honor.

BY MR. GINGOLD:

Q. With respect to 1969 to 1971, back to Plaintiffs' 188.

A. 1969 to 1971, actually, from 1956 to 1971 there were no disbursement information available to us that we could find, and also the defendants didn't have any, so we used there the average rate for a time period later, when we had both the CP&R and the EFT information, so checks and electronic fund transfers, that we could identify exactly what was leaving the Trust. We used the average rate for that time period for the 1956 to 1971 period.

Q. What did you do for 1972 to 1987?

A. For 1972 to 1987, again we did an adjustment, and that adjustment, it's the same ratio we just talked about, that when we get to Schedule C and talk about how it was calculated, you'll see that's the adjustment we used for that period. Also the period after, the time period we had the information, the 2003 to 2007, we do have a ratio adjustment there, and that's based upon the time period 1988 to 2002, when we had the actual check data and the electronic transfer data.

MR. GINGOLD: Let's go to Schedule C, which is PX-189-C.

BY MR. GINGOLD:

Q. Did you prepare Attachment C, Dr. Palmer?

A. Yes.

Q. Please explain what it is.

A. Well, there's a couple of different things that happened in this attachment. Basically what we're doing is we're trying to look at actual information that we have, or at least we understand is the actual information. The CP&R captures the checks that were actually written, the EFT or the electronic funds transfers -- and both of these are out of the IIM Trust -- and we used those to look at what the total disbursements out of the Trust would be.

We compared that to the corrected revenue numbers for those years, and that gave us an average disbursement rate. We then, since we had this actual information for those years, 1988 to 2002, we used the actual disbursement rates in our calculation. We then take an average of those years and use that average for time periods when we don't have information.

Also, this document was used to examine what the defendants had reported as their disbursements and their rate of disbursement during this same time period, and then that's how we calculated the average adjustment rate, because in some years we can see that the plaintiffs' numbers are lower, some years they're higher, and so what we did is use that average of that ratio to say when there were years when we didn't have the check and EFT information, the CP&R and EFT information, that it seemed to us logically that that same type of overreporting would be in those other years as well. So that's why we did a ratio adjustment.

The adjustment that we do use here is different from the one that was previously done. The one that was previously done that Dr. Cornell talked about in Attachment C was using an average -- used number of checks, and I believe, as the Court pointed out, and we have a little box down there, that the average number of checks paid were higher than the average number of checks that were written, being -- so they were kind of, the residual or unpaid checks were lower.

So what we did for this instead is we used a total amount, so a dollar amount, which would be essentially a dollar weighted average. But the total dollar checks that were paid versus the total dollar checks that were written, we see that's 93.68 percent. So in the years where we didn't have that information in terms of the checks that were paid, we adjusted -- that's the difference between Column B and Column C -- we adjusted the checks that were written by this percentage of checks that were cashed, as it were, to get at an adjusted number.

We then added to that adjusted number the electronic funds transfers. This was again information that we had received during the course of this litigation that we didn't

previously have. The defendants provided to us the PACER database so we could go in and add up and calculate the number of electronic funds that were transferred out of IIM Trust accounts, so we can add the checks to the electronic funds transfers, which we were told were the only way that funds really go out of the IIM Trust, and that gave us the total disbursement.

That total disbursement then, divided by the revenues in any given year, give us a disbursement rate for that year, and it varies over time. And then that's how we got the average. And then as I mentioned earlier, we calculated a ratio that defendants' documents had used for disbursement numbers for other years.

THE COURT: All right. Mr. Gingold, I'm sure that answer was complete, comprehensive, and understandable to you. But it's a textbook example of why narrative answers don't sell, because I need for you to go over that line by line, calculation by calculation if I'm going to have any idea what he just said.

MR. GINGOLD: Your Honor, I was planning to do that.

THE COURT: Good. Thank you.

BY MR. GINGOLD:

Q. First, when you were -- you were talking about average checks. Correct?

A. Average checks, so we're talking now about the blue box down in the lower left-hand corner. That is the average check amount

which was -- this was an example of what was previously done.

MR. GINGOLD: Could we please go to footnote seven, which is on the next page?

BY MR. GINGOLD:

Q. Dr. Palmer, did you draft this footnote?

A. It was drafted under my direction.

Q. Please explain it.

A. What we were doing here was taking information that we had on DX-272 -- 236, DX-236, which had the total amount that was paid out in checks for the given year.

Q. Total amount paid out in checks from what source?

A. The source was on DX-236. It was the government data that they had provided to us.

Q. Okay. Proceed.

A. Okay. And from that then we also -- we knew the number of checks that had been cashed, and so we divided those two numbers to get the value of checks cashed. We knew from the CP&R data the number of checks that were issued and the total value of checks issued. Dividing the total checks issued divided by the checks that were issued gave us an average check value.

So then we created those two. The amount of money that was not cashed that was issued gave us the amount of money -- you're holding up your hand.

Q. Let's go to DX-272.

A. Okay.

Q. Have you reviewed this exhibit before?

A. Yes, I have.

Q. On page 48 of DX-272, I would like to direct your attention. Have you seen this information before?

A. Yes, I have. This is the information that we were able to obtain -- that we obtained for the CP&R data.

Q. And what does that reflect as you understand it?

A. These are the checks that were issued out of the account, the IIM Trust account, the amount and the number of records.

