

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285  
et al. :  
Plaintiffs :  
v. : Washington, D.C.  
: Wednesday, June 25, 2008  
DIRK KEMPTHORNE, Secretary :  
of the Interior, et al. :  
Defendants : 2:00 p.m.

TRANSCRIPT OF EVIDENTIARY HEARING  
DAY 10  
BEFORE THE HONORABLE JAMES ROBERTSON  
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

1 THE COURT: I have been very impressed with the high  
2 quality of the lawyering in this case on both sides, but no --  
3 the first honors in this courtroom go to the two young men who  
4 have been operating the laptops. And so in their honor, we're  
5 going to have a little music. I think we go -- it takes just a  
6 minute to stream. If you don't know bluegrass, then this will  
7 go completely over your head.  
8 (Audio played in open court.)  
9 THE COURT: Now, we are gathered together for what I  
10 think is going to be the last court appearance in this case for  
11 a while. And I was serious when I said that I enjoyed the  
12 lawyering in this case. You've all done a terrific job. I do  
13 have some questions. You have some answers of your own, but let  
14 me just go over two or three issues that are in my mind. And I  
15 don't mean by any means to foreclose anything you want to say to  
16 me. I want to hear whatever you've got to say by summary or  
17 argument in this case. And these are not in any particular  
18 order.  
19 But I need some clarification from both sides about the  
20 Osage money. And by the way, if the representative of the  
21 Osage Nation is here, when counsel for both sides are finished  
22 arguing, I will give you an opportunity to speak on the subject  
23 if you wish to.  
24 MR. GODFREY: Thank you, Your Honor.

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

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1 THE COURT: I don't think I quite fully understand what  
2 use the government is making of the Osage data, and for what  
3 reason the government calculates the Osage money moving through  
4 the IIM system. Is it solely to offset or to respond to the  
5 plaintiffs' use of it? Does the Osage money belong in the  
6 calculation at all, from the government's point of view?  
7 For the plaintiffs, I need to know what evidence there  
8 is in this record, if any, that Osage headright share money  
9 actually entered into or was supposed to enter into the IIM  
10 system. I know that there are Osage IIM accounts, but I'm  
11 talking about the Osage mineral rights money that is generally  
12 called headright money. Have the plaintiffs presented any  
13 evidence that those headright shares actually entered the  
14 system, or are they merely assumed to have, or is the argument  
15 that they should have even if they didn't?  
16 And I suppose I may hear from the Osage Nation as part  
17 of this argument this afternoon what their view is about what  
18 role, if any, Osage headrights money should play in this whole  
19 analysis of withheld or not properly paid out IIM monies.  
20 Interest. Now, we all know that anything we call  
21 interest is something of which I probably don't have  
22 jurisdiction, so the plaintiffs have been talking throughout  
23 about benefit to the government. But there is also an interest  
24 calculation or an interest number, properly so named in this  
25 case by virtue of the statute, that allows for the award of

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1 interest to the Indians. And what I need to know from the  
 2 government is how they read that statute, and what if anything  
 3 does it have to do with the issues that are before me now in  
 4 this case.  
 14:16:59 5 And for the plaintiffs I'm interested in knowing  
 6 whether there is any evidence that the government made a  
 7 specific investment of Indian funds for its own benefit, or is  
 8 the theory that it inherently benefits from the retention of  
 9 funds, and are the plaintiffs asserting that an award of actual  
 14:17:31 10 interest by virtue of the statute is appropriate in this case?  
 11 The CP&R data - that is, the exact use of the CP&R data  
 12 in this case - remains something of a mystery to me. I need to  
 13 understand better than I do why the parties disagree about the  
 14 percentage of CP&R checks that were cashed. The defendants in  
 14:18:11 15 their brief say only about two-tenths of one percent of the  
 16 dollars were not cashed; the plaintiffs say that number is  
 17 closer to six percent. And I need to know a little bit more.  
 18 Maybe you can remind me of where it is in the record where those  
 19 numbers come from.  
 14:18:34 20 For the defendants, as I understand the testimony, it  
 21 looks like NORC relied on or actually directly used information  
 22 which your own experts said would systematically underreport  
 23 receipts. I'm talking about the 1906 Sundry Act in which  
 24 Dr. Angel said it would underreport receipts. And I understand  
 14:19:03 25 that NORC used that number anyway. If that's conceded, then  
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1 disbursement rates, even at points where there are data, don't  
 2 seem to mesh with the data? It's a calculated rate, but I  
 3 wonder if all the actual data that is available has been  
 4 properly factored into the disbursement rate that you've  
 5 calculated.  
 14:22:01 6 And at a more general level, I want to hear from the  
 7 plaintiffs about whether they think their reliance, almost total  
 8 reliance on the CP&R data for a disbursement rate, is really  
 9 quite plausible. What corroborating evidence is there  
 10 suggesting that only three-quarters of the beneficiaries' money  
 11 was paid out to them; would auditors have given even qualified  
 12 opinions if there were any evidence that upwards of 25 percent  
 13 of the monies collected and intended for beneficiaries were  
 14 disappearing.  
 14:22:56 15 I've got a couple more questions, but I think I'm  
 16 probably sort of overloading you now anyway. And they're not  
 17 very well organized. I'm waiting for you to organize them.  
 18 Who goes first, Mr. Dorris, Mr. Smith?  
 19 MR. SMITH: Your Honor, did you want to address  
 14:23:16 20 exhibits now or wait until after the closing arguments? We had  
 21 not introduced the exhibits at the close of evidence.  
 22 THE COURT: Are there disputes about the exhibits?  
 23 MR. SMITH: We've consented to all of the defendants'  
 24 exhibits. Apparently the defendants object to two of our  
 14:23:27 25 exhibits.  
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1 what is the effect? What's the bottom line effect?  
 2 Also, it appears that some of the data from CD&L  
 3 regarding receipts and disbursements from the general ledger has  
 4 some duplicate numbers, no numbers for some years. What's the  
 14:19:34 5 effect of that? Or are you sticking by the duplicates? Are the  
 6 duplicate numbers just appropriate estimates? What is your  
 7 position on those?  
 8 The Morgan Angel estimate of Tribal IIM of 10 percent  
 9 for many years and 15 percent for some years struck me when I  
 14:20:01 10 heard it, and still strikes me as a big round number, and I'm  
 11 not sure whether the government is sticking to that number in  
 12 the face of the plaintiffs' argument and evidence that the real  
 13 number is more like two percent. Has the government done any  
 14 recalculation of that?  
 14:20:26 15 Now, there's some puzzled faces at defense table, and  
 16 it may be puzzled because I don't understand what the evidence  
 17 is. And if I don't, I'm happy to be re-educated.  
 18 A big question for the plaintiffs is whether they are  
 19 effectively conceding that the CP&R data, which is the major  
 14:20:59 20 premise of their disbursement rate, does not include amounts  
 21 disbursed to tribes, third parties, so called stakeholders, and  
 22 others who do not have IIM accounts. And if that is conceded,  
 23 don't you have to concede that the calculated disbursement rate  
 24 systematically understates total estimated disbursements?  
 14:21:34 25 And what do you do with the fact that your CP&R  
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1 THE COURT: And which two do the defense object to?  
 2 MR. SMITH: Exhibit 65, which was Mr. Pallais' document  
 3 where he had about 200 reports and you could hyperlink to see  
 4 the actual report, and Exhibits 58 and 124. It had the same  
 14:23:46 5 document number, excuse me. And that was Mr. Kehoe's report on  
 6 IIM banking.  
 7 THE COURT: What's the objection?  
 8 MR. SIEMIETKOWSKI: And fortunately, Your Honor,  
 9 because of cooperation with counsel, there are indeed only two  
 14:24:07 10 objections.  
 11 THE COURT: You said unfortunately?  
 12 MR. SIEMIETKOWSKI: I said fortunately.  
 13 THE COURT: I would have to play some more banjo music  
 14 to you.  
 14:24:17 15 MR. SIEMIETKOWSKI: Or Cumbayah.  
 16 Exhibit 58, which is also Exhibit 124, is a 2001 draft  
 17 report authored by Dr. Kehoe on IIM banking policy. It was  
 18 offered by the defense at the 2003 Phase 1.5 trial, and not  
 19 received into evidence because it was a draft report.  
 14:24:39 20 Likewise, it is still a draft report, now seven years  
 21 old, and that's why we object to it.  
 22 THE COURT: What's that number?  
 23 MR. SIEMIETKOWSKI: It is marked as both 58 and 124.  
 24 THE COURT: All right. And what about 65?  
 14:24:56 25 MR. SIEMIETKOWSKI: Your Honor, we oppose admission of  
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1 PX-65, which is the compendium of documents that was prepared by  
 2 plaintiffs' counsel.  
 3 THE COURT: Oh, the compendium, yes.  
 4 MR. SIEMIETKOWSKI: Right. And filed on May 30th in  
 5 opposition to our motion in limine. In our view it is a biased,  
 6 slanted view of what the cited documents represent and should  
 7 not be admitted for that reason. If the document were admitted,  
 8 Your Honor, plaintiffs could cite to it without any reference to  
 9 the underlying documents that provide context to more accurate  
 10 portrayal of the events at the relevant time. This is of  
 11 special concern for defendants upon appeal, where the Court will  
 12 not necessarily have heard the context surrounding the  
 13 compendium as Your Honor has.  
 14 Now, of course, Your Honor, as I've discussed with  
 15 counsel, we have no objection to plaintiffs admitting each and  
 16 every one of the documents cited within the compendium in their  
 17 entirety, and they can quote from those in their filings as we  
 18 can as well. In our view, though, the compendium itself, PX-65,  
 19 should not be admitted.  
 20 THE COURT: All right. Well, I'll receive the  
 21 compendium, but on the understanding that it is essentially a  
 22 listing of selected quotations from longer documents. And if  
 23 the government feels the need to cite any larger part of the  
 24 context, either in opposition or if it, heaven for fend, goes to  
 25 the Court of Appeals, you may feel free to do so. In other  
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1 really two issues, primary issues in front of us to address.  
 2 One has to do with the amount of money that has come into the  
 3 Trust that remains and that the defendants cannot account for or  
 4 show has been distributed; the second has to do with the benefit  
 5 the government has received from those funds, or the specific  
 6 relief to which the plaintiffs are entitled as a result of the  
 7 statutory duty to pay.  
 8 Your Honor, with respect to the restitution of  
 9 plaintiffs' money, I want to visit with you on revenues and  
 10 distributions, in that order. Now, with respect to the  
 11 restitution of plaintiffs' monies and dealing with revenues,  
 12 there are really four topics that I want to address with you.  
 13 The first is the method of estimating the data points  
 14 and adjustments made to those, Tribal IIM and Osage. The method  
 15 of estimating, Your Honor, really comes down between an approach  
 16 that Drs. Cornell and Palmer used in terms of straight line  
 17 interpolation between points. While defendants' counsel  
 18 initially raised objections to that, their own statistician has  
 19 confirmed that that is a reasonable approach and a good model  
 20 for doing it. I would submit to you, especially as we look a  
 21 little further into the evidence, the one objection they seem to  
 22 make had to do with during the Depression time frame, where the  
 23 plaintiffs in the initial data in their model had very few data  
 24 points, so a straight line between the points was objectionable  
 25 to the defendants. Now, with many more data points during that  
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1 words, it will be received essentially as a surrogate for the  
 2 longer documents that they're quoted from.  
 3 And I'll sustain the objection to 58 and 124. It's a  
 4 draft.  
 5 MR. SIEMIETKOWSKI: Those are the only two objections  
 6 we had, Your Honor.  
 7 MR. SMITH: Your Honor, can we provide the list of  
 8 exhibits to the Court and have them introduced into the record?  
 9 THE COURT: Yes, of course.  
 10 MR. SIEMIETKOWSKI: For the record, we will do the same  
 11 as well, Your Honor.  
 12 THE COURT: All right. Mr. Dorris?  
 13 MR. DORRIS: Good afternoon, Your Honor.  
 14 THE COURT: Good afternoon, sir.  
 15 MR. DORRIS: I learn something new every day, and a  
 16 musical interlude before closing is certainly something new for  
 17 me.  
 18 THE COURT: Calms the nerves, doesn't it?  
 19 MR. DORRIS: It is great. Thank you.  
 20 Your Honor, I think I have anticipated most of your  
 21 questions, and I will try to weave those into my remarks, but  
 22 will pick up the list toward the end of anything I have not  
 23 covered in the outline as I have put it.  
 24 We appreciate your time and your attention and patience  
 25 during these nine days of this important trial. There are  
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1 period of time, I think that objection has been addressed and we  
 2 will discuss it. So I would submit to you that with respect to  
 3 the method of estimating missing values from the data that we  
 4 have here, that plaintiffs' approach has been validated.  
 5 With respect to Dr. Scheuren, Dr. Scheuren's own  
 6 testimony is that his model was really designed to show the  
 7 uncertainty in the data, and was not really a good model for  
 8 showing point estimates at any particular time. He testified  
 9 specifically to that.  
 10 So let me turn to the data points and the adjustments  
 11 that were made, and to talk about that. In order to put this  
 12 into context, I want to look for a minute at what the  
 13 differences were when we came into court at the start.  
 14 Plaintiff Exhibit 41 initially showed revenues of about  
 15 \$15.1 billion. DX-371, which is the updated AR-171, shows  
 16 revenues of 14.3 billion, but that contains approximately a  
 17 billion dollars in interest. So when you compare apples to  
 18 apples, there's about a billion, nine difference between the two  
 19 revenue totals to begin with, not including interest.  
 20 Now, that gap quickly closed during the course of the  
 21 case. You will see where the parties were initially, at 15.13  
 22 billion and 13.24 billion, which was the defendants' number  
 23 without interest. But Dr. Scheuren, as he sat and listened to  
 24 the testimony of Michelle Herman and we looked at the CD&L  
 25 summary of the data between 1972 and 1985 alone, he said that  
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1 would cause him to move up to needing to use a 97-and-a-half  
 2 percent confidence factor, given all of the uncertainty, and  
 3 according to his testimony, that would add about 400 million, I  
 4 think it was \$409 million, onto the net.  
 14:32:04 5 So clearly Dr. Scheuren, recognizing the uncertainty in  
 6 the data at least during that time frame, moved toward  
 7 plaintiffs' number.  
 8 Now, Dr. Palmer, who sat and listened to the testimony,  
 9 attempted to respond, I think in a very professional way, to  
 14:32:20 10 weigh the testimony and then put it into the plaintiffs' model,  
 11 moved plaintiffs' revenue estimate about \$500 million down, to  
 12 \$14.64 billion that have come into the Trust. Now, how did he  
 13 do that? He did that by looking at the various data points and  
 14 trying to use as many data points as he could. One of the  
 14:32:48 15 exhibits that he showed us yesterday I think is very telling in  
 16 what it shows with respect to the parties' revenue totals.  
 17 You'll see here, this is Plaintiffs' Exhibit 190. You  
 18 will see Dr. Scheuren is in the red, Dr. Palmer's 189-A revenue  
 19 estimate is in the blue. You will see they move hand in hand.  
 14:33:16 20 There are some differences, but just to step back and look, you  
 21 can see that there's much greater similarity than there is  
 22 disparity.  
 23 But let's focus for a second on where there is some of  
 24 the disparity, so that can help focus our discussions about the  
 14:33:33 25 differences. If you'll look at Plaintiffs' Exhibit 190, you'll

