

For the Defendants:

ROBERT E. KIRSCHMAN, JR., ESQUIRE
JOHN WARSHAWSKY, ESQUIRE
MICHAEL QUINN, ESQUIRE
J. CHRISTOPHER KOHN, ESQUIRE
U.S. Department of Justice
1100 L Street, N.W.
Washington, D.C. 20005
(202) 307-0010

JOHN STEMPLEWICZ, ESQUIRE
Senior Trial Attorney
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
Ben Franklin Station
P.O. Box 975
Washington, D.C. 20044
(202) 307-1104

GLENN D. GILLET, ESQUIRE
U.S. Department of Justice
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044
(202) 514-7162

Court Reporter:

REBECCA STONESTREET
Official Court Reporter
Room 6415, U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001
(202) 354-3249

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

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

2 COURTROOM DEPUTY: This is Civil Action Number 96-1285,
3 Cobell, et al. versus Gover, et al. If counsel that will be
4 speaking please identify yourselves for the record.

5 THE COURT: Why don't we just let them do that as they
6 stand up to speak.

7 COURTROOM DEPUTY: Yes, sir.

8 THE COURT: This is a pretrial conference for a trial
9 that is going to begin on October the 10th, I believe. It's
10 been a long time coming. Here, for the benefit of anyone who is
11 interested, is what the hard copy looks like of what the lawyers
12 have filed over the last couple of weeks as pretrial
13 information, more documents than are usually submitted as all
14 the evidence in trial.

15 I am assuming that everybody in this courtroom has some
16 familiarity with this case. Probably most of you have more than
17 I do, but I have a few preliminary observations I want to make
18 both about this pretrial process and about the trial that we
19 expect to begin here.

20 The first is to remind everybody that this will be a
21 bench trial. There is no jury in the box, and because there is
22 no jury in the box, we're all going to indulge the presumption
23 of the American law that judges are experts in relevance and are
24 able to hear things that they shouldn't hear and then put them
25 out of their minds. That means that we don't have to worry

1 about contaminating the finder-of-fact with some objectionable
2 remark. And that means, in other words, that the process of
3 offering and receiving evidence for the record is going to be a
4 much more relaxed process than we would have if we had a jury
5 here.

6 Because it is a bench trial, there will also be
7 opportunities, if we need them, to stop, regroup, think about
8 things for a day or two, give people a chance to go off and do
9 things they have to do, eliminate surprise. And although we're
10 going to work, I think you will find, very hard, from 9:30 until
11 5:00 o'clock every day, or most days, that doesn't mean that
12 this is an implacable process that has to go on from
13 October 10th until it's over. My guess is, frankly, that we
14 will find a couple of places that we want to or need to pause.

15 And while I'm on that subject, I don't know about
16 you-all, but in trial courts around the country, a
17 five-day-a-week trial is almost intolerable because it means
18 that the judge can't do anything else. Most judges in this
19 courthouse who are looking at long trials conduct the trials
20 from Monday through Thursday and take Friday off.

21 Without objection, it is my intent to conduct this
22 trial in that fashion. It gives everybody a little breathing
23 room at the end of the week, and allows me to handle my calendar
24 of routine matters on Fridays so that we can give full time and
25 attention to the case between Monday and Friday.

1 Nobody has talked, I don't think, in the pretrial
2 statements about something that I mentioned the last time we
3 were together, which was the possibility of a trip to Kansas.
4 I'm still thinking about that; I hope you're still thinking
5 about that. And I don't expect to have any detailed discussion
6 of it today, but I want everybody to keep that subject on your
7 radar screen, or your computer screen, and let's not forget to
8 talk -- at some point to talk about how that might work, when
9 that might work, and what might be the confines of it.

10 Now, I'm sure the lawyers immediately involved in the
11 case don't need to be reminded of this, but the last time we
12 were together, I laid out what I thought the trial was going to
13 be about. There are a lot of issues that are presented by the
14 complaint in this case, a lot of issues that are presented by
15 the whole dispute between the Department of the Interior and the
16 plaintiffs that are not going to be covered in this case.

17 I don't think we're going to be talking about what
18 monies should have been collected on behalf of the Indians over
19 the years but were not; I don't think we're going to be talking
20 about leases that were leased too cheap; I don't think we're
21 talking about how the Treasury Department should have handled
22 the money. That's that Treasury issue, and we'll be talking
23 about that more this afternoon. And we're not going to be
24 talking about the set of issues that has generally come to be
25 known as fixing the system issues.

1 What the trial is about, I believe - and here I'm just
2 repeating what I said here the last time - are these four
3 questions: Number one, what is the government doing to
4 discharge its declared accounting duty and what is it not doing;
5 number two, what would it cost to include the excluded
6 categories in the historical accountings; number three, taking
7 cost into consideration, as the Court of Appeals has made clear
8 must be done, is the government's accounting adequate in light
9 of its declared accounting duty; and number four - and this is
10 the issue that gives government lawyers heartburn - what is the
11 actual throughput of the Trust.

12 I think we'll talk a little bit this afternoon about
13 what I meant by throughput and what we're going to hear about
14 throughput.

15 Now, I made a little fun of the amount of paper that
16 counsel have filed here. But the virtue of it is that it
17 reflects a good deal of careful thinking, and some disputatious
18 thinking, but careful thinking about how best to approach these
19 issues. And so I think the best way for us to deal with -- for
20 us to conduct a useful pretrial conference is simply to step
21 through these various objections and motions in limine one at a
22 time and see how we come out at the end of it.

23 Oh, let me say one more thing while I'm thinking about
24 it. Every time I approach these documents, it occurs to me that
25 I wish I had, and I wish everybody had -- in fact, I would like

1 to hand out at the doorway to this courtroom like they do a
2 program at the Kennedy Center, a glossary of terms. And I would
3 like counsel to prepare and exchange notes about a glossary of
4 terms so that we can begin to talk to each other in acronyms, if
5 necessary, or use terms of art, if necessary, and I'll know what
6 we're talking about.

7 I mean, you are all much more comfortable with them
8 than I am now. I will get more comfortable with them, but the
9 people out in the courtroom may not be. And I literally want to
10 have a stack of glossary things at the door to hand out to the
11 public when they come in to listen to this trial.

12 The first thing I said when I came in here was to ask
13 you to remember this is a bench trial. And because it is a
14 bench trial, many, if not most, of the motions in limine that
15 you-all have presented are not going to be resolved here today
16 on a blanket basis, they're going to be sorted out as we go
17 along in the context of the record as it develops.

18 I don't, even in jury trials, very often, grant blanket
19 motions in limine, because frankly, it's simply impossible to
20 understand the context of the specific objection until you see
21 the document or until you understand the context of it.

22 And so you're all going to have to live with a good
23 deal of uncertainty about many if not most of the issues that
24 you've presented by these motions in limine. That doesn't mean
25 we can't talk about them. And I think in chronological order of

1 their filing numbers -- by the way, we are now up to, I think,
2 over 3,500 docket numbers in this case. The first one on my
3 list is the Plaintiffs', they call it a report to the Court
4 about deficiencies in the administrative record.

5 And again, before I forget about it, may we have, for
6 chambers, an electronic version of the administrative record?
7 Does one exist? Is it on CD? I think there's one in the
8 clerk's office.

9 MR. KIRSCHMAN: Yes, Your Honor.

10 THE COURT: We would benefit by having, I think, two
11 copies of it for chambers on CD.

12 MR. KIRSCHMAN: We can provide that very quickly, Your
13 Honor.

14 THE COURT: Good. I'm not sure what relief the
15 plaintiffs want here, and maybe one of you would like to step up
16 and talk about this. But my basic take on this issue of the
17 completeness of the administrative record is that the government
18 is entitled to some deference about what the administrative
19 record is and what it wasn't, and what was before them in
20 designing the 2007 plan and what wasn't.

21 To the extent that this is an APA review of the
22 administrative record case, the government wins or loses some
23 points, depending on whether the administrative record supports
24 their position. But what they say is the record is the record,
25 I think, for purposes of APA review.

1 Now, what am I missing, counsel? And will each of you,
2 as you step to the podium, please say what your name is so the
3 court reporter gets it right?

4 MR. DORRIS: Yes. Good afternoon, Your Honor. I'm
5 Bill Dorris for the plaintiffs.

6 I don't know that you're missing anything, except we
7 did want to register our objections, as the Court had asked us
8 to do so, with respect to the completeness of the record and a
9 number of other categories. There are some instances where in
10 response to the discovery requests that the Court gave us leave
11 to file back in May, that the government said they were going to
12 include certain documents in the administrative record which
13 they have not included. I mean, they say it as plain as they
14 can in their response to discovery, "these documents will be
15 included in the administrative record," and they're not.

16 I would ask -- I would certainly think that those
17 documents, at a minimum, should be provided.

18 With respect to one class of those documents, it has to
19 do with approximately 800 to 900 separate reports or audits or
20 reconciliations that were the foundation for NORC's, their
21 consultant's, meta-analysis report. And they indicated that
22 they were going to provide those.

23 Now, they didn't provide them in the AR as they said
24 they were going to -- and I'm kind of getting into another
25 motion now, Your Honor, but it's hard to divorce the two between

1 the AR and that meta-analysis. They said they were going to
2 provide it in the AR, and they did not. I'll leave aside for a
3 minute the question of whether those should have been provided
4 when they provided the expert reports on which those were based.
5 Okay?

6 But generally, one of the other issues that has arisen
7 since we filed those objections or report to the Court, at that
8 time the administrative record was not even certified, as it's
9 required. They have since filed a declaration purporting to
10 certify the record, the AR; we would submit that that
11 certification is inadequate, it's not up to the legal standards
12 that are required for the certification.

13 My guess is that Your Honor would rather deal with that
14 on voir dire when the particular witness is going to talk about
15 the authenticity and completeness of that record, so we have not
16 filed a separate motion on that. But I at least wanted to
17 register with you that we do have an objection and complaint
18 about even the certification of the AR.

19 THE COURT: Okay.

20 MR. DORRIS: But I think that we'll have to deal, as we
21 move forward, where they have not included documents that are
22 clearly referenced in the AR as being relied on or considered
23 during this process that have not been included in the AR, and
24 what the appropriate relief is for their failure to have a
25 complete AR.

1 I'm not -- we don't have a pending motion with respect
2 to that report, we just wanted the Court to be aware of the
3 deficiencies we saw there.

4 THE COURT: You know, if this were a classic APA
5 administrative record review case, we wouldn't have any
6 witnesses up here talking about anything. It would all be on
7 record.

8 You're going to have witnesses here, some of whom
9 contributed to that administrative record, and it seems to me
10 you're going to have the opportunity to show documents to the
11 witnesses that are not in the administrative record and ask them
12 about them.

13 I mean, I would expect that part of the Plaintiffs'
14 case here will be challenging not only the completeness of the
15 administrative record, but whether it makes any sense and
16 whether the people that put it together came to logical
17 conclusions, and you're going to have people up here to cross
18 examine. Right?

19 MR. DORRIS: That is correct, Your Honor.

20 THE COURT: So the absence of a document from the
21 administrative record is not the end of the case as far as
22 you're concerned?

23 MR. DORRIS: Well, there is some truth to that, Your
24 Honor. One of the problems that we'll see, and I think may lead
25 to us needing to take some pauses, is we don't have those

1 documents. It's not a situation where we've got the documents
2 and are aware of what they are; we've seen references in the
3 documents that are in the AR to a number of other documents that
4 they've considered and looked at, and we don't have those
5 documents.

6 So we're not -- just so you know, we're not in a
7 situation during that cross-examination to come up and say, what
8 about this document, why didn't you include it, and then go
9 through it. To some extent it's going to be, it references
10 these exhibits; what are they and where are they and what do
11 they do, that then, to the extent we need them, will need to be
12 examined during the course of the hearing.

13 THE COURT: All right. I understand. And you're
14 effectively making a record here. I mean, it may be that to
15 some degree and with some witnesses and with some parts of this
16 case, what we're calling a trial is going to turn into kind of a
17 rolling discovery exercise where you ask about documents and
18 they get produced. That may indeed happen. I understand your
19 point.

20 MR. DORRIS: Okay.

21 THE COURT: Does the government want to respond now to
22 this question of the 800 documents supporting the NORC
23 meta-analysis?

24 MR. WARSHAWSKY: Your Honor, John Warshawsky from the
25 Justice Department for the defendants.

1 A couple of points, Your Honor, in response. The
2 administrative record, of course, is the compilation of
3 materials upon which the decision-maker relied in making the
4 decisions about the 2007 plan. And the simple fact is that the
5 decision-maker relied on the meta-analysis report, among many
6 documents, the 2006 document, but certainly didn't rely on the
7 800 or so reports, accounting, audits, and reconciliation
8 documents, that Mr. Dorris spoke of.

