

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, : Civil Action 96-1285
et al. :
 :
Plaintiffs :
 :
 : Washington, D.C.
V. : Monday, June 16, 2008
 :
 :
DIRK KEMPTHORNE, Secretary :
of the Interior, et al. :
 :
 :
Defendants : MORNING SESSION

*TRANSCRIPT OF EVIDENTIARY HEARING
DAY 5
BEFORE THE HONORABLE JAMES ROBERTSON
UNITED STATES DISTRICT JUDGE*

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C O N T E N T S

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
MICHELLE HERMAN				
By Mr. Quinn	--	--	742	--
By Mr. Dorris	--	687	--	--

E X H I B I T S

NUMBERADMITTED

(No Exhibits Moved into Evidence.)

P R O C E E D I N G S

1
2 COURTROOM DEPUTY: This is Civil Action 96-1285,
3 Elouise Cobell, et al. versus Dirk Kempthorne, et al.

4 THE COURT: Mr. Kirschman, I believe you wanted to be
5 heard first on your 52(c) motion, and I think we can do that
6 before we proceed any further.

7 MR. KIRSCHMAN: Thank you, Your Honor. Good morning.

8 THE COURT: Good morning.

9 MR. KIRSCHMAN: Defendants last week filed our
10 Rule 52(c) motion at the close of plaintiffs' case based on the
11 testimony that was presented in plaintiffs' case-in-chief.

12 Their witnesses, and I believe they presented six
13 witnesses, did not establish the case that pursuant to the
14 Court's May 2nd order plaintiffs had the burden of establishing.
15 As the Court's order set out, plaintiffs had to establish that
16 funds that entered the IIM system were supposed to be paid to
17 IIM beneficiaries, but were not. And even more clearly, the
18 Court's May 2nd order made it clear that regarding plaintiffs'
19 claim for approximately \$54 billion in benefits to the
20 government, that it would be plaintiffs' burden to establish
21 both, one, the fact, and two, the amount of the government's
22 benefit from its alleged use of funds that were not explained by
23 the government's data.

24 The testimony and the evidence that was presented in
25 plaintiffs' case-in-chief did not establish any of those

1 elements; that is, they did not establish that funds should have
2 been paid, they did not establish the fact of the government's
3 benefit, they did not establish the amount of the government's
4 benefit, and they did not establish that the government actually
5 used funds that were not explained by the government's data.

6 And the clearest proof of that lies in an examination
7 of the testimony from plaintiffs' witnesses themselves,
8 Your Honor. This testimony is just a week old, and I'm sure you
9 recall it, but I would like to just point out some things
10 clearly to the Court as it bears on the Rule 52(c) motion.

11 Plaintiffs' first witness was Professor Laycock. And
12 although Professor Laycock may have been clear in addressing his
13 legal opinion regarding jurisdictional issues, such as what is
14 damages and what is restitution, and although he addressed the
15 broad purposes of restitution, he also candidly stated to this
16 Court on cross-examination, and I'm quoting, "The basis of my
17 testimony is that's what the plaintiffs are claiming, but
18 whether or not what they're claiming really happened was not
19 within the scope of my testimony."

20 Certainly Mr. Laycock did not add anything to this
21 Court's understandings of the facts related to plaintiffs'
22 \$58 billion claim.

23 And then, Your Honor, we look at the testimony of Mona
24 Infield, Ray Ziler and Don Pallais, all who testified regarding
25 the alleged unreliability of the data as it related to the

1 disbursement of IIM funds. You yourself, Your Honor, may recall
2 at the end of Mr. Ziler's testimony asked what the relevance of
3 this line of testimony was to the claim where you're seeking a
4 number, and you noted that it really didn't seem to advance
5 plaintiffs' position in the trial. And you were exactly
6 correct.

7 As we stated, as I stated at the time, it is not
8 relevant to the burdens of proof that were set forth in the
9 May 2nd order. And you were also correct that this was
10 testimony, or the line of testimony, certainly, that you heard
11 back in October.

12 In response to your observations at the time,
13 plaintiffs' counsel acknowledged, Your Honor, that this line of
14 testimony -- and I'm quoting from the transcript at pages 158
15 and 159, acknowledged that this line of testimony does, quote,
16 "not have a direct bearing on how -- on what numbers you add up
17 in a column to get that quantification of plaintiffs' claim."

18 So the testimony that Mona Infield, Ray Ziler, and
19 Don Pallais offered to this Court did not go to the heart of
20 this matter and to the issues in this trial, and they cannot
21 serve as a basis to establish any of the elements that
22 plaintiffs were required to put forth evidence on.

23 We can then look to the testimony, Your Honor, of James
24 Miller, the former OMB director, who offered vague, general
25 statements about how he believed the United States may benefit

1 by the flow of cash into its coffers. But his testimony, he
2 acknowledged during your questioning, was what was his opinion
3 as to what was common sense. It was not based on his personal
4 knowledge, it was not based on facts; he made it clear that he
5 was not testifying from firsthand knowledge, he did not know how
6 the Treasury process worked related to decisions on borrowing,
7 he did not have a basis for his common sense theoretical
8 testimony. That certainly doesn't establish, as the Court
9 required, the facts or the amount of a benefit.

10 And regarding the amount, on cross-examination
11 Mr. Miller stated repeatedly that he was not testifying to any
12 particular amount. And here I'm citing, Your Honor, the
13 transcript at page 218: "You also testified that plaintiffs'
14 calculation of a \$58 billion benefit to the government was,
15 quote, 'prepared under certain assumptions on which I can not
16 verify. I do not have requisite information to verify the
17 numbers.'"

18 He further went on to elaborate, Your Honor, that,
19 quote, "I can't comment on the actual data, the actual amounts,
20 the net amounts that were retained by the government. I do not
21 have that knowledge." And again, this is all directly
22 consistent with the responses you received when you questioned
23 him at the end of his testimony. He did not have knowledge and
24 he was not speaking from knowledge, and his opinions were just
25 vague and based on what he viewed to be common sense based on

1 his broad responsibilities as an OMB director, I believe roughly
2 20 years ago.