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1 understatement of that.  
 2 1968, plaintiffs used; Dr. Scheuren did not.  
 3 Dr. Scheuren acknowledged -- when we showed him the \$121 million  
 4 number out of the audit that year, he indicated that he would  
 14:35:57 5 have used that had he been aware of it. You'll recall Dr. Angel  
 6 indicated at first on cross when confronted with it if he missed  
 7 it and he should have used it; the next day he said, no, I've  
 8 looked at it some more now and I think that was an average.  
 9 Well, that's a little bit like jumping from the frying pan into  
 14:36:15 10 the fire, because instead of just using 121 million for one  
 11 year, you could arguably use it for two or three. Dr. Palmer  
 12 continued to use 1968 based on that hard evidence of  
 13 \$121 million, did not use it for several. But I submit he  
 14 could. That goes a long way to explaining why we saw the blue  
 14:36:34 15 bar higher than the red bar in Plaintiffs' 190 during that time  
 16 frame.  
 17 The second major area of disagreement with respect to  
 18 the data points then comes from 1972, it should say, to 1995,  
 19 where the plaintiffs are using the defendants' own exhibit at  
 14:36:54 20 the last trial, AR-171, and are not accepting certain  
 21 unsupported deductions that Ms. Herman has made to them. And I  
 22 will cover that in some more detail.  
 23 From 1996 on to 2007, the two parties are using the  
 24 same data points for revenue.  
 14:37:16 25 Now let me turn and look at these two areas of revenue

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1 see in the late 19 teens, we are higher, and you will see that  
 2 that continues on past that into the '20s and '30s.  
 3 Then again you will see over in approximately the 1960  
 4 to 1970, the blue line goes higher than the red line. The two  
 14:34:02 5 track again together, but then there is some -- the blue is  
 6 higher than the red some when you get into the late 1980's. And  
 7 so this helps show where the plaintiffs' model comes out to be a  
 8 little bit higher than Dr. Scheuren's model as we turn to  
 9 address those.  
 14:34:24 10 Now, here are the data points that we used. Now,  
 11 Dr. Palmer attempted to combine all of the data points, those  
 12 that had been used initially by the plaintiffs and those that  
 13 had come up to the defendants. And in the early years, both  
 14 sides used 1909 to 1911 for the revenues. Both sides used it.  
 14:34:49 15 1915 to 1920, the complaint by the defendants was that the  
 16 reports that Dr. Cornell and Palmer had taken the information  
 17 out of included some amounts for unallotted lands. That has  
 18 been removed, so the data we believe is correct for revenue  
 19 between 1915 and 1920. And that addresses the first place that  
 14:35:14 20 we saw the red -- the blue bar going higher than the red bar on  
 21 Plaintiffs' Exhibit 190.  
 22 Now, 1923 to 1949 is one of the areas that you have  
 23 noted a question, and I want to come back to that. That is what  
 24 I would submit to you is one of the primary issues and  
 14:35:34 25 differences between us with respect to revenue and

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1 difference, 1923 to 1949 and 1972 to 1995, and explore that a  
 2 little further.  
 3 Let's talk about 1923 to 1949. This is one of the  
 4 areas of your inquiry as we started. I think I don't need to  
 14:37:41 5 cover all of this in light of the question that you have asked,  
 6 but let me say this: It is clear from the record that revenues  
 7 in the reports used by Dr. Angel and Ms. Herman and then  
 8 Dr. Scheuren in his model are understated during that period.  
 9 It is obvious because the reports are only reporting on what's  
 14:38:04 10 in the hands of the disbursing agents and does not even cover  
 11 funds paid into Treasury and that are in Treasury.  
 12 Now, how do you go about making an adjustment? There  
 13 are only two alternatives there. We can throw the data out or  
 14 we can accept that data and try to work with it in some adjusted  
 14:38:24 15 fashion. If you throw it out, we have little if any indication  
 16 between these 45 or 6 years, Your Honor. So Dr. Palmer  
 17 testified he accepted the data to try to work with it and made  
 18 an adjustment.  
 19 You can't make a perfect adjustment. You asked the  
 14:38:48 20 question yesterday, how do you deal with some of these words of  
 21 "deplorable"? How do you quantify them? It's impossible to do  
 22 it. But we're having the work -- given the state of the  
 23 defendants' documents that they've maintained, we're having to  
 24 work with what is reasonable.  
 14:39:07 25 I submit to you what Dr. Palmer did in going to

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1 Defendants' 365 and taking the 77 percent, especially in light  
 2 of the fact that Defendants' Exhibit 375 does not include any  
 3 Tribal IIM, was a reasonable approach to try to do it. At least  
 4 he showed some logic and thinking behind how to go about trying  
 5 to make that estimate. Is it perfect? Absolutely not. It's  
 6 not an exact science, but it's using the data and adjusting for  
 7 a known problem. That's what we submit is reasonable.  
 8 We don't think that there's any evidence that the  
 9 disbursements were likewise understated during that period to  
 10 any part of the degree to which the revenues are.  
 11 Now let me turn to 1972 to 1995. Those are really two  
 12 periods. The first period is 1972 to 1985. That is a period  
 13 where both in AR-171 and then in the new Defendants'  
 14 Exhibit 371, Ms. Herman used a summary that was prepared by the  
 15 accounting firm of CD&L which was a summary of some of the  
 16 reports, hard copies of the reports from the electronic data in  
 17 the electronic accounting system that was in place during those  
 18 years.  
 19 Now, with respect to revenue, there's no question that  
 20 that was incomplete. There were 89 -- 88 agencies listed on  
 21 Defendants' Exhibit 372 at pages 116 through 118. In 1972,  
 22 26 agencies were reporting they had \$132.6 million; six years  
 23 later, with almost twice as many agencies reporting, they had  
 24 419.1 million. In 1982, with 57 agencies reporting, it was  
 25 \$600 million.

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1 So there's no question in our mind but that this  
 2 summary is clearly incomplete and misses a lot of the revenue.  
 3 Were oil prices going up and what people were selling oil for  
 4 during that time frame increasing? Yes, they were. We  
 5 recognize that explains some of the increase, but we would  
 6 submit to you, as I think Michelle Herman agreed in her  
 7 cross-examination, that clearly the incompleteness of the data  
 8 was also a reason that you see this kind of increase.  
 9 Now, the adjustment that was then made by Ms. Herman at  
 10 the tail end between last October and this trial was she knocked  
 11 off \$20 million, saying that there was a beginning balance of  
 12 about 500,000 in 1984 and about 19-and-a-half-million dollars in  
 13 1985. And I stood here and asked her, can you show us anything  
 14 other than this one entry on a chart you prepared in the  
 15 documents to support that? And she could not.  
 16 And even more so, then, when we turn to the period of  
 17 1986 to 1995, the deductions -- this says 1985. It should say  
 18 1995. The deductions in the black box -- now, last October the  
 19 defendants brought Ms. Herman into court and she testified that  
 20 the database that she had been working with and manipulating for  
 21 many years showed certain figures during this same period of '86  
 22 to '95. Now she came in this time and said that essentially  
 23 \$243 million that she had testified to in revenue in October had  
 24 disappeared.  
 25 What you'll recall, Your Honor, she said this was the

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1 result of primarily transaction mapping that had been done.  
 2 Again, where is the support for that? She has none, and in fact  
 3 testified she couldn't even go back and begin to tell you where  
 4 that money went, because once they did it, they changed the data  
 5 and changed the system.  
 6 So what the plaintiffs submit to you was such  
 7 unexplained -- clearly this isn't just an opaque box, this is a  
 8 black box where these adjustments were made. Let's live with  
 9 the data that the defendants testified to last October from  
 10 those years, before they start monkeying with the electronic  
 11 database in a way they can't even explain to us or show to us.  
 12 Now, as we move forward and we look at the revenue, I  
 13 submit to you that Dr. Palmer's approach of taking the data that  
 14 we have laid out here and put into his model which Dr. Scheuren  
 15 said was reasonable ends up with a reasonable approach. There  
 16 are two more revenue parts, though, that we need to talk about,  
 17 Tribal IIM and Osage.  
 18 Now, this is one of the things you asked about, Judge.  
 19 An estimate without any foundation, any explanation, is nothing  
 20 but a guess. And that is what we have from Dr. Angel. I will  
 21 tell you that when Dr. Angel testified on direct, they didn't  
 22 even ask him about it. It was only during cross where we tried  
 23 to find out, could you explain to us the 10 to 15 percent, I  
 24 would submit to you that the testimony is that it cannot be  
 25 explained. It's just something that he told Ms. Herman. It is

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1 not evidence, it should not be used. Especially in light, as  
 2 you've referred to already today, that there was documentary  
 3 evidence that was gone over with Dr. Angel from the early 1980's  
 4 where Tribal IIM was running one or two percent.  
 5 Now, not only was that one or two percent is all that  
 6 was in Tribal IIM, but even in some of that were per capita  
 7 funds which were in a Tribal IIM account but they were really  
 8 money that was intended for individual Indians. They were per  
 9 capita funds that needed to be paid to individual Indians.  
 10 They've testified there's no way to segregate what was  
 11 Tribal IIM from what was intended for individual beneficiaries,  
 12 but they have testified and documents show that they required  
 13 all the Tribal IIM money to get out of the Trust, and that they  
 14 have succeeded in doing that. Even Ms. Herman's Defendants'  
 15 Exhibit 371 shows that money quit flowing in as Tribal IIM at  
 16 some point, and there is no evidence in the record at all that  
 17 there's any Tribal IIM money that is still left in the Trust.  
 18 None. They've not proven that there's a penny of Tribal IIM  
 19 that is left there. So I would have to tell you, I think it is  
 20 really a red herring.  
 21 Now let's go to Osage. There are about two or three  
 22 issues with Osage, Your Honor, that I would like to visit with  
 23 you on. The first is, I think I would say fairly, a legal  
 24 question, which is, is the money that's being held by Treasury,  
 25 is that money Tribal Trust money or is that money individual

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1 Indian beneficiaries'? Your question, I submit to you, is not  
2 quite the right question on that. And here's my problem with  
3 it:

4 You indicate, did the Osage headright money that is  
14:47:38 5 paid directly to headright owners, did that ever come into the  
6 IIM system? My concern is this sense of system, simply because  
7 it's been discussed a lot. There is -- as the Treasury  
8 witnesses testified, I think it was Mr. Grippo, there is no  
9 IIM system at Treasury. So what we have here are funds that  
14:48:02 10 have come into the government that are intended for, and the  
11 1906 act makes clear, are being held for the credit of  
12 individual members of the Osage tribe, and therefore those are  
13 trust funds of individual Indians being held by the government.

14 Now, the fact that they call it a Tribal account does  
14:48:30 15 not change the nature of those funds any more so than if they  
16 took all of the individual accounts today and called them Tribal  
17 accounts. They would still be for individual Indians.

18 So I would submit to you that the legal question is one  
19 to be resolved that those are being held for the benefit of  
14:48:54 20 individual Indians. And I would submit to you that this  
21 artificial sense of, quote, "system" does not exist. It's a  
22 question, what is the nature of the funds that the government is  
23 holding in trust?

24 Now, there was a question also about the number of  
14:49:16 25 headrights. It's one of those issues I had to kind of laugh

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1 disbursements. I cannot help but to look to the law for a  
2 minute when we go to talk about disbursements. Your Honor, we  
3 end up -- I don't know that I've ever been in a trial where both  
4 sides struggled as mightily as the two sides here to prove what  
14:51:38 5 the correct numbers were. That's very telling. It's very  
6 telling, but it really points to the fact that the government  
7 has done a very poor job as trustee of this trust, and keeping  
8 and performing a fundamental trust obligation of preserving and  
9 maintaining the trust records.

10 So I am sure there were many times during this trial  
11 that you felt frustrated with the parties that they could not  
12 provide you with greater precision. Well, we couldn't. We had  
13 to work with the records that were there. Let's look at the  
14 defendants' burden for a minute.

14:52:20 15 In the pretrial order you cited to an Indiana Law  
16 Review that I think sets it out very well that "The defendant  
17 has the burden of proof to establish expenses, losses, or other  
18 deductions which it has claimed reduce the amount due the  
19 plaintiff. It will be presumed that funds or property  
14:52:44 20 unaccounted for were misappropriated and expenses unexplained  
21 were not incurred, with all inferences resolved against the  
22 defendant on these issues. If the defendant claims expenses but  
23 fails to support these claims without adequate evidence, the  
24 plaintiff recovers the gross amount proven because the defendant  
14:53:04 25 has failed to meet his burden of proof."

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1 about. Ms. Herman gave us certain figures on the Osage early  
2 on; she multiplied all the Osage per shares by 2,229, which is  
3 the number of headrights that got established in 1908. So from  
4 1880 through 1907, she used 2,229. That's, quite frankly, the  
14:49:47 5 same thing that the plaintiffs had done in initially preparing  
6 Attachment A, but then Dr. Angel criticized that and said there  
7 weren't that many headright owners early on. And so Dr. Palmer  
8 attempted to adjust it down, an adjustment Ms. Herman did not  
9 even make.

10 Now, it was pointed out yesterday that Dr. Palmer, in  
11 using a straight line interpolation across that time frame  
12 one year, that there were a couple hundred more headright owners  
13 in his calculations than some document Mr. Warshawsky showed to  
14 him. I will tell you that I think Dr. Palmer's was a reasonable  
14:50:29 15 effort to respond to the evidence that was provided, and as he  
16 said, if the government can show exactly how many headright  
17 owners there were during that period, those are easy adjustments  
18 that can be made in the model.

19 Now, with respect to the proof of payments outside of  
14:50:47 20 CP&R and EFT, I'm going to pause on that and come back when we  
21 talk about disbursements, because that's something that you have  
22 asked specifically about. But I would note for you that without  
23 even proof of all of these payments, plaintiffs' model has about  
24 75 percent of all of the Osage money being paid out.

14:51:12 25 Now, let me turn, Your Honor, now to talk about

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1 And these same concepts have been consistently followed  
2 in this circuit for many years. Both the *Cafritz* and the  
3 *Rosenak* case, which I've got two quotes from each and I will not  
4 read to you here, Your Honor, but in both of those cases it is  
14:53:26 5 clear both this court and the DC Circuit follow that law. It  
6 was the defendants' burden to prove with particularity what has  
7 been paid out. I will tell you, they didn't get close to doing  
8 that. There was never any proof of disbursements in terms of  
9 checks, in terms of check registers. It was at a summary level,  
10 at best.

11 Now let's move through the different issues that deal  
12 with disbursements. I will go through quickly a series, Your  
13 Honor, from Plaintiffs' Exhibit 65, the compendium, which I  
14 might indicate to you has links to all of the documents  
14:54:15 15 themselves.

16 You will see here from 1914, the government itself owes  
17 many millions of dollars for Indian monies which it has  
18 converted to its own use, and it is of interest to note that it  
19 does not know and the officers do not know what is the present  
14:54:39 20 condition of the Indian funds in their keeping.

21 Likewise, when we look further in that compendium to  
22 1929, you will see a similar quote there. And on the third line  
23 here on the screen you'll see where it's referring to that they  
24 cannot tell you about the expenditures that have been made.