9 With respect to -- and also, if I may just very briefly
10 jump to the meta-analysis motion in limine which Mr. Dorris
11 mentioned, similarly Dr. Scheuren and Dr. Hinkins did not rely
12 on those 800 or so reports, they relied on the 2006 study, which
13 was included in the administrative record.

14 That being said, we hear the Court on this one, and it
15 would not be difficult for us to provide the plaintiffs with the
16 800 or so audit and reconciliation documents. But they simply
17 were not the documents that were relied on by the
18 decision-maker, or Dr. Scheuren or Hinkins, and that's why they
19 weren't provided.

20 THE COURT: Well, if they weren't relied on, then they
21 weren't relied on. I guess that's -- I don't know whether the
22 plaintiff still needs them or not, if they weren't relied on.

23 MR. WARSHAWSKY: But we can certainly make them
24 available.

25 I would request, Your Honor --

1 THE COURT: How about it, Mr. Dorris? Do you want
2 them?

3 MR. DORRIS: Your Honor, we want them. Our motion is
4 to exclude the meta-analysis report and testimony by their
5 experts on it. Here they're saying they didn't rely on it,
6 other than the report, but, you know, it is difficult at this
7 point, when they said in June that they were going to provide
8 them to us in the administrative record that was filed on
9 July 6th, to get that number of reports done.

10 So our motion is to exclude the evidence as a result of
11 their failure to produce those to us. If that is not what the
12 Court is inclined to do, obviously we think we would be much
13 better prepared more quickly to move forward by getting them
14 now. They say now that there's nothing to produce to us.

15 THE COURT: Well, you've been offered them, the offer
16 is accepted. Please turn them over. I'm not going to exclude
17 the report because of that. And as a famous American keeps
18 telling us, we are where we are.

19 MR. DORRIS: Your Honor, given where we are, they have
20 identified to us that they have them in an electronic database
21 that is searchable. We would request that we be furnished that
22 database.

23 MR. WARSHAWSKY: Your Honor, I'm not sure that it's a
24 searchable database. I know I have access to the individual
25 reports; I can certainly provide that.

1 One request, Your Honor, is that a number of the
2 documents --

3 THE COURT: If it's searchable, give it to them in
4 searchable form.

5 MR. WARSHAWSKY: Absolutely.

6 One request: A number of the documents I would say
7 contain sensitive confidential information. I'm not sure which
8 of our many protective orders would govern, but I would ask that
9 when we provide them to plaintiff, we should confirm that one of
10 them applies.

11 THE COURT: You mean, IIM-specific confidential
12 information?

13 MR. WARSHAWSKY: It's not IIM specific, but it's in
14 some cases sensitive -- I would say sensitive financial
15 information. I would like to just confirm that with the
16 plaintiffs before we --

17 THE COURT: Well, I don't hear any objection. I'm not
18 sure what kind of information -- if it's financial information
19 about individuals...

20 MR. WARSHAWSKY: I don't recall individuals. I do
21 recall some pertaining to Trusts -- tribes. But in any event --

22 THE COURT: You're not sure?

23 MR. WARSHAWSKY: I'm not positive, frankly.

24 THE COURT: All right. Talk about it offline.

25 MR. WARSHAWSKY: I would hate to see it appear on a

1 website until we've had a chance to decide.

2 THE COURT: All right. Fine.

3 MR. WARSHAWSKY: Thank you, Your Honor.

4 THE COURT: Next, the defendants want an extension of
5 time to file certain trial exhibits. This is number 3373. I've
6 kind of forgotten what trial exhibits you want more time for.
7 Whose motion is this?

8 MR. KIRSCHMAN: The government's, Your Honor.

9 THE COURT: I know. But which one of you? You,
10 Mr. Kirschman.

11 MR. KIRSCHMAN: Robert Kirschman for the defendants,
12 Your Honor. These are the DCV reports that are being prepared
13 now by FTI, and specifically Michelle Herman, who will be
14 testifying before the Court.

15 These reports will constitute the most recent evidence
16 of work done related to performance of the historical accounting
17 plan. We can't produce something that hasn't been generated
18 yet. Those reports are due to be completed on or about
19 September 30th, and we would produce those to plaintiffs on or
20 about September 30th.

21 They're very relevant. The Court has asked that we
22 provide information about the current status of the work, and
23 these documents, along with the testimony of Ms. Herman, will
24 provide the Court with that information. And that's why some
25 time ago we sought leave to produce them once we have them.

1 THE COURT: Well, this comes under the category of
2 we'll take the time we need. I'm not going to try an old case
3 if you have new information. You will have time and you will be
4 permitted to file those things, and if the plaintiffs need more
5 time to digest them, or if they need -- even if they need a
6 break to digest them, they can have it. What I would not expect
7 you to do is to deliver those reports on the eve of -- is
8 Ms. Herman going to testify? I guess she is.

9 MR. KIRSCHMAN: Yes, Your Honor. We do anticipate now
10 that Ms. Herman will be one of our early witnesses after
11 Mr. Cason.

12 THE COURT: Well, she may be one of your early
13 witnesses, but if the plaintiffs tell me they haven't had a
14 chance to digest the information you've given them, she may go
15 away and come back later on for cross-examination.

16 So just bear that in mind. But I'm not going to
17 exclude the information, the most recent information. That's
18 what I want, is the most recent information.

19 MR. KIRSCHMAN: Understood, Your Honor.

20 THE COURT: Mr. Dorris, do you have anything to say
21 about that?

22 MR. DORRIS: Nothing in what you've just ordered or
23 ruled, Your Honor. Except that one of the things we're going to
24 run into with this report is we need to get her workpapers or
25 the underlying data on which this new report is going to be

1 issued. We hate to be back in front of you, if we get this in
2 the next few days, and then turn around and say, for us to
3 understand what we've got, we need to see what it was based on.

4 So at this point we would go ahead and ask that the
5 underlying data or the workpapers that Ms. Herman has and that
6 we're going to be entitled to see and ask her about - clearly
7 she relied on them in preparing this report - is something that
8 we should go ahead and get now, too, as opposed to later.

9 THE COURT: Mr. Kirschman?

10 MR. KIRSCHMAN: Your Honor, Ms. Herman is being
11 presented as a fact witness. I don't know why her workpapers
12 leading up to the completion of these reports would be required
13 or necessary.

14 I don't know what those workpapers may consist of, but
15 she's being presented as a fact witness, and will be providing
16 fact testimony about the work that she did, and these reports
17 summarize the work of FTI on the data completeness validation.

18 So I don't see a basis to turn over workpapers, when
19 she's only testifying to facts. And these documents will assist
20 the Court in understanding Ms. Herman's testimony, and will also
21 assist Ms. Herman in explaining the work of FTI and the
22 Department of the Interior to the Court.

23 THE COURT: Well, I'm not going to -- I understand both
24 sides' positions, I think. I'm not going to require the
25 government to turn over workpapers along with the most recent

1 version of the data completeness validation report, but it is
2 conceivable that when or after Ms. Herman is on the witness
3 stand, I'll have a different view of it. So we'll just see how
4 that plays.

5 The next one is plaintiffs' request for production
6 listing 67 individual names, and this whole dispute about data
7 involving these 67 individuals.

8 The plaintiffs, according to the defendants' response,
9 say the plaintiffs listed 67 individual names but no account
10 numbers. They wanted information, and then what the plaintiffs
11 gave them was tribal identification and no social numbers or
12 anything else that would help to identify them.

13 Where does that stand? Who wants to speak to that?

14 MR. QUINN: Good afternoon, Your Honor. For the
15 record, Michael Quinn for the government.

16 We received the request Your Honor described for
17 67 names rather than 100, and issued a response served on the
18 plaintiffs; which I believe because the plaintiffs had filed
19 their request with the Court, we also in turn filed our
20 response, which we normally wouldn't do, as discovery material.
21 But we filed a response objecting in large part to the scope of
22 the plaintiffs' request.

23 When Your Honor was presented with their request in
24 court and granted them leave to serve a request, they had
25 described three systems -- identified three systems, IRMS, LRIS,

1 and TAAMS, I believe.

2 The request we got was much broader than that, included
3 TFAS, included information from the Minerals Management Service,
4 MMS, and it was written very broadly in terms of requests.

5 We attempted, in responding, to hew close to what the
6 Court we believed had intended, and that is to give the
7 plaintiffs, to the extent we could match up account information
8 with the 67 names that have been identified, that we would
9 provide them as much transactional information as we could find
10 within a reasonable amount of time.

11 When this was first proposed, plaintiffs had suggested
12 to the Court that this could be accomplished by pressing a
13 button to print things in a couple of hours. I believe the
14 Department of Interior overall has devoted well over 40 hours,
15 and probably far beyond that, because there have been follow-up
16 search efforts done.

17 But what we did do and what we agreed to do in
18 response, subject to our objections, and what we have produced
19 to plaintiffs were the results of a search done of the TFAS
20 system, which wasn't -- actually hadn't been part of the
21 plaintiffs' request to Your Honor when we first discussed this,
22 but TFAS is the basic accounting system that the department uses
23 to track IIM transactions, so that makes sense.

24 And the way the system is structured is, there is, as I
25 understand it, a rolling 17-month system; as you get to an

1 18-month age in the transaction, it then gets moved to an
2 archive.

3 So the current reporting part of TFAS was searched. We
4 only had the 67 names, and Your Honor noted, we had no account
5 information. But the technicians who work with the software
6 took a broad name search, much like you do with the telephone
7 directory; we only have Smith, and we looked for all the Smiths
8 that come up in the account and try to see if one matches with
9 the first name. If they had a match, they went and printed out
10 screen prints of the transaction listings that matched that
11 account.

12 There is another database that plaintiffs did not ask
13 for, but that the Department of Interior searched, and that is
14 the database of all historical information that's been compiled
15 for purposes of the historical accounting project. It's a
16 database maintained for the Office of the Historical Trust
17 Accounting Office by a contractor, FTI.

18 That database includes all the TFAS transaction
19 information, as well as earlier data, a predecessor system which
20 was discussed and mentioned to Your Honor, the IRMS. And
21 actually, off the top of my head, I don't know what that acronym
22 stands for either.

23 THE COURT: That's why I need a glossary.

24 MR. QUINN: I do too at times, Your Honor.

25 But the IIM account subsystem of the IRMS, which had

1 been the transaction database used prior to TFAS, that data has
2 been loaded or copied onto this FTI historical accounting
3 project database. It also includes data from TAAMS, which is a
4 successor in part to LRIS. LRIS was a land records information
5 system; TAAMS is a successor to that, but it includes some other
6 components as well.

7 The FTI is kind of an amalgam of all of those. And
8 since that database is actually the one that's more or less the
9 working offline database that the accountants and contractors
10 refer to in doing the historical accounting, we believed that
11 was the most appropriate data source to search.

12 So we searched the current TFAS database, we searched
13 everything in the FTI historical accounting project database.
14 That database actually is a little bit easier to search because
15 it's a SQL database and has a SQL structure, which means, in
16 computer speak, it's an easier thing to form inquiries on the
17 fly. You can search for names, you can have universal
18 characters, and search for all sorts of formatives of names.

19 Then the Bureau of Indian Affairs, which has
20 responsibility for TAAMS, searched for 67 names information in
21 TAAMS. When the report of the FTI searches came back, since
22 that's a somewhat more flexible database, they had some better
23 information coming back as a result of the name searching, and
24 that information was referred to TAAMS and TAAMS referred
25 information back to FTI.

1 And all together we've had three productions, the third
2 one just taking place this afternoon, of records that have been
3 printed from TAAMS relating to accounts that the Department of
4 Interior could -- from which it could determine a likely match
5 to the name.

6 We've made these productions to plaintiffs; we have not
7 had further requests or inquiries from plaintiffs, so I don't
8 know whether they've actually had a chance to digest the
9 information as yet. But that's where we stand at this moment.

10 THE COURT: All right. Is this your issue, Mr. Harper?

11 MR. HARPER: It is, Your Honor. Good afternoon, Your
12 Honor. Keith Harper for the plaintiffs.

13 THE COURT: Good afternoon.

14 MR. HARPER: I would like to make a number of points on
15 what defendants' counsel has presented here.

16 First, I think we would start with the fact that when
17 we listed -- we asked for electronic information to the Court,
18 and leave to file for electronic information, and we specified
19 as examples three databases, but never intended those to be the
20 end-all be-all of the request.