3 The only witness, Your Honor, who was identified by
4 plaintiffs as offering testimony regarding the calculation of
5 the amount of the government's benefit, Professor Cornell, made
6 it clear that he was not offering an opinion as to the
7 correctness of the amount he calculated, to the amount that's at
8 the end of plaintiffs' calculations, a \$58 billion amount.
9 Professor Cornell testified that while he believes the
10 methodology he employed in his case was correct, he was not in
11 court to tell you that the \$58 billion figure was actually the
12 precise measure of the government's benefit from its alleged use
13 of the funds, and that he wasn't there to provide any further
14 factual development of it. He said, "I think that requires work
15 further than I have done."

16 Professor Cornell acknowledged, Your Honor, that, and
17 I'm quoting, "I eventually made the assumptions that went into
18 Attachment A, but I did say to counsel in this matter that I was
19 not a historian and had not been working on this matter long
20 enough to have delved into the nature of each number, so to some
21 extent I would be operating at a high level that may have to be
22 refined."

23 Well, plaintiffs' case-in-chief was the point where
24 they had to establish the facts and present the testimony to
25 meet their burden. They are not in a position now, as we begin

1 our rebuttal case, Your Honor, to meet that burden. Plaintiffs
2 had their opportunity with those six witnesses, and they clearly
3 did not meet it.

4 In our motion we set forth specific elements and
5 specific facts that have not been considered by these witnesses,
6 but -- and those should all be weighed and considered by the
7 Court. But the point of it is, Your Honor, when it comes down
8 to it, you can look to what these witnesses testified to by
9 themselves. The two people who specifically were asked to
10 testify about the benefits to the government specifically
11 stepped back from plaintiffs' numbers and disavowed any
12 responsibility for the calculations or for the numbers that
13 resulted from those calculations.

14 With that, there is no basis to proceed further in this
15 trial on either the establishment of funds that should have been
16 paid, should have been posted to the IIM accounts and were not,
17 and especially, Your Honor, based on the testimony of
18 plaintiffs' own witnesses, there's no reason to proceed further
19 and hear testimony related to an alleged benefit to the
20 government, when there's been no factual foundation laid for
21 that in the plaintiffs' case-in-chief. Thank you.

22 THE COURT: Who wants to respond to the motion? Thank
23 you, Mr. Kirschman.

24 MR. DORRIS: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. DORRIS: Under Rule 52, it's well within this
2 Court's discretion, of course, to decline to render any judgment
3 until the close of the evidence. And in a case like this, with
4 a beneficiary, beneficiaries in a dispute with the trustee who
5 has access to all the information and has all the information
6 under their custody and control, we would submit that that is
7 something that the Court should consider.

8 Now, moving to the motion itself, plaintiffs believe
9 that they have made a prima facie case with respect to both the
10 fact and the amount of the government's benefit. AR-171, which
11 is the government's own exhibit from the prior trial, and which
12 has been used here in this court in this hearing, acknowledges
13 that there is over \$3.6 billion from the period of 1909 through
14 1971 that is due and owing to the plaintiffs, that there has
15 been more collected by the government than has been paid out.

16 Now, Don Pallais' testimony, which Mr. Kirschman did
17 not refer to this morning, makes it clear that all of the
18 evidence regarding disbursements that are on AR-171 must be
19 looked at with a jaundiced eye, and that the number may very
20 well be higher.

21 So first of all, in terms of the plaintiffs' proof, the
22 exhibit that the government used at the last hearing we believe
23 would go by -- stand by itself as being prima facie evidence
24 that there has been a benefit to the government.

25 In addition, the defendant in their opening argument

1 acknowledged that there has been -- if you use a 95 percent
2 confidence factor, there's been \$365 million more paid in than
3 is acknowledged by the present stated or reported balance in the
4 IIM accounts. So there is a benefit to the government where
5 they are acknowledging that if you're going to be not
6 100 percent confident but at least 95 percent confident, there's
7 at least \$365 million that they cannot account for having been
8 disbursed but they recognize as having been collected.

9 Now, what is defendant's proof? The defendants have
10 shown that with respect to the revenues, that they're in excess
11 of \$15 billion that have been collected. Your Honor, this is
12 more than what AR-171 shows, but it is clear that the
13 differences in the revenue are not that great. Much of it has
14 to do with how you treat the Osage payments. That accounts for
15 probably about \$800 million in the difference between our two
16 charts, and there's about \$800 million difference between the
17 two charts.

18 There are some other differences, though, because the
19 government's number includes interest; our number in terms of
20 the nominal dollars does not. And some of those, in fact, were
21 identified, I think, during the cross-examination of Ms. Herman,
22 which admittedly was not in our case, but begins to show that
23 much of the revenue difference is -- we can identify and deal
24 with that as we move on through the case.

25 So the amount of money that has been collected, there

1 are some disputes and differences, but I think as we go through
2 all the evidence, we'll be able to be -- and examine their
3 calculations, we would be real happy just to stay with AR-171
4 for their calculations, but they want to change them. But as we
5 deal with that, we'll be able to identify those revenue
6 differences.

7 A large part of the case has to do with disbursements
8 and the amount of disbursements. It's been the law in this
9 district for a long time in the *Cafritz* case, 60 F.Supp at 632,
10 that when a fiduciary is under a duty to account and he fails to
11 do so, the only inference to be drawn is that he could not
12 satisfactorily explain the transaction without an expression of
13 guilt. Also in *Rosenak v. Poller*, 290 F.2d at 749, it is the
14 burden of the trustee to establish the non-existence of money
15 due to the plaintiff.

16 And that's what we have here. We have made an
17 effort -- despite the fact that they have all the records or
18 should have all the records, we've made a genuine effort to come
19 in and show a reasonable calculation for a disbursement rate.
20 They're using some different disbursement data and estimates
21 that we will be inquiring about and trying to deal with, but it
22 is ultimately -- now that we think we've made a reasonable,
23 prima facie showing that not everything that was brought in was
24 paid out, that it is now their burden to prove the
25 disbursements, and with particularity.

1 Now, with respect to the benefits that the government
2 enjoyed from having the money, the money that they brought in
3 more from the Trust property than they disbursed out,
4 Mr. Miller's testimony was - and he was in a position to have
5 seen it - that that was a benefit to the government. He did say
6 that he had not been in a particular meeting with how they may
7 have made a particular decision as to how much to borrow by the
8 government, but that he knew having the money, excess money
9 there, did benefit the government.