14:54:54 25 Likewise, when we look further in the compendium to

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1 1952 and 1953, it again talks about problems that are had there.  
 2 And halfway through that paragraph you can see that they don't  
 3 have supporting records of receipt or disbursement. Here you  
 4 have the language of "deplorable condition" that we looked at  
 14:55:15 5 yesterday. And these are talking about the ISSDA records on  
 6 which Dr. Angel was relying.  
 7 When we look just a little further into the compendium,  
 8 as we get even closer to the modern era of 1969, we talk  
 9 about -- they address here that you do not have any effective  
 14:55:38 10 control over information flow between the Bureau's Special  
 11 Disbursing Agent in Albuquerque and the area and agency offices,  
 12 and they cannot reconcile the total assets and the total  
 13 liabilities.  
 14 And even a little further in the compendium, Your  
 14:55:57 15 Honor, as we keep this march of time going on, you see a quote  
 16 from 1982 from Plaintiffs' Exhibit 65, where in the fourth line  
 17 you see they talk about system operating deficiencies, including  
 18 inadequate controls over cash receipts and disbursements. This  
 19 is exactly during the time that we're talking about the CD&L  
 14:56:20 20 ledger that we'll talk about later.  
 21 And as we move even a little further, here we're  
 22 talking about that difference between the general and subsidiary  
 23 ledgers, where we've got \$46 million out of balance, and the  
 24 unreliability of the documents.  
 14:56:39 25 So when we talk about that it's the defendants' burden,  
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1 So let's talk about the different data points that we  
 2 have to with respect to disbursements. Here on the screen are  
 3 really four points that I want to visit with you specifically  
 4 about disbursements. From 1887 to 1922, Dr. Palmer is using a  
 14:59:01 5 disbursement rate that he calculated from the years 1909 to  
 6 1911. That comes out to a disbursement rate that I think is  
 7 approximately 77 percent. It's got something after the 77, it  
 8 may be 77.3, but approximately 77 percent. That's the best we  
 9 could do during that period.  
 14:59:23 10 Quite frankly, that is consistent with -- when I was  
 11 cross-examining Dr. Scheuren, he said that yes, his model, the  
 12 way he had it all tied together in his opaque box, showed about  
 13 a 95 percent disbursement rate during that period, but he would  
 14 agree that 1909 to 1911 would be the best indication of the  
 14:59:48 15 disbursement rate during this period. We've applied it on to  
 16 1922. I would say that may be longer than my question to  
 17 Dr. Scheuren, but I would submit to you that's the best we can  
 18 do with the data we have at that period.  
 19 Now, we accepted the disbursement rate that was from  
 15:00:08 20 1923 to 1949. There was an adjustment made over on the revenue  
 21 side of that data that I've talked about, but we've accepted the  
 22 disbursement rate that was there. Were there disbursements out  
 23 of Treasury during that period? There's no evidence of that.  
 24 We don't know. We tried to adjust the revenue side, I think  
 15:00:28 25 Dr. Palmer tried to adjust it in a conservative fashion, and so  
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1 and then we talk about the unreliability of the documents coming  
 2 from the systems over all of these years, we have to keep both  
 3 of those points in mind as we begin to look at what is fair and  
 4 right to give any credit to here.  
 14:57:04 5 As a practical matter, Your Honor, I would submit to  
 6 you that in a typical trust situation that every dollar of  
 7 revenue that has been proven or reasonably approximated by the  
 8 plaintiffs and shown would be awarded to them because the  
 9 defendant trustee has not proven the disbursements. We  
 14:57:30 10 recognize, though, that there have been some amounts paid out,  
 11 and we recognize that this court may be reluctant to apply that  
 12 standard trust law in this particular setting. So what we have  
 13 tried to do, we've tried to work with the information the best  
 14 we can to come up with something fair and reasonable.  
 14:57:50 15 But let's remember, this isn't one of those things --  
 16 we love to say what's good for the goose is good for the gander.  
 17 This is not the situation before us right now. On the one hand  
 18 we have the plaintiffs, that had no obligation to keep the  
 19 documentation, and where there are admissions in the record at  
 14:58:15 20 their summary level that we want to use as admissions against  
 21 interest against them; we're entitled to do that. But when we  
 22 come over here and we look at where the trustee is and what the  
 23 trustee was obligated to do, and they want to rely on some  
 24 unreliable summary level information to try to say millions more  
 14:58:34 25 have been paid out, they're not entitled to do that, Your Honor.  
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1 that's why there's not a difference on the disbursement data  
 2 point there.  
 3 1955, this is one where Dr. Palmer looked at the data,  
 4 it says about 66 million was disbursed, and he adjusted it  
 15:00:47 5 downward because he saw a number of problems in that report with  
 6 respect to disbursements, and therefore he applied a factor to  
 7 that to say that he does not believe that all of that was  
 8 actually disbursed out away from the Trust.  
 9 With respect to Attachment C, Attachment C, Your Honor,  
 15:01:10 10 is where the CP&R data is used to calculate actual disbursement  
 11 rates. Now, it was not just the CP&R data, though. At first  
 12 plaintiffs did not have the EFT data that is maintained on the,  
 13 quote, "PACER" system. That's not the same PACER system that  
 14 the court system uses; it stands for something else. But we  
 15:01:35 15 received that last Friday, and Dr. Palmer ran that and included  
 16 that in his calculations now. You asked a number of questions  
 17 about the PACER system and the PACER data.  
 18 Now, the first question you asked is that there is a  
 19 percentage that's set out I think in the defendants' brief that  
 15:02:03 20 quoted about two-tenths of one percent. That has to do with a  
 21 limited part of the checks that were not cashed in terms of a  
 22 limited payability data.  
 23 The data that you have and the evidence you have in  
 24 front of you now, Your Honor, is that there was a higher  
 15:02:21 25 percentage of checks that were not cashed, and that's coming  
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1 directly from the defendants' -- both the Treasury's CP&R data  
 2 itself, the exhibit that we've used, and with respect to later  
 3 data that Mr. Winters even testified about.  
 4 So I would tell you that the percentage they refer to  
 5 there, they're not comparing apples to apples. That has to do  
 6 with limited payability, and we'll try to tie that down even  
 7 tighter for you in the findings of fact that we submit to you.  
 8 Now, you asked also about the CP&R data. Now, let me  
 9 get this right. You remember the chart of Ms. Herman. When you  
 10 think about the CP&R data with the EFT data, that covers all of  
 11 the disbursements that go out to the beneficiaries, that go out  
 12 to the third parties, that go out to the stakeholders. It may  
 13 even include some disbursements to the tribes. Okay?  
 14 The whole issue that we begin to deal with when we talk  
 15 about disbursements to the tribes is this issue of transfers.  
 16 Now, the transfer issue is a very difficult one to address if  
 17 you step -- if you do not keep in mind the fundamental burdens  
 18 here. It was the defendants' burden to prove.  
 19 Now, let's deal with transfers. Your Honor, you noted  
 20 during Dr. Palmer's testimony that you thought that that may  
 21 explain much of the difference between what the CP&R data shows,  
 22 supplemented with the EFTs, and what may be in AR-171. The fact  
 23 that the government needed to prove the amount of those  
 24 transfers and who those transfers went to and why they went to  
 25 them was clear before we started this trial. Attachment A

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1 this difference between interfund and intrafund transfers. She  
 2 says intrafund transfers aren't even disbursements. Well, I  
 3 agree with her, but I also agree with her they're not transfers,  
 4 because that money never leaves the Treasury, no more so than  
 5 transfers out, these BB transfers, are just moving it to another  
 6 account and never leave the Treasury.  
 7 Now, the audits do not help the government on this  
 8 point, Your Honor. Not at all. Let's look at that. From 1988  
 9 to 1990, Arthur Andersen audited essentially BIA; from 1996 to  
 10 2007 there was an audit of what's now called OFTM by Griffin,  
 11 and at some point during those years it transferred over to  
 12 KPMG. We know that all of those are qualified audits. And this  
 13 goes right to the heart of one of your questions, which picks up  
 14 on a question that Mr. Warshawsky asked yesterday: Would an  
 15 auditor issue even a qualified opinion where he's uncertain  
 16 about the disbursements? Well, I can tell you, these auditors,  
 17 and we'll look at the quotes and we'll cite the exhibits right  
 18 here, that's exactly what they did.  
 19 But what did Interior understand these audits to mean?  
 20 Right here, what does a qualified audit mean? Interior's own  
 21 Inspector General put it this way in Plaintiffs' Exhibit 120 on  
 22 page three. Talking about the problems and conditions of their  
 23 books and records, he said, "These conditions prevented the cash  
 24 and trust fund balances and the receipts and disbursements from  
 25 being audited." He acknowledged they did not even audit the

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1 didn't give them any credit for those transfers, didn't give  
 2 them even any credit for the EFTs. Once we got our hands on the  
 3 EFT data from PACER, we've included that.  
 4 There is at best episodic, a few random situations  
 5 where they've shown disbursements out, these BB disbursement  
 6 transfers out. They have not proven the disbursements, Your  
 7 Honor. They did not meet their burden.  
 8 Now, just as soon as we talk about they can't be given  
 9 credit for those disbursements out, the question becomes, well,  
 10 what about transfers with money coming in? How can the  
 11 plaintiffs fairly take that money coming in but not acknowledge  
 12 transfers going out? Well, that's because not all transfers are  
 13 equal. Much of the money, in fact the majority of the money  
 14 that comes into trust for these individual Indian beneficiaries  
 15 comes in by way of transfers. MMS is a transfer into the Trust  
 16 for all of the oil royalties and other mineral rights that come  
 17 in.  
 18 So the fact that the plaintiffs are saying we accept  
 19 the defendants' admissions about revenues and that we are  
 20 including some transfers there, but we want to hold their feet  
 21 to the fire to prove at least with some specificity transfers  
 22 out is entirely appropriate. Judge, they knew that that was an  
 23 issue and they've not proven it at all.  
 24 Michelle Herman, when she testified about transfers --  
 25 and to clarify the testimony, she said intrafund. She developed

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1 receipts and disbursements.  
 2 If we look on further at that same exhibit, which is  
 3 the 1999 audit that Griffin did, they talk about there being on  
 4 page 32 - and that's note five on page 32 - significant  
 5 estimates. "The preparation of financial statements requires  
 6 management to make estimates and assumptions that affect certain  
 7 reported amounts and disclosures. Accordingly, actual results  
 8 could differ from these estimates."  
 9 It can't be any clearer that the auditors are saying  
 10 what's actually happening and what's actually there may be  
 11 different than what's in these financial statements.  
 12 In fact, in that same audit, a little further back on  
 13 page 46, they show that a weakness has to do with the control  
 14 over intrafund and interfund transfers. And they said, because  
 15 of those issues, the auditors recommended a process be developed  
 16 and documented to consistently record transfers.  
 17 The record trails off from there, Your Honor. Did the  
 18 Government develop processes and document them to consistently  
 19 record transfers? We don't know. We know that Ms. Herman was  
 20 never asked to look into that issue. She said no one ever asked  
 21 her to do it. We know that there's been no evidence here that  
 22 they have done this, and developed and documented those  
 23 transfers, so either, one, they didn't do it and they have not  
 24 proven it; or two, they did it and they didn't want to come in  
 25 and show us the evidence regarding those transfers.

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1 Now, let me also look for a minute, Your Honor,  
 2 about -- go back to a minute to the CD&L period where we talk  
 3 about transfers. And I think we have that in Summation. Can  
 4 you bring that up? I'll go quick, because I know you've seen --  
 15:10:15 5 THE COURT: Excuse me, Mr. Dorris. I'm sorry to  
 6 interrupt you, but it occurs to me you've been up for about an  
 7 hour, and I didn't put any time limits on anybody, but I want to  
 8 make sure the government gets some time to talk. What's your  
 9 estimate here?  
 15:10:29 10 MR. DORRIS: Your Honor, I think I've got about another  
 11 15 minutes, maybe 20.  
 12 THE COURT: Fine. Go ahead.  
 13 MR. DORRIS: I will go fast. I'm talking as fast as I  
 14 can, but I'll try to wrap up in the next 20 minutes or so.  
 15:10:43 15 THE COURT: Considering your geographic origins, you're  
 16 doing a good job, Mr. Dorris.  
 17 MR. DORRIS: Thank you. Judge, I want to go back.  
 18 When we talk about disbursements in the electronic era and  
 19 everything, here are the CD&L summaries that you've looked at  
 15:11:01 20 before. These are the disbursement summaries. We're at  
 21 Plaintiffs' Exhibit 372; this is page 120, where we've  
 22 highlighted or put in red all of those where they've just got  
 23 disbursement from one year are the same, and the next page I  
 24 think is even worse than this.  
 15:11:21 25 So that this is an instance that has to do with now  
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1 Treasury; the money that was in commercial banks was controlled  
 2 by Treasury and rolled into it in 1934. All the cash is  
 3 deposited into Treasury, and all securities are redeemed by  
 4 Treasury and all payments come from Treasury. Any money that is  
 15:13:35 5 undisbursed remains in the Treasury General Account - that's the  
 6 only cash account for the government - and that account, the  
 7 evidence has been clear, is the account that the government  
 8 looks to to make their borrowing determinations, and it's based  
 9 on the cash in the TGA, including the IIM funds.  
 15:13:54 10 Quickly, let's look at what the evidence is. The first  
 11 is from a witness that testified in a previous trial, Your  
 12 Honor. You did not have the benefit of seeing him testify, but  
 13 his testimony could not be clearer. Commissioner Gregg  
 14 testified when asked the question, "Who gets the benefit of the  
 15:14:16 15 money in the Treasury General Account?" And his answer was,  
 16 "Essentially the federal government. It certainly isn't  
 17 credited to any" --  
 18 THE COURT: Commissioner Gregg is commissioner of what?  
 19 MR. DORRIS: He was a commissioner of -- first he was  
 15:14:30 20 with the Public Debt, the Bureau of Public Debt, and then he was  
 21 the commissioner of FMS, which I think is the Financial  
 22 Management Service at Treasury, which were the two groups at  
 23 Treasury that it was testified to are involved in the borrowing  
 24 decision.  
 15:14:51 25 THE COURT: All right.  
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1 applying, Your Honor, the percentage that was calculated from  
 2 the CP&R and the EFTs, why should that be applied to other  
 3 periods? Well, clearly the disbursement data here is, at best,  
 4 estimates that we've got, and I think it's entirely reasonable,  
 15:11:42 5 where you have as long a period as we have of 1988 through 2002,  
 6 where we have the actual checks and the electronic transfers and  
 7 can come up with a hard disbursement rate, to then use that in  
 8 periods nearby when we were dealing with similar sort of  
 9 records.  
 15:12:02 10 Now, Your Honor, let's talk about the net of the  
 11 revenues and disbursements for a minute. When you take what  
 12 Dr. Palmer has testified to as 14.64 billion, you look at the  
 13 disbursements at 10.67, we end up with disbursements of  
 14 \$3.97 billion that have been paid in that have not come out of  
 15:12:32 15 this Trust, that are still there in Treasury. And, as  
 16 Professor Laycock testified on the first day, this type of -- I  
 17 liked the way he put things, in a very simple, straightforward  
 18 way. It's a down-the-middle-of-the-plate restitution claim. I  
 19 guess that's a good saying during baseball season.  
 15:12:57 20 Now let me move to the second area, Your Honor, which  
 21 has to do with benefit conferred and specific relief. On the  
 22 benefit conferred, Your Honor, our case is really summed up in  
 23 four straightforward points.  
 24 First, the defendants have failed to distribute  
 15:13:13 25 billions from the Treasury. All the money goes through  
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1 MR. DORRIS: And he goes on to say, "What it means is  
 2 that to the extent that there are funds that come into the  
 3 Treasury's General Account, those are considered in the  
 4 borrowing decisions that are made by the department and carried  
 15:15:05 5 out by the Bureau of Public Debt. So it means that, at least at  
 6 the margin, the more that's collected and within the various  
 7 accounts within Treasury, the less Treasury has to borrow."  
 8 Similarly he testified further, and this is a little  
 9 smaller, Your Honor, he explained that Treasury treats the IIM  
 15:15:26 10 money and account like any other funds that come into Treasury,  
 11 really without distinction. When he was asked what it means  
 12 when funds are available to Treasury, Commissioner Gregg  
 13 explained, "To me it means it's within the general account, the  
 14 Treasury's General Account."  
 15:15:41 15 Question: "So it's the Treasury's asset at that  
 16 point?"  
 17 Answer: "Well, it's the government's. It happens to  
 18 reside within Treasury, yes."  
 19 Question: "And I think you testified that when funds  
 15:15:52 20 are available to Treasury, those funds do not earn interest. Is  
 21 that correct?"  
 22 Answer: "That's correct."  
 23 And he goes on to explain, "It's really -- yes, it's  
 24 our -- the funds that are in our Treasury General Account that  
 15:15:58 25 we use to pay off obligations that are due, and it helps, you  
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1 know, to look at that to determine how much the borrowing has to  
 2 be at any given time."  
 3 Similarly, Dr. Miller came and testified here on the  
 4 first day of trial, Your Honor, that the monies in the Treasury  
 5 General Account that should have otherwise been disbursed, it's  
 6 a benefit to the federal government because the federal  
 7 government doesn't have to borrow that money. Now, while he  
 8 said he wasn't in meetings where those decisions were made, he  
 9 testified as a director of OMB that he knew how those decisions  
 10 were made, and it's more than just a common sensical inference  
 11 that he is making there.  
 12 Similarly, Your Honor, with Gary Grippo, who testified  
 13 before you, it was very clear that TGA, that the Treasury  
 14 General Account is important in Treasury's borrowing decisions.  
 15 You see here what is quoted from the transcript at 1255, lines 3  
 16 through 11. And the question at the end is: "As a matter of  
 17 fact, that's something that is standard. From as long as you  
 18 know Treasury, the Treasury General Account is an important  
 19 factor in determining borrowing decisions. Correct?"  
 20 And the answer was yes.  
 21 Now, he testified even further that the borrowing  
 22 decisions are derived from the cash position, and go on and the  
 23 question was: "And that's why you focus on the TGA, because  
 24 that's a cash account. Correct?"  
 25 And he said correct.