Q. Is it limited to any particular period of time?

A. Well, we have information here annually from 1987 to 2002.

Q. Let's now turn to Defendant's 236, DX-236. Have you seen this document before?

A. Yes. This is the -- the second page of this document actually gives the dollar number of the checks that were cashed. It's reflected on the first page, but here we have it all the way out to the cents, whereas the first page it was rounded to less digits. And the number we used you'll see for 1999 is the $175,544,960.19.

Q. Did you utilize that data in Attachment C?

A. Yes, we did. That is the information that we were able to utilize to get at the fraction of -- the amount that was cashed versus the amount that was written. That's the 93 percent. This is also the information that was used to illustrate and to calculate the average dollar amount for checks cashed.

MR. GINGOLD: I would like to back go to DX-272, please. I would like to go to page 50.
BY MR. GINGOLD:
Q. Now, you've seen this before. Have you seen this before?
11:38:20 A. Yes, I have.
Q. Did you utilize this information at all?
A. Yes. This is the source that gives us, in the table down below, of the number of checks.
Q. Let's focus in on the table below. What is reflected in
11:38:34 this table, as you understand it?
A. Again, I believe it's called "R," as we saw the code above, for 1999 gives us the number of checks that were cashed. And we used that information in conjunction with the dollar amount that we just looked at, to get at the average value for checks
11:38:54 cashed.
Q. Did you adjust this information that is contained in this table?
A. I don't believe so.
Q. Let's go to page 51 of this exhibit. Have you seen this
11:39:15 table before?
A. Yes.
Q. What is it, as you understand it?
A. Again, the same type of information. There's two CDs that were provided, so it's combining the two tables together to
11:39:26 create the total number.

Q. Now, does this explain how you used the CP&R data?
A. This shows that for -- the last two tables we just looked at were used in terms of the number of checks, in order to calculate the per check value. The numbers we looked at earlier
11:39:52 in terms of the dollar numbers, that's what we used for the CP&R data that's reflected in Attachment C.
Q. Did you rely on any other information other than the information in DX-272 for that calculation?
A. For the calculations in Schedule C, that was the source of
11:40:11 our information.
MR. GINGOLD: Let's go back to Schedule C, please.
BY MR. GINGOLD:
Q. I would like you to focus your attention on Column D, which is EFT.
11:40:33 A. Okay.
Q. What exactly does the EFT data mean?
A. EFT are electronic funds transfers. Again, in the previous version of Attachment C that Dr. Cornell testified to, we did not have the EFT information. That's been subsequently provided
11:40:54 to us, so we looked at that. We had data actually for 1988 through 2002 of the funds that were transferred out of the IIM Trust electronically as opposed to by check. So the disbursements are the two, the checks and the EFTs.
Q. Do you recall which database you relied on for that
11:41:16 information?

A. It's the PACER database, and that went from the years 1998 to 2002. Before 1998 there was not information available for that fiscal year, so what we did was to -- we had a separate report from NORC that they had prepared in examining the EFTs
11:41:38 earlier, and said there were a -- they gave a number of transactions from before the PACER database information we have.
So we took the average number of EFT per transaction in 1998, multiplied it by the number of transactions that the NORC document indicated, and then had a three-year decay so we could
11:42:05 smooth that out over time.
Q. Were there any other data sources that you reviewed other than PACER, the NORC document, and the CP&R database?
A. Those were the foundation for the information here.
Q. Just for clarity, could you just explain to me how you
11:42:27 calculated the average check value?
A. The average check value was, take the total amount of checks, divide it by the number of checks, and that gives an average check value. And then there are different categories that we looked at. So we looked at checks that were written,
11:42:53 checks that were paid, and then other checks that were not paid.
Q. The not-paid checks, how did you calculate that amount?
A. That would be the difference dollar-wise between what was written and what was paid. That would be the dollar other, and then the number would be the number of checks that were written
11:43:13 versus the number of checks that were cashed. And that would be

the number of checks other. And then dividing those two gave the average other.
Q. Did you eliminate any checks that were identified in the database for any reason whatsoever?
11:43:27 A. We used all the information that were available.
Q. So you didn't review whether or not the checks were paid to Trust beneficiaries. Correct?
A. We used any and all checks that came out of the IIM Trust. It was the code that was identified and to whom it went -- we
11:43:49 don't have the checks, we don't know where it went, but we took all the information for checks that were paid out, and the same with the electronic funds transfers.
Q. And did you use all that information as a disbursement from the Trust?
11:44:00 A. That's correct.
Q. What did you do with regard to EFT in that regard?
A. Again, all of the electronic funds transfers that came out of the accounts that we had, we used all of those to come out. So with regards to whom it went, the information we have is if
11:44:21 it leaves the Trust, then we're counting it as a disbursement.
MR. GINGOLD: Plaintiffs would like to mark for identification Plaintiff Exhibit AR-388.
BY MR. GINGOLD:
Q. Dr. Palmer, this document is identified as electronic
11:44:45 payment prototype for the Alaska region. It is a NORC document

dated September 30th, 2003. Have you reviewed this document?

A. Yes, this is a document that was the source of the number that I had just mentioned about the number of electronic funds transfers before the PACER database information.

MR. GINGOLD: Can we turn to page nine, please? If we could focus on the highlighted paragraph at the bottom of the page.

BY MR. GINGOLD:

Q. Have you reviewed this before?

A. Yes, this is the number, this 669 are the number of electronic payments in the IRMS that were posted before October of 1997. The PACER data system begins, at least the information we were provided begins in October of 1997, so we wanted to include an estimate of what the electronic payments were before the time period, and that's when we used the average of the earliest time that was available, and multiplied it by the 669, and then spread that over time.