10 Now, of course, there was no mention this morning of
11 Mr. Gregg' testimony, who was both the head of FMS and the head
12 of Public Debt, and, as Mr. Miller testified, in a somewhat
13 unique position to know about these benefits. And he testified
14 in an earlier hearing, and his testimony is even attached to our
15 March 19th filing in this case that makes it very clear that the
16 government enjoys a distinct benefit from having excess funds in
17 the Treasury General Account.

18 In addition, Your Honor, in addition to that benefit,
19 which we used the 10-year Treasury rate - and there may be some
20 issues as to whether that's the correct rate or not, but I think
21 the testimony is that that was a reasonable approximation of the
22 average borrowing, what the government paid on its average
23 borrowing - there are a number of statutes that are also
24 important which require the government to pay interest on these
25 accounts. Those were referred to in Professor Laycock's

1 testimony, they've been handed up to the Court before. But
2 25 U.S.C. 4012 represents a Congressional consent to award of
3 interest on claims for Individual Indian Money, and we clearly
4 have that here in this case that would permit payment of
5 interest, and it shows a benefit to the government.

6 Likewise, for interest after October 25, 1994,
7 25 U.S.C. 161(a), sub part B, makes it clear that they must pay
8 interest on these funds.

9 Even going back as far as 1841, the act of
10 September 11, 1841 obligated the government to -- all funds held
11 in trust to be invested in securities, they actually call it,
12 say stocks of the United States, bearing a rate of interest of
13 not less than five percent per year.

14 As a result, Your Honor, in terms of the benefit to the
15 government, we think that we have shown clearly that there is
16 such a benefit through Dr. Miller's testimony, we think
17 Dr. Cornell's testimony confirms that there was a benefit, and
18 the government's own witness, Mr. Gregg, in a prior hearing
19 makes clear there was a benefit to the government to have this
20 excess -- the excess funds in the Treasury General Account and
21 otherwise available to the government even in the commercial
22 bank setting.

23 Now, how you exactly calculate that and whether you use
24 a Treasury rate, a 10-year Treasury rate, as was used in the
25 calculations that Dr. Cornell testified about, or whether you

1 end up using rates that are set out in other statutes is
2 something for the Court to determine at the end of the day.

3 So we would submit to you, Your Honor, that in this
4 type of proceeding where the plaintiffs have made a prima facie
5 showing that there was more money brought into the Trust than
6 has been paid out, where the defendants ultimately have the
7 burden with respect to disbursements, that it is appropriate for
8 us to proceed on, and for the Court to hear all the evidence.
9 As I indicated, Rule 52(c) indicates the Court, however, may
10 decline to render any judgment until the close of the evidence,
11 and we would request that of you at this time.

12 THE COURT: Mr. Kirschman, I don't think I need any
13 reply. I think I understand it. I think it is quite useful to
14 have had this motion and to have heard it at this point in the
15 trial. It tends to be a mini summary of where we are so far.

16 The pretrial order in this case issued on May 2nd did
17 point out that it would be the plaintiffs' burden to establish
18 both the fact and the amount of the government 's benefit from
19 its alleged use of the funds that are not explained by the
20 government's data. That is one of the two prongs, if you will,
21 of this trial, the first being how much money was received and
22 not disbursed.

23 On that first issue, how much money was received and
24 not disbursed, the burden of proof is a bit murky. We have
25 been, I think, proceeding on the premise that under ancient

1 equity cases, if the government can't account for it -- that
2 it's the government's burden to account for that money, and if
3 it can't account for it, then consequences flow. And part of
4 this trial, of course, a major part of this trial is figuring
5 out how much that is and what are the consequences.

6 But on the government's benefit, there's a different
7 overlay, legal and factual overlay that I have to deal with.
8 The pretrial order points out cases that establish that it is in
9 fact the plaintiffs' burden to establish the fact and the
10 amount, and when we're dealing with this issue of benefit to the
11 government, we are dealing with a question that is legally a
12 dicey question to begin with.

13 Because there is, it seems to me, a strong counter
14 argument that you can call it whatever you want to, it's
15 interest, and the government isn't liable for interest. And as
16 I indicated in the pretrial order, that question, the question
17 of whether the benefit, if proven, is the functional equivalent
18 of prejudgment interest remains for decision.

19 But on top of that is the question of how -- even if
20 benefit to the government can be awarded in a case like this,
21 how can it be proven and on what amount. I think we heard in
22 the examination and cross-examination of the plaintiffs'
23 witnesses that some of the money, maybe a substantial amount of
24 the money that can't be accounted for by the government can't be
25 accounted for because of, let's say, waste, fraud, and abuse.

1 If money is lost through waste, fraud, and abuse, the government
2 doesn't have the benefit of it, and there may be a damages claim
3 for it, but I don't think there's an equitable benefit to the
4 government claim for it.

5 Or if the money is in banks and not in the Treasury,
6 Mr. Miller testified on the basis of what he thought was common
7 sense that the government has the use of and makes its borrowing
8 calculations on the basis of funds that are held in banks, but
9 he didn't really know that. I haven't heard anybody who knows
10 that in this trial.

11 It is not clear as a matter of law how precise this
12 benefit showing would have to be. I think equity may very well
13 support -- on the other prong of the case, the
14 how-much-is-not-accounted-for-prong of the case, equity may very
15 well support something that is the best judgment that can be
16 made given a lot of weak data points. I'm not sure that equity
17 will support a benefit to the government claim based on those
18 same kind of weak data.

19 And so I have to say that at this stage of the game --
20 it's not a game. At this point in the trial, the government has
21 the better of the argument on the benefit to the government
22 argument, I believe. That doesn't mean I'm going to issue that
23 ruling now. I think under Rule 52(c), if I take the matter
24 under advisement to the close of the evidence, I will ultimately
25 review it, ultimately review it based on the record as it

1 existed at the close of the plaintiffs' case, and I'm going to
2 do that.

3 But I'm not finished with any of the issues in this
4 case yet, and accordingly, I'm going to decline to rule on the
5 52(c) motion until the close of the evidence, but with the
6 caveats that I've already laid down about what the benefit to
7 the government -- what the standard is and what the state of the
8 record is.

9 So the motion is under advisement until the close of
10 the evidence, and it's time for us to get on with Ms. Herman's
11 testimony.