21 And I'll tell you why; for example, account information
22 for people in certain areas of the country are not on Integrated
23 Resource Management System or Land Record Information System or
24 the TAAMS system. They're not none of those. They have their
25 own isolated system, so it would make little sense to have

1 somebody from Concho agency, and ask for IRMS, because obviously
2 they wouldn't have any information there because they don't use
3 IRMS in that instance. Or alternatively, if you go into the
4 Great Plains, they use the GPRO system.

5 So these systems, you can't limit it to a certain set
6 of three systems. It has to be -- even in the electronic, if
7 you're just seeking electronic information, it has to be a
8 multitude of systems.

9 But let's talk a little bit, if we could, Your Honor,
10 about what our request was: 67 individuals, information in the
11 electronic era that they are utilizing or say they're utilizing
12 for the accounting.

13 Now, we should be able to get the base system and the
14 base information that is in their electronic. If they're
15 archived, then that's fine. We'll get the archived information.

16 THE COURT: How did you select the 67 people?

17 MR. HARPER: We had a number of names from a number of
18 different sources, and we cut back from a large number into a
19 smaller number, contacted people out in various areas so that we
20 could get a cross-section regionally, tribally, based on
21 different systems, based on different types of resources.

22 So a lot of it was --

23 THE COURT: Now, back up with me for a minute. The
24 purpose of this -- the word that I'm about to say is "exercise."
25 I don't mean anything pejorative by calling it an exercise. But

1 the purpose of this exercise was to get -- I assume, I've always
2 assumed, was to find information about the people that you knew
3 about in the files of the government that would basically prove
4 your premise that the government had no idea of what it was
5 doing with the accounts of these people.

6 I mean, this was no random cross-section of people;
7 this is a list of people who are dissatisfied or unhappy or
8 don't think they've been paid enough or something. Right?

9 MR. HARPER: It contains some individuals which we had
10 some idea that they had issues or potential issues. It also
11 contained a series of people that we didn't have that kind of
12 information, but we included them because they have, for
13 example, certain kinds of production on their land that we
14 thought is worthwhile looking at.

15 See, if we can get the information that they're doing,
16 what's on their records, in, say, the LRIS system - they haven't
17 produced any of those, for example, ownership data - and what is
18 the chain of title that they hold on their records from 1985
19 forward - and that's what we were looking for, just the
20 electronic era, IRMS, LRIS, and other systems - and then we can
21 match that, metes and bounds and things of that nature, and
22 determine what records, other than in those the government show
23 are the production from that land, and then match those up to
24 what the government says went through their accounts.

25 Now, if those are drastically different, then obviously

1 there's a severe problem here.

2 THE COURT: Understood. Understood. But the problem
3 the government has is, you've given them a first name, a last
4 name, and in some cases a tribal affiliation; no account number,
5 no Social Security number, no date of birth, none of the sorts
6 of indicators that are usually used in search strings to find
7 people in databases.

8 MR. HARPER: And Your Honor, when we sent those names
9 in, we said very clearly in our request, to the extent that you
10 need additional information for a specific individual -- so if
11 they came back to us and said, okay, you're giving us a name of
12 Mary Smith; is it Mary A. Smith or Mary D. Smith, is it Mary
13 Smith in Navaho or Mary Smith in Anadarko, then we can identify
14 and aid them in the process for that individual.

15 But there's no reason to get detailed information for
16 every single person, particularly with some of these names that
17 are, I can guarantee you, sui generis.

18 THE COURT: Look, again, I promise not to say this too
19 many times this afternoon, but we are where we are. So what
20 more do you need? I mean, you did say this is only going to
21 take a few hours, all they have to do is push the buttons, and
22 they've spent a lot more time than a few hours and they've
23 pushed a lot more buttons.

24 So I don't sense anything but a good faith attempt to
25 get you what you want, but what do you now need that you don't

1 have?

2 MR. HARPER: We haven't even received what -- if it is
3 true that it was only those three databases we identified, we
4 haven't received all the ownership records on LRIS for these
5 individuals; we certainly haven't received the archived
6 information on IRMS.

7 So we need all that information in order to do any kind
8 of evaluation whatsoever. And to the extent that there's
9 individuals in which they need more information, identification
10 of those individuals and what exact information for that
11 specific individual would be helpful, that's the kind of
12 information that we can then utilize.

13 And as for -- could I just --

14 THE COURT: Did you and Mr. Quinn talk about these
15 things on the telephone?

16 MR. HARPER: We have had, I think, one conversation on
17 these things, but we have not had further conversations on that,
18 other --

19 THE COURT: Do you think that might be useful?

20 MR. HARPER: I think that may be useful. I think that
21 the fact that they spent 20 days before they sent us a letter
22 saying, "If you have any additional information from us" --

23 THE COURT: It's five days to go, and we are where we
24 are. Do you think it would be useful for you to -- maybe you
25 could go out in the hall with Mr. Quinn and talk about this.

1 Let's get what they have and what they can reasonably get, and,
2 you know, at some point the government will scream and say, "We
3 can't do that." But I have a feeling that you're just kind of
4 lobbing shells at each other over the horizon. Why don't you
5 call him up?

6 Mr. Quinn, why don't you call up Mr. Harper? Would you
7 do that?

8 MR. QUINN: I would be happy to, Your Honor. We
9 actually sent them a letter before --

10 THE COURT: No, no, don't send him a letter, call him
11 on the phone. Call him on the phone, talk about it, sort it
12 out. You might even have lunch together, heaven for fend. I've
13 been threatening you with that for a long time. Talk about it.
14 Just talk about it. Meet and confer, sort it out.

15 Next issue.

16 MR. HARPER: Thank you, Your Honor.

17 THE COURT: And this is a big issue. This is the issue
18 of the plaintiffs' motion in limine to preclude testimony as to
19 the Department of the Treasury. And the whole confusion about
20 what role, if any, the Treasury and Treasury witnesses and
21 Treasury documents will play in this case is probably in
22 significant measure my fault for not being a little clearer or
23 more precise when we talked about Treasury previously.

24 I have said on the record that I don't expect this
25 trial to be about Treasury issues. The plaintiffs apparently

1 understood that to mean no Treasury, no how, and the defendants
2 apparently understood that to mean this isn't about the Treasury
3 as trustee, but it's impossible to talk about money without
4 talking about the Treasury. I mean, I think that may be a
5 grossly oversimplified description of the polar position of the
6 parties.

7 Now, here's what I think: I think it's not possible to
8 talk about money without talking about the Treasury. And
9 particularly is that so, I think, when we're talking about this
10 other big fuzzy issue we have to talk about this afternoon,
11 which is throughput.

12 What led to the discussion of Treasury witnesses and
13 Treasury issues the last time we were together was I think
14 Mr. Gingold's discussion, which began to glaze my eyes, about
15 certificates and documents in the Treasury Department, and the
16 way money was being handled and invested, and certificates, and
17 I began to lose it. And that whole set of issues in which I
18 know the plaintiffs are very much concerned I don't think is
19 part of this trial; how the money was invested, what interest
20 rates, and so forth.

21 But I do want to know, and I think it's important to
22 know, how much money has been collected on behalf of individual
23 Indians by the federal government and how much has been paid out
24 to individual Indians on behalf of the federal government.
25 That's what I call throughput.

1 Now, the defendants want me to narrow that down and
2 say, well, you mean the money that's passed through IIMs. And I
3 think no. I think my concept of throughput is broader than
4 that. It may be money that's been collected that should have
5 gotten to IIMs and never got to IIMs.

6 I want to know, and I think Congress wants to know, and
7 I think the public wants to know, and I think Indian country
8 wants to know, to the extent it can be proven, how much money
9 has been collected by the government on behalf of Indians from
10 oil leases and grazing leases and mining leases and all the
11 other things that make up the IIM monies over the years, at
12 least since 1938, and how much of it can be accounted for as
13 money that was paid out to Indians.

14 Now, the last time we were here, Mr. Kirschman said,
15 but that's damages. And I said, no, it's not damages, it's a
16 piece of the proof that has to do with the adequacy of the
17 accounting process. And that's why I want it, and that's why I
18 think it's an important part of this trial.

19 Now, the parties have presented me with pretrial
20 statements that are frankly pretty skimpy on this subject. I
21 mean, I have tried to parse your witness list into which parts
22 of this trial it seems to fit, and the only witnesses I can
23 identify from your pretrial statements that deal with this
24 throughput question are defendants' witness Ronald Cymbor, and
25 plaintiffs' witness Richard Fasold.

1 What documents there are from Treasury, what records
2 there are from Treasury, what information there is from Treasury
3 on this point I don't know, but it seems to me that to the
4 extent there is information on this throughput question in
5 Treasury, it will not be excluded from the trial, and indeed it
6 is an important part of the trial.

7 Who wants to speak to this question? Mr. Gingold? You
8 have a powerful effect, Mr. Gingold.

9 MR. GINGOLD: I think it was to ensure that your eyes
10 are not glazed over.

11 THE COURT: All right, sir.

12 MR. GINGOLD: Thank you. Your Honor, I will talk about
13 Treasury and Mr. Guilder will talk about Mr. Fasold.

14 Your Honor, we thought you were clear on June 18th when
15 you excluded Treasury from the proceeding. I did provide a
16 lengthy explanation as to why we believed Treasury, which is an
17 indispensable party in this litigation, is critical to anything
18 do with the accounting.

19 Through the history of this litigation, as a matter of
20 fact, even with regard to the difficult production issues
21 regarding paragraph 19, this Court required that Treasury and
22 Interior together put together a plan in order to ensure that
23 production is done because they are dependent upon each other
24 for complete information.

25 However, notwithstanding our belief, the government

1 represented to you that, and I will quote from the transcript of
2 June 18th, "Treasury does not play a role with the issues as
3 described by the Court or described by us in our briefing, nor
4 should it. The Department of the Interior has prepared the
5 historical statements of account that you've seen today, they've
6 prepared the adaptations to the plan, and it's the Department of
7 the Interior that is moving forward." Your Honor, that's at 71,
8 lines 8 to 14.

9 In addition, the government said, "All of those
10 necessary elements of the historical accounting are included in
11 the books and records of Interior," closed quote. That is at
12 47, lines 3 to 6 of the June 18th transcript.

13 So Your Honor, it was always our understanding that the
14 information that Treasury has is absolutely critical. We
15 recognized the decision of this Court, we intended to abide by
16 it, and we relied on the representations of the government to
17 you. And when we identified no witnesses, we did not go through
18 the vast amount of information that was relevant to Treasury,
19 that was produced in accordance with the joint obligations that
20 this Court has imposed on both Treasury and Interior, including
21 documents and testimony that was provided in a two-day
22 proceeding before the Special Master.

23 There is a tremendous amount of information, some of
24 which is very technical, all of which involves throughput; some
25 of it involves the information relating to how funds are

1 collected and deposited at Treasury, funds of IIM are
2 misidentified and deposited in other accounts at Treasury other
3 than IIM, including tribal, including other government agencies,
4 including the securities that are purchased and the liquidation
5 and redemption of the securities and where the funds go after
6 that.

7 So it was our belief, Your Honor, that it was
8 absolutely essential. But we did rely on the representations of
9 the government, and we attempted to comply to the letter with
10 what this Court instructed, and we narrowed our case accordingly
11 because of the belief that Interior now tells us, or has told
12 the Court on June 18th, that they had all the information.

13 Well, Your Honor, as we suspected, they do not have all
14 the information, and Treasury is indeed critical and Treasury is
15 a party, and we are not aware of the distinction between
16 Treasury as a statutory trustee delegate and Treasury in another
17 capacity.

18 The Secretary of the Treasury and the Secretary of the
19 Interior and the Assistant Secretary of the Interior are the
20 named defendants in this proceeding for a reason, and therefore,
21 Your Honor, we're in a situation where we believe Treasury is
22 critically important, but we also understand there will be
23 another proceeding.

24 I don't know how, Your Honor, Treasury can participate
25 informally, where we do not have full access to the ability to

1 documents and witnesses. There's nothing in the administrative
2 record, again, as Interior says - or the Justice Department
3 says - it's the Department of Interior that is moving forward.
4 That's the direct language. No statement about Treasury.

5 Therefore, we have nothing of significance in the
6 administrative record. There are a number of exhibits that were
7 identified subsequent to the service of the administrative
8 record, and many of them now deal with Treasury. That was at
9 the time we were supposed to exchange exhibits; we identified no
10 Treasury.