Q. Were you able to identify any other information to be able to include in your calculations for CP&R disbursements or EFT disbursements?

A. This is all the information we had available to us.

Q. I would like to go back to Attachment C, please. The information that's identified in the columns that you prepared, let's take 1988, for example. CP&R disbursements unadjusted, what is that?

A. That is the information that we received of the total amount that was written, or checks written out of the account for the IIM Trust.

Q. Now, you have Column C, which is CP&R disbursements adjusted. What does that mean?

A. What we did is we looked when we had information, which we had just reviewed, for a year, 1999, where we were able to see that the total dollar amount of checks that were cashed, we took the ratio of the checks that were cashed to the total amount of checks, and that gave us a 93.68 percentage.

So we adjusted the other years that all the amounts of checks that were written were not all cashed. So the adjusted column reflects that adjustment.

Q. And the CP&R and EFT disbursement column, what is that? With respect to 1988.

A. So for 1988 we do not have --

THE COURT: Excuse me, Dr. Palmer. Every number in Column C is 93.68 percent of the numbers in Column B?

THE WITNESS: That's exactly correct.

THE COURT: All right.

A. And then Column D we've just talked about are the electronic funds transfer information we have. Column E then is the sum of the adjusted CP&R amount and the EFT amount.

So if we add those two columns together, that should be the total amount of disbursements that have been identified

going specifically out of the Trust.

BY MR. GINGOLD:

Q. And with respect to Column F, corrected revenues, what is that?

A. Column F are the numbers from Attachment A that we have just looked at and we talked about earlier. So we have -- those revenue numbers are brought in here, they're identical. Then we take the division between the information in Column E and Column F, and that gives us a disbursement rate. So the ratio of those two.

Q. With regard to 1988, you have a disbursement rate column. There is no percentage there. Why is that?

A. That's a good question. I don't know. There should be.

Q. In any event, how would you calculate the disbursement rate?

A. It would be the ratio of the information in Column E to Column F.

Q. With regard to Column AR-171 "disbursement rate, one percent of receipts," what is that?

A. I'm sorry, what was that again?

Q. What is supposed to be in Column H, AR-171, "disbursement rate, one percent of receipts"?

THE COURT: It doesn't say "one percent;" it just says "percent."

MR. GINGOLD: Sorry, I misread it, Your Honor.

THE COURT: Okay.

A. What we did there is we took the disbursement information and the revenue information from AR-171, and we divided the two to get a disbursement rate that would be reported in AR-171. And that then, on the year-by-year comparison, would be able to be seen to be what is the rate that's reported there versus what is the rate that we observed looking at what was actually disbursed through checks and EFTs.

BY MR. GINGOLD:

Q. Now let's look at -- so we have a completed year, let's drop to 1989 and the disbursement rate column.

A. Yes.

Q. There is a rate identified under the disbursement rate column. What is it?

A. 74.5.

Q. And how did you calculate that?

A. And that's calculated, the ratio of Column E to Column F. So the total amount that was disbursed from checks and EFTs, divided by the revenues for that year, gave the 74.5.

Q. And under Column H for 1989?

A. So Column H, the number there is taken from taking the disbursements for 1989, divided by the revenues for 1989 found in AR-171, and that gave the 108.3 percent.

Q. And now under the disbursement adjustment ratio percent of actual disbursements under Column I, what is that number?

A. So what we've done there is take the amount that was the disbursement rate in AR-171, which is the 108.3, and divided that by the 74.5, which is the disbursement rate that we calculate based upon the information we have going out of the Trust, the checks and EFTs, and we see that the disbursement rate on AR-171 was 45.4 percent higher.

THE COURT: What do you do with that number?

THE WITNESS: What we do with that number is we do that for each year, then we come down to the bottom and get an average of all those years, so on average those numbers are 34 percent higher.

THE COURT: Yeah.

THE WITNESS: Then what we do is take that back to the years where we don't have specific check and EFT information. So for example, in 1985, 1985 we don't have information on what the checks were and what the EFTs were. But we do have a number from Ms. Herman of what her disbursements were. So we look and we see when we can identify, when we have all the information, that on average those numbers are 34 percent higher, so we adjust in the years when we don't have the specific information, we adjust her numbers down. And that's when we were talking about earlier, that you had asked to see what the ratio adjustment was. That's the ratio we adjust things by.

So, for example, again, the disbursement number that we have for 1985 we take from AR-171.

THE COURT: Well, I don't understand why you need

134.1 percent. Aren't you really just using the 74.45 percent number? Isn't that essentially the same thing?

THE WITNESS: No, they're different. The 74 percent number is the average disbursement rate. We use that for years when we don't have any information at all.

When we have actual information, as reported in AR-171, they're going to bounce up and down. On average it would probably be the same, but we wanted to look at, instead of just taking a straight percentage, we wanted to allow year-to-year variation. But that year-to-year variation, when we observed the information for both years, that information was higher, so we adjusted down by dividing by 1.34.

So again, 1985, whatever was in AR-171, we divided that number down to adjust it, and then we can use that number, but just adjusted down to a level that was consistent when we had information from the actual checks and actual electronic funds transfer.

THE COURT: All right. Now, this disbursement rate that you've got in Column G is powerfully driven by this average check calculation that you've done, isn't it?