12 Good morning, Ms. Herman.

13 THE WITNESS: Good morning, Your Honor.

14 THE COURT: I won't ask how you celebrated Father's
15 Day. I have a feeling you got stuck in town.

16 THE WITNESS: I was on an airplane, Your Honor.

17 THE COURT: All right.

18 MR. DORRIS: Thank you.

19 **(MICHELLE HERMAN, DEFENDANT witness, having been previously duly**
20 **sworn, testified as follows:)**

21 **CONTINUED CROSS-EXAMINATION**

22 BY MR. DORRIS:

23 Q. Good morning, Ms. Herman.

24 A. Good morning.

25 Q. Ms. Herman, as you may recall, on Thursday we left off where

1 I was beginning to ask you some questions regarding Osage and
2 your calculations regarding Osage. And I indicated I needed a
3 little more time, obviously, in light of some of your answers to
4 try to study that and figure that out, and I would like to pick
5 back up with that now, if we might.

6 In Defendant's Exhibit 372, which is the binder that we
7 have --

8 MR. DORRIS: And Your Honor, do you still have your
9 binder there with you?

10 THE COURT: I do.

11 MR. DORRIS: If you would turn with me under Osage A,
12 which is back toward the back of the notebook, and then it will
13 be Bates page 149.

14 BY MR. DORRIS:

15 Q. Ms. Herman, for the years 1980 through 1925, for most of
16 those years you have estimated the amount of money you believe
17 came into the IIM system in connection with the Osage annuities.
18 Is that correct?

19 A. I believe from 1880, sir.

20 Q. Yes, ma'am.

21 A. Yes, sir, we have.

22 Q. Okay. And the way you did that, and looking at this
23 particular exhibit --

24 MR. DORRIS: And you may see if you can bring that up.
25 It would be 372, page 179. And can you kind of blow up the blue

1 area there? I tell you what let's do, just down at the very
2 bottom of the page, blow that up.

3 BY MR. DORRIS:

4 Q. Your exhibit that we looked at on Thursday indicated for the
5 blue area, that that had been used calculating a percentage of
6 31.2 percent, saying that 31.2 percent of the total Osage
7 annuities was paid into the IIM system. Correct?

8 A. During that time frame.

9 Q. Right. And what I was struggling with at the time was to
10 figure out how you came up with the 31.2 percent. But let's see
11 if I have it right now.

12 You took the -- in the column that's just left of the
13 blue column, you took those percentages that are indicated there
14 that fall within the blue time period, which the one for 1925
15 would be, for example, 31.9 percent. Do you see that?

16 A. Yes, I do.

17 Q. And then you used those numbers that appear in that column,
18 starting at 31.9 percent and above it in that column, and added
19 those together and divided by the number of years to then come
20 up with a percentage to apply for the rest of this period?

21 A. Yes, that's an average of the available data.

22 Q. So for about six or seven years, during this lengthy period
23 you came up with an average that you believe was paid into the
24 IIM system, and then used that to calculate the others?

25 A. That's correct.

1 Q. So at best you would agree that this is an estimate, and
2 your column even calls it estimated IIM payments. Correct?

3 A. For that time frame, yes, sir.

4 Q. In a similar fashion you did for many of the time periods
5 that are then shown in yellow there on page 149 and 150.

6 Correct?

7 A. I'm sorry, I don't believe I understand the question.

8 Q. In other words, for that time period you made a similar
9 average calculation and applied it to the years in which you had
10 no data?

11 A. It's not that we had no data. We didn't have the individual
12 payments for some of those time frames, and we --

13 Q. I'm sorry, go ahead.

14 A. I apologize. We used a different set of years to determine
15 the average for the yellow time frame.

16 Q. You used the years where you did have some data about the
17 amounts you believed were paid into the IIM in the yellow time
18 period. Correct? You used those averages to calculate the
19 average to apply to the other years in the yellow time?

20 A. Yes, we used all the available data during that time frame.

21 Q. But then the period that's in gray below that on page 150,
22 that period you didn't have any data as to whether all or some
23 part of the Osage had been paid into the IIM. Correct?

24 A. We did not have time to find reports for that period.

25 That's correct.

1 Q. Okay. There may be data out there, but you didn't have time
2 to go find it. Is that correct?

3 A. That's correct.

4 Q. So you have then come up with a percentage, looking at the
5 period before that and the period after that, to arrive at a
6 percentage to use during that period. Correct?

7 A. That's correct.

8 Q. And that is then an estimate that is not based on anything
9 that was paid into the IIM system during that particular period
10 between 1952 and 1968. Correct?

11 A. It's based on the payments prior to and subsequent.

12 Q. Now, would you look all the way at the back of this
13 notebook, it would be page 206 in Defendant's Exhibit 372, and
14 it says, "Osage Headright History Per Share."

15 MR. DORRIS: If you'll blow up the top there so we can
16 see it.

17 BY MR. DORRIS:

18 Q. Is this a chart that you put together, Ms. Herman?

19 A. No, sir, this is from the website.

20 Q. Okay. So this is a document that you used from the website.
21 Is that right?

22 A. This in conjunction with the document previous, which is the
23 1975 annual report from the tribe.

24 Q. Okay. So Bates pages 199 through roughly 204 was an annual
25 report from the tribe. Correct?

1 A. That's correct.

2 Q. And where there were differences between the two numbers,
3 the information that's on page 206, in that and the annual
4 reports, which did you rely on?

5 A. I used the 1975 report, as the website report switches from
6 fiscal year to calendar year.

7 Q. Okay. So at times you used the annual reports?

8 A. Yes.

9 Q. Did you ever use the website report in lieu of the annual
10 reports?

11 A. I would have to look. I don't recall.

12 Q. Now, the information that is on page 206, are these amounts,
13 then, that we see in the total amount in the -- the annual total
14 in the column there, after the year, the first column, that's
15 the per-share amount for each of the Osage headright owners?

16 For example, \$10.50 would not be the total amount paid
17 to all the Osage headright owners, it would be a per-share
18 amount. Is that correct?

19 A. For that entire year, yes.

20 Q. And to the best of your knowledge, these are accurate
21 amounts that are stated here on page 206?

22 A. As I mentioned, some of these -- this chart switches from
23 fiscal year to calendar year, so as a result, there's some
24 double counting within the website.