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1 Let's look at four features of this statute that I want  
 2 to visit with you on. The first is that it deals with funds  
 3 deposited or invested. The drafters of this statute wanted to  
 4 make it very clear that interest was to be paid on funds that  
 5 were deposited or were invested; either way, interest was to be  
 6 paid. Second, it makes it clear that this statute applies to  
 7 all funds that come in to the government prior to October 25,  
 8 1994. We will show you the statute that then applies for  
 9 periods after that. Third, this statute on its face is  
 10 retroactive. It's retroactive to the date the Secretary began  
 11 investing Individual Indian Monies on a regular basis.  
 12 Now, the testimony is -- Dr. Angel said that goes all  
 13 the way back to the beginning. That's when the Secretary  
 14 started doing that, and Dr. Kehoe said he knows it goes back at  
 15 least to 1899. So it goes all the way back.  
 16 And then fourth, where to the extent the claim is  
 17 identified by a reconciliation process of Individual Indian  
 18 Money accounts, nothing could be clearer, but that's exactly  
 19 what we are wrestling with here, Your Honor.  
 20 There are some other interesting statutes that I want  
 21 to show you. The next is what would apply to interest after  
 22 October 25, 1994. Let's go back. It's 25 U.S.C. 161.  
 23 25 U.S.C. 161(a), sub part B, would apply to that. Now, Judge,  
 24 what's up on the screen now is 31 U.S.C. 9702. This is a  
 25 current version of the 1841 act that says that the government,

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1 So what we have here is confirmation that money in the  
 2 TGA is what forms the basis for the borrowing decisions, and  
 3 that is why clearly the government has benefitted from holding  
 4 the IIM monies all these years.  
 5 Now, with respect to how to calculate that, I would  
 6 submit to you that Dr. Palmer's model and Dr. Cornell's model do  
 7 a great job. Just to make sure that there's nothing  
 8 misunderstood in his testimony, however, two important documents  
 9 also help this. First, from the 2009 budget, OMB unequivocally  
 10 states that deposit fund balances are available to finance  
 11 expenditures and are recorded as a means of financing other than  
 12 borrowing from the public, Plaintiffs' Exhibit 139.  
 13 Treasury's fiscal year-end 2006 Performance and  
 14 Accountability Report clarifies that, quote, "Treasury is  
 15 authorized to make expenditures and pay liabilities, includes  
 16 deposit funds." And these are deposit funds from  
 17 Plaintiffs' 140.  
 18 Now let me turn to the issue regarding specific relief.  
 19 Now, Your Honor, you asked about this statute, and this is  
 20 25 U.S.C. 4012. And we're shifting now from talking about  
 21 benefit conferred to talking about the same restitution type  
 22 relief in terms of specific relief that we're asking for. When  
 23 the government talks about the no-interest rule, I've got to  
 24 tell you, this statute and others we'll show you, but this  
 25 statute by itself blows that whole issue out of the water.

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1 for amounts held in trust by the United States government, and  
 2 look at that parents, "including annual interest earned on the  
 3 amounts," so both the funds and the interest earned on those  
 4 amounts "shall be invested in government obligations and shall  
 5 earn interest at an annual rate of at least five percent."  
 6 Now, we've also introduced, as the asterisk here shows  
 7 you, a Secretary of Interior letter viewing the 1841 act as  
 8 binding and controlling. That's at Senate report number 46-186,  
 9 at three, from 1889. The Secretary of Interior clearly viewed  
 10 that this is a controlling statute for them.  
 11 Now, what did Professor Laycock say about how this  
 12 relates, the nature of this remedy? He said, and explained as  
 13 you see the testimony here, that with respect to the  
 14 25 U.S.C. 4012 statute that we looked at, he said, "Well, I'm  
 15 not an expert on these statutes, and the judge can read them at  
 16 least as well as I can, but I can testify to the nature of the  
 17 remedy that would be involved in enforcing these statutes. The  
 18 statute on its face appears to require the payment of interest  
 19 on funds held for individual Indians."  
 20 He goes on to make clear it's retroactive. And the  
 21 question at the bottom of the screen here is, "Is this the sort  
 22 of statutory obligation that existed in *Bowen*?"  
 23 Answer: "Well, it's a statutory obligation to pay  
 24 money. The obligation in *Bowen* was a very different statute,  
 25 but it was also a statutory obligation to pay money. So the

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1 remedy of specifically enforcing that statutory obligation would  
 2 be the same remedy; it wouldn't be money damages, it would be  
 3 specific relief to enforce the statutory obligation."  
 4 That's exactly what we have here, Your Honor.  
 15:23:36 5 Now, let me conclude, Your Honor, in two areas, and  
 6 I'll try to move quickly. The first has to do with finality.  
 7 It's time for the Cobell case to come to a close and that final  
 8 judgment be entered on the merits. In reassigning this case to  
 9 this court, the Court of Appeals made it clear that it expected  
 10 this case to be resolved expeditiously and fairly. This Court  
 15:24:03 11 in Cobell XX has similarly noted that it's time to bring this  
 12 suit to a close. The only way to do that is to ensure that this  
 13 proceeding results in a final judgment on the merits. To ensure  
 14 finality, plaintiffs propose the following:  
 15:24:25 15 First, plaintiffs requested earlier this year that in  
 16 light of the inability to obtain an accounting, that this court  
 17 order the restitution of certain lands. In response to that,  
 18 the defendants have argued that that is beyond the scope of this  
 19 case. They indicated that issues related to the way in which  
 15:24:44 20 trust assets are managed are outside the scope of this  
 21 litigation. Plaintiffs will yield to defendants on this issue  
 22 and concede that the restitution of land claims is outside the  
 23 scope of this case.  
 24 Second, the only other part of this case that arguably  
 15:25:02 25 remains a live issue, other than proceedings necessary to  
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1 everyone knowing of the injustices that were befalling them in  
 2 this Trust. They are looking with hope because of where they  
 3 look, to this courthouse and this Courtroom 23.  
 4 They're not asking for a gift, they're not asking for  
 15:27:04 5 welfare, they're not asking for a handout, they're simply asking  
 6 for what is theirs, their money. It has been their money and it  
 7 is time for them to receive their money.  
 8 Your Honor, I would like to close with three quotes,  
 9 quickly, two from Cobell VI, one from Judge Lamberth, and ask  
 10 you to keep these in mind as you wrestle with this decision.  
 15:27:24 11 The first passage from Cobell VI reminds us of the high standard  
 12 of conduct the government should have conducted itself by: "The  
 13 federal government has charged itself with moral obligations of  
 14 the highest responsibility and trust in its relationships with  
 15:27:45 15 Indians, and its conduct should therefore be judged by the most  
 16 exacting fiduciary standards."  
 17 The second quote, Your Honor, helps indicate the  
 18 significance of these trust funds to the plaintiffs, many of the  
 19 plaintiffs: "Given that many plaintiffs rely upon their IIM  
 15:28:08 20 trust accounts for their financial well-being, the injury from  
 21 delay could cause irreparable harm to plaintiffs' interests as  
 22 IIM Trust beneficiaries. Thus, it seems that the interests at  
 23 stake are not merely economic interests in an administrative  
 24 scheme, but personal interests in life."  
 15:28:27 25 And the final quote, Judge Robertson, comes from your  
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1 implement this judgment, is trust reform, also referred  
 2 sometimes to as fixing of the system. Given that injunctive  
 3 relief in that regard has proven to be elusive, to the extent  
 4 trust reform remains a live issue, plaintiffs request that this  
 15:25:26 5 court dismiss such claims without prejudice to ensure that this  
 6 case comes to a close.  
 7 THE COURT: You want a 54(b) judgment?  
 8 MR. DORRIS: Yes, sir, Your Honor. And should  
 9 plaintiffs prevail on the merits in this trial, there will of  
 10 course be need to have further proceedings to implement the  
 15:25:42 11 final judgment, but we think it appropriate that otherwise this  
 12 case comes to a fair and expeditious resolution and a conclusion  
 13 by a final judgment.  
 14 Your Honor, I know I have run long, and I have tried to  
 15:25:59 15 be faithful to your charge to dispense with the rhetoric. But I  
 16 would ask your brief indulgence as I quickly close.  
 17 500,000 Native Americans look to Washington here the  
 18 summer of 2008 with hope, 121 years after the Dawes Act,  
 19 14 years after the Trust Reform Act. They look to this city for  
 15:26:24 20 hope, notwithstanding this city having been the headwaters of a  
 21 mighty river of injustices flooding down on them for decade  
 22 after decade. But it's because of where they're looking.  
 23 They're not looking to the White House and the executive branch,  
 24 they're not looking to Congress and the legislative branch, two  
 15:26:44 25 branches that have failed them mightily over the years despite  
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1 predecessor in this case in a July 2000 memorandum of opinion  
 2 that was so forthright and raw that it helped lead to this case  
 3 finding its way to your chambers. And he wrote that he had a  
 4 quickly receding hope that something good might come out of this  
 15:28:53 5 case, and he wrote: "This hope is sustained in part by the fact  
 6 that the Indians who brought this case found it in themselves to  
 7 stand up, draw a line in the sand, and tell the government,  
 8 enough is enough, this far and no further. Real justice for  
 9 these Indians may still lie in the distant future, it may never  
 10 come at all. This reality makes a statement about our society  
 15:29:12 11 and our form of government that we should be unwilling to let  
 12 stand."  
 13 Your Honor, in the summer of 2008, as these plaintiffs'  
 14 last resort in our much flaunted system of government, we ask  
 15:29:31 15 that the system not fail them, and that you hear the  
 16 reverberations of their refrain that enough is enough, this far,  
 17 no further, it is our money. Thank you, Your Honor.  
 18 THE COURT: Thank you, Mr. Dorris.  
 19 Mr. Kirschman?  
 15:30:15 20 MR. KIRSCHMAN: Thank you, Your Honor.  
 21 Your Honor, you had stated repeatedly both before and  
 22 during the course of this trial that it should be about the  
 23 numbers, and we, defendants, responded to that and presented  
 24 credible, reliable numbers based on actual documents and valid  
 15:30:42 25 statistical analysis presented through credible, earnest  
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1 witnesses. Plaintiffs, in contrast, have failed to justify  
 2 their grossly inflated claim for, by their most recent  
 3 calculations, \$47 billion. Calling the \$47 billion claim  
 4 grossly inflated is a serious understatement.

15:30:58 5 Plaintiffs have failed to present any credible  
 6 testimony or evidence to justify that claim. In their  
 7 case-in-chief, plaintiffs bore the burden of establishing that  
 8 the government had wrongly failed to disburse approximately  
 9 \$4 billion in IIM funds to IIM beneficiaries. However, this  
 15:31:16 10 \$4 billion figure was supported by not one of the witnesses they  
 11 presented to this court, and was contrary to the facts  
 12 established by defendants' witnesses and evidence throughout the  
 13 trial.

15:31:32 14 Despite any evidence to justify it, plaintiffs have  
 15 continually misstated the amount of funds that should be in the  
 16 IIM system by including amounts that clearly do not belong  
 17 there, while at the same time understating disbursements from  
 18 the IIM system.

15:31:46 19 Even more pronounced was the failure of plaintiffs'  
 20 witnesses to establish any basis for their claim that the  
 21 government benefitted from wrongfully withholding these funds,  
 22 and that this benefit totaled \$58 billion, at least originally.

15:32:04 23 Based on the most recent calculations, plaintiffs now  
 24 claim that the total benefit to the government equals  
 25 \$47 billion. However, plaintiffs' most recently revised model

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1 basis of my testimony is that's what the plaintiffs are  
 2 claiming, but whether or not what they're claiming really  
 3 happened was not within the scope of my testimony."

4 Furthermore, Your Honor, we the defendants have  
 15:33:53 5 consistently urged that the remedy in this case must follow  
 6 from - that is, be causally related to - the alleged injury,  
 7 which is the failure to provide a historical accounting. In  
 8 that regard, Professor Laycock testified in response to the  
 9 Court's own questions that plaintiffs', quote, "restitution  
 15:34:10 10 claim is now focused not on the failure to account as such, but  
 11 the inability to account continues to be relevant as an  
 12 evidentiary matter to the attempt to determine the difference  
 13 between income and disbursements." So, he says, "Restitution  
 14 here, or specific relief, is not intended to be directly the  
 15:34:31 15 remedy for failure to account."

16 Now, Your Honor, this testimony from Professor Laycock  
 17 supports our position that plaintiffs are seeking a remedy that  
 18 is distinct and separate from the breach found by this court,  
 19 and that is the failure to provide a historical accounting. And  
 15:34:46 20 at least one of the reasons that is relevant here, Your Honor,  
 21 is the argument raised here, which is a legal argument, about  
 22 burdens of proof.

23 First I have to remind the Court that the Court of  
 24 Appeals and Judge Lamberth as well have already stated that the  
 15:35:04 25 standard presumptions related to a trustee in the private arena

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1 presented by Dr. Palmer fails to account for relevant documents  
 2 and facts, and is comprised of baseless adjustments to the data  
 3 it does use.

4 Last week you asked for a summary of the testimony and  
 15:32:21 5 evidence you heard, and that's what I am prepared to present to  
 6 you, Your Honor. You have now also asked questions, and I will  
 7 certainly attempt to answer those questions, or at least address  
 8 them to the best I can today. And we will certainly address  
 9 those questions further in our proposed findings of fact and  
 15:32:37 10 conclusions of law. If I don't touch on one, please remind me  
 11 and I'll address it before I step down.

12 But Your Honor, you saw plaintiffs' witnesses and you  
 13 heard their testimony. Even a quick summary of this testimony  
 14 from plaintiffs' witnesses demonstrates how clearly they have  
 15:32:55 15 failed to prove their case. Not one of their six witnesses in  
 16 their case-in-chief testified affirmatively that the government  
 17 actually benefitted from wrongfully withholding funds. In fact,  
 18 those who were questioned about plaintiffs' claim for a total of  
 19 \$58 billion firmly disavowed knowing anything about the factual  
 15:33:17 20 basis for it during their case-in-chief.

21 Professor Laycock testified first. While  
 22 Professor Laycock spent a lot of time providing his legal  
 23 opinions regarding jurisdictional issues and the broad purpose  
 24 of restitution, his testimony did not support plaintiffs' claim  
 15:33:34 25 for a dollar amount. Indeed, he candidly stated that, "The

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1 do not apply here in this case as it relates to the federal  
 2 government and the IIM Trust.

3 Second, and this relates to what Professor Laycock  
 4 stated, there is no duty before the last year to create  
 15:35:24 5 aggregate trust records. That's what the Court has asked us to  
 6 present as an alternative. But when it comes to a duty and a  
 7 related burden of proof, the duty has always been to individual  
 8 accountholders to perform a historical accounting related to  
 9 their individual accounts.

10 So to the extent you can call it an accounting,  
 11 Your Honor, in this trial, that accounting or that  
 12 reconciliation of the records has nothing to do with the duty to  
 13 account for an individual. And you've seen that. We've been  
 14 talking about aggregate figures, aggregate numbers.

15:36:03 15 So the burden of proof that plaintiffs speak of, even  
 16 if it would be applicable, which it's not, does not lend itself  
 17 to this case, to this trial, and to this determination by the  
 18 Court of an appropriate remedy.

19 Now, the second witness plaintiffs presented in their  
 15:36:26 20 case-in-chief was Mona Infield. And a lot of these witnesses  
 21 you haven't heard about at all before now, but I think it's  
 22 important we go through the case-in-chief and what was actually  
 23 presented to you.