THE WITNESS: I wouldn't say powerfully. It does have an effect. So if the average -- so if, for example, we just took, instead of using an adjusted number, it was 94 percent, approximately, 93.6 percent, if we used 100 percent so that every check that went into the system, we assumed it was paid

out, then it's true that the disbursement rate would change. But again, we have information that not all checks that went out were actually cashed, so -- and we have an average number there as an illustration.

But it does affect --

THE COURT: And Mr. Gingold, do the parties all agree that the float, basically the float, which is uncashed checks, constitutes money that should be returned to all the IIM account holders?

MR. GINGOLD: Your Honor, I can't speak for the government. It's plaintiffs' position that if the money was to be paid out by check and it wasn't, it's Trust money that remained in the Trust.

THE COURT: It's paid out but never cashed.

MR. GINGOLD: Well, it's never been paid out. The check wasn't negotiated. If you write a check to yourself and put it in your desk drawer, your account balance shouldn't change. The difference is, Your Honor, when a check is cut on the 14X-6039 account, immediately the account is debited without regard to when the check is cashed or not.

THE COURT: So I suppose the question devolves into two subquestions. The first is, in your theory of the case, the government is required to disgorge all the float to IIM members. Right?

MR. GINGOLD: If that's what you would like to

characterize it, Your Honor, yes. But they are funds that have not --

THE COURT: But the answer is yes. Okay?

MR. GINGOLD: Yes.

THE COURT: And the next question is, you also want a benefit of the government calculation based on that, because you assert that the money was wrongfully withheld. Right?

MR. GINGOLD: That's correct. Or withheld. Whether it was wrongful or not is not the issue, Your Honor.

THE COURT: Okay. Just want to orient myself in your argument, that's all.

MR. GINGOLD: Be my guest, Your Honor.

Maybe it would help if we had an example of what Dr. Palmer was talking about.

Can we bring up Plaintiffs' 191, please?

BY MR. GINGOLD:

Q. Have you seen this before, Dr. Palmer?

A. Yes.

Q. What is this?

A. This is an example of taking a specific year and showing how the adjustment would be, based upon the information in Attachment C, we had just talked about roughly this. And here it lists the number in AR-171 for disbursements for 1987 is 258.4 million. Based upon our adjustment factor, that again we calculated looking at what actually went out in terms of what

was cashed, went out in terms of checks and also electronic
funds transfer, and there we look at, the total there would be
adjusted to 192.62 million.
Q. And what does that adjusted number mean?
11:57:38 A. The adjusted number is then what we used in our calculation
as the outflows in that year.
Q. Okay. Let's go to AR-171. Let's go to --
MR. GINGOLD: Can we focus on 1987, please?
BY MR. GINGOLD:
11:58:11 Q. Do you see the number that you just discussed?
A. Yes, it's in the far right-hand column, the 258.4 million.
So that's the source of the information in the example that was
just put up.
Q. Did you prepare this document?
11:58:24 A. AR-171, I did not. I prepared the example that we just
showed, but I did not prepare 171.
Q. Do you know whose document this is?
A. AR-171 is a government document.
Q. Thank you. I would like to return to Attachment A, please.
11:58:49 And again I would like to focus on the disbursement component of
Attachment A.
Have you reviewed government documents regarding
disbursements -- items identified as disbursements from the
Individual Indian Trust?
11:59:27 A. Yes, I have.

MR. GINGOLD: Plaintiffs would like to identify
Exhibit 87. This is a document that is identified as reports of
the Department of the Interior for the fiscal year ended
June 30, 1918. It's Indian Affairs, Washington Government
11:59:56 Printing Office.
I would like to turn to page five of this document.
Excuse me. Before we turn to page five of the document, I would
like to turn to page four of the document.
Let's pull up Plaintiffs' 92. PX-92 is another report
12:00:47 of the Department of Interior, 1919. It is identified as House
of Representatives. And I would like to turn to page four of
this document.
BY MR. GINGOLD:
Q. Have you reviewed this document before?
12:01:25 A. Yes, I have.
Q. And what do you understand is stated on that page?
A. This document talks about disbursements and revenues. This
particular page begins -- the bottom begins, "Disbursements."
MR. GINGOLD: Can we go back to the previous page,
12:01:44 please?
A. So here's the section that begins -- this is the information
that begins, "Receipts." The next page begins, "Disbursements."
So there are sections where they're identifying the individual
areas for receipts and disbursements.
12:02:19 MR. GINGOLD: I think we're having some technological

problems, Your Honor. We'll go back to this document.
BY MR. GINGOLD:
Q. Do these documents refresh your recollection about anything?
A. Well, the next page of the document actually talks about
12:02:35 specific areas of disbursements, and one of the items it talks
about for disbursements were investments in Liberty Loan bonds
and war stamps, and they were listed as disbursements.
Q. Now, why did you take note of that?
A. Well, investment in Liberty Loan bonds and purchasing war
12:02:56 stamps, it's an investment. It's an asset. And so it may have
been a disbursement of funds out of an account to purchase
those, but it's still within the IIM Trust. It's still an
asset, it's still an investment.
And so noticing that in some years disbursements were
12:03:14 called lots of different things, gave me some concern, and I
think that's one of the reasons that we looked at this ratio for
time periods when we did have information.
MR. GINGOLD: Your Honor, this is PX-92, and this is
the page we didn't have before.
12:03:35 BY MR. GINGOLD:
Q. This page in highlight, what does it say, Doctor?
A. The highlighted area says disbursements.
Q. And then let's go on to the next page, please. And let's
focus in on the last paragraph.
12:03:52 A. Again, so this is under the categories of disbursements, it