25 Q. Now, where did you get most of your information regarding

1 Osage?

2 A. I'm sorry, what information specifically, sir?

3 Q. Well, after this notebook there were four more notebooks
4 that were containing, it appeared to me to be nothing but
5 information dealing with the Osage. Is that correct?

6 A. Primarily financial documents relating to the Osage
7 payments, yes.

8 Q. And where did you get those documents?

9 A. It depends on the time frame, sir.

10 Q. Okay. Can you give me an overview, or is there a particular
11 document you're aware of that tells me what time -- who provided
12 you what information for what time frame?

13 A. Yes. Primarily the data from I believe it's 1973 forward
14 was located by the Office of Historical Trust Accounting. The
15 earlier years were gathered as a component of the Andersen
16 Tribal Reconciliation, and the later years were gathered either
17 from TFAS batches or document search at the AIRR.

18 Q. And that's the time frame from 1972 forward, you're saying?

19 A. I believe it was '72 or '73.

20 Q. Okay. And before '72, where did you get that information?

21 A. Dr. Angel gathered it from the National Archives.

22 Q. And provided that to you?

23 A. Excuse me, some of the documents during the 1950s and 1960s
24 I believe were also found at the AIRR.

25 Q. Okay. So before 1972, some of the documents were from

1 Lenexa and some of the documents were from Morgan Angel?

2 A. Yes. The documents from Morgan Angel were gathered from the
3 GAO settled account packages.

4 Q. And who gathered those for you?

5 A. Someone on Dr. Angel's team. I'm not aware who
6 specifically.

7 Q. I'm trying to find out, have you reviewed all of those
8 documents and cross-checked them against your calculations?

9 A. I personally have not reviewed every document. Our team
10 reviewed each document.

11 Q. In terms of documents before 1972 that have to do with
12 Osage, is it somebody from Morgan Angel that would be the person
13 better able to answer questions about those, or would you be
14 comfortable answering questions about those documents?

15 A. I guess it depends on the question that you're going to ask
16 me, sir.

17 Q. Okay. I guess if I'm asking questions about what a
18 particular document shows in terms of payments to whether
19 they're individuals or to the IIM Trust, is that something that
20 you would be comfortable answering or you would defer to
21 Dr. Angel or his staff?

22 A. I would answer that question.

23 Q. Okay. Good. Now, I want you to look at the document that
24 starts the second volume of this Exhibit 372, which is
25 Defendant's Exhibit 372, Bates page -- my Bates page is cut off.

1 That would be Bates page 206. And do you see that?

2 A. I believe it says 208, yes.

3 Q. Okay. Thank you. And blowing up the top half of this
4 document, this is an e-mail from Ed Angel to you transmitting to
5 you a draft of Frank's research memo on Osage. And it also says
6 attached is a spreadsheet. Do you see that?

7 A. Yes, I do.

8 Q. The spreadsheet was not anywhere in the volumes that
9 followed, was it?

10 A. I'm not certain.

11 Q. Okay. And the reference to Frank there is to whom?

12 A. Frank Sapienza.

13 Q. And then we see following the e-mail there a memo that
14 purports to be from Frank Sapienza to Ed Angel dated April 14th,
15 2008. Do you see that?

16 A. Yes, I do.

17 Q. Did you understand that to be a draft memo?

18 A. Yes, I did.

19 Q. And have you used that memo in its draft form in the
20 calculations that you performed?

21 A. Some of the numbers gathered, yes.

22 Q. Okay. Let's look at that memo. Who is Mr. Sapienza?

23 A. I believe he's a contractor to Dr. Angel.

24 Q. And did Mr. Sapienza -- do you know what his background is?

25 A. I believe at one point he worked for ITAD.

1 THE COURT: For what?

2 THE WITNESS: I believe it's referred to as ITAD, Your
3 Honor, the Indian Trust Accounting Division.

4 BY MR. DORRIS:

5 Q. And that would be at General Services Administration?

6 A. I'm not sure.

7 Q. But do you know whether he was working at Interior or at
8 some other agency?

9 A. I'm not aware.

10 Q. You just know the name of the division of whichever agency
11 it was. Correct?

12 A. As I mentioned, I believe that's the division he worked for.
13 I'm not certain.

14 Q. Okay. Now, looking down -- and you have accepted what
15 Mr. Sapienza has said in this e-mail in part of your
16 calculations. Correct?

17 A. Some of the numbers he gathered, yes.

18 Q. In fact, some of the numbers he gathered were instrumental
19 in your calculation of the percentage that went into the IIM
20 system during the first roughly 40 years of your calculation.
21 Correct?

22 A. I believe the next page of this memo refers to a specific
23 time frame where Mr. Sapienza wasn't allowed by the Archives to
24 copy the records because they were deemed to be fragile.

25 Q. Okay. Looking at the bottom of this first page, that last

1 paragraph, do you see -- if you'll take a moment and read that
2 first sentence to yourself.

3 A. (Witness complies.)

4 Q. Now, do you know what he's referring to when he talks about
5 Osage settled accounts?

6 A. I believe he's referring to the settled account packages
7 during the Treasury time frame.

8 Q. Okay. And the Treasury time frame, remind us, was when?

9 A. Prior to 1921.

10 Q. And then the GAO time frame of settled packages that you
11 referred to on Thursday I think you told me was 1921 to 1951.
12 Is that correct?

13 A. That's correct.

14 Q. And then when it says, "Because of time constraints and in
15 an effort to locate the highest dollars payments," it indicates
16 he concentrated on a six or seven-year period there. Do you see
17 that?

18 A. Yes, I do.

19 Q. Do you know why he was looking for just the highest dollars
20 payments?

21 A. Because we didn't feel we would have time to review all of
22 the payments.

23 Q. Okay. So this was an instance where you went and looked at
24 the higher dollar payments because you didn't have the time or
25 weren't going to take the time to look at all of the payments.

1 Is that correct?

2 A. I believe I said we didn't have the time.

3 Q. Okay. Whether you had the time or didn't have the time, it
4 wasn't done, though, was it?

5 A. As I mentioned, we did not have time to look at all of the
6 information available.

7 Q. Okay. But do you believe that there was information
8 available, had you taken the time to look at it, that you could
9 have come up with something that would have been more precise
10 than what you have put in your notebook and in your calculation?