24 Mona Infield was the first of three plaintiffs'  
 15:36:42 25 witnesses to testify generally that the data related to the

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1 disbursement of funds is not reliable. This testimony was  
 2 essentially a rerun of what this court had already heard from  
 3 Ms. Infield in October. It clearly did not support plaintiffs'  
 4 calculation of benefits, either the \$4 billion figure or the  
 5 total \$89 billion figure at that time.  
 6 Also, Ms. Infield's brief testimony about Osage  
 7 headright funds was so vague and groundless as to constitute no  
 8 support for plaintiffs' position related to the Osage headright  
 9 fund. Ms. Infield testified that there is a, quote, "general  
 10 understanding, and the culture at Osage is that Osage funds  
 11 belong to individual headright shareholders." This assertion of  
 12 a general understanding and a culture at Osage is unsupported by  
 13 any evidence and is too vague to prove anything.  
 14 We then look, Your Honor, at the third witness  
 15 plaintiffs put on in their case-in-chief, Mr. Ray Ziler. Like  
 16 Mona Infield, Mr. Ziler testified only that in his view the data  
 17 related to the disbursement of IIM funds was not reliable.  
 18 Mr. Ziler's testimony was limited to his vague recollections  
 19 based on his work with Arthur Andersen in 1988 through 1990; the  
 20 most detailed information he provided was based on documents  
 21 that plaintiffs' counsel had specifically provided to him so  
 22 that he could speak to the issue of fraud with some definity.  
 23 And as the Court has noted more than once during this trial, an  
 24 act of fraud or theft of these funds does not prove a benefit to  
 25 the government, because the government did not have use of that

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1 He offered only vague, general statements about how the  
 2 United States Government may benefit by the flow of cash into  
 3 the Treasury General Account, but he did not provide evidence of  
 4 the actual fact or amount of the alleged government benefit, as  
 5 the Court required of plaintiffs in its May 2nd order.  
 6 Indeed, Mr. Miller acknowledged in response to your  
 7 questions, Your Honor, that he does not have any personal  
 8 knowledge regarding the government's day-to-day borrowing  
 9 decisions, but was only offering what he viewed to be a  
 10 theoretical or strategic position. Therefore, Mr. Miller could  
 11 not and did not establish whether the government in fact  
 12 benefits from the holding of any IIM funds.  
 13 Plaintiffs' fifth witness, Dr. Cornell, was the only  
 14 witness who was identified by plaintiffs as offering any  
 15 testimony regarding the calculation of the amount of the  
 16 government's benefit. However, Professor Cornell testified  
 17 unequivocally that he was not offering an opinion as to the  
 18 correctness of the amount of funds he had calculated in his  
 19 model. He testified that while he believes his methodology,  
 20 linear interpolation, is in this case correct, he was not in  
 21 court to tell you, Your Honor, that the \$58 billion figure was  
 22 actually the precise measure of the government's benefit from  
 23 its alleged use of funds that couldn't be explained from the  
 24 work we had done.  
 25 Professor Cornell testified, "While I think that

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1 money.  
 2 As the Court correctly observed in regard to  
 3 Mr. Ziler's testimony, it only addressed the alleged  
 4 unreliability of data roughly 20 years ago, but did not advance  
 5 plaintiffs' position in this trial. And that's correct, it did  
 6 not relate to the figure that the Court has set out to  
 7 determine.  
 8 In response to the Court's observation, plaintiffs'  
 9 counsel candidly acknowledged that this line of testimony,  
 10 quote, "does not have a direct bearing on how and what numbers  
 11 you add up in a column to get that quantification of plaintiffs'  
 12 claim."  
 13 That took us then, Your Honor, to James Miller, the  
 14 former OMB director. He testified for plaintiffs as an expert;  
 15 however, it became quickly apparent that Mr. Miller did not have  
 16 any detailed experience or expertise regarding any amounts not  
 17 paid to IIM beneficiaries, or even regarding any alleged benefit  
 18 to the government. Mr. Miller testified repeatedly that he was  
 19 not testifying to any particular amount, and that plaintiffs'  
 20 calculation of a \$54 billion benefit to the government was  
 21 prepared under certain assumptions on which he could not verify.  
 22 He said, "I do not have requisite information to verify those  
 23 numbers." Mr. Miller went on to elaborate that "I can't comment  
 24 on the actual data, the actual amounts, the net amounts that  
 25 were retained by the government. I do not have that knowledge."

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1 requires work further than I've done," he explained that "I  
 2 eventually made the assumptions that went into Attachment A.  
 3 But I did say to counsel in this matter that I was not a  
 4 historian and had not been working on this matter long enough to  
 5 have delved into the nature of each number, so to some extent I  
 6 am working at a very high level."  
 7 And then, Your Honor, Professor Cornell left this case  
 8 without giving any further testimony. In light of the clear  
 9 limitations that he himself placed on his testimony, it is clear  
 10 that he has not provided any factual support for plaintiffs'  
 11 positions.  
 12 Your Honor, the last of only six witnesses that  
 13 plaintiffs put on in their case-in-chief was Mr. Don Pallais.  
 14 And he also did not further plaintiffs' position. He offered  
 15 views regarding only the reliability of data for the accounting  
 16 of individual accounts, and, as I said, his testimony was  
 17 similar to that of Mr. Ziler's and Ms. Infield's. He offered no  
 18 basis for finding of benefit to the government, because although  
 19 he discussed a potential for IIM funds to be lost or stolen,  
 20 again, that doesn't show a benefit to the government. In short,  
 21 Mr. Pallais added nothing to plaintiffs' case.  
 22 And that was it, Your Honor. There was no more in  
 23 plaintiffs' case-in-chief. After 12 years of litigation,  
 24 plaintiffs presented to you only six witnesses to establish  
 25 their entitlement to billions and billions of dollars,

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1 58 billions of dollars -- \$58 billion, to be exact. Three of  
 2 these witnesses did not present any evidence that actually  
 3 addressed, let alone proved, the validity of the numbers within  
 4 plaintiffs' claim, and the other three, Mr. Laycock, Mr. Miller,  
 15:43:14 5 and Dr. Cornell, who when asked specifically disavowed any  
 6 responsibility for or the ability to vouch for the numbers  
 7 within plaintiffs' claim.  
 8 Your Honor, no named plaintiffs testified in this case.  
 9 There were no named plaintiffs or other IIM beneficiaries at  
 15:43:37 10 this trial who testified that 70 percent of their money has been  
 11 wrongfully withheld. There was no credible explanation from the  
 12 six witnesses who did testify as to why, for example, Tribal IIM  
 13 should be considered as part of total collections but then not  
 14 accounted for by plaintiffs when they calculated disbursements.  
 15:43:59 15 Or why suddenly, for the first time, after 12 years of  
 16 litigation, all Osage headright revenue should now be viewed as  
 17 part of the individual IIM trust accounts.  
 18 This is the first time, as far as we can tell from  
 19 looking at all of the decisions in this case, that the matter of  
 15:44:18 20 the Osage headrights has been addressed by this Court. It  
 21 certainly was not addressed related to the historical  
 22 accounting.  
 23 Nor did the six witnesses, Your Honor, offer, for  
 24 example, any credible basis for plaintiffs' factual assumption  
 15:44:34 25 that only current year revenues were ever disbursed throughout  
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1 the history of the IIM system, or why that compounding effect  
 2 that was addressed during the trial is appropriate in any way.  
 3 And most certainly, Your Honor, none of them provided any  
 4 factual basis to support plaintiffs' claim of a benefit to the  
 15:44:53 5 government. Plaintiffs clearly did not prove a reasonable  
 6 approximation, as is the standard, to be disgorged as monetary  
 7 relief.  
 8 All of this nutates in favor of Your Honor granting the  
 9 Rule 52(c) motion that we had earlier filed against plaintiffs,  
 15:45:16 10 and that motion should be granted now. At the time you first  
 11 heard argument on the Rule 52(c) motion, you stated that you  
 12 would not rule until the close of the evidence, and of course  
 13 now, Your Honor, the evidence is closed.  
 14 During the first argument you indicated that the  
 15:45:29 15 government had the better of the argument regarding the  
 16 \$54 billion claim that the government had somehow benefitted  
 17 from withholding IIM account funds, and you correctly stated  
 18 that when you ultimately would review that motion, you would do  
 19 so based on the record as it existed at the close of plaintiffs'  
 15:45:49 20 case.  
 21 That record, as I just summarized, requires granting  
 22 this motion. It should be granted at this time, Your Honor, not  
 23 only because of the merits behind it that are clear, but also  
 24 because there's no reason for the parties to prepare --  
 15:46:04 25 especially as it relates to the benefit to the government claim,  
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1 there's no reason for the parties to prepare and the Court to  
 2 consider proposed findings of fact and conclusions of law on a  
 3 claim for which plaintiffs have so clearly failed to present any  
 4 credible evidence. Absolutely no credible evidence, Your Honor,  
 15:46:22 5 none.  
 6 Turning from that motion, I would like to summarize for  
 7 you what followed from the defendants' witnesses and what they  
 8 established during our responsive case. In contrast to the  
 9 testimony plaintiffs offered the Court, we presented witnesses  
 15:46:43 10 like Ms. Herman, Dr. Angel, and Mr. Rosenbaum, who personally  
 11 reviewed the documents and explained reasonably where defendants  
 12 numbers related to collections and disbursements came from, and  
 13 how those numbers should be interpreted and used.  
 14 We also presented the testimony of Dr. Scheuren, who,  
 15:46:58 15 unlike Dr. Cornell and Dr. Palmer, correctly used all of the  
 16 data available to him and rationally countered for the  
 17 uncertainty of the mean number within his model by calculating a  
 18 lower and upper confidence bound.  
 19 Ms. Herman was defendants' first witness, as you'll  
 15:47:14 20 recall. She was uniquely qualified to testify about the flow of  
 21 collections into and the disbursements out of the IIM system.  
 22 Her testimony, as was summarized in her historical flow of funds  
 23 chart pictured on the screen, was based on more than 11 years of  
 24 detailed review and analysis of the IIM system.  
 15:47:38 25 At the time of this trial, she and her team at FTI had  
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1 mapped over 119 million transactions within the IIM system as  
 2 part of their data completeness validation work, or DCV work, as  
 3 you know it. Her testimony should be accorded great weight  
 4 because of that experience and that work with the actual  
 15:48:01 5 documents.  
 6 Ms. Herman explained in much detail the research and  
 7 analysis performed by FTI to update the throughput information  
 8 that had been in AR-171, and that is now presented in DX-371.  
 9 She explained why AR-171 does not justify and cannot be  
 15:48:18 10 reasonably relied upon to support a finding that \$4 billion  
 11 should have been paid into individual IIM accounts.  
 12 For example, supported by the documents of record,  
 13 Ms. Herman explained how Tribal IIM is tribal money and is not  
 14 and never has been receipts into individual IIM accounts. She  
 15:48:38 15 explained that Tribal IIM is only a portion of all tribal money  
 16 that has been collected and that has flowed through the IIM  
 17 system over the years, and she addressed that specifically,  
 18 Your Honor, at transcript pages 474 and 475. And this, Your  
 19 Honor, is why Ms. Herman has relied upon total collections and  
 15:49:01 20 total disbursements to report the historical flow of funds  
 21 through the IIM system.  
 22 In contrast, plaintiffs include Tribal IIM and other  
 23 tribal money in their collections, but fail to account for the  
 24 Tribal IIM and other tribal money when it is disbursed as  
 15:49:19 25 bookkeeping transfers.  
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1 Ms. Herman also explained that a large part of the  
 2 Osage headright revenues were not and never have been entered  
 3 into the IIM system in any way because they are paid directly by  
 4 the Osage with a check to the headright owners. She explained  
 5 that is why these funds should not be considered as collections  
 6 into the IIM system, and why it is wrong for plaintiffs' model  
 7 to include them as collections into the system.

8 And Your Honor, you asked specific questions this  
 9 morning about that. You asked: Why does the government show  
 10 Osage data? And it is, Your Honor, because, as she stated, as  
 11 Ms. Herman stated, Osage funds do come into the IIM system, they  
 12 are transferred for certain IIM accountholders, and we presented  
 13 evidence of that.

14 But her testimony also made clear that a vast majority  
 15 of that does not ever enter into the IIM systems, and you'll  
 16 recall one of the documents you saw yesterday from her volumes  
 17 demonstrates this. You'll recall, Your Honor, or you may  
 18 recall, at least, that when her chart was up, she was asked, and  
 19 where do the funds go, the Osage funds that are paid directly  
 20 from the tribe? And she stated, it would be off this chart, it  
 21 would be another chart.

22 So the reason we show Osage revenues is because  
 23 Ms. Herman had to try to determine, and has determined, which of  
 24 those funds were directed into IIM accounts. These would be,  
 25 for example, Your Honor, for minors or for incompetents, and she

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1 provided testimony to that effect.  
 2 But what she also made clear, and I would like to draw  
 3 the Court's attention to transcript pages 539 and 540, she also  
 4 made clear that not all of the Osage annuity funds go into the  
 5 IIM. So there's a limited reason we, the government, have  
 6 addressed those, because they are in limited circumstances part  
 7 of the funds into individual IIM accounts.

8 And if I could, I would just like to quote briefly some  
 9 of the questions and answers on those pages I referred to.  
 10 Ms. Herman testified that some component of the Osage annuity is  
 11 transferred into the IIM system from the Tribal Trust system,  
 12 and that's what I just told you. The question was asked: "And  
 13 the Osage annuity that's in the Tribal Trust system, where does  
 14 that go?"

15 And he answered: "The component that's not transferred  
 16 into IIM is paid out directly from the Tribal Trust via checks."

17 And the question was put: "So those monies that paid  
 18 out through the Tribal Trust system, do those dollars show up  
 19 anywhere in Exhibit 371?"

20 And she answered, "No, they do not."

21 And the question was then put to her by Mr. Quinn: "So  
 22 what then is the Osage annuity column, Column C?" And that was  
 23 referring, Your Honor, to AR-171 and DX-371.

24 And Ms. Herman answered: "Only those monies that  
 25 actually enter into the IIM system."

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1 So that's why we have addressed the Osage, that's why  
 2 it was in AR-171 and that is why it's in DX-371. And the  
 3 volumes in DX-372 behind the first volume contain the workpapers  
 4 and the contemporaneous documents that Ms. Herman used and  
 5 examined to try to determine the distinction between Osage funds  
 6 that went directly to Osage accountholders and those that came  
 7 into the system. And you saw yesterday during the  
 8 cross-examination of Dr. Palmer exactly how that division  
 9 occurred through the documentation itself.

10 Now, moving on -- oh, another thing I want to point  
 11 out, Your Honor. It came up yesterday during the short  
 12 arguments on the motion to intervene by the Osage, but it's  
 13 important to keep in mind what this case, the Cobell case, is  
 14 about, and what class is before this court. And Mr. Quinn  
 15 mentioned it, and I'll reiterate it. The February 4th, 1997  
 16 order certifying the class action specifically defined the class  
 17 as present and former beneficiaries of Individual Indian Money  
 18 accounts. That does not include every individual Indian who  
 19 ever received money, it involves present and former  
 20 beneficiaries of Individual Indian Money accounts. And that's  
 21 what this case is about, that's what this case has been about  
 22 since 1996.

23 And again, what you won't see throughout the many  
 24 opinions is any reference to the Osage revenues. So that's why  
 25 Ms. Herman considered it and this is the limitations to it. It

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1 does not include all Osage funds.  
 2 Moving on, Ms. Herman also testified that FTI's  
 3 calculations of total disbursements in her DX-371, in her  
 4 revised chart, includes all disbursements out of the IIM system.  
 5 And that's a very important point, Your Honor. This included  
 6 many disbursements from the IIM system to tribes that Ms. Herman  
 7 indicated could be identified by a, quote, "BB," end quote,  
 8 notation within the contemporaneous documents, as well as the  
 9 notation appearing in the TFAS and IRMS systems.

10 THE COURT: What do you say, Mr. Kirschman, to  
 11 Mr. Dorris' assertion, and it's not only he who has made the  
 12 assertion, that this notion of an IIM system is a construct of  
 13 the government's case and that there isn't any such thing?