11 That is a process, Your Honor, that has taken several
12 months, pursuant to the scheduling order. And now we're in a
13 situation where not only from my review of the exhibits,
14 Your Honor, is there information that is pertinent, but there is
15 a whole lot of information that has not been identified either
16 in the administrative record or with respect to exhibits that we
17 simply haven't even had a chance to consider.

18 So we're in a situation, Your Honor, where there isn't
19 much we can do about it. Our experts have not reviewed
20 information from Treasury. We did not ask them to because of
21 our understanding of the representations of the government and
22 this Court's decision. Our own research and analysis, which is
23 preparing for witnesses and identifying what we need to do, does
24 not contemplate Treasury, because of, again, our reliance on the
25 representations of the government and this Court's decision.

1 THE COURT: How did you contemplate, in your own trial
2 preparation, dealing with this issue that I have called
3 throughput?

4 MR. GINGOLD: Your Honor, Mr. Guildler will deal with it
5 in a little more detail. However, I will tell you this: I
6 didn't believe it was possible to have a trial without Treasury,
7 and I think I indicated that when I was here on June 18th
8 speaking with you.

9 I was very interested in seeing what the Interior
10 Department was going to provide, since the representations are
11 the Interior Department had all the records and information.
12 Your Honor, I didn't believe it, but nevertheless, we are where
13 we are, as you tell us.

14 We are left, therefore, with Mr. Fasold, who was
15 qualified as an expert by this Court, and whose model was
16 specifically held not to be a damages model, and as a matter of
17 fact, the Court even admonished or suggested to the government
18 that they consider in the accounting.

19 But the only thing we have, based on our inability to
20 this point of identifying appropriate Treasury witnesses and
21 exhibits, and in the absence of an administrative record, Your
22 Honor, in that regard, is what we have with Mr. Fasold.

23 So ours is skinny because we were attempting to abide
24 by this Court's instructions. I think Mr. Guildler will be
25 dealing with Mr. Fasold, but I would like to say that none of

1 the Treasury documents deal with direct pay, none of the
2 Treasury documents deal with compacting and contracting, none of
3 the Treasury documents that I've seen in the exhibits, Your
4 Honor - and unfortunately, I've reviewed the entire
5 administrative record and I think nearly all the exhibits -
6 none of them deal with Individual Indian Trust funds. And
7 that's money collected from Trust lands, oil and gas, timber and
8 the like, deposited in the Treasury but not put in the
9 Individual Indian Trust account, whether it's 14X6039 or another
10 account.

11 None of the Treasury documents deal with the deposits
12 in the commercial banks, which the government's own Interior
13 experts identify amassed a significant amount of money.

14 None of the Treasury documents that I reviewed, Your
15 Honor, deal with the securities that were pledged by the banks
16 that were held by Treasury to ensure those deposits would not be
17 lost.

18 And, Your Honor, the control of the currency is the
19 Bureau of the Treasury Department. Many of the banks that
20 existed, whether we're dealing with pre-1938 or subsequent to
21 1938, the banks were the depository institutions that pledged
22 either their securities or acquired bonds to guarantee the
23 Individual Indian Trust funds, again, bonds held by the
24 Treasury; none of that information is provided in the exhibits
25 or in the administrative record either.

1 And indeed, Your Honor, the banks themselves, under
2 McCulloch v. Maryland, are federal instrumentalities, they're
3 chartered by the controller --

4 THE COURT: Yeah, I remember that case.

5 MR. GINGOLD: And Your Honor, McCulloch was the first
6 controller of the currency. The issues in that case you are
7 familiar with, and they're not necessarily related to this.
8 However, let me point out that the reports of examination are
9 usually not destroyed. If there are ledger records that go back
10 to the 1870s that we see in the exhibits proposed by the
11 defendants, there are examination reports that go back, Your
12 Honor, to 1863 when the agency was created; we see none of that,
13 and that's where deposits would be identified.

14 The yellow portions of the examination reports, which
15 are confidential reports, contain the type of information such
16 as the pledged and guaranteed securities, because of the unique
17 nature of those particular deposits. That would be a very vital
18 source of information. On the cover of the examination reports
19 it specifically says it is the property of the government, not
20 the property of the bank, and subject to 18 U.S.C. 656, it
21 cannot be appropriated for any other use.

22 So Your Honor, we haven't seen any of that. If
23 Treasury is a party to this proceeding, and you are interested
24 in throughput and you are interested in the money that was
25 collected and deposited in agent banks, that is extremely

1 important information.

2 But again, our understanding is, one of the reasons
3 that wasn't produced is because Treasury is not a participant in
4 this upcoming trial.

5 THE COURT: Well, one of the reasons none of that stuff
6 was produced, of course, is that the government has a much
7 narrower notion of throughput than you do, and I think narrower
8 than I do.

9 Let me hear from Mr. Kirschman, if you're the right guy
10 to talk about this, Mr. Kirschman. How are you going to prove
11 throughput?

12 MR. KIRSCHMAN: Your Honor, let me explain our view on
13 throughput in light of something you just said a few minutes
14 ago. Throughput is, we believe, as the '94 act described it,
15 the receipts and disbursements of money that have, quote, "been
16 held in Trust," end quote. What we intend to provide to the
17 Court, then, are documents that provide evidence of the money
18 that was received into the Trust and money that was disbursed
19 out of the Trust to beneficiaries.

20 The Court, I believe, stated that he views throughput
21 as also including money that is collected but that never got
22 into the IIM Trust fund. I must say respectfully, that falls
23 out of our definition of throughput. We believe the 1994 act
24 has addressed monies that were actually received into Trust and
25 held in Trust in a fiduciary capacity and then disbursed, and

1 that that is what we are capable of addressing, and intend to
2 address.

3 Now, as we informed the Court in our response to
4 another motion that was actually stated to be related to
5 throughput, the amount of aggregate IIM statistics are
6 relatively small in number. The Trust fund is administered on
7 an individual basis through individual accounts, so we intend to
8 present, and we have identified in our defendants' exhibit list,
9 historical documents that demonstrate the aggregate receipts.
10 Those documents led to the estimate of \$13 billion in receipts.

11 We will present testimony and evidence related to that
12 estimate of \$13 billion of receipts, and we intend to present
13 testimony and documents related to the disbursement of the
14 funds. You will hear testimony that the \$13 billion was only an
15 estimate, and there are documents, there are a few in the
16 administrative record, that address that.

17 You also mentioned that you could only find one or two
18 witnesses who would address throughput, and it is a topic that
19 will be addressed by several people on the government's witness
20 list in various pieces. It will address their involvement
21 related either to the calculation of receipts or the handling of
22 disbursements or the accounting for or the recording of
23 disbursements.

24 So I would just like to note that, for example,
25 Ms. Herman will be testifying regarding calculations she has

1 provided and worked with OHTA on the aggregate numbers related
2 to the 13 billion. Also, Dr. Scheuren will also testify about
3 work he has done in providing estimates that led to the
4 aggregate \$13 billion number.

5 Ron Cymbor, a Treasury witness, will also address
6 disbursements and information received and shared between
7 Treasury and Interior related to disbursements; Abe Haspel,
8 Department of Interior Assistant Secretary, will touch on --
9 will address an element of throughput.

10 Kathy Ramirez is another witness, a will-call witness
11 that we intend to present. Ms. Ramirez will talk about what is
12 called mass cancellation, involving a mass cancellation of
13 checks by the Department of Treasury pursuant to a Congressional
14 law.

15 Rob Winter, an Interior employee, will also touch on
16 the issue of disbursements. Ed Angel, a historian, will be
17 testifying as a fact witness regarding the historical documents
18 he collected that demonstrate input. Dr. Angel will present the
19 documents that are historical in nature, and these documents
20 often include annual figures relating to the input -- I'm sorry,
21 not the input, the receipts into the IIM Trust fund.

22 And then James Sturgill, a Treasury witness, also will
23 testify - or he's a may-call witness - but he may testify
24 regarding the issue of disbursements and throughput, and
25 information shared with Treasury and Interior related to this.

1 There isn't a massive collections of documents in one
2 place that addresses an aggregate of the information the Court
3 has requested, so to the extent that was your perception when
4 you reviewed the witness list, that is the reason for it. But
5 you will be presented with all the information and all the
6 testimony the Department of the Interior can provide related to
7 the issue of receipts and disbursements that is throughput.

8 Now, getting to the -- and that's what we intended to
9 do. We understood that the Court wanted the information we
10 could provide related to that issue, and then also provide an
11 estimation of the relationship between receipts in, and the
12 historical accounting work, how much of those receipts were
13 accounted for. And that's another issue we're intending to
14 address with the Court through the testimony now of Mr. Haspel.

15 So that is the information, and that is our
16 understanding of how throughput - that is, receipts and
17 disbursements - are categorized under the 1994 act.

18 Getting to the basis for plaintiffs' motion,
19 representations I made to the Court were related to the Court's
20 April 20th order and the understanding that Treasury's role as a
21 fiduciary here - that is, Treasury's role in fulfilling its
22 fiduciary obligations - was not part of the hearing commencing
23 on October 10th.

24 So there was no change in our position. The issue of
25 throughput, when it was determined by the Court that the Court

1 would hear evidence -- hear testimony and see evidence on this
2 issue, that necessarily required the presentation of documents
3 that were generated by Treasury, or information that came from
4 Treasury.

5 But there's another element that I wanted to address
6 related to the plaintiffs' motion, Your Honor, and that is that
7 plaintiffs' motion is so broad that it would even include
8 excluding testimony related to Interior's performance of the
9 historical accounting, because those contractors who are working
10 with OHTA to perform reconciliations of transactions use
11 information from Treasury as a means to ascertain whether checks
12 were actually negotiated.

13 So the scope of plaintiffs' motion would even include
14 information necessary to present to the Court to explain what
15 Interior is doing in moving ahead with the historical
16 accounting, as required by the courts.

17 For that reason, also, in addition to compiling
18 information on receipts and disbursements, plaintiffs' motion
19 should be denied.

20 THE COURT: Well, the plaintiffs' will be denied, but
21 I'm still trying to catch up with Mr. Gingold's discussion of
22 Treasury issues, and I'm getting there. The one thing that does
23 trouble me a little bit is when I talk about throughput being
24 funds that were received by the government and are or should
25 have been deposited in IIM accounts, and Mr. Gingold refers to

1 funds that were received from Treasury and did not make it
2 properly into IIM accounts, he's got a case to make there that
3 he doesn't have the data and hasn't had the discovery, hasn't
4 had what he needs to make the case.

5 So I'm going to hear the testimony you have on this
6 subject from Treasury, and I'm going to let Mr. Gingold
7 demonstrate, through cross-examination, what your witnesses
8 don't have, and we may -- this may be one of those areas in
9 which we open the case a little wider in midstream to collect
10 and add information and witnesses that are not contemplated.

11 But as I say, I can't program that in advance. I've
12 got to see what you're going to put on, I've got to see what the
13 plaintiffs' objection is to it. And by the way, this ushers in
14 the flip side of this whole throughput question, which is your
15 objection to their witness.

16 You object, do you not, to their witness, their expert
17 witness?

18 MR. KIRSCHMAN: Fasold?

19 THE COURT: Fasold.

20 MR. KIRSCHMAN: Yes, Your Honor.

21 THE COURT: Because that's just a model. That's
22 basically your claim. Right?

23 MR. KIRSCHMAN: Well, Your Honor, in essence, getting
24 to the nub of it - and Mr. Warshawsky can speak to this more
25 directly and on point - Mr. Fasold is not a witness who has

1 anything to say about throughput; that is, the receipts and
2 disbursements of funds through the IIM Trust fund. He didn't
3 address it in his 2003 report, and he didn't certainly raise it
4 in 2007 when he added nothing new to his 2003 report.

5 He doesn't mention throughput, he doesn't mention
6 receipts and disbursements, and in fact, he was told to avoid
7 using that information and come up with his own means of
8 demonstrating the collection of funds.

9 If you want to address that motion, I would like to
10 present Mr. Warshawsky.

11 THE COURT: Mr. Warshawsky, I would like to talk about
12 that, because it seems to me it's some sort of a piece here.

13 MR. WARSHAWSKY: Thank you, Your Honor. I had the
14 opportunity to examine Mr. Fasold back in 2003, and I'm very
15 familiar with his model.

16 The 2007 report that Mr. Fasold submitted expressly
17 contains no update to the 2003 model. It says that he did no
18 additional work since 2003, simply attaches his 2003 report.