has --
MR. GINGOLD: Can we get a little more clarity on the
last paragraph? Thank you.
A. Focusing on individual Indian and miscellaneous monies,
12:04:07 these are disbursements. It says paid to Indians of 1.8
million, then purchase of Liberty Loan bonds. Again, the
purchasing of a bond would still be an investment but it is
counted as a disbursement.
So if the disbursements for that year, this would be
12:04:27 counted as not necessarily two paid out to individual Indians,
but there are lots of things in disbursements.
BY MR. GINGOLD:
Q. And you also identified another investment, did you not?
A. Again, purchasing of war savings stamps is another
12:04:43 investment as well.
Q. Why was this information important to you in your
calculations?
A. Well, when we looked at disbursements, the time period that
we had information of monies going out from the system -- well,
12:05:02 let me start again.
We had information of monies going out from the Trust,
be it through check or electronic funds transfer, we can
identify what monies went out. We used that information, and
that sometimes there were lots of other things that might have
12:05:18 been included in disbursements, which gave me pause to consider

other years when there was reported disbursement information.

Hence, we used this ratio adjustment for when we had specific information, as opposed to the numbers we were provided by the defendants.

Q. Did you review any other documents that identified disbursements from the Trust other than check or EFT?

A. Again, in that time period what we were specifically focused on, the 1988, when we had check and EFT information, then we focused on that and we used that.

For 1909, the reported information for 1909, 1910, and 1911, talked about what the disbursements were. There were no mention of things like purchasing of assets or anything like that, so we used that reported information for that earlier time period.

Q. Why did you use that information --

THE COURT: Let me just interrupt you a minute here to make sure I understand what you're saying. Are you saying that for these war years, World War I years, you backed out the purchase of Liberty bonds from the disbursement numbers because you didn't consider them disbursements?

THE WITNESS: The World War I years, I believe were missing years for disbursement information. We didn't have disbursement information at all. In those particular years we used an average. Showing this exhibit -- or showing the illustration here, was more to say there's oftentimes something

in disbursements that we don't know -- if we reported a number of disbursement, don't always know what's included in that number. We were just given the bottom line number.

For a year where disbursements were actually identified of all the different component pieces, we see there was an investment in there that was identified as disbursement.

If we only got the bottom line number here, we wouldn't know that there was a big chunk of that, in fact the majority of it, went to purchase an asset.

THE COURT: Yeah, but just do you not consider the expenditure of IIM monies for war bonds to be a disbursement?

THE WITNESS: From what -- my understanding of a disbursement is money that goes to individual Indians. If a purchase of an asset, that the Trust still holds that asset, is not to an individual Indian, so it still sits in the Trust. So the redemption of that war bond --

THE COURT: Does it sit in the Trust or does it go out to a war bond account?

THE WITNESS: If it goes out to a war bond account, it doesn't go to an individual Indian.

THE COURT: Right, but then the war bond gets redeemed at some point?

THE WITNESS: And those proceeds from that presumably go back to the IIM Trust. So it's the Trust that purchases the war bond --

THE COURT: So you will consider the redemption amount of a war bond to be a receipt, but not the purchase of it as a disbursement?

THE WITNESS: From what we identified as receipts, there were no identified as war bonds that were being receipts into the system. If the war bond is a disbursement and then later was a receipt in the system, by treating one and not the other, that would be incorrect.

But we don't see that, and I don't take any specific adjustment in a year for a war bond, just noticing that in disbursements there's often things that don't look like a disbursement to an individual, as an example. We don't take any specific adjustments.

THE COURT: So you are basically explaining to me why you use an average number instead of a number that appears in an account here. You're not saying that you backed out of disbursement numbers funds that were used to invest in war bonds or savings stamps or things like that?

THE WITNESS: No, this particular year, there was not enough information for total disbursements, it's only for a subset. So we looked at that and we did not back out -- there was no calculation that backs it out. When the information was absolutely missing, we used an average.

THE COURT: And just for comparison purposes, we have a number, you just showed me a number that included money paid to

Indians, money paid for war bonds, money paid for savings stamps, and a total number identified as disbursements. Dr. Palmer says he doesn't consider that a good number for disbursements so he used a substitute number. What's the comparison between that number and the substitute number?

MR. GINGOLD: Your Honor, the government didn't use that number either because that is solely relating to the five civilized tribes. There is no similar number for the remainder of the Trust beneficiaries or members of other tribes.

So it was a subset of whatever was done during that particular year. It wasn't enough information to include as the disbursement total from the Trust.

THE COURT: Nobody is using that disbursement?

MR. GINGOLD: That's correct.

THE COURT: So I just wasted five minutes of your time?

MR. GINGOLD: No, Your Honor, you did not. Because Dr. Palmer was explaining why it was necessary to evaluate what constitutes a disbursement and what doesn't, and that explained further why he was using this calculation that he was, to ensure that checks and EFTs were properly reflected as disbursements from the Trust.

THE COURT: All right.

MR. GINGOLD: This may help a little bit. It's not directly on point but I would like to bring this up for purposes of this discussion.

Plaintiffs would like to identify Exhibit 139.

THE COURT: 139?

MR. GINGOLD: 139.

BY MR. GINGOLD:

Q. This is an exhibit that's been introduced prior to your testimony, Dr. Palmer. And it is a document that's entitled fiscal year 2009 budget of the United States, Office of Management and Budget. And first I would like to turn to page five of this document, and I would like to highlight this figure on five, which is "budget deficit or surplus and means of financing." Do you see that?