14 MR. KIRSCHMAN: That's flatly wrong. What I will tell  
 15 you is Ms. Herman designed that chart to try to help explain to  
 16 the Court that the historic flow of money and where the money  
 17 goes and where it does not go, she constructed that chart based  
 18 on her 11 years of experience in reviewing, I believe it was  
 19 119 million transactions.

20 So that's just wrong. That's not something we've made  
 21 up. And both in October and now, Your Honor --

22 THE COURT: Who used the term "IIM system" before  
 23 Ms. Herman?

24 MR. KIRSCHMAN: I don't know. I would have to look to  
 25 see if it was used before. I suspect it has been, because her

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1 review of the documents demonstrates the existence of such a  
 2 system. But there's no magic to the word "system." What you  
 3 have to look at is the evidence you saw in October and the  
 4 evidence you heard and saw at this trial. And what you could  
 15:57:09 5 see yourself, Your Honor, are funds that went to Individual  
 6 Indian Money accounts, and many funds that did not. They came  
 7 into the fund, into 14X-6039, but they were never intended to be  
 8 received by individuals in their IIM accounts.  
 9 Those are the facts. That's what's been uncovered as  
 15:57:33 10 the Department of Interior and its contractors, FTI, Morgan  
 11 Angel, and others, have reviewed the actual documents.  
 12 So IIM system, there's nothing magical about that.  
 13 That describes the process, that describes the actual flow of  
 14 money for the last 100 years. But it makes a clear distinction,  
 15:57:57 15 and this is the important distinction, between all the monies  
 16 that enter into this system and those that were ever intended  
 17 for Individual Indian Money accounts. That's the important  
 18 distinction for this court to keep in mind, and that's what  
 19 Ms. Herman was explaining through her use of the historical flow  
 15:58:17 20 of funds.  
 21 But whatever name you put on it, the evidence speaks  
 22 for itself. The transactional histories show that not all funds  
 23 collected as part of the IIM system were ever intended to be  
 24 paid to the individuals. Dr. Angel - and I'll speak to that  
 15:58:34 25 shortly - also showed you historical examples where you had  
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1 money coming in that was going to all types of different funds,  
 2 including tribal funds, Tribal IIM that was not intended to go  
 3 to the beneficiaries. So that's the key point, Your Honor. We  
 4 shouldn't get hung up on that word "system."  
 15:58:53 5 And as I was saying, Ms. Herman spoke to that BB  
 6 notation within the contemporaneous documents as well as the  
 7 fact that that notation appears on the TFAS and the IRMS  
 8 systems, and you saw examples of that during her testimony. She  
 9 explained that these disbursements were not made by checks but  
 15:59:23 10 were bookkeeping entries. She presented an example of such a  
 11 disbursement, and at least one of them was DX-481, and she  
 12 explained it in detail. This point, Your Honor, was also made  
 13 clear in footnote five of DX-371; that is, the revised AR-171.  
 14 Ms. Herman explained what disbursements included in her DX-371.  
 15:59:46 15 She further explained that because these disbursements  
 16 were not made by check, they were not accounted for by CP&R data  
 17 and where therefore not accounted for as disbursements in  
 18 plaintiffs' model, even though plaintiffs treated tribal  
 19 transfers as revenue.  
 16:00:02 20 In assuring that all disbursements from the IIM system  
 21 were included in her DX-371, Ms. Herman relied on all available  
 22 data, including the audited disbursements amounts that were  
 23 captured in the electronic funds transfers and in these  
 24 BB transfers. Ms. Herman also explained that the numbers set  
 16:00:24 25 forth in DX-371 for disbursements from 1887 to 1972 were based  
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1 upon statistical analysis performed by NORC and historical data  
 2 provided by Dr. Angel, which I'll address in a few minutes.  
 3 In summarizing the results of FTI's work, Ms. Herman  
 4 demonstrated how, taking into account the actual current balance  
 16:00:49 5 of dollars held in the IIM system, which is reported as  
 6 \$423.7 million, Your Honor, the difference between the reported  
 7 trust balances and the estimated average sum of all IIM system  
 8 transactions is \$158.7 million. That is the amount which  
 9 defendants have not yet been able to explain as of the time of  
 16:01:12 10 this trial.  
 11 And Ms. Herman also clarified - and this is an  
 12 important point - that this amount most surely includes funds  
 13 that are not intended to be posted to individual IIM accounts  
 14 but are still included in the total IIM system. The analysis  
 16:01:28 15 leading up to that figure, to that \$158.7 million figure, is set  
 16 forth in great detail in not only DX-371 but DX-372, which are  
 17 comprised of the volumes of supporting material that you saw,  
 18 the volumes. DX -372 includes FTI's detailed road map as to how  
 19 figures were reached, as well as contemporaneous documents upon  
 16:01:55 20 which it relied.  
 21 Now, after Ms. Herman's testimony, Dr. Angel followed  
 22 her. His testimony is consistent with Ms. Herman's, and is  
 23 credibly based on his years of research and review of hundreds  
 24 and hundreds of historic documents. Dr. Angel testified and  
 16:02:17 25 showed the Court that historically the IIM system contained  
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1 funds that were not intended for disbursement to individual IIM  
 2 accounts. You may recall, Your Honor, Dr. Angel pointed to, for  
 3 example, cemetery funds, school funds, bid deposits,  
 4 rehabilitation funds, and you'll recall wage deposits from the  
 16:02:39 5 Civilian Conservation Corps. These specific examples were at  
 6 DX-485 and DX-487.  
 7 Dr. Angel further testified that based on early  
 8 historical documents, it was evident that at times much of the  
 9 Osage revenue was paid directly to individual Osage Indians  
 16:02:58 10 rather than going through the Individual Indian Money account  
 11 system. And again, that's what we just talked about, and  
 12 Dr. Angel provided some documentation to show that was  
 13 consistent in the past as well as in the present.  
 14 Also, based on his review of approximately  
 16:03:14 15 50 settlement packages and reports from Indian Service Special  
 16 Disbursing Agents, Dr. Angel opined that system controls in the  
 17 historical records reflect regularity and oversight of the  
 18 IIM system throughout its history through 1951, making it less  
 19 likely that any mistakes or leaks or accumulations in individual  
 16:03:37 20 IIM accounts would go undetected.  
 21 And finally, Your Honor, Dr. Angel explained to this  
 22 court how we provided historical information to FTI and NORC for  
 23 their use in calculating collections and disbursements into the  
 24 IIM system. Dr. Angel not only provided the historical  
 16:03:54 25 documents themselves, but he also provided context for those  
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1 documents, such as their limitations. For example, he  
 2 specifically noted to NORC that the 1922 receipts and  
 3 disbursements figures was an outlier, and you recall that  
 4 Dr. Scheuren later testified that he understood that to be a  
 5 limitation on the 1922 data.  
 6 Now, Your Honor, you have asked a question regarding  
 7 the estimate that Dr. Angel provided FTI regarding the  
 8 Tribal IIM. I'm trying to find your question in my notes. You  
 9 said that struck you as a big round number, I believe were your  
 10 words --  
 11 THE COURT: 10 to 15 percent.  
 12 MR. KIRSCHMAN: -- and you asked if we were sticking to  
 13 that number. And we are, Your Honor. We are. I think his  
 14 estimate was described earlier this afternoon as a guess, but it  
 15 certainly was not a guess, Your Honor. Dr. Angel answered the  
 16 question about how he calculated that 10 to 15 percent in quite  
 17 an amount of detail. What he relied on was described in detail.  
 18 That is found at page 842 of the transcripts, and that was on  
 19 June 17th.  
 20 Dr. Angel was asked how he calculated that 10 to  
 21 15 percent, and he responded that he could certainly answer that  
 22 question. And if I may, because of the significance that's been  
 23 attached to this, I would like to read this. "What we did,"  
 24 Dr. Angel said, "was we looked at documents we had collected  
 25 over the years. These included such documents as audit reports,

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1 many years of documents, and he noted specifically at least a  
 2 few of them in answering questions during his testimony. So one  
 3 document presented in isolation should not be enough to  
 4 distract -- to detract from that number.  
 5 Now, after Dr. Angel testified we presented the  
 6 statistical analysis of Dr. Scheuren, and Dr. Scheuren explained  
 7 how his multiple imputation analysis used available data to  
 8 measure the uncertainty surrounding the point estimate of  
 9 \$158.7 million.  
 10 Dr. Scheuren testified how he and his team at NORC  
 11 undertook a statistical analysis using all available  
 12 collections, disbursement balances, and Osage data over all the  
 13 fiscal years to measure the uncertainty within the model.  
 14 You'll remember this chart from Dr. Scheuren's testimony. The  
 15 point estimate developed by NORC's model for the IIM system  
 16 balance that could not yet be explained represented a mean and  
 17 was consistent with what DX-371 had demonstrated; while the  
 18 information within DX-371 led to a calculation of \$158.7 million  
 19 within the IIM system that could not yet be explained, NORC's  
 20 point estimate for that figure was very close, at \$159.9  
 21 million.  
 22 Further, Dr. Scheuren explained that prior to the  
 23 beginning of the trial, his team had determined that  
 24 statistically, at a 95 percent level of confidence, the evidence  
 25 demonstrated that the amount that could not be explained within

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1 such documents as Indian Trust Accounting Division accountings  
 2 of Tribal Individual Indian Monies, these included a review of  
 3 settled account packages, along with review of others in my  
 4 office. These included the 1991 report to Congress, the 1952  
 5 report to Congress, the 1972 OSR audit."  
 6 "These included a review," Dr. Angel continued, "of  
 7 correspondence. Our audit was also based on -- our estimate was  
 8 also based on a review of the reports that showed how much money  
 9 the United States Government lent to tribal enterprises from the  
 10 period 1934 to 1949. It was something like \$13 billion, a  
 11 little over \$13 billion." And he said, "We, Morgan Angel, took  
 12 these estimates, we took this data, and I made an estimate. And  
 13 that's what it is, an estimate. And my estimate was also based  
 14 on the historical circumstances," and he went on to describe how  
 15 he accounted for World War II as a historical event that had to  
 16 be considered.  
 17 So Your Honor, it wasn't a guess, it was an estimate  
 18 that Dr. Angel provided to FTI based on his review of all of  
 19 those documents.  
 20 After Dr. Angel testified -- oh, and another point in  
 21 that regard. And the record will speak for this. But based on  
 22 our recollection, I believe on cross-examination Dr. Angel was  
 23 shown one agency's two percent figure for one year. And if  
 24 that's the case, that lone document in no way should discredit  
 25 Dr. Angel's testimony or that estimate. His review was based on

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1 the IIM system could be at worst no more than \$365.7 million.  
 2 And that is depicted on DX-464.  
 3 However, you will recall - and Your Honor, you  
 4 mentioned this as one of your questions - that it became  
 5 apparent during Ms. Herman's cross-examination that certain  
 6 annual data points provided by the Chavarría Dunne firm that  
 7 NORC had relied upon as actual numbers were really estimates for  
 8 a relatively small number of years. And it was based on that  
 9 information and with that recent knowledge that Dr. Scheuren  
 10 moved his confidence levels within his model to adjust for the  
 11 uncertainty related to that new information.  
 12 And that shift in his model is depicted in DX-500 that  
 13 was shown to you during Dr. Scheuren's testimony. He explained  
 14 that based on his view of the new information, a 97.5 percent  
 15 upper bound would be an appropriate adjustment, and that  
 16 adjustment to a 97.5 percent level of confidence resulted in  
 17 Dr. Scheuren's estimate that no more than \$409.8 million could  
 18 be left unexplained by the missing data.  
 19 Your Honor, this amount represents a difference -- the  
 20 \$409.8 million figure represents a difference between the upper  
 21 bound depicted on DX-500 of 833.5, and the reported balance of  
 22 423.7 million that was shown on DX-371.  
 23 And with relation to this upper bound figure,  
 24 Your Honor, Dr. Scheuren explained, quote, "Despite the  
 25 weaknesses in the system and the length of time that these

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1 records have been produced, that's as bad as it gets." And that  
 2 testimony is at transcript page 974 through 976.  
 3 Dr. Scheuren next testified about NORC's analysis of  
 4 Dr. Cornell's model. Dr. Scheuren testified that NORC used  
 16:11:29 5 Dr. Cornell's model of linear interpolation to make a comparison  
 6 model, but incorporated into Dr. Cornell's model all of the  
 7 available data related to collections and disbursements. Using  
 8 the same model as Dr. Cornell, but with all available data  
 9 points incorporated into it, resulted in a small, approximately  
 16:11:50 10 \$31.5 million, upward adjustment, to the \$423.7 million reported  
 11 in the IIM system.  
 12 When Dr. Scheuren came back for a second day of  
 13 cross-examination, he explained the significant differences  
 14 between NORC's work using Dr. Cornell's model and Dr. Cornell's  
 16:12:10 15 model. He explained that NORC used all of the data pairs that  
 16 provided receipt and disbursement information, whereas  
 17 Dr. Cornell had used data only from certain years. He also  
 18 noted that NORC used total disbursement figures for a year that  
 19 included such things as electronic funds transfers and transfers  
 16:12:29 20 of tribal money, while Dr. Cornell had only relied upon CP&R  
 21 data.  
 22 After Dr. Scheuren was finished testifying, Your Honor,  
 23 our next three witnesses each addressed plaintiffs' claim that  
 24 the government had derived approximately a \$55 billion benefit  
 16:12:43 25 by withholding money and using that money for its own use.

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1 Together, these three witnesses completely and convincingly  
 2 established that there's no factual basis for this  
 3 benefit-to-the-government claim.  
 4 Dr. Terry Kehoe was the first of these witnesses. He  
 16:13:00 5 demonstrated through his review of historical documents that for  
 6 much of the IIM system's history, a large percentage of  
 7 IIM funds were held outside of the Department of Treasury. He  
 8 explained that from 1989 -- I'm sorry, I have my years mixed up.  
 9 From 1889 through 1933, very little money was held at Treasury.  
 16:13:24 10 He also showed that from 1933 through 1966, while more funds  
 11 were held in Treasury, that money was mostly in government  
 12 securities. And finally, Your Honor, Dr. Kehoe demonstrated  
 13 that from 1966 until approximately 1985, there was again very  
 14 little funds held at Treasury.  
 16:13:44 15 The next witness, Jeffrey Hoge, was our first witness  
 16 from the Department of the Treasury. As director of the  
 17 Accounting Systems Division within FMS, Dr. Hoge demonstrated  
 18 detailed knowledge about the Treasury General Account and  
 19 Treasury's Central Accounting System, two very different things.  
 16:14:05 20 Based on his knowledge, Mr. Hoge explained the detailed  
 21 reporting requirements that are followed to ensure that every  
 22 dollar coming into the TGA is tracked to the penny. Because of  
 23 these strict tracking requirements, he explained how no cash can  
 24 disappear from or leak out of the Cash Concentration System that  
 16:14:25 25 moves the cash into the TGA in New York. Nor could cash

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1 accumulate in the TGA from an unknown source or from any agency  
 2 that did not identify where the cash came from.  
 3 Mr. Hoge also explained the important distinction  
 4 between cash that enters the Cash Concentration System to the  
 16:14:42 5 TGA, and the fund amounts accounted for in Treasury's Central  
 6 Accounting System. This is a distinction that continues to be  
 7 muddled by plaintiffs. Funds within the Central Accounting  
 8 System, such as the IIM funds in 14X-6039, are merely internal  
 9 bookkeeping entries.  
 16:15:01 10 Because of that, Your Honor, Mr. Hoge explained that  
 11 the government does not benefit from a greater IIM fund balance  
 12 within 14X-6039; instead, as the amount of funds in 14X-6039  
 13 goes up, the government's liability goes up, and that fund  
 14 balance does not increase the amount of cash that is in the TGA.  
 16:15:24 15 Finally, Mr. Hoge explained that IIM accounts are  
 16 treated differently from other fund accounts in the Central  
 17 Accounting System because they are deposit fund accounts and  
 18 they do not belong to the government. They are not owned by the  
 19 government. Thus, Mr. Hoge explained they constitute a  
 16:15:42 20 liability against the government and against the Treasury. They  
 21 are not treated as government funds and they are not included  
 22 within the government's budget.  
 23 After Mr. Hoge, Your Honor, Gary Grippo, the Deputy  
 24 Assistant Secretary For Fiscal Operations and Policy, testified,  
 16:15:59 25 and he has been employed by Treasury for 16 years. Mr. Grippo