19 And what the 2003 report said is that he was
20 instructed -- I'm sorry, his report was described -- describes
21 the task as, quote, "to set forth a proposed methodology to
22 determine the revenues derived from Individual Indian Trust
23 lands and other Individual Indian Trust monies from 1887 to the
24 present without relying on information generated by the
25 Department of the Interior to the extent possible," end quote.

1 That's page one of the 2003 report.

2 The way Mr. Fasold went about generating an estimate of
3 revenues is he engaged a number of resource experts; say, for
4 example, somebody who was an oil -- you know, an oil expert, a
5 hard rock minerals expert, a timber expert. And he would have
6 them utilize different methodologies to, for example, estimate
7 how much revenue should have been generated from a certain
8 property. He would say -- and it gets a little complicated,
9 because he also used a thing called GIS technology to allocate a
10 portion of a reservation, to try to estimate what portion of
11 that related to individuals as opposed to tribal revenues.

12 But basically he would say, you know, my resource
13 expert tells me they should have generated X in oil during this
14 year in production. They then take that production and apply
15 perhaps an average market value rate to it, or come up with some
16 other way of generating an estimate of what the revenues should
17 have been, multiply it times the percentage derived by the GIS
18 expert, and that was an estimate of how much oil revenue should
19 have come into the IIM Trust for this property for a particular
20 year.

21 Now, I have to tell Your Honor, we've never seen the
22 data that ends up getting you to their total \$13.3 billion
23 revenue estimate, although it's not really necessary, because
24 there's a final piece of the model, which is their "other
25 revenues" figure for certain types of revenue that they couldn't

1 estimate, rights-of-way, land sales, whatever. And that, by the
2 report, simply is determined as being the difference between
3 whatever estimates his resource experts came up with for the
4 other amounts, and the 13 billion figure that was in the 2002
5 Interior report to Congress.

6 It's an algebraic equation which is always going to add
7 up to 13.3 billion, and it's simply an estimate of what he
8 believes should have been derived from, say, oil and gas or from
9 hard rock minerals --

10 THE COURT: What's his bottom line?

11 MR. WARSHAWSKY: Well, the bottom line -- again, we've
12 never been provided the data, and the reason, Your Honor, is
13 that in 2003, the Phase 1.5 trial was to review the plans for
14 calculating or for conducting the accounting. We never got the
15 numbers, Your Honor.

16 And in the case of --

17 THE COURT: Well, does Fasold have a number? You took
18 his deposition. Does he have a number?

19 MR. WARSHAWSKY: Your Honor, no. The answer is, he
20 does not. The report says 13.3 billion, but it doesn't --

21 THE COURT: And you say 13 billion. So everybody says
22 it's 13 billion. Why don't we just stipulate that the amount of
23 money is 13 billion? It solves the whole throughput question.

24 MR. WARSHAWSKY: He says 13 billion because he takes
25 that number from the 2002 report to Congress. But he doesn't

1 tell you how he got to it. It's just X, plus Y, plus Z equals
2 13 billion, and Z is always going to be 13, minus X, plus Y.

3 The important thing, Your Honor, is that because his
4 model expressly is designed to ignore government documents -- I
5 mean, he says, "I can't Trust government documents, I'm going to
6 use other ways to estimate them." In no way, shape, or form
7 could this be a throughput model. He certainly doesn't use the
8 word "throughput" in his report. That's something we've only
9 recently heard.

10 If we're trying to get to the bottom line of receipts
11 and disbursements, you have to look at the records that are used
12 to measure receipts and disbursements. And what Mr. Fasold does
13 is simply estimate what he thinks revenues should have been
14 based on allocations of reservation lands and estimates of
15 production and fair market royalty rates.

16 So it's not a throughput model, Your Honor, it is
17 substitutionary relief, pure and simple.

18 And I have to say, I don't recall -- I was there in
19 2003. I know Mr. Fasold was admitted as an expert; I don't
20 recall being admonished. But I do recall that ultimately
21 Judge Lamberth didn't adopt Mr. Fasold's model.

22 THE COURT: Did or did not?

23 MR. WARSHAWSKY: He ultimately implicitly rejected it.

24 THE COURT: Well, this sounds to me like creationism
25 versus Darwinism. I don't know how many of you read a quite

1 fascinating article in the paper last week about algorithms, and
2 how algorithms have become the new dominant force in our lives.
3 Did you read that, happen to see that?

4 MR. WARSHAWSKY: I did not, Your Honor.

5 THE COURT: Fascinating. I'll find it and distribute a
6 copy when you give me the glossary.

7 MR. WARSHAWSKY: I'll Google it when I get out of
8 court, Your Honor.

9 THE COURT: Google it, algorithms.

10 But is it right that this guy says the bottom line is
11 \$13.3 billion, and Mr. Kirschman says it's about 13 billion?
12 What are we arguing about?

13 MR. WARSHAWSKY: Well, actually, Your Honor, at this
14 point the 13.3 billion is an estimate --

15 THE COURT: I know, I know. But that --

16 MR. WARSHAWSKY: -- and I believe right now the
17 estimate is lower than 13 billion.

18 THE COURT: Okay. Look, my take on this is, I'm going
19 to let the creationists put on their case and the Darwinists put
20 on their case, and it may be that it doesn't amount to anything.
21 It may be that there isn't any throughput.

22 But I haven't heard Mr. Fasold. I might reject him,
23 but at this point it sounds to me like his testimony -- I'm not
24 going to have a Daubert hearing first. Remember, this is a
25 bench trial. Because a Daubert hearing is what the judge has

1 before he allows the jury to do it, but the judge has to hear it
2 before he allows the jury. So the Daubert hearing and the
3 testimony are, it seems to me, merged in a bench trial. I'll
4 hear it. It goes to weight. It may have no weight at all; it
5 may, at the end of the day, not bear on throughput.

6 But the government's position is we can't really prove
7 throughput in the way you want to prove it; you say they can't
8 prove it in the way it should be proven. Let's just both sides
9 bring your witnesses and see how it shakes out.

10 MR. WARSHAWSKY: Okay. Thank you, Your Honor.

11 THE COURT: I would like to take about a five-minute
12 recess, counsel. We'll be in recess -- keep your seats. I'll
13 be back in five minutes. I've got to take care of one thing.

14 (Recess taken at 4:23 p.m.)

15 THE COURT: Sorry about that. Here's a little inside
16 baseball factoid. This is September 28th, the last working day
17 before September 30th. Do you know why September 30th is
18 important to federal judges? Because all motions that have been
19 pending for more than X months that are undecided have to be
20 reported twice a year on September 30th and on March 31st, and a
21 lot of midnight oil has been burned here this week in the
22 chambers of various judges around the court to get their numbers
23 down as low as possible.

24 Okay.

25 MR. GUILDER: Your Honor, briefly, if I may correct the

1 record, Judge Lamberth in Cobell X did not implicitly reject
2 Rick Fasold's financial model; rather, he directed Interior to
3 investigate GIS database modeling and to determine how it could
4 effectively discharge their accounting duty. That is
5 28 Fed. Supp 2d 66. Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. WARSHAWSKY: Your Honor, I'll just allow the Court
8 to read Judge Lamberth's opinion and the extent to which he
9 adopted it.

10 MR. KIRSCHMAN: Your Honor?

11 THE COURT: Mr. Kirschman.

12 MR. KIRSCHMAN: An administrative matter. If I may,
13 Your Honor, I would like to present you with the two disks of
14 the administrative record. They have hyperlinks on them, they
15 are what we produced to plaintiffs. It includes both the
16 original administrative record and the supplementation of it.
17 If I may approach the bench.

18 THE COURT: Thank you. Of course. This is two copies
19 of the same thing?

20 MR. KIRSCHMAN: Yes, Your Honor.

21 THE COURT: Isn't that credible? How many pages of
22 data do you think this includes?

23 MR. KIRSCHMAN: 25,000 pages. I don't know. I'm
24 asking. I don't know, Your Honor.

25 THE COURT: Amazing. Thank you very much.

1 MR. KIRSCHMAN: And Your Honor, could I make one point
2 on the Treasury motions --

3 THE COURT: Yes, sir. Yes.

4 MR. KIRSCHMAN: -- before we leave that?

5 The Court has indicated that related to the issue of
6 throughput, this may be an occasion where we step aside if
7 plaintiffs need additional information.

8 I think that consideration has to be tempered by the
9 fact that discovery on this issue, discovery directed at
10 Treasury, has been made by plaintiffs years ago. And as our
11 opposition demonstrated, Treasury responded by making the
12 information available years ago.

13 So at least we would like the Court to be aware that
14 information was either provided to plaintiffs, such as the mass
15 cancellation files, or the opportunity was made available to
16 them to inspect the type of information that we are now
17 addressing. And any consideration of further opportunity should
18 be at least tempered by that, because that has been years ago.

19 THE COURT: Okay, I hear you. And you'll have ample --
20 if you ever hear me sound like I'm going to stop the trial for a
21 month and declare open season on new discovery on Treasury,
22 you'll have ample opportunity to object to that.

23 MR. KIRSCHMAN: Thank you, Your Honor.

24 THE COURT: I don't think that's what I'm talking
25 about.

1 Mr. Gingold? Now, we're all making records about
2 things we don't have to, but go ahead.

3 MR. GINGOLD: Your Honor, I just want to make sure that
4 what actually occurred has occurred. Plaintiffs have requested
5 discovery from Treasury, and there was no response to discovery.
6 We have more than a thousand interrogatories that were proffered
7 pursuant to a process --

8 THE COURT: Did you say a thousand interrogatories?

9 MR. GINGOLD: That's right. They were never responded
10 to.

11 THE COURT: No wonder they weren't responded to.

12 MR. GINGOLD: Your Honor, there was a process requested
13 by Treasury that precluded us from taking depositions and that
14 precluded us from any other form of discovery. We were limited
15 to interrogatories; we objected to it. And based on the
16 limitation and pursuant to the order that was entered at the
17 request of Treasury, issued by the Special Master, we were told
18 just to propound interrogatories, which we did.

19 We objected, we said it would be difficult, voluminous,
20 we were given a short period of time to do it. We requested the
21 ability to take depositions; it was denied.

22 So Your Honor, we did not have discovery on Treasury.

23 THE COURT: Okay. Understood. Everybody has now made
24 his record, again. We are where we are, counsel. Let's
25 proceed.

1 Plaintiffs' motion in limine to preclude evidence on
2 meta-analysis. That's a pretty easy one for me. It's denied,
3 without objection to more specific denials made in the context
4 during the trial. This comes under the category of: I can't
5 rule on this now. I don't have enough context for it.

6 Plaintiffs' motion in limine to preclude evidence of
7 completeness testing, I think we've talked about that already.

8 Plaintiffs' motion to exclude experts whose supporting
9 documentation has not been provided, what does that one cover?

10 MR. SMITH: Your Honor, David Smith for the plaintiffs.
11 Your Honor, you may recall back on June 18th -- I know how you
12 like the parties to agree on certain things, and back when you
13 were detailing what the trial was going to entail, you sort of
14 discussed the preparation of a pretrial order, and counsel for
15 the defendants stepped up and said we would like to try to work
16 that out with the plaintiffs. And I think a smile appeared on
17 your face with that, because I know that's what you like to
18 hear.

19 We actually met on June 27th and made a good faith
20 effort to resolve certain issues, and actually did resolve some,
21 and those were discussed at the July 9th pretrial conference.
22 And one of the issues we agreed on was for any expert that
23 provided a pretrial -- excuse me, a Rule 26 report, they were
24 supposed to identify the documents, data, other information they
25 considered in formulating their opinions, and they were to

1 produce those documents as well.

2 Your Honor, when we provided our Rule 26 reports, we
3 meticulously attached to them the documents our experts
4 considered; when we got the defendants' reports, they included
5 nothing.

6 Your Honor, what they say in their response is, number
7 one, well, you know, our experts are really some sort of
8 combined factual and retained expert of some sort. You may
9 recall that the government's position was during that hearing,
10 well, you know, if they're not retained experts, we don't have
11 to provide a report. And our response was, look, you know, all
12 our experts are retained, and everybody who may give expert
13 testimony should be required to provide a report; otherwise, we
14 have a pretty unlevel playing field.

15 You agreed with that at the time. And in fact --

16 THE COURT: I agreed with that at the time, but what I
17 didn't agree with and what I didn't know at the time was who was
18 really an expert and who was not.

19 MR. SMITH: That's true. And in this case, Your Honor,
20 they in fact have provided certain expert reports, but did not
21 provide the underlying data. In fact, your order on July 9th
22 was specific reports or documents that are relevant to their
23 testimony, referring to those who were providing a Rule 26
24 report have to be produced.