11 A. I believe there are additional documents available. I can't
12 tell you how it might change my calculation without reviewing
13 them.

14 Q. Okay. Look down under -- on the next page, under Results
15 and Conclusions --

16 MR. DORRIS: And if you'll blow up that last half of
17 that page.

18 BY MR. DORRIS:

19 Q. Do you see in the second sentence it says, "While all
20 payments were made by check, a quick review of other pertinent
21 documents in the accounts, schedule of individual bank accounts
22 and schedule of IIM accounts, failed to answer adequately the
23 question as to whether the individual payments were disbursed
24 directly to the headright holder or whether the money was
25 transferred into IIM."

1 Do you see that?

2 A. Yes, I do.

3 Q. And that's for the period of July 1915 to June 1919.

4 Correct?

5 A. That's correct.

6 Q. Now, look down, then, at the bottom of this page -- the
7 highlighting, by the way, is in the original document. This is
8 not my highlighting. Okay? And I take it where we start seeing
9 these red notes that have been made there, those then show where
10 you've come in and taken some of his information from another
11 time period and are using those in your calculations. Correct?

12 A. Yes, that does indicate that we're using that information.

13 Q. So essentially you've used from the first quarter of 1920
14 through, on the next page, the second quarter of 1922. Correct?

15 A. I can't see the next page, sir.

16 Q. Well, it will be coming up momentarily. And if we look at
17 the top half of that, you've then used Mr. Sapienza's
18 calculations for that directly in your calculations. Correct?

19 A. May I see the previous page again, please?

20 Q. Do you see that blown up at the bottom, Ms. Herman?

21 A. No, I just needed the titles. Thank you. And if we could
22 switch back to the next page.

23 It appears so, sir, but I would need to check. But I
24 appears that we have used these. I'm not certain about the
25 third quarter of 1920, though.

1 Q. But a quick check back into the calculations in notebook one
2 of Defendant's 372, it appears to you, at least sitting here
3 today on the stand, that you did use this information from the
4 draft memo of Mr. Sapienza. Correct?

5 A. I believe we didn't use the third quarter of 1920, but I'm
6 not certain. It appears it's broken up into three payments. I
7 would have to do additional review.

8 Q. Now, did anybody indicate to you that you should rely on a
9 draft memo, or was that your decision?

10 A. It was my decision. And my understanding of the numbers
11 here is that these documents couldn't be copied and that was the
12 issue. It wasn't -- the draft was more the fact of summarizing
13 the research that was done, not the numbers themselves.

14 Q. Did anybody tell you that you could take Mr. Sapienza at his
15 word?

16 A. I'm sorry?

17 Q. Did anybody tell you that you could rely on what
18 Mr. Sapienza told you?

19 A. In terms of providing the numbers to me?

20 Q. Yeah, providing information about the settlement packages.

21 A. I don't recall somebody specifically telling me that I could
22 rely on Mr. Sapienza.

23 Q. Or not? Nobody commented on his credibility one way or the
24 other?

25 A. Not that I recall, no.

1 Q. Well, let me be real precise -- a little more precise in my
2 question.

3 Did anybody tell you that Mr. Sapienza had previously
4 been found to have filed a false affidavit with this court in
5 connection with the GAO settlement packages?

6 MR. QUINN: Objection, Your Honor. Lack of relevance,
7 lack of foundation.

8 THE COURT: This is a non-jury trial. I'll let it in.

9 A. I'm sorry, sir, could you repeat the question?

10 BY MR. DORRIS:

11 Q. Yes. Did anyone tell you that Mr. Sapienza had been
12 previously found to have filed a false affidavit with this court
13 regarding GAO settlement packages?

14 A. Not that I recall.

15 Q. But you have taken information from a draft e-mail from him
16 and used that at least in part to calculate the percentage of
17 Osage payments into the IIM Trust for a period of about 40 or
18 45 years. Correct?

19 A. We've used the numbers as he recorded off of the documents,
20 yes.

21 Q. Okay. Now, when I looked through some of the documents in
22 the Osage package, that would attempt -- in some of those you
23 were attempting to include documents that would show the amounts
24 that were paid directly to the Osage headright owners. Correct?

25 A. Yes, we included both the direct and component that came

1 into IIM, to the extent they were available.

2 Q. In some of those I found references where they were being
3 paid to estates or to guardians of minors, estates of deceased
4 people or guardians of minors. Did you notice that in some of
5 that, too?

6 A. I do recall. I don't recall a specific instance, though.

7 Q. And even though that was the case, it's your testimony you
8 believe those were not paid into the IIM system?

9 A. Based on the documents that I reviewed, the checks were
10 clearly written. I would have to look at the specific question,
11 the specific document you're referring to.

12 Q. Okay. Now, when you said the checks were clearly written,
13 you haven't actually looked at any of those checks. Correct?

14 A. No. I'm making that statement based on the check numbers
15 being recorded on the document.

16 Q. Okay. Now, so when you say the checks clearly indicated
17 something, you actually were looking at a schedule, a payment
18 schedule that had people's names on it, and you were assuming
19 the checks were written to the people on that schedule.

20 Correct?

21 A. That the checks were written as indicated by the check
22 column, yes.

23 Q. Now, what does -- let me change subjects now. We're moving
24 off of Osage. Okay?

25 What do you mean when you write that something is

1 likely to occur, by the word "likely"?

2 A. I'm sorry, in what context, sir?

3 Q. Like you say something is likely overstated or understated.

4 A. I believe it's just a descriptive word. If you have a
5 specific document, I'm happy to look at it.

6 Q. Well, would "likely" in that context mean that it's more
7 than a 50 percent chance that it would be overstated or
8 understated in the example I gave you?

9 A. I would have to look at the specific document. I'm sorry.

10 Q. Okay. Now, looking at the notebook, at DX-372, volume one
11 at page four, you see that all of the funds in the pre-1972
12 period are referenced to -- the amounts go to your page A-1.1?

13 A. Yes, I do.

14 Q. I'm on Bates page four, and I'm just saying that if I want
15 to find out information on what occurred before 1972, you're
16 saying on this schedule go to page A-1, page one. Correct?

17 A. That's correct.

18 Q. When I turn to page A-1 and I look at -- this is now Bates
19 page eight. Are you with me? Are you on Bates page eight,
20 Ms. Herman?