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1 testified that for the last fiscal year, the amount of the  
 2 federal government's budgetary receipts was approximately  
 3 \$2.6 trillion, and the government's outlays were even greater  
 4 than those receipts.  
 16:16:17 5 THE COURT: We know that.  
 6 MR. KIRSCHMAN: Sadly. Mr. Grippo examined the total  
 7 revenues then into the IIM system for the year 2007 as he was  
 8 shown Plaintiffs' Attachment A. That amount stated in  
 9 Attachment A was \$336 million. Mr. Grippo testified that this  
 16:16:40 10 \$336 million in the IIM system would not factor into Treasury's  
 11 borrowing decisions.  
 12 He explained that the government's scale of borrowing  
 13 is such that relatively marginal amounts like \$500 million on a  
 14 given day would not impact how Treasury borrows, let alone an  
 16:17:01 15 annual figure, an annual figure of \$336 million. In fact, he  
 16 explained that Treasury's financing group makes decisions on  
 17 what to borrow in billion-dollar increments, and that the amount  
 18 of IIM revenues would not have any effect on Treasury's  
 19 decisions about whether or how much to borrow.  
 16:17:21 20 Mr. Grippo further testified that Treasury's financing  
 21 group has no knowledge of IIM, and even if the information were  
 22 to be provided to them, it would make no difference in the  
 23 borrowing decisions the financing group makes.  
 24 Mr. Grippo also testified that cash in investments held  
 16:17:41 25 outside Treasury, like the IIM funds that Interior deposits in

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1 or invests in commercial banks, is cash that Treasury is not  
 2 controlling and thus plays no role in any borrowing decisions.  
 3 It is money that Treasury does not even consider available to  
 4 it.  
 16:18:00 5 This testimony from these very credible three  
 6 witnesses, Dr. Kehoe, Mr. Hoge, and Mr. Grippo, read together  
 7 establish beyond any reasonable dispute that there is no basis  
 8 for plaintiffs' benefit-to-the-government claim. And plaintiffs  
 9 offered no one, no one in their rebuttal case to refute them.  
 16:18:22 10 Our last three witnesses, Your Honor, completed  
 11 defendants's responsive case by demonstrating that the evidence  
 12 of record does not support a conclusion that 30 percent of the  
 13 money that should have been disbursed to IIM beneficiaries was  
 14 not disbursed.  
 16:18:37 15 You will recall, Your Honor, that Ali Mushtaq at NORC  
 16 and Frank Banda of the Resnick Group testified regarding the  
 17 Treasury and GAO settlement packages. Consistent with  
 18 Dr. Angel's earlier opinion regarding these settlement packages,  
 19 Mr. Mushtaq and Mr. Banda showed evidence that supports the  
 16:18:54 20 conclusion that through 1951, there was an orderly review  
 21 process in place by an outside agency that led to detailed  
 22 scrutiny of the IIM records.  
 23 Mr. Banda explained the two-tiered review process that  
 24 the IIM transactional information went through, and opined that  
 16:19:13 25 based on the Resnick Group's review, there was a thorough review  
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1 of the IIM records performed from 1890 through 1951.  
 2 Your Honor, our final witness, Joseph Rosenbaum, was a  
 3 very significant witness. And it's Mr. Rosenbaum who reviewed  
 4 in detail the histories of the named plaintiffs and their  
 16:19:36 5 designated predecessors. It is these named predecessors who are  
 6 representative of this class as a whole; a class, by the way,  
 7 again, that includes present and former beneficiaries of  
 8 Individual Indian Money accounts.  
 9 Now, what Mr. Rosenbaum found debunks any serious  
 16:19:58 10 argument that significant amounts of money that should have been  
 11 disbursed into individual IIM accounts was not. He showed that  
 12 through portions of his earlier work, and these were marked as  
 13 DX-515.  
 14 DX-515 sets out some of Mr. Rosenbaum's most relevant  
 16:20:16 15 findings. Over 12,600 transactions totaling \$1.1 million were  
 16 examined by Ernst & Young. These transactions were located in  
 17 IIM ledgers and account statements, and in IRMS and TFAS data.  
 18 Reconstructed transactions, and you recall, or you may recall  
 19 Mr. Rosenbaum spoke to those briefly, were not part of the  
 16:20:41 20 analysis of the over 12,600 transactions found in the ledger  
 21 information.  
 22 As you can see from DX-515, total receipts, including  
 23 both collections and interest, totaled \$560,017.08.  
 24 Disbursements for that same time period for the accounts  
 16:21:06 25 reviewed of the named plaintiffs and their predecessors equalled  
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1 \$557,219.08. The very small difference between these total  
 2 receipts and total disbursements for the representative named  
 3 plaintiffs was \$2,798. And that does not mean, Your Honor, that  
 4 this amount was not later disbursed, but it does show that at  
 16:21:32 5 the time of this analysis, that difference was under \$3,000.  
 6 Although Ernst & Young did not calculate a disbursement  
 7 rate, Your Honor, looking at these figures and doing the math  
 8 reveals that 99.5 percent of the total receipts posted to these  
 9 accounts were disbursed from those accounts.  
 16:21:51 10 Those, Your Honor, are the numbers, that is the  
 11 evidence we have regarding the representative named plaintiffs,  
 12 those are the facts that have been established. With the  
 13 credible numbers provided by Ms. Herman, Dr. Angel, and  
 14 Dr. Scheuren, these are the numbers that refute plaintiffs'  
 15 claims for billions and billions of dollars.  
 16:22:07 16 And Your Honor, plaintiffs' rebuttal case certainly did  
 17 not in any way detract from the numbers defendants presented to  
 18 you. At our last pretrial conference on June 2nd, Your Honor,  
 19 you offered plaintiffs the opportunity to put on an expanded  
 16:22:28 20 rebuttal case. You stated that although it might not be  
 21 rebuttal, strictly speaking, because of the circumstances  
 22 leading up to the trial, you would allow plaintiffs to put on  
 23 any of their may call witnesses to respond to the witnesses we  
 24 offered in our responsive case.  
 16:22:42 25 Plaintiffs did not do that. Instead, after having put  
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1 on only six witnesses during their case-in-chief, none of whom  
 2 established a factual foundation for plaintiffs' claim for  
 3 billions of dollars, plaintiffs chose instead to call only  
 4 Dr. Palmer. And Dr. Palmer as an expert witness did not and  
 16:23:05 5 could not establish any facts necessary to prove plaintiffs'  
 6 case.  
 7 As you heard yesterday, even in his model that  
 8 purported to use the data that we had provided during the course  
 9 of the trial, Dr. Palmer, at the direction of plaintiffs, was  
 16:23:22 10 still being selective in the data he would use, and would  
 11 repeatedly substitute his own estimates instead of relying on  
 12 the available data, instead of relying on the actual numbers  
 13 found within the documents.  
 14 He, like Dr. Cornell, summed data from a document but  
 16:23:42 15 would then disregard data from another available document. And  
 16 the clearest example of that was Dr. Palmer's adjustment of the  
 17 1955 disbursements amount found in the 1955 Comptroller  
 18 General's report, and that is at Plaintiffs' Exhibit 53.  
 19 Dr. Palmer had absolutely no information that justified his view  
 16:24:08 20 that the internal control shortcomings mentioned in the report  
 21 could somehow be interpreted and then quantified to mean that  
 22 actual disbursements are approximately 74.5 percent of the  
 23 reported amount. But that is what he did in his calculations.  
 24 As they did with Dr. Cornell, plaintiffs again had  
 16:24:27 25 Dr. Palmer use unfounded assumptions in plugging numbers into  
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1 his model. Dr. Palmer's adjustment of data for 1972 and 1987 --  
2 1972 through 1987 and 2003 through 2007, where he used his  
3 134.1 percent analysis, you recall this from yesterday, that  
4 adjustment effectively reduced disbursements to close to  
5 75 percent of the reported amounts.

6 In doing this, Dr. Palmer rejected actual reported  
7 disbursement data generated by business records, and in the case  
8 of the time period 2003 to 2007, amounts that were reported in  
9 audited financial statements.

10 Also, Your Honor, plaintiffs' disbursement rate  
11 understates disbursements made by check by over six percent.  
12 You may recall that plaintiffs' evaluation of the CP&R data for  
13 fiscal year 1999 resulted in an incorrect assumption that only  
14 93.68 percent of checks issued throughout the history of the  
15 IIM Trust were cashed. That assumption is contradicted by the  
16 evidence of record, evidence that is both in the record of the  
17 October trial and in this trial, Your Honor. Plaintiff's six  
18 percent discount for check disbursements understates total  
19 disbursements by approximately \$900 million.

20 And Your Honor, this was another question you raised  
21 regarding CP&R data. You asked the question -- I didn't have a  
22 chance to jot down the exact question, but you noted this  
23 six percent factor. And I want to point out that we have  
24 briefed this issue, at least in part, in our April brief where  
25 we addressed the evidence from October that demonstrates a more

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1 are not paid by check, but by a bookkeeping entry; for example,  
2 BB transfers are journal entries representing approximately  
3 20 percent of disbursements, and both Dr. Palmer and Dr. Cornell  
4 failed to consider these in deriving their low disbursement  
5 rates. And something to point out, again, DX-371 expressly  
6 indicated in footnote five how Ms. Herman was considering these  
7 transfers.

8 This flaw in both Dr. Palmer's and Professor Cornell's  
9 analysis provides much of the explanation for Dr. Palmer's  
10 decision to discount disbursements for 1972 and 1987, and for  
11 2003 through 2007 using his 134.1 percent ratio analysis that we  
12 heard about yesterday.

13 Finally, Dr. Palmer's model, as had Dr. Cornell's,  
14 assumes that only current year revenues were not disbursed  
15 during the history of the IIM system, and there is simply no  
16 factual foundation for that assumption. But as a result of it,  
17 there's a compounding effect that inflates plaintiffs' claim  
18 dramatically.

19 Those, Your Honor, are only a few of the flaws in  
20 Dr. Palmer's model. In our proposed findings of fact we will  
21 address more in more detail, and address these in more detail  
22 with more explanation.

23 I want to address now the issue of interest that  
24 really -- and we addressed part of this yesterday. In our view,  
25 you may recall, we objected to the claim, the alternate claim

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1 accurate rate related to the CP&R data.

2 Now, Dr. Palmer also calculated what he called  
3 corrected revenues, and as we've already touched upon and as was  
4 addressed by witnesses throughout the trial, those are bloated  
5 with Osage headright revenue. Dr. Palmer's model repeats the  
6 flawed analysis of Osage headright revenues that existed in  
7 Professor Cornell's model. Dr. Palmer's decision to include  
8 virtually all of the payments, deducting only the 1.25 percent  
9 for the Osage Nation share, resulted in an inclusion of payments

10 made directly from the Osage tribe account to annuitants. And  
11 you will recall during the cross-examination of Dr. Palmer that  
12 this was demonstrated by examples, by documents in DX-372.

13 Significantly, Dr. Palmer expressly agreed with the  
14 earlier testimony of Dr. Cornell that if the payments, quote,  
15 "never flowed through the IIM Trust, they should not have been  
16 included in their models."

17 Using the amount in Palmer's model results in nominal  
18 overstatement of revenues in excess of \$821 million. Both  
19 Dr. Palmer and Dr. Cornell agreed that such an overstatement  
20 translated to an excess of \$11 billion after adding their  
21 interest calculations.

22 Regarding Tribal IIM and all other tribal funds,  
23 Dr. Palmer includes them as collections but then does not  
24 recognize the disbursement of these tribal funds because he uses  
25 only CP&R and PACER data. These disbursements you will recall

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1 now for interest as specific relief. This was a matter not  
2 before raised, and it is something that is, one, clearly a legal  
3 issue, and two, one that as a result we will clearly address in  
4 our conclusions of law.

5 But let me just say this about it: Plaintiffs have  
6 cited the interest provisions in the 1994 Act, 25 U.S.C. 401.  
7 If you look at the terms of that you will see that it talks  
8 about a claim being paid as a result of a reconciliation process  
9 and a claim being identified by an individual who had to present  
10 information or documents to the Secretary, and then, through the  
11 reconciliation, an amount would be paid.

12 That is not this case. That provision, 4012 -- and  
13 again, we will brief this more, and I should point out, Your  
14 Honor, we also have -- we have briefed this in our April 9th  
15 brief, our pretrial brief to the Court. But those provisions  
16 dealing with interest are not applicable here.

17 In our brief on April 9th, for example, we point out in  
18 footnote 54 that there was a -- I'm sorry, strike that. So we  
19 will address that further.

20 But the provision cited now and not addressed by any  
21 witness, nor should they have because it's a legal issue, do not  
22 provide a basis to award interest.

23 Mention was also made regarding the 1841 act which is  
24 currently at 31 U.S.C. 9702. And that 1841 act, Your Honor,  
25 does not apply to IIM accounts. We will establish that. One

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1 thing we cited in our April brief in footnote 54 was in the  
2 1991 Comp General opinion, which stated specifically that  
3 Section 162 does not require a payment of interest. So there's  
4 no historical basis to find that interest was due based upon  
5 certainly the 1841 account -- the 1841 statute.

6 What we will present to the Court, for example, is a  
7 statute, I believe in 1936, that specifically made it clear that  
8 that provision does not apply to Individual Indian Money funds.

9 So Your Honor, in summary, now that the trial is  
10 concluded and the witnesses have had their turn, it is clear  
11 that plaintiffs did not carry their burdens of proof. After  
12 12 years to prepare for this trial, a trial in which they are  
13 seeking billions and billions of dollars, plaintiffs presented  
14 the thinnest of cases possible. They presented six witnesses,

15 five of whom had no personal knowledge or probative evidence to  
16 offer to support the plaintiffs' burden, and their first expert,  
17 Dr. Cornell, who offered at best numbers that he himself  
18 admitted required refinement and modifications. These six  
19 witnesses offered no affirmative proof to support a claim for  
20 \$58 billion or \$47 billion.

21 Further, even if this Court were to consider their sole  
22 rebuttal witness, Dr. Palmer, the evidence presented by that  
23 witness proved to be as defective as the witness he replaced,  
24 Dr. Cornell, for the reasons I just gave you and for reasons we  
25 will explain in further detail with the findings of fact.

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1 amount of unexplained monies within the IIM system even further  
2 than we did at this trial. However, even at this point in time,  
3 with the limited amount of time and resources defendants have  
4 had to address the Court's inquiries, the credible evidence and  
5 testimony demonstrates that the difference between the current  
6 reported ending balance of the IIM system and the average  
7 statistical estimate of the ending balance is \$158.7 million.

8 Further, employing a confidence level of 97.5 percent  
9 to account for the information developed during the trial,  
10 Dr. Scheuren's statistical analysis credibly established that at  
11 worst no more than \$409.8 million cannot be explained within  
12 that IIM system. And, Your Honor, as Ms. Herman testified, this  
13 unexplained amount of funds within the IIM system undoubtedly  
14 includes amounts more than just the Individual Indian Money  
15 account monies.

16 With that in mind, Your Honor, to the extent your  
17 decision will include an amount next to a dollar sign, it should  
18 be a low amount indeed.

19 THE COURT: Thank you, Mr. Kirschman. I keep doing  
20 this. I'm sorry about this. But you keep saying, "if we had  
21 enough time." I'm going to quote four lines of poetry: "At my  
22 back I always hear at times winged chariot hurrying near and  
23 yonder. All before us lie deserts of vast eternity."

24 If you know bluegrass, you'll know where that poem  
25 comes from.

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1 On the basis of this shallowest of cases, Your Honor,  
2 plaintiffs request that this Court enter an award that would in  
3 some manner, a manner as yet still undefined by plaintiffs, set  
4 the stage for one of the largest awards of relief ever entered  
5 by a court. Given their utter failure to provide factual  
6 evidence to support their claim, this Court should firmly and  
7 quickly reject that request.