A. I do.

Q. I would like to turn to the next page. In the highlighted section of this page it includes the following language: "Deposit fund balances may be held either in the form" -- "in the form of either invested or uninvested balances. To the extent that they are not invested, changes in the balances are available to finance expenditures and are recorded as a means of financing other than borrowing from the public. To the extent they are invested in federal debt, changes in the balances are reflected as borrowing from the public in lieu of borrowing from other parts of the public and are not reflected as a separate means of borrowing."

Does the invested versus uninvested balances issue have any relation to what you were talking about?

A. In our calculation of benefit to the government, this is indicative of something that we're trying to capture.

Q. But if you have trust fund balances, is it fair to say that trust fund balances include investments from this information?

MR. WARSHAWSKY: Objection, Your Honor. This is beyond the scope of his expertise. There's been no foundation laid to establish why Dr. Palmer can offer these opinions.

BY MR. GINGOLD:

Q. You were discussing with the Court your understanding --

MR. WARSHAWSKY: Your Honor?

MR. GINGOLD: I'm not going to continue --

THE COURT: Well, he's asking a new question, so I'm assuming that what's happening is that he's beefing up -- he's either beefing up the witness' expertise so that he can answer the question or he's asking a new question. So you can have a seat, Mr. Warshawsky.

MR. GINGOLD: Your Honor, I'm asking a new question.

THE COURT: All right.

BY MR. GINGOLD:

Q. You were discussing with the Court the reason you did not consider the investment of trust funds in securities as a disbursement from the Trust. Is that fair?

A. That is correct.

Q. And you explained to the Court why you didn't believe it was a disbursement?

A. Because it's available -- it's still available to the Trust.

Q. The description here, deposit fund balances in the form of either invested or uninvested balances, does that mean anything to you?

A. Well, again, that would be the deposits from the Trust that are not disbursed from a check or EFT, so it's not a disbursement to an individual Indian; therefore, there would still be a fund balance that is held by the government. They would hold it -- in this case if they bought Liberty war bonds, it would be an invested amount.

Q. Thank you, Doctor. I would like to go back to Attachment A, Plaintiffs' 189-A. Column F, disbursements, what do the numbers reflect in Column F?

A. These are the numbers that we had just talked about that have been calculated for the different reasons for different years. And they represent the outflows from the Trust.

Q. And if we can turn to page four of this document. Do you see a total?

A. Yes. There's the total for the nominal dollars in disbursements is 10.67 million -- billion, I'm sorry. I'm in the wrong units.

Q. Excuse me?

A. 10.67 billion.

Q. Thank you.

The last four columns deal with nominal benefit to the government, 10-year U.S. Treasury bond rate, accrued benefit annual and accumulated benefit end of the year. I want to ask you about the first column, which is nominal benefit to the government. Could you please generally describe what the numbers in that column mean?

A. Certainly. For each year we calculated the corrected revenues number. Again, this is a revenue number that would not have any interest included in it. Subtract from that number the disbursements for that year, and that would give the amount of funds that were available to the government in that year.

Q. Does it make any difference to you whether or not the funds were held in banks or the funds were held in the Treasury?

MR. WARSHAWSKY: Objection, Your Honor. Lack of foundation.

BY MR. GINGOLD:

Q. In your calculation.

THE COURT: Overruled.

A. For this calculation there is no separation as to where the funds are held once they're available.

BY MR. GINGOLD:

Q. Can you explain why?

A. Well, what we do is, the way the model works here is it takes the nominal benefit and that benefit being available goes through and said, okay, we use the 10-year U.S. Treasury bond rate as an estimate of avoided costs or costs of borrowing. If the funds are held in a bank, then they're not -- they would be earning interest in the bank and are not charged necessarily as a benefit to the government, because all the monies at the end are subtracted out.

12:17:09 So if there were interest or things earned at a bank, those monies would not be included in what we're calculating; they would be in the fund, they would be subtracted at the end, so there's an offset, as it were, accounting for that information.

12:17:22 So for the calculation, it's not important where the information resides -- where the money resides.

Q. Does it make any difference that at any point in time the funds that are in banks are returned to the Treasury?

A. Well, again, it doesn't -- I don't think it really matters. 12:17:40 So if we take an example, if the proceeds -- or if the nominal benefit amount, the amount of Column G, if half of that were put in a bank and half of that were put in the Treasury, and at the end of the year let's say there's a five percent interest rate, so the amount in the bank would be -- let's say it was 100 in 12:18:05 each; 105 in the bank. And whatever the Treasury does with it, if they invested it, it would be 105. If they just used the money and didn't borrow against it, then they would have received five in benefit, so there's an amount there.

If then we subtract it at the very end, as we have done 12:18:25 here, what the value was for the Trust, the amount in the bank

would be completely washed out, and all we're really focusing on would be the amount that was in Treasury and the benefit that would have been there.

Now, if instead the following year those monies went 12:18:39 into Treasury from the bank, well, again, since we've only calculated what the revenues were without interest, then the following year the Treasury has the 105 that it had -- or let's say it invested it, just as an example, so the money it had that it could deal with, plus the money it had from the bank, and 12:19:02 then it has that additional money, the original amount that went in, plus the interest earned at the bank, available for its use.

Again, the following year, then, however that money was used, if it were invested and it earned money, if it instead didn't borrow with that money, at the end of the day we subtract 12:19:19 out all that was in the Trust in terms of balance, so the interest that would have been earned in the bank while it was not in Treasury, would have been subtracted out.