25 THE COURT: Now, who specifically are we talking about

1 here?

2 MR. SMITH: Your Honor, we are talking about a number
3 of experts, specifically David Lasater. He is now with an
4 accounting firm called FTI; previously with KPMG, before that
5 with Arthur Andersen. He is their primary accountant testifying
6 how reasonable, purportedly, their plan is.

7 A woman by the name of Caren Dunne, with an accounting
8 firm called CD&L. She has been, quote, "in charge" of this
9 project, by her testimony, for almost 20 years.

10 We're talking about a man named Ed Angel, who is a
11 historian; we're talking about Mr. Scheuren and Ms. Hinkins, who
12 are with NORC, who are those providing the statistical sampling
13 testimony.

14 THE COURT: And have you ever taken the testimony of
15 these people before?

16 MR. SMITH: Your Honor, Mr. Lasater testified
17 previously at the Trial 1.5, and I believe -- well, the rest,
18 actually, I don't know. I think Mr. Angel has been deposed
19 before.

20 Your Honor, our concern is that each of these witnesses
21 testified or stated in their expert reports that they were
22 relying on certain data, but they didn't produce the data.
23 Specifically, Mr. Lasater said, "I'm relying on the projects I
24 did for Interior, whether it was with KPMG or FTI, I'm relying
25 on the knowledge I gained over the years working for them."

1 And he's coming in, he's testifying about the purported
2 reasonableness of the statistical sampling, the reasonableness
3 of the accounting work. Yet you go through the reports we've
4 known he has prepared for Interior over the years, he's prepared
5 a report on identifying high dollar transactions for sampling,
6 obviously relevant --

7 THE COURT: Say again.

8 MR. SMITH: Identifying high dollar transactions for
9 sampling. A consulting report dated December 2003, a data
10 validation study; a consulting report on high dollar
11 transactions; he did a report validating and defining 220,000
12 land-based IIM databases. He worked on a report entitled "Gaps
13 in Electronic Error Files in IRMS Transactional Analysis."

14 While he was with KPMG, there was analysis done of
15 receipts, disbursements, and ending balances from fiscal year
16 1951. There are a whole slew of reports, Your Honor, this
17 gentleman has been involved in, and he indicates he's relying on
18 the projects he's done for Interior, but they won't produce the
19 reports.

20 Your Honor, the same is true of Caren Dunne with CD&L.
21 Again, she was previously -- she is now with another firm, now
22 with CD&L; previously with Arthur Andersen. She states in her
23 report that she considered personal knowledge of IIM systems,
24 underlying source documents, specific knowledge and experience,
25 and supporting documentation. She says she was involved with

1 the judgment accounts, per capita accounts, reconciliation of
2 high dollar transactions, quality control.

3 But again, you look at the reports that we've been able
4 to glean from the record that she has been involved with; a
5 report from CD&L, Trust fund data between 1972 and 1995. She
6 was involved in reviewing judgment fund documentation; she was
7 involved with a report regarding verification of judgment funds;
8 she was involved with an accounting pilot data validation
9 result. It was a report dated July 17th --

10 THE COURT: You're reading that off a piece of paper,
11 and the court reporter is doing an amazing job of keeping up
12 with you, but I can't keep with you. Slow down.

13 MR. SMITH: I'll slow down, Your Honor.

14 Was involved with a report regarding completeness of
15 data and gaps in IRMS and IIM transactions --

16 THE COURT: IRMS?

17 MR. SMITH: IRMS. That's one of the computer systems.
18 Your Honor, these are all listed on pages six and seven of our
19 motion.

20 So again, a lot of the items on which she has been
21 designated to testify, she has specifically been involved in
22 reports to Interior regarding those subject matters.

23 Mr. Newell, another one of their experts, he is their
24 historian. In his opinion, he says, I am relying on, quote,
25 "the work that my firm has undertaken for OHTA." Well, what is

1 that work? He has prepared 55 histories of leasing and
2 contracting activities; he's prepared 36 case studies; he's
3 worked on a land-to-dollar completeness test.

4 Again, their response is, I believe, we provided you
5 about 10 of those reports back, I think, in 1991 for Phase I.
6 I'm not sure what we're supposed to do with 10 out of the 65
7 reports that he says he has relied on.

8 Mr. Angel stated in his report that he -- in preparing
9 it he considered his research, which he said was set forth in
10 historical reports concerning various issues relating to the
11 historical disposition of individual Indian monies. We've been
12 provided some of those reports; certainly not all them.

13 And finally, Mr. Scheuren and Ms. Hinkins, who are
14 clearly their key NORC witnesses, they say they relied on
15 63 reports that they provided -- that they prepared and provided
16 to Interior. One of those appears to be a report on throughput,
17 and yet we can't say what they are, because in his report he
18 says they're proprietary and he cannot discuss them. But
19 nevertheless, they were provided and formed the basis of his
20 testimony.

21 Your Honor, our agreement was fairly simple, that if
22 you're going to provide an expert opinion, you're going to
23 provide the documents that these experts considered. And the
24 order of this Court was fairly clear when it said specific
25 reports or documents that are relevant to their testimony, then

1 they have to be produced.

2 Here, Your Honor, we got almost nothing from these
3 experts. You know --

4 THE COURT: Who wants to respond to this for the
5 government?

6 MR. KIRSCHMAN: Your Honor, the rule of civil procedure
7 26(a)2(b) requires disclosure of only "the data or other
8 information considered by the witness in forming the opinions
9 that are set forth in an expert report."

10 As we explained to Your Honor previously, many of these
11 witnesses are hybrid witnesses, they are fact witnesses who have
12 been performing work on the historical accounting project for
13 years, from roughly 2002. That's the case for Ms. Hinkins and
14 Ms. Dunne and Dr. Scheuren and Michelle Herman.

15 Simply because -- and by the way, Michelle Herman and
16 James Hammond, both mentioned in plaintiffs' motion, are being
17 presented as fact witnesses, so there is no basis to even
18 consider them in this regard.

19 But regarding the others, the simple fact that they
20 have provided expert reports because they have considered a
21 particular issue does not mean that there should be discovery on
22 their entire career's work dating back to 2002, when it involves
23 them as fact witnesses.

24 In fact, each of these witnesses has identified the
25 documents or the data they relied upon in preparing their

1 reports. These reports were prepared out of an abundance of
2 caution. These witnesses, say for Dr. Lasater, are also fact
3 witnesses who have been involved in the project. There's no
4 requirement under Rule 26 that every document that they have
5 touched or considered or looked at during the course of their
6 employment as contractors for Interior now be produced because
7 they have addressed specific issues in an expert report.

8 That's essentially what plaintiffs are seeking here.
9 They're seeking discovery of the fact witnesses, not a
10 disclosure pursuant to Rule 26. Those disclosures have been
11 made.

12 For example, Dr. Lasater provided a list of the
13 documents he relied upon in forming his opinion, and that is
14 clearly listed. Dr. Lasater has met the requirements. He
15 states clearly, "materials considered," and then he lists those
16 documents, those treatises that he considered, and he cites the
17 documents as they came and appeared in the administrative
18 record.

19 So there's no question that plaintiffs are aware of the
20 documents that Dr. Lasater considered, and, in fact, they have
21 those. They were submitted with the administrative record
22 before they received Dr. Lasater's report. So they had more
23 time with those documents than even from the date that
24 Dr. Lasater submitted his report.

25 On top of that, Dr. Lasater testified before, so they

1 are familiar with Dr. Lasater. This isn't a matter of surprise
2 related to any of these witnesses.

3 That is especially true of Dr. Scheuren and
4 Dr. Hinkins, both of whom have worked for NORC for several years
5 and have contributed efforts towards the historical accounting
6 project. These people are largely fact witnesses. They have
7 prepared expert reports to make sure that we were in compliance
8 with the rules, but that does not mean that there should be
9 unlimited -- an unlimited requirement that they produce every
10 document they may have touched or considered or happened upon
11 since began their work in 2002. They both have identified the
12 documents they relied upon in preparing their reports --

13 THE COURT: You're starting to repeat yourself a little
14 bit.

15 MR. KIRSCHMAN: Okay. And plaintiffs have those.

16 I just want to make clear, for all of these people,
17 they have identified the documents they relied upon and
18 plaintiffs have those documents.

19 THE COURT: I think that's the third time. I got it.

20 MR. KIRSCHMAN: That's it.

21 THE COURT: I got it.

22 MR. KIRSCHMAN: That's the point.

23 THE COURT: Rule 26(a)2(b) does require production of
24 the data or other information considered by the witness in
25 forming the opinions. I agree with the government that it's not

1 a general, you've got to turn over everything you've ever done
2 in your life requirement. It will be up to plaintiffs, if they
3 choose to do so, to demonstrate that the opinions are based on
4 something that hasn't been turned over. I can't make a blanket
5 ruling like that.

6 The motion in limine is denied, without prejudice to
7 its renewal, with respect to any particular witness, or any
8 particular opinion of any particular witness, as the testimony
9 develops at trial.

10 Defendant moves to exclude Richard Fitzgerald, and to
11 exclude Richard Fasold. Both motions denied, for the reasons
12 I've stated earlier.

13 Defendant moves for an order to return confidential
14 draft historian's report. That's denied. The work product
15 protection, if any, and I'm not going to -- I mean, it's a
16 fascinating question as to whether there was ever any work
17 product protection for material prepared by a lawyer for a
18 trustee who has a fiduciary responsibility for the plaintiff,
19 who is the beneficiary of the Trust, but that's much more exotic
20 than we have to be in this one.

21 The rule in this jurisdiction is work product
22 protection is waived once it's released, whether inadvertent or
23 not. And you can call them not gentlemen if you want to, but
24 the rule is the rule, and it's been waived.

25 Now, that is not to say, necessarily, that the exhibit

1 is admissible or that it proves anything, or that it can be used
2 as the plaintiffs wish to use it as admissions or any other
3 thing. All of that remains to be seen, and will be sorted out
4 at trial. But the work product protection issue I will resolve.

5 Mr. Harper, you want to be heard on that?

6 MR. HARPER: Yes. Could I just clarify one point on
7 that? We filed that out of an abundance of caution, agreeing
8 with the Court that there is no work product or it has been
9 waived. But we filed it under seal, and our presumption is that
10 now the document is no longer under seal?

11 THE COURT: Yeah, the seal can be removed. You know,
12 it is what it is. It's been waived. But I'm not ruling
13 admissibility and I'm certainly not ruling on weight. Okay?

14 MR. HARPER: Thank you, Your Honor.

15 MR. GINGOLD: Your Honor?

16 THE COURT: Yes, sir.

17 MR. GINGOLD: May I ask one question for clarification?

18 THE COURT: You may.

19 MR. GINGOLD: You indicated a few minutes ago that the
20 completion issue was resolved. The completion issue that we
21 were discussing was not with regard to the data being complete
22 generally, it was with respect to two particular expert reports
23 that referenced a completion test. And those -- the underlying
24 data for the completion tests weren't provided.

25 As I understand what you've been ruling on, whether or

1 not they were provided, you would be hearing that and deciding
2 how to proceed, depending on how the questioning is going. Is
3 that fair?

4 THE COURT: If I understand your question, yes, I think
5 that's fair.

6 MR. GINGOLD: Because otherwise we were dealing with
7 two issues, an issue that was not related directly to a global
8 completeness issue.

9 THE COURT: Now, you-all have set new standards in the
10 naming rights for documents you filed. This one is "Motion in
11 Limine in Exclude All Exhibits and Proposed Testimony Identified
12 in Plaintiffs' Pretrial Statement That Are Outside the Scope of
13 Matters to Be Considered at the October 10th, 2007 Trial."

14 The only issue in that motion that is -- the motion is
15 generally denied, because a blanket motion like that, as I've
16 said, before trial, I can't deal with.

17 But I want to focus for a minute on the testimony of
18 Congressman Clinger, or former Congressman Clinger. I
19 understand that legislators have been permitted in some courts
20 to testify about legislative history. That is unlikely to
21 happen in this case.

22 However, if the plaintiffs wish to present or to
23 proffer the testimony of former Congressman Clinger as written
24 direct, I will consider it. I'm not going to consider it in the
25 abstract. I frankly don't consider the testimony of one

1 congressman on what the intent of the entire United States
2 Congress was in passing legislation to be of any weight at all,
3 but I could be wrong. And I will look at a proffer -- at a
4 written proffer before ruling definitively on that part of the
5 motion.