21 A. Yes, I am.

22 Q. This is information where this information is taken from
23 this schedule and is then put on the schedule we just looked at,
24 which was page four. Correct?

25 A. That's correct.

1 Q. Now, we look at this and it says "collection detail" across
2 the top, and the next heading are "estimated values." Do you
3 see that?

4 A. Yes, I do.

5 Q. When I look at that, does that mean that the collection --
6 those collection numbers are also estimated?

7 A. We start with the total collection number that was provided
8 by NORC, and we've just walked through how we determine the
9 Osage annuity calculation and the Tribal IIM numbers I believe
10 we reviewed on Thursday, which are found in the next section of
11 the binder.

12 Q. But one is talking about in terms of being estimated values,
13 the others talk about in terms of being detailed, and I was just
14 wanting to find out, are the collection details, are those
15 estimates or are those actual amounts?

16 A. I believe, as we looked at, some of the Osage numbers are
17 estimated and some are actual amounts that were located. The
18 Tribal IIM number has been estimated, and the "other receipts"
19 is the differential between NORC's total collection and those
20 other two columns.

21 Q. So the "other receipts" is then based -- the beginning
22 number is based on an estimate from NORC. Correct?

23 A. That's correct.

24 Q. So much of the collection detail is also estimated amounts.
25 Correct?

1 A. With the exception of the Osage, that's correct.

2 Q. Now, look where it says "estimated values" at footnote two,
3 and let's blow up footnote two. Is footnote two something you
4 wrote?

5 A. No, it is not.

6 Q. Who wrote it?

7 A. Dr. Scheuren.

8 Q. Okay. Who prepared this document that we're looking at,
9 Bates page eight of Defendant's Exhibit 372?

10 A. I did.

11 Q. Okay. And then you asked him what you should put there?

12 A. Dr. Scheuren provided this information with his estimates.

13 Q. Okay. Because you gave me in the backup documentation an
14 e-mail from, it was not Dr. Scheuren but somebody on his staff,
15 that gave these numbers, but it did not provide this footnote.
16 Is there some other footnote that you had from Dr. Scheuren?

17 A. I don't recall if this footnote did come from Dr. Scheuren
18 or a member of his staff.

19 Q. Did you talk to him about what this meant?

20 A. No, I did not.

21 Q. Okay. So if we want to ask somebody about what's meant by
22 this footnote two, we need to ask Dr. Scheuren. Right?

23 A. That's correct.

24 Q. Did you form any understanding as to what it meant when it
25 says, "a statistical model fit"?

1 A. I did not try to interpret Dr. Scheuren's footnote, no.

2 Q. Okay. Now, when we look at this, you see the reported
3 ending balance, and it says 5, it says, "IIM system balance
4 reports." Do you see?

5 A. I do.

6 Q. What does it mean by the IIM system balance reports?

7 A. This is just referring back to a category of reports that
8 were gathered by Dr. Angel.

9 Q. Oh, okay. So this really is just talking about some
10 reports, it's not talking about something that actually came out
11 of an IIM system?

12 A. In some instances, not during this time frame, there would
13 be audit reports, investment reports, things of that nature.
14 You could turn to his tab to review the reports that were relied
15 upon.

16 Q. Explain to me the significance of the reported ending
17 balance and how that's used in your calculations.

18 A. That column is carried forward to the lead schedule. I
19 believe we've seen that.

20 Q. Yes, okay. And then what's the significance of it in the
21 lead schedule?

22 A. We compare it to the balance as calculated.

23 Q. Okay. Well, let's just take the first year, the first
24 period that's about -- what is that, about 34 years, 33,
25 34 years, 1887 to 1920? You see here in the back schedule it

1 shows a reported ending balance of 38 million, and if you'll
2 keep your hand there and then look at the front schedule, that
3 carries over in Column K at 38 million. Correct?

4 A. That's correct.

5 Q. Okay. Now, what's the significance on the front page,
6 page four of Defendant's Exhibit 372, of then that reported
7 ending balance in that column? How is that used in your
8 calculation?

9 A. I'm sorry, I don't understand your question.

10 Q. Okay. You take the Column J, the calculated ending balance,
11 and you calculate that based on the estimates you've been
12 provided, that there was \$26.9 million more paid into the IIM
13 system than was paid out between 1887 and 1920. Correct?

14 A. That's correct.

15 Q. And you then compare that to the reported ending balance of
16 38 million. Right?

17 A. That's correct.

18 Q. And you then show a balance difference of 11.1 million.
19 Correct?

20 A. That's correct.

21 Q. So what you're saying is, is that your estimates of what was
22 collected from 1887 to 1920 is \$11.1 million less than what was
23 actually shown in some report as having been in the IIM system
24 at that time?

25 A. That's correct.

1 Q. And that positive number in that Column L, then, ends up
2 offsetting to some extent the ultimate amount that's shown as
3 being a negative \$158.7 million over on the next page of this
4 spreadsheet. Correct?

5 A. That's simply a sum in Column L, yes.

6 Q. We talked about that \$158 million number on Thursday. Do
7 you remember that?

8 A. I believe so.

9 Q. But your chart on the front page indicates that it is
10 putting more weight on what is calculated in Column J than what
11 was reported in Column K. Correct?

12 A. I wasn't intending to place more weight on one or the other,
13 only to show that they didn't agree in some instances.

14 Q. Okay. Now let's look back at the supporting schedule we
15 were looking at before, which was page eight. And it says
16 "history." You see the reported ending balance of 38 million,
17 and it tells me that I should look at, under history, page one
18 in your supporting information. Correct?

19 A. That's correct.

20 Q. And let's look at history, supporting page number one, and
21 that's going to be on Bates page 33 of your Exhibit 372.
22 Correct?

23 A. That's correct.

24 Q. And when I look at that, it shows me the total IIM system
25 funds of 38 -- roughly \$38 million, the same figure we've seen

1 before. Correct?