So it doesn't really matter where the funds reside.

Q. What if the deposits were never returned to the Treasury?

12:19:35 A. Well, that was my first example, where if it sat outside, we have the total balance and it's subtracted out, then it would be just a wash and it wouldn't matter.

Q. So you would not include that as a benefit conferred?

A. It would be part of the calculation, but in terms of since 12:19:51 you're subtracting out that amount, the net amount would not be

a benefit to the government.

MR. GINGOLD: Plaintiffs would like to call up Defendant's Exhibit 497. I would like to turn to page five of this exhibit, please. I would like to highlight the language in 12:20:23 1933. Or if we can just focus on the language. Thank you.

BY MR. GINGOLD:

Q. Have you seen this before, Dr. Palmer?

A. Yes, I have.

Q. It states as follows: "Congress prohibited the payment of 12:20:37 interest on bank demand deposits and authorized the Federal Reserve to set maximum interest rates on time deposits (Act of June 16th, 1933) the BIA then closed all IIM bank checking accounts and transferred the funds to checking accounts in the Treasury."

12:20:53 Dr. Palmer, if in fact as a result of legislation in 1933 all the bank deposits or nearly all the bank deposits were returned to the Treasury, how would you calculate the benefit conferred to the government if that event occurred?

A. That was kind of the continuation of my example, where the 12:21:16 funds went from the bank into the Treasury. The interest that would have accrued on the banks, while the funds were in the banks, would then also go with the fund into Treasury, and the government would then have the benefit of being able to use the original amount of the fund, plus the interest that had accrued.

12:21:37 And the calculation then incorporates that going

forward, subtracts off of the end of the calculation what actually was paid to -- or what the value of the Trust was, so those funds would have been calculated out.

So for that time period that funds were not in 12:21:57 Treasury, that information, that interest would have been accumulated, and then it gets subtracted out at the end. The government then has available to it all of the funds plus the interest on those funds for its use at that point.

Q. Now let's go back to Attachment A, analysis of benefit to 12:22:16 government. For many years or for all the years prior to 1933, you have a number in the nominal benefit to the government column. Correct?

A. That is correct.

Q. Now, why do you have the number stated the way it is in each 12:22:39 of the years prior to 1933?

A. That's going to be what the total value would be, because it's taking the revenue minus disbursements for that year. Again, that doesn't include any interest payments that would have been received by the IIM Trust. And then it calculates 12:22:59 what the benefit -- what the potential benefit would have been, and cumulates that forward.

As we talked about, there's a subtraction at the end of the day of what was in there. So if there was interest in things earned, then that would be subtracted out, so this would 12:23:15 be the potential benefit to the government. Not necessarily the

exact item that year, because again we're subtracting out at the end, to make all those that would have been offset at the end of the day.
Q. So if a deposit was returned to the Treasury and the deposit was in the bank in 1888 and was returned to the Treasury in 1934, you have a number that is .29. Correct?
A. I'm sorry, could you...
Q. We're in Column G, nominal benefit to the government.
A. Right.
Q. You have in 1888 .29 -- am I looking at a different -- .24. Do you see that number? Do you see the number .24 in 1888?
A. Yes, I do.
Q. That .24, is that what you just described as the nominal benefit to the government if the deposit was returned to the government -- or to the Treasury in 1934?
A. Well, the .24 number would be the amount that was possible for 1888. If those funds were invested in a bank and returned in 1934, there would be interest on those funds that were returned to Treasury, and then -- so there would be a cumulated number that would be larger in 1934 than the .24. That amount then would sit in Treasury and be available for the government's use.
The interest on those funds that went with them at that point, whatever the number would be in 1934, would also be available and sitting in Treasury. And then to continue, at the

end of the day we subtract out what was sitting in the Trust, so that the cumulated interest between 1888 and 1934 that had then been grown until the very end, would have been part of the amount that was subtracted out at the end.
Q. So let's go to 1934 on the second page.
A. Okay.
Q. 1934 appears to have a .83 number. Correct?
A. 1934, .83 was the amount in that year, yes.
Q. So you didn't -- did you reflect a large deposit into the government from the banks reflected in .83?
A. No, that's the incremental amount from the inflows minus the outflows in that year, into the Trust.
Q. And why is it the incremental amount?
A. Because it only accounts for the revenues and the disbursements for that year. It's not taking into account any interest income from any other funds, from any other balances from previous years or anything else, it's just the incremental amount for that year that would then be available.
Q. Let's look at 1933.
A. Okay.
Q. 1933 has a number, negative 6.50. Do you see that?
A. I do.
Q. What does that mean?
A. 6.5, a negative amount would be when disbursements were higher than revenues, so that there was actually funds flowing

out of the Trust in excess, so the amount that was available to the government would be reduced.
Q. So if you have a negative amount, what are you saying about the benefit to the government?
A. That in that year there would not be a benefit. In fact, it would subtract off from the funds that were already available for use by the government. So it would reduce the benefit to the government of having other funds from prior years, because it was subtracting off of those funds.
Q. From 1934 forward, are you dealing with the bank deposit issue in your Column G, nominal benefit to the government, from 1934 forward?
A. Again, as we discussed, the calculation does not look specifically where the funds are, because once the funds are into the government's hands, available to them -- if it's in a bank earning interest, that would be then credited later. So it doesn't look specifically where the funds are located.
Q. And let's go to the fourth page of this exhibit and look at the total with respect to Column G, nominal benefit to the government. Do you see the total, Dr. Palmer?
A. I do.
Q. And what is that?
A. The nominal benefit to the government over this time period is, from 1887 to 2007, is $3,971,000,000.
Q. Let's talk about the 10-year Treasury bond rate, Column H.