8 Plaintiffs have wholly failed to establish a reasonable  
9 approximation of any amount to be disgorged. Certainly by no  
10 stretch of the imagination have plaintiffs come close to meeting  
11 their burden as described in the Court's May 2nd, 2008 pretrial  
12 order. They have failed to present a credible case for relief,  
13 much less one that could be used to create the means for them to  
14 recover hundreds of millions or even billions of dollars.

15 For that reason, the Court should grant our Rule 52(c)  
16 motion for judgment against plaintiffs. Should the Court  
17 decline to grant our motion and adhere to its intention to enter  
18 a decision in which a number is placed behind a dollar sign,  
19 your review of the testimony and evidence presented in our  
20 rebuttal case can lead or should lead to only one conclusion,  
21 that the government's witnesses and documents clearly and  
22 convincingly refuted plaintiffs' claim for 49 or 47 billion  
23 dollars.

24 As you've heard repeatedly, Your Honor, given more  
25 time, defendants could perform more work that would reduce the

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1 Does the Osage Nation have anything to say this  
2 afternoon?

3 MR. GODFREY: Yes, Your Honor.

4 THE COURT: I'll be happy to hear from you, sir.

5 MR. GODFREY: Thank you. Merrill Godfrey on behalf of  
6 the Osage Nation.

7 THE COURT: Mr. Godfrey.

8 MR. GODFREY: The Osage Nation's position in this case  
9 turns on the government's duty here, and the government's duty  
10 is to disburse the funds that it was required to hold on behalf  
11 of individual Indians.

12 The Osage have a hybrid system, and explaining that  
13 system very briefly I think will shine some light on what the  
14 government's duty in this case is and how the award should be  
15 measured.

16 The Osage mineral estate is a tribal asset, and for a  
17 time the mineral income is held on behalf of the tribe. That's  
18 specified by statute. There is a time when those funds are  
19 required by statute to be segregated into individual shares and  
20 distributed to the headright owners. It is at that time that  
21 those funds are required by statute to be held on behalf of  
22 individual Indians.

23 So the Osage funds do come into the picture of the  
24 government's duty in this case; the question is when. And under  
25 the 1906 Act, the individual headright owners have a right to a

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1 quarterly distribution at the end of the fiscal quarter. The  
 2 distribution historically has taken one of two forms. One form  
 3 is a transfer to the IIM accounts of individual Osage headright  
 4 owners; the other, which has been alluded to by the government,  
 16:39:49 5 is a distribution by check directly to the Osage headright  
 6 owner.  
 7 The government's distinction between the funds that  
 8 went into what they call the IIM system and the funds that were  
 9 distributed by check is formalistic, and they've offered no  
 16:40:15 10 basis for the decision to distribute some of the funds through  
 11 check as opposed to putting them into accounts for individual  
 12 Indians. Under statute, the obligation is at the end of the  
 13 fiscal quarter to segregate those funds and to hold them on  
 14 behalf of individual headright owners. The government should  
 16:40:38 15 not get off the hook by saying, well, we decided to cut checks  
 16 to some of these people for reasons we haven't explained.  
 17 Therefore, the Osage Nation's position is that all of  
 18 the funds that were required to be distributed to headright  
 19 owners were required by statute to be held in trust for  
 16:40:56 20 individual Indians, and that that amount of money should have  
 21 been disbursed. And to the extent that it was not, those monies  
 22 should be part of a restitutionary award in this case.  
 23 At all times before the distribution specified by  
 24 statute at the end of the fiscal quarter, the funds are held on  
 16:41:20 25 behalf of the Osage tribe. Statute specifies that royalties are  
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1 collected for the tribe, the royalties are owned by the tribe,  
 2 and that Congress can appropriate out of those funds to provide  
 3 for tribal purposes, such as historically the education of Osage  
 4 children, improvements that benefit the tribe as a whole, and  
 16:41:48 5 similar purposes. It is only at the end of the fiscal quarter  
 6 that the headright amount is calculated out of the remainder.  
 7 Admittedly, the amount that is used for tribal purposes  
 8 is very limited, and the Osage Nation views seriously its role  
 9 of protecting as much of the funds as it can to be distributed  
 16:42:14 10 to the headright owners at the end of the fiscal quarter. The  
 11 Osage Nation has no discretion, as has been pointed out, under  
 12 statute to appropriate funds on its own for statutory -- excuse  
 13 me. Congress specifies how much of the headright revenue is  
 14 subject to the discretion of the Osage Nation for certain  
 16:42:42 15 expenses. So the headright owners do have a right to that  
 16 distribution, but the right begins at the end of the fiscal  
 17 quarter.  
 18 Now, this is not a formalistic distinction, from the  
 19 Osage Nation's perspective. It's a very important one, because  
 16:43:00 20 it historically has been very important to the tribe that the  
 21 mineral estate has remained a tribal asset, a collective asset,  
 22 even though it is individuals who eventually receive the income.  
 23 That's particularly important for the headright owners  
 24 themselves, because the sovereign government of the Osage Nation  
 16:43:18 25 is the protector of the headright owner's right to receive those  
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1 distributions.  
 2 With respect to the monies that were held on behalf of  
 3 the tribe, the Osage Nation currently has a damages claim in the  
 4 Court of Federal Claims, and that's another reason why this is  
 16:43:40 5 not a formalistic distinction. The individual's right to the  
 6 money begins at the end of the fiscal quarter when the right to  
 7 a distribution arises.  
 8 THE COURT: Where does the damages claim stop and the  
 9 equitable claim in this court begin?  
 16:43:58 10 MR. GODFREY: At the time that the statute specifies  
 11 for the distribution, which is the end of the fiscal quarter.  
 12 So to the extent that the evidence shows that monies should have  
 13 been distributed to Osage headright owners, that money should go  
 14 into the input side of the equation in this case.  
 16:44:17 15 THE COURT: And what if there's no evidence specific to  
 16 that point, but the evidence is only aggregated among and across  
 17 all Indians and all tribes?  
 18 MR. GODFREY: I think the --  
 19 THE COURT: The suggestion of the plaintiffs -- and  
 16:44:41 20 they've been very careful to say any award would be distributed  
 21 as the Court would direct, but their suggestion is that the  
 22 award should be distributed per capita.  
 23 MR. GODFREY: Well, to the extent that the records show  
 24 that funds were owed to Osage headright owners, there's no  
 16:45:00 25 reason to award those funds per capita to all other Indians. I  
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1 understand that to the extent there's not evidence that funds  
 2 were held for any particular Indian, that the Court would  
 3 approximate by doing a per capita distribution.  
 4 But in this case, because the Osage Nation has a  
 16:45:19 5 special system, and because, as evidenced by some of the reports  
 6 that the government has been able to produce, there is a  
 7 separate system for the Osage --  
 8 THE COURT: Well, I suggest that when you file whatever  
 9 you're going to file, and you will have the opportunity to file  
 16:45:34 10 on the same schedule as the other parties here, Mr. Godfrey,  
 11 that you be as precise as you can about the nature of your  
 12 damages claim and how it impacts and how it may be prejudiced  
 13 and how it -- where its boundaries are as distinct from the  
 14 boundaries of the plaintiff class claim in this case.  
 16:45:59 15 MR. GODFREY: Yes. Thank you, Your Honor.  
 16 THE COURT: Thank you very much. Mr. Dorris, you want  
 17 to give a rebuttal but I don't have time for a rebuttal.  
 18 MR. DORRIS: Your Honor, I have two points, one  
 19 administrative, one substantive, and I can do it in less than  
 16:46:14 20 one minute.  
 21 THE COURT: I'll hear your administrative point.  
 22 MR. DORRIS: Okay. It's reported to me that the docket  
 23 shows the findings of fact and conclusions of law to be due on  
 24 July 8th. I understood from yesterday --  
 16:46:27 25 THE COURT: No, we're going to talk about that.  
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1 MR. DORRIS: If I get it done in 30 seconds?  
 2 THE COURT: 30 seconds.  
 3 MR. DORRIS: Your Honor, a large number should not  
 4 cause this court to turn away from justice. As the DC Circuit  
 16:46:41 5 said in --  
 6 THE COURT: I thought you had a substantive point.  
 7 That sounds like a rhetorical point to me, Mr. Dorris.  
 8 MR. DORRIS: Well, I may have misspoken, Your Honor.  
 9 THE COURT: All right. Your 30 seconds are running.  
 16:46:53 10 MR. DORRIS: The DC Circuit said in 2005 at 414 F.3d  
 11 13, in the Medicare reimbursement litigation, quote, "Having to  
 12 pay a sum one owes can hardly amount to an equitable reason for  
 13 not requiring payment."  
 14 Your Honor, the amount is high but the years have been  
 16:47:12 15 many. Thank you.  
 16 THE COURT: Thank you, sir.  
 17 MR. KIRSCHMAN: Your Honor --  
 18 THE COURT: How many seconds do you want,  
 19 Mr. Kirschman?  
 16:47:21 20 MR. KIRSCHMAN: 45 seconds.  
 21 THE COURT: You've got 30.  
 22 MR. KIRSCHMAN: This is in response to counsel for  
 23 Osage. Counsel for Osage suggests that the government is making  
 24 a formalistic distinction between tribal funds and IIM funds,  
 16:47:38 25 and that is not the case. The only claim here is related to IIM  
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1 funds.  
 2 And in fact, I want to point to the Court, in my  
 3 15 seconds left, the transcript at 163, where Ms. Infield  
 4 herself testified not that Osage revenues are classified as  
 16:47:57 5 funds in Treasury's IIM account, but that the Osage headright  
 6 revenues are classified as funds in an Osage annuity account  
 7 within Treasury.  
 8 These are two different cases, two different sets of  
 9 plaintiffs, and they should not be merged here at the 11th hour.  
 16:48:13 10 THE COURT: Okay. I'm sure this is all going to be  
 11 clarified for me in the findings of fact. Now, proposed  
 12 findings and conclusions are due from all parties,  
 13 simultaneously or whenever they get around to filing them, on  
 14 the date of July 11th. I have told you that we are operating on  
 16:48:32 15 a tight schedule, frankly, for the efficient use of the  
 16 resources of this court. And accordingly, oppositions, that is  
 17 responses of any kind, will be due 10 days, 10 calendar days,  
 18 later on July 21st.  
 19 And that will be all the briefing that we will  
 16:48:55 20 entertain before we issue a ruling. That ruling will be issued,  
 21 I say, and I hope I will not be guilty, like Mr. Dorris, of  
 22 having misspoken, will be issued within the month of August.  
 23 Now, a couple of closing observations. I have been  
 24 very interested in the summaries and arguments of both sides,  
 16:49:20 25 which continue the high level of professionalism and excellence  
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1 that I've heard all through this trial. I hope that your  
 2 proposed findings and conclusions will give me concisely, but  
 3 will give me whatever guidance you can on the standards of proof  
 4 in equity. Because it is absolutely true that whatever award is  
 16:49:52 5 issued in this case has to be made on the basis of statistics,  
 6 interpolations, estimates, some of you call it guesses. There  
 7 is very little hard data on which to base an award that covers  
 8 120 some years of collections and disbursements by the  
 9 government.  
 16:50:16 10 And by the way, a lot of what we've seen during this  
 11 trial deals with modern era and relatively modern era account  
 12 numbers and accounting techniques, and I have no idea whether  
 13 14X-6039 existed before 1920 or 1910. Nobody has told me that.  
 14 And we have no idea about accounting systems. We're  
 16:50:40 15 pulling numbers out of reports and aggregate numbers here and  
 16 there, and somehow making them into numbers. It is a very, very  
 17 difficult process that if this were a damage case, and there is  
 18 no court in the country that would award damages on the basis of  
 19 what we've heard here, because it would be called remote and  
 16:51:02 20 speculative in any court of law that is considering a damages  
 21 award.  
 22 Equity, equity is a different animal. And we are  
 23 sitting as a court of equity, and we will have to make a  
 24 decision on the -- the best decision we can. But I need some  
 16:51:22 25 help from both sides on the question of just how much -- what I  
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1 want is the maxim that says equity loves guesswork, or hates  
 2 guess work. You know, give me either way.  
 3 Second, on Mr. Kirschman's repeated raising of his  
 4 Rule 52(c) motion, which as I remember it at the close of the  
 16:51:50 5 plaintiffs' case didn't govern the whole award, it governed the  
 6 benefit-to-the-government award, I continue to believe that the  
 7 government has the better argument here. I am not going to rule  
 8 on it now because the plaintiffs have not responded to it  
 9 formally in writing, nor have they really had a chance to do so.  
 16:52:13 10 And they may do so either separately by a response to the 52(c)  
 11 motion or they may do it as part of their proposed findings and  
 12 conclusions of law.  
 13 What I am frankly concerned about is the expectations  
 14 that have been built up here, by repetition in the press and by  
 16:52:32 15 the plaintiffs, of an award that is in 11 digits. I have to  
 16 tell you, from where I sit today, it looks like the dispute in  
 17 this case is between 10 digits and nine digits.  
 18 I think the burden of proof lies with the plaintiffs on  
 19 the benefit-to-the-government claim, as I have indicated in  
 16:53:02 20 earlier court filings, including a reference to that Indiana Law  
 21 Review article that the plaintiffs showed part of on the screen  
 22 today. And my instinct - and I need help from the parties in  
 23 the briefs on this - my instinct is that the standards of proof  
 24 for benefit to the government would be more rigorous than the  
 16:53:43 25 standards of proof on the underlying disgorgement award.  
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1 I have no requirements to announce about the content of  
 2 your proposed findings and conclusions of law. I do not want to  
 3 get into the business of playing with a spreadsheet myself.  
 4 That way lies all kinds of potential error. But there are a few  
 16:54:18 5 sets of numbers in this case that we have talked about that seem  
 6 to me to -- I would be interested to see how the spreadsheets  
 7 worked with different numbers.  
 8 I would be interested to see how the spreadsheet works  
 9 if Mr. Angel -- if Dr. Angel's 10 to 15 percent IIM number were  
 16:54:51 10 something dramatically different. I mean, just for the sake of  
 11 discussion, what if it were two percent all the way through  
 12 instead of 10 to 15 percent?  
 13 I would be interested to see how the spreadsheets would  
 14 work if all the payments to annuitants were backed out of the  
 16:55:14 15 spreadsheet, and without prejudice to Mr. Gregory's (sic) point,  
 16 if it were held that the Osage headrights -- the Osage headright  
 17 monies were not in fact monies held for the account of IIM  
 18 accountholders.  
 19 I would be interested to see how the spreadsheet worked  
 16:55:39 20 if Dr. Palmer's 75 percent number -- how sensitive the  
 21 spreadsheet is to adjustments of that number, which particularly  
 22 in the 2002 to 2007 era seemed to me to be almost self-evidently  
 23 way off.  
 24 And I would be interested to see how sensitive the  
 16:56:12 25 spreadsheet analyses are to a different check clearing or check  
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1 CERTIFICATE OF OFFICIAL COURT REPORTER  
 2  
 3 I, Rebecca Stonestreet, certify that the foregoing is a  
 4 correct transcript from the record of proceedings in the  
 5 above-entitled matter.  
 6  
 7  
 8  
 9 \_\_\_\_\_  
 10 SIGNATURE OF COURT REPORTER DATE  
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1 cashing number.  
 2 You-all may have different ways of presenting different  
 3 numbers in the spreadsheets, but what I'm suggesting is that  
 4 among the materials that you present on July 11th, or in  
 16:56:39 5 response on July 21st, that you take into realistic account the  
 6 disputes that the parties have had about these various numbers,  
 7 and make some demonstration of how the spreadsheet would react  
 8 if the numbers were different. I don't care how many  
 9 combinations and permutations you present, but those are at  
 16:57:03 10 least some of the numbers that I think are questionable and need  
 11 to be considered.  
 12 I think I'll stop right there. Once again, counsel, I  
 13 want to thank everybody for their patience and their relative  
 14 good humor during this long procedure. Well tried case, great  
 16:57:31 15 laptops, we're adjourned.  
 16 (Proceedings adjourned at 4:57 p.m.)  
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