6 MR. KIRSCHMAN: Your Honor, could I be heard briefly on
7 that?

8 THE COURT: Yes.

9 MR. KIRSCHMAN: Congressman Clinger has already
10 testified in this case, and his testimony is of record.

11 THE COURT: Oh, good.

12 MR. KIRSCHMAN: So from your statement, I did not know
13 if you were aware of that.

14 THE COURT: I was not aware of that. Somebody just has
15 to point me to it. Is it in these motion papers?

16 MR. SMITH: Your Honor, Congressman Clinger did testify
17 previously. His testimony is going to be slightly different.
18 The issues were slightly different back, I think, in Trial I.

19 THE COURT: All right. Give me a proffer. You're more
20 comfortable doing that anyway, aren't you?

21 MR. SMITH: Sure. Congressman Clinger was probably one
22 of the two key people, along with Representative Synar,
23 responsible for the Trust Reform Act.

24 THE COURT: Mr. Smith, I'm sure he's a very
25 distinguished congressman and knows more about it than anybody

1 in the world. He's still only one congressman.

2 MR. SMITH: Exactly.

3 THE COURT: And if it's legislative history you want --
4 I mean, as I don't have to tell you, there are judges above my
5 pay grade who don't think there is any such thing as legislative
6 history.

7 MR. SMITH: Exactly.

8 Your Honor, he was in a unique position during that
9 period of the late '80s up to the early '90s where he was
10 talking to the folks at Interior, got a good idea of what they
11 could do as far as an accounting and what they couldn't do. And
12 I think he can offer a lot of unique history as to what went in
13 to the 1994 act, which is one of our burdens. One of the
14 burdens you placed on us on many of those exclusions, I think he
15 can address.

16 So Your Honor, we would be happy to go ahead and
17 proffer that testimony, and he's available if the Court wants to
18 hear his testimony.

19 THE COURT: All right. Thank you.

20 Plaintiff has moved in limine to preclude the testimony
21 of experts for whom defendants only provided a rebuttal report.
22 Let's see. That's 3419.

23 MR. KIRSCHMAN: I believe it's 3410, Your Honor. Our
24 opposition may be 3419.

25 THE COURT: You're right. Susan Hinkins, Caren Dunne,

1 Edward Angel, Alan Newell, and Joseph Langbein. Well, I think
2 we've discussed all but Langbein, have we not?

3 MR. HARPER: Yes, Your Honor. But in a slightly
4 different context. If I could speak to this motion.

5 During the July 9th pretrial conference, as Your Honor
6 will recall, defendants' counsel was making a presentation, and
7 Your Honor mentioned at that time - and I'll quote for the
8 record - "I think both sides are entitled to know what the term
9 rebuttal is really, really narrow term, and the actual incidence
10 of rebuttal testimony or expert testimony in trial is, I won't
11 say rare, but unusual. So calling somebody rebuttal expert to
12 come back and deny what somebody else said, that is not
13 rebuttal. Rebuttal is something different. It's more narrow
14 are. It is to respond to something that is new and that is
15 unanticipated," and so forth.

16 THE COURT: I said that?

17 MR. HARPER: Yeah.

18 THE COURT: I was right.

19 MR. HARPER: And Your Honor, we fully concur. And
20 that's why defendants withheld their reports in their initial
21 stage, and they filed only rebuttals on issues that are basic
22 issues to the four questions before the Court during this trial,
23 fundamental issues. And nothing in there is new, nothing in
24 there is unanticipated. As we set forth in our motion, example
25 after example for each of these witnesses where they can't

1 possibly be new.

2 Ms. Hinkins, for example, talks about --

3 THE COURT: What is there in any of these reports that
4 is new and surprising and would prejudice you by letting them
5 testify?

6 MR. HARPER: Well, Your Honor, the point being is that
7 we received them so late, and we can't respond to them -- we
8 were unable to respond to them with our own rebuttals because
9 they filed it well after the point that they should have filed
10 it. Indeed, we agree with what defendants' counsel said at the
11 time, which early disclosure is good disclosure.

12 And they have prejudiced us, because we have now had
13 less time than they have had to prepare for this trial and to
14 have these witnesses come forward and be prepared to know what
15 they were going to say.

16 That is why, Your Honor -- I expect Your Honor included
17 the dates that it included for when we would turn over initial
18 reports as opposed to rebuttal reports. Plaintiffs comported
19 with that, defendants did not, and we're prejudiced because of
20 it.

21 THE COURT: Well, so far the prejudice you've
22 identified is you haven't had as much time. You know all these
23 witnesses anyway, don't you? You know what they're going to
24 say?

25 MR. HARPER: Well, a number of these witnesses we've

1 never heard from before; Hinkins, for example, Ms. Dunne for
2 another. And they're expanding somewhat the scope of what
3 they're testifying to -- the others are expanding the scope of
4 what they're testifying to before.

5 This also handcuffed our ability to do motions in
6 limine, to attack what they're saying --

7 THE COURT: Hear, hear.

8 MR. HARPER: And that's a fair point.

9 However, the fact of the matter remains that there is a
10 reason for both parties to play by the rules that this Court
11 sets forth. We played by the rules --

12 THE COURT: Understood. Let me hear from the
13 government.

14 MR. HARPER: -- the other side did not.

15 MR. KIRSCHMAN: Your Honor, we certainly played by the
16 rules. The Court discussed, as counsel has said, rebuttal
17 testimony during the course of trial when a witness would be
18 presented to address only surprise that arose out of testimony
19 during the trial.

20 At the same time, the Court clearly, in its scheduling
21 order, indicated that the designations of responding experts
22 were due on September 17th.

23 Because of both the discussion at the trial -- I'm
24 sorry, at the status conference, and the Court's order where it
25 referred to the designation of responding experts, you may

1 recall that while it wasn't on the record, we had a phone
2 conference on motion for enlargement, and I also personally
3 raised this issue regarding the fact of the difference between
4 responding expert and a rebuttal expert who would be offering
5 testimony during the course of the hearing.

6 To put it simply, until you have an expert report,
7 there's nothing to respond to. Susan Hinkins, for one, has
8 provided a point-by-point response to Dwight Duncan's expert
9 report. Until we had that report and could see what he was
10 addressing and how he addressed it, there was absolutely no
11 basis to provide a responsive report to Dwight Duncan.

12 Dr. Hinkins addressed his report at the first
13 opportunity, and timely met the schedule set by the Court in the
14 scheduling order.

15 Likewise, John Langbein offered a responsive report.
16 At 1.5, for example, plaintiffs' designated expert on Trust
17 matters, Robert Vaughn, didn't even appear. They had no one
18 like Mr. Vaughn testifying. There was no way we could have
19 anticipated Robert Vaughn's expert report, and when we saw it,
20 John Langbein was brought in to prepare a responsive report.

21 The same is true for Ed Angel and Alan Newell and Caren
22 Dunne. Ms. Dunne responds to a specific critique and criticism
23 of the Accounting Standards Manual and how that document is used
24 during the performance of the historical accounting project.
25 There's no way that these people could know beforehand what the

1 allegations or the claims of plaintiffs' experts would be until
2 the report was submitted.

3 And that is why these experts prepared and provided
4 their expert reports in accordance with the scheduling order.
5 That is, they provided them on September 17th. But we talked
6 about this. We have played by the rules, and we even sought
7 clarification on the rules. And that's a point I can't stress
8 enough. Thank you.

9 MR. HARPER: Your Honor, that's a nice story, it's just
10 not the reality. The reality is, after you said what you said -
11 and I read what I read into the record earlier, Your Honor -
12 defendants' counsel said, "Well, I certainly appreciate that,
13 Your Honor, I'm familiar with this sort of practice that you're
14 referring to. It is certainly not our expectation, our plan to
15 hold expert backs (sic) for rebuttal."

16 I mean, the sort of notion that it wasn't absolutely
17 crystal clear to both parties --

18 THE COURT: Is this September 17th date for rebuttal or
19 for responsive? Refresh my recollection about what we set up,
20 what were the rules for rebuttal versus responsive experts.

21 MR. HARPER: Your Honor, we see the responsive and
22 rebuttal as basically responding to the other experts. And the
23 way it's prejudiced plaintiffs is that our experts were unable
24 to prepare reports to respond to people like Mrs. Hinkins. And
25 she puts forward things that are clearly, Your Honor, just --

1 the order says, Your Honor, "designation of responding experts
2 are due." So responding experts, rebuttal reports, you know, I
3 think these are the same things. These, I think in part, are
4 called rebuttal reports.

5 THE COURT: Well, Mr. Harper, I suppose by this point
6 in this hearing, at a quarter after 5:00, it's not going to
7 surprise you to hear this. But my ruling on this is going to
8 be, I'm not going to exclude these witnesses.

9 What I will do, what I will do is to afford you and
10 your colleagues whatever extra time you need to prepare yourself
11 for these witnesses, or whatever additional time you need to
12 give your experts an opportunity to respond to the responding
13 witnesses. But am I going to preclude the witnesses from
14 testifying? No.

15 MR. HARPER: And Your Honor, to the extent that we
16 would like to bring up an expert as a rebuttal expert that we
17 have not yet identified in order to respond to their late-filed
18 rebuttals, may I presume we could do that as well? Because
19 that's the only way to cure the prejudice.

20 THE COURT: In theory that would work. Let me see what
21 you propose and what they object to when you propose it. But
22 yes, I would think that a cure for this problem, if they have
23 late-named witnesses, would be to give you time and space to
24 present a response to their response.

25 MR. HARPER: Thank you, Your Honor.

1 MR. KIRSCHMAN: Your Honor?

2 THE COURT: Mr. Kirschman?

3 MR. KIRSCHMAN: We have two administrative matters we
4 wanted to raise, and not knowing your schedule, I wanted the
5 Court to be aware of that.

6 THE COURT: I'm going to stay here until we're
7 finished.

8 MR. KIRSCHMAN: Thank you, Your Honor.

9 THE COURT: Nobody will be surprised that my ruling on
10 this one, plaintiffs' motion in limine to preclude defendants'
11 expert testimony, reports, and other information, to the extent
12 they rely on unreliable data, denied, goes to weight. You tell
13 me the data is unreliable; prove it, show it to me, demonstrate
14 it by cross-examination or otherwise, and I won't give much
15 weight to anything that is based on unreliable data.

16 The Department of Interior wants leave to file their
17 Status Report to the Court Number 31 on or before February 1st,
18 2008, because all of the people who are working on that report
19 will be involved in the trial.

20 Plaintiffs say they intend to oppose this motion. You
21 can oppose it. I'm inclined to grant it, but I won't rule until
22 I see what your opposition is.

23 Now, there is -- I think that's all the motions in
24 limine, unless you -- unless I haven't dealt with the four or
25 five that you filed at 2:00 o'clock this afternoon.

1 MR. KIRSCHMAN: Your Honor --

2 THE COURT: And the only other issue on my agenda has
3 to do with authentication of the administrative record. I know
4 Mr. Harper has an issue on that. And then I want to talk to you
5 about we're going to use electronic presentation in this trial.

6 Let's talk about authentication of the administrative
7 record. Mr. Harper, do you want to be heard on that?

8 MR. HARPER: Your Honor, I think we covered that
9 earlier with respect to the certification issue.

10 THE COURT: Oh, that's the certification issue?

11 MR. HARPER: Yeah, in part -- I mean, the only other
12 question, and I think it's sort of been covered as well, is to
13 the extent that they're utilizing a specific document that maybe
14 has handwriting on it or something like that, there has to be
15 some authentication of certain documents within the AR if
16 utilized for purposes other than merely what an AR is
17 established for. For other evidentiary purposes, it's obviously
18 got to be competent evidence, then.

19 And so we would obviously reserve any objections at the
20 time, of course.

21 THE COURT: All right. Now, while you're up, there are
22 lots of documents in this case, and I suppose a lot of them are
23 on this disk. May I assume that both sides are going to have
24 the capability to select documents and present them on a video
25 screen rather than pass a lot of hard copy around?

1 MR. HARPER: Your Honor, I'm not certain we have that
2 capability. I'm not sure if the government does, but we can
3 check and get back to you on that point. I'm just not sure one
4 way or the other.

5 THE COURT: Well, one way or another -- I mean, the
6 highest and best use of all this technology we have in this
7 courtroom is for -- it may simply be too late for you to do
8 this, but the highest and best use of all this technology is for
9 you to have all the documents you intend to use on a CD, and
10 some bright young person sitting there at a laptop who can call
11 them up and zoom in on what you want and highlight what you want
12 and demonstrate it on the screen.