A. Okay.
Q. Why did you pick the 10-year Treasury bond rate?
A. The 10-year Treasury bond rate, it's a conservative rate, it's a rate that Professor Cornell and I had discussed. It's a rate we previously used. It hasn't changed. I know there's been testimony about that rate. It's a long rate, it's a series that's available back to this time period.
Q. Is there a reason you didn't use a five-year Treasury bond rate?
A. Again, the 10-year is about the middle of the road, it's a conservative rate, it's probably -- it is reflective of what the government's borrowing is. There's lots of different time period rates that the government uses; this is again a middle of the road, it's an estimate that we used, it's what we had provided before.
Q. And how does the Treasury bond rate affect the nominal benefit to the government?
A. The Treasury bond rate is basically kind of the amount or almost kind of like the opportunity cost. If the government had funds that -- if it had extra funds available for its use in its account, it needs a minimum balance in its account, let's say, so it used those funds, it didn't necessarily disburse those funds, but it sat -- it needs a certain minimum amount in its account. Then it could have those funds available, and it sat there, instead of investing them, or instead of having to borrow

and issue more debt in order to get the funds there, that is the rate that we used.

Again, those funds, if they were sufficiently large, could have been in the cash account, could have been lent out to 12:30:28 banks for overnight rates to have their minimums. But in the financial institutions there's always a minimum amount that people need to have to make sure their checks clear. The government maintains a balance as well. This would have been something that's indicative of a rate that the government would 12:30:46 have avoided borrowing costs.

Q. Under the accrued benefit column, annual, what is that?

A. What that does is then takes -- well, as it's listed there, it's Column J and H, so it's the amount that it takes from the previous year, so it takes the previous year's cumulated benefit 12:31:15 at the end of the year, multiplies it by the interest rate, so it says whatever was in the fund for the previous year, that's the balance of funds that were available for the government to use. It then calculates the rate on those funds, and that's what that amount is.

12:31:30 Q. And what is the accumulated benefit end of year calculation?

A. So the benefit then takes the previous year's balance, it adds the additional amount of revenues minus disbursements that are available, and then it also adds what the benefit was in terms of its avoided borrowing cost, with the potential 12:31:55 available from it from that rate that we just discussed.

Q. Let's take a particular year and apply it.

A. Okay.

Q. Let's look at 1914. 1914, under nominal benefit to government, you have 1.83. Correct?

12:32:18 A. That is correct. So that reflects the revenues minus disbursements, so that's the incremental amount for that year that was not paid out that we talked about earlier.

Q. And the Treasury bond rate, what is that?

A. The Treasury bond, that's the loan bond rate for that year, 12:32:36 the 4.16 percent. That would then be applied to the previous balance, the accumulated balance from the previous year. So there was 50.27, if we look at the very end column, which is also the amount at the beginning of the year. It takes that amount as the amount of monies available, or if there's an 12:33:00 avoided borrowing cost, it's the benefit that were available, and multiplies it by that rate, to come up with the additional amount there, which would be the 2.09.

And then the final balance at the end is the 50.27 from the previous year, plus the 1.83, which was the incremental 12:33:19 amount from the additional revenues, plus the 2.09, which is this amount that is the benefit from either not having to lend out or from receiving monies. And that gives us the 54.19.

Q. Now, is that what you've done for each year through 2007, from 1887 to 2007?

12:33:41 A. That is correct.

Q. And let's go to page four. Page four, there's a total row, isn't there?

A. Yes, there is.

Q. Is there a total for accumulated benefit end of year?

12:34:06 A. Not listed there, no.

Q. Okay. If you look further down on that page under the column, under that same page, if we can highlight the bottom, immediately under "Total" on the right-hand side, which is directly under the "Accumulated Benefit End-of-Year" column, you 12:34:32 have two numbers. What are they?

A. So the reported trust balance on September 30th, 2007, that's the amount that was reported for the balance, as we talked about earlier, subtracting out what the balance is of the Trust; therefore, the accumulated benefit over this entire time 12:34:53 period, once we subtract out and give credit for all those offsets, would be 46.85 billion.

Q. Is this the same number as what was included in the original data that was used by the CRMO?

A. The 423.69 I believe is the same amount.

12:35:17 Q. How about the accumulated benefit conferred minus the reported trust balance?

A. No, that number is different.

Q. How is it different?

A. Well, again, there were several different pieces of 12:35:30 information. The model is the same, but there are several

pieces of information of data that we received or obtained during the course of this litigation. Also from the testimony, some adjustments that were made to other data items.

So as the data changed, the total number changed as 12:35:45 well.

Q. How did it change?

A. It went down.

Q. Do you know how much?

A. I don't remember exactly what the original number was.

12:35:53 Q. Approximately? You don't remember?

A. I don't remember. Approximately within several billion, but that's not...

MR. GINGOLD: Your Honor, this might be a good time to take a break, if you wouldn't mind.

12:36:11 THE COURT: Are you going to refresh his recollection over lunch?

THE WITNESS: I can look at a document.

THE COURT: We'll go to lunch.

MR. GINGOLD: Thank you very much.

12:36:20 THE COURT: Be back here in an hour.

(Recess taken at 12:36 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Rebecca Stonestreet, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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