13 You know, there are lots of snazzy things being done in
14 courtrooms these days that really, really enhance everybody's
15 ability to deal with documents, and I would hope that both sides
16 would at least try to do that.

17 If you can't do it, at a minimum you've got to learn to
18 use that little device right there, which is the video
19 presenter. And the reason we use that one is because frankly it
20 saves a lot of walking back and forth to show documents to
21 witnesses. You can show a document to a witness on screen, have
22 the witness identify it on screen, talk about it on screen, and
23 you don't have to do this, "I hand you this, please identify
24 it," and walking back and forth. Believe it or not, that takes
25 a lot of time. It's good exercise, but it takes a lot of time.

1 So I will expect you at least to be using the video
2 presenter. I would hope that you would ratchet up another
3 generation, but if you can't, you can't.

4 MR. HARPER: Your Honor, we'll do our best. We'll talk
5 about what we can accomplish on the IT side. I'm not the person
6 to speak to on that issue. And then we'll get back with
7 Your Honor.

8 THE COURT: If any side needs any assistance with
9 figuring out how this courtroom is wired or how you can connect
10 to all the equipment here, the man to contact is named John
11 Cramer, spelled with a C. Mr. Cramer is our courthouse
12 technologist, and he's the guy who knows all about sound and
13 computers and video presenters and screens and so forth.

14 MR. QUINN: Your Honor, if I may on that, we had our
15 contractor on the documents contact Mr. Cramer, and
16 unfortunately he's now on leave, as I understand it, from today
17 until the 9th of October.

18 If there's any other person -- I hope that's not an
19 omen, Your Honor. But if there's anyone else that Your Honor or
20 chambers could suggest that we could talk to in that respect, we
21 would appreciate that.

22 COURTROOM DEPUTY: If you would call 354-3218, that is
23 Mr. Blend. He's in charge of OIT, so he'll be able to help you
24 out.

25 MR. KIRSCHMAN: How do you spell his name?

1 COURTROOM DEPUTY: Last name is B-L-E-N-D.

2 MR. KIRSCHMAN: Thank you, Your Honor.

3 THE COURT: He'll probably sent you to somebody called
4 Tommy Hilton, who you can probably ask for Tommy Hilton and --
5 don't you think Tommy Hilton is probably handling this stuff in
6 Cramer's absence?

7 COURTROOM DEPUTY: More than likely.

8 THE COURT: You had some administrative matters?

9 MR. KIRSCHMAN: Yes, Your Honor. But one point. It
10 might be perfunctory, but I believe you did not address our
11 motion in limine related to Mr. Homan, Paul Homan.

12 THE COURT: No, I didn't. And do you want to remind me
13 of what that's all about?

14 MR. KIRSCHMAN: Mr. Homan is a proposed expert witness
15 who has been identified by plaintiffs. He testified in 2003; we
16 have sought to exclude his testimony based on the fact that he
17 cannot be of assistance to the Court.

18 His opinions that he expresses both in his 2003 report
19 that he adopted in 2007 are contrary to the law of this case,
20 and therefore cannot assist the Court in deciding a material
21 matter.

22 Mr. Homan 's premise is that a
23 transaction-by-transaction reconciliation is required for a
24 proper historical accounting, and now that is in conflict with
25 the Court of Appeals' determination that in fact statistical

1 sampling is appropriate, and certainly within the discretion of
2 the Secretary of the Interior.

3 THE COURT: Is Mr. Homan the lawyer from
4 North Carolina?

5 MR. KIRSCHMAN: No. That is Robert Vaughn, Your Honor.

6 THE COURT: Oh, okay.

7 MR. KIRSCHMAN: Mr. Homan is a former special trustee
8 who testified in 2003.

9 He also believes that Interior -- one of his opinions
10 is that Interior is wrong in considering appropriations, and the
11 level of appropriations, in determining how the accounting
12 should be performed. That now is also clearly contrary to law.
13 It's contrary to the Court of Appeals, and therefore opinions he
14 has to offer related to the historical accounting cannot assist
15 the Court under the rules of evidence.

16 THE COURT: How long do we expect Mr. Homan's testimony
17 to take?

18 MR. KIRSCHMAN: Mr. Homan testified for seven days in
19 2003.

20 THE COURT: Well, nobody is going to testify for seven
21 days in my courtroom. Nobody.

22 MR. KIRSCHMAN: I do not recall the hours.

23 MR. HARPER: I'm not sure, Your Honor. Eight hours is
24 what he's scheduled for. Maybe it's even less than that, four
25 hours, maybe. I don't know.

1 Could I speak briefly to the issue, though?

2 THE COURT: Sure.

3 MR. HARPER: First of all, you denied summarily the
4 government's motion on Mr. Fitzgerald, which is virtually
5 identical to their motion on Mr. Homan. On the specific issues
6 that they raised, I mean, clearly we disagree. The government
7 reads Cobell XVII as some kind of indication that they can use
8 statistical sampling for any purpose in which they determine.
9 Clearly, that's not the case.

10 Your Honor, I was told it's eight hours that he is
11 designated as a witness for, and he did file an expert report
12 and we designated him for eight hours.

13 THE COURT: By the way, have I said anything to you-all
14 about qualifying experts?

15 MR. HARPER: No, not that I recall, Your Honor.

16 THE COURT: There is no jury here. Give me a break on
17 qualifying experts. Give me a CV, offer him for voir dire, and
18 forget about spending an hour telling me about all the wonderful
19 things experts have done. I don't want to hear it, period. I
20 want CVs, and I just -- I mean, all of you who are trial lawyers
21 understand what I'm talking about. It's just not necessary,
22 particularly not necessary in a bench trial.

23 I mean, you may want to impress a jury with it. You're
24 not going to impress me with it. I want written qualifications
25 for experts, period. I think I just cut Mr. Homan down from

1 eight hours to six hours. Right? Okay.

2 MR. HARPER: We thought we would qualify him in about
3 15 minutes, so maybe seven hours and 45 minutes, Your Honor.

4 The other point on these witnesses, a number of our
5 witnesses have already been previously qualified for aspects, or
6 most of the things that they're going to be testifying with
7 respect to in this trial. Certainly Mr. Homan falls in that
8 category.

9 THE COURT: Well, as much respect as I have for
10 Judge Lamberth, as I hope I've stated on many, many occasions, I
11 do not consider previous qualification in this case to be law of
12 the case.

13 On the other hand, I don't want to have a big struggle
14 about qualifications of experts. I'm frankly pretty easy on
15 that. I mean, as far as I'm concerned, the issue isn't
16 qualification, the issue is whether I like him, believe him,
17 trust him, think that they're telling me anything important.

18 MR. HARPER: And Your Honor, that's perhaps the best
19 reason Mr. Homan, the former special trustee, the first special
20 trustee appointed and confirmed by Congress, would be a very
21 valuable witness to talk about many of the things that have gone
22 on both at the department, and his expert views with respect to
23 how to discharge the Trust responsibilities.

24 THE COURT: I'm going to deny the motion in limine, but
25 it gives me an opportunity to say one more thing about the

1 conduct of this trial.

2 You know the declension of the noun "steadfast." It
3 goes like this: I am steadfast, you are obstinate, he, she, or
4 it is pig-headed. I like to think of myself as a quick study;
5 you may think of me as impatient. But I, in a bench trial, have
6 the authority, and expect to use it, to interrupt testimony of
7 witnesses to get more directly to what I need to hear from the
8 witnesses.

9 And you can all anticipate that, and I hope I will do
10 it politely. I may not always be perceived as doing it
11 politely, but I really am going to intend to move this trial
12 along very quickly. The notion of eight hours of any kind of
13 testimony just sort of gags me. Most witnesses in this case I
14 think can tell me what they need to tell me in a couple of
15 hours. I can't imagine an eight-hour witness.

16 You will all try to teach me differently, but we are
17 going to move this case along a lot faster than you have in
18 previous cases, I think.

19 So I hope I'm properly respectful, but I may be
20 somewhat preemptory in dealing with all of your witnesses. Fair
21 warning.

22 MR. HARPER: Thank you, Your Honor.

23 THE COURT: Okay. Yes, sir?

24 MR. KIRSCHMAN: I had two administrative matters. One
25 was addressing our need to review the courtroom for audio-visual

1 equipment and make sure ours was compatible, and that's been
2 addressed.

3 THE COURT: There you are.

4 MR. KIRSCHMAN: The second is an issue regarding
5 Mr. James Cason, the Associate Deputy Secretary who we intend to
6 call as our first witness.

7 Mr. Cason is expected to talk about the 2007 plan to
8 complete the historical accounting. Mr. Cason was delegated the
9 responsibility of making the decisions related to the plan and
10 the work that would go forward, and he is expected to testify
11 regarding the considerations he made regarding the scope of the
12 plan and the work that has been done that led to his decisions
13 between 2003 and 2007.

14 Mr. Cason, though, is also the chairman of the Wildland
15 Fire Leadership Council, which has an annual meeting on
16 October 10th and 11th.

17 THE COURT: Well, I guess he won't be your first
18 witness.

19 MR. KIRSCHMAN: Well, he is available on the 11th,
20 Your Honor, for this trial, but as the chairman, he is
21 responsible for opening it.

22 On the 10th we will be giving opening statements; what
23 we ask is that we be permitted to present Mr. Cason beginning on
24 the morning of the 11th.

25 THE COURT: You can present him beginning on the

1 morning of the 11th, and we'll interrupt whatever you've got,
2 but I am not going to hear a whole day of opening statements,
3 counsel. I would expect you to start calling witnesses by the
4 end of the morning, late in the morning, on the 10th.

5 So I'm sorry if Mr. Cason can't be your first witness,
6 but we're starting on the 10th.

7 MR. KIRSCHMAN: Very good, Your Honor.

8 THE COURT: Anything else, counsel? Mr. Gingold?

9 MR. GINGOLD: Yes, I have a couple of points.

10 Plaintiffs are excluding from their proposed exhibit list item
11 4408. Based on a meet and confer with the defendants, that item
12 should not be on the exhibit list.

13 So with an agreement with the government, we just
14 wanted to inform the Court that that would be excluded.

15 THE COURT: Thank you. Thank you.

16 MR. GINGOLD: The other thing I wanted to mention to
17 Your Honor, even though the issue has already been disposed of,
18 we filed our opposition to the government's motion to return the
19 Morgan Angel report. That was the one that was deemed -- that
20 they said was privileged and they wanted it returned.

21 We filed with this Court under seal yesterday, but in
22 error we did not serve the government yesterday. Mr. Kirschman
23 called me this morning and asked for it, and as soon as he told
24 me about it, I did whatever I could to both e-mail it to
25 Mr. Kirschman and provide it in hard copy.

1 I want to tell this Court we were remiss. I don't know
2 how it happened, but it won't happen again.

3 THE COURT: All right. Thank you. We start at 9:30 in
4 the morning, we break about 12:30 for lunch, we never take more
5 than a one-hour lunch. You know, you could say there is no such
6 thing as a one-hour lunch. It may turn into one hour and
7 five minutes or one hour and 10 minutes, but we strive for a
8 one-hour lunch. And we go until about 5:00 o'clock. We take
9 one break in the middle of the morning and another one in the
10 middle of the afternoon of about 15 minutes.

11 If you do the math, you'll realize that's about
12 six hours of testimony a day. That's hard work. I will expect
13 counsel on both sides to do two things -- lots of things. But I
14 will expect them to give each other the courtesy of giving ample
15 advance notice of who their next witnesses are going to be, and
16 I will expect counsel to have another witness ready when one
17 witness is finished.

18 What I really don't find acceptable is, "Your Honor,
19 we're out of witnesses today, or our witness is" -- "we called
20 him and he's an hour away," or something like that. There's an
21 awful lot of time lost with that, so I expect both sides to have
22 their witnesses ready.

23 Is there anything else we need to talk about today?

24 MR. HARPER: Yes, Your Honor, there's one other item.

25 It's been the custom in prior trials in this case that

1 we did not need to subpoena contractors of the United States,
2 and we just wanted to clarify that that was the case for this
3 trial as well.

4 THE COURT: Right, counsel? Any problem with that?

5 MR. KIRSCHMAN: May I confer?

6 (OFF THE RECORD.)

7 MR. KIRSCHMAN: No issue with that, Your Honor.

8 MR. HARPER: Thank you, Your Honor. That's all we
9 have.

10 THE COURT: Thank you, everybody. We'll see you at
11 9:30 in the morning on the 10th of October.

12 (Proceedings adjourned at 5:36 p.m.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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.

SIGNATURE OF COURT REPORTER

DATE