2 A. That's correct.

3 Q. And it tells me now to go to page two to see the detail for
4 it. Right?

5 A. That's correct.

6 Q. Now, when I turn to page two --

7 MR. DORRIS: And can you bring that up, please?

8 BY MR. DORRIS:

9 Q. We have turned this upside down. If you'll look at the
10 screen with me just a second, Ms. Herman.

11 A. Sorry.

12 Q. These will make your eyes go crossed looking at them.

13 MR. DORRIS: Can you bring up the part there on the
14 bottom of the screen?

15 BY MR. DORRIS:

16 Q. Let's look under, it says, "Funds in banks and in the hand
17 of superintendents."

18 MR. DORRIS: Can you blow up that top portion? Yeah,
19 the yellow portion. And can you blow up the first few lines?

20 BY MR. DORRIS:

21 Q. Do you see the 38,035,476 that's been underlined there in
22 that column?

23 A. Yes, I do.

24 MR. DORRIS: Your Honor, it's just the top half of this
25 page is turned upside down in your notebook.

1 BY MR. DORRIS:

2 Q. But that's where the number comes from. Right?

3 A. That's correct.

4 Q. And you see that that column has footnote one. Do you see
5 the column? You can look on the screen. It's easier to see in
6 the yellow. Do you see footnote one?

7 A. I believe so, yes.

8 Q. Okay. Now let's go down and look at what that footnote
9 says.

10 MR. DORRIS: Can you bring up that footnote, please?

11 BY MR. DORRIS:

12 Q. Do you see that the footnote one says "data incomplete,
13 special deposits not included"? Do you see that?

14 A. Yes, I do.

15 Q. Had you noticed that before?

16 A. I don't recall.

17 Q. What you've used here, then, is a figure that says, here's
18 the ending balance of \$38 million, and you've used that in your
19 schedule as part of this overall calculation that you've done.
20 Correct?

21 A. That's correct.

22 Q. And yet right on the document that you put behind it, it
23 says this data is incomplete because special deposits are not
24 even included in the number. Correct?

25 A. Yes, it does.

1 Q. Do you know how much the special deposits were as of 1920?

2 A. No, not at this particular time, I do not.

3 Q. Now let's look back under a previous schedule we were
4 looking at, which was A-1.1. Let's look at A-1.1, and this then
5 would be Bates page 10.

6 MR. DORRIS: And if you could bring up the top half of
7 this chart.

8 BY MR. DORRIS:

9 Q. Now, on this particular -- this is then where you are using
10 estimated Tribal IIM and you're using to estimate that. Do you
11 see that?

12 A. Yes, I do.

13 Q. And you then have receipts in the column under "receipts."
14 Correct?

15 A. That's correct.

16 Q. And these are then receipts that you were given by whom?

17 A. These reports were provided by Dr. Angel.

18 Q. Okay. And this is the same information, to the best of your
19 knowledge, that Dr. Angel gave to Dr. Scheuren. Correct?

20 A. I believe so.

21 Q. And so in this receipts column, these are then the receipts
22 that are being used in your calculations, to the best of your
23 knowledge, as to what was received into the system. Correct?

24 A. I believe this was part of the information that was provided
25 to Dr. Scheuren, if that's your question.

1 Q. Okay. Now look over at document reference on the far right.

2 Do you see it?

3 A. Yes, I do.

4 Q. And so this is then saying, here's where you can find all
5 this information. Is that right?

6 A. That's correct.

7 Q. And look at footnote two. Do you see -- you saw that
8 footnote two was referenced there. Look at footnote two. It
9 says, "These reports," and that would be referring to the
10 reports that are part of the documents that are in that column.
11 Right?

12 A. That's correct.

13 Q. By the way, did you write this footnote?

14 A. I worked on this footnote with Dr. Angel.

15 Q. Okay. "These reports were generated in response to the
16 enactment of the Sundry Civil Appropriations Act," I'll skip the
17 parenthetical, "on June 30, 1906. Under Section 5 of this act,
18 government agencies were required to report all monies to
19 Congress which were derived from the proceeds of public property
20 or any other source that was not paid into the General Treasury
21 Account. These reports likely understate total receipts."

22 Do you see that?

23 A. Yes, I do.

24 Q. And why did you -- is that consistent with your
25 understanding?

1 A. Based on my conversations with Dr. Angel, yes.

2 Q. Okay. And so even Dr. Angel told you the receipts that are
3 shown on this report are likely understated?

4 A. That was his belief, yes.

5 Q. Okay. And that was where I was talking about likely
6 understated; in other words, more likely than not there was more
7 money received than what this report shows. Correct?

8 A. That's his understanding, yes. That's what we discussed.

9 Q. Now, how much more money was received than what you're
10 giving the plaintiffs credit for on this chart?

11 A. I'm sorry, sir, I don't understand your question.

12 Q. Well, we've taken receipts and said, here's what's been
13 received, and you've used that in your calculations. Correct?

14 A. These receipt numbers aren't being utilized to determine
15 total receipts, these receipt numbers are being utilized to
16 determine Tribal IIM.

17 Q. Because these numbers were given to Dr. Scheuren that used
18 them in some fashion, and he then came up with total receipts
19 for a whole period. Correct?

20 A. I don't know how Dr. Scheuren utilized these reports in his
21 calculation.

22 Q. Let me ask you this: If you use these receipts numbers, you
23 know you're using numbers that are likely understated in terms
24 of total receipts. Correct?

25 A. I'm sorry, in regards to my calculations of Tribal IIM?

1 Q. If anybody uses these numbers to calculate total
2 collections, then their total collection number is likely
3 understated. Would you agree with that?

4 A. It depends if this is the only source that they're relying
5 upon. I don't know how Dr. Scheuren used these numbers.

6 Q. Okay. If this is the only source somebody relies on, then
7 their total collection number is likely understated. Correct?

8 A. For that particular year, based on --

9 THE COURT: You're going to wring an answer out of her
10 on this subject one way or another, aren't you, Mr. Dorris?

11 MR. DORRIS: Yeah, I guess so, Your Honor.

12 THE COURT: I mean, she's not accepting any of the
13 premises of your question, so why don't you move on?

14 MR. DORRIS: Okay, Your Honor.

15 BY MR. DORRIS:

16 Q. Now, from 1987 (sic) to 1951, which is about 64 or 5 years,
17 you've ended up using a beginning balance for -- or an ending
18 balance for 1920 that was incomplete. Correct?

19 A. It did not include special deposits. That's correct.

20 Q. And at least for the receipt numbers for these years, '34
21 through '49, you have a question certainly in your mind as to
22 whether those are complete. Correct?

23 A. Those numbers didn't specifically come into my model.
24 Dr. Scheuren's estimate did.

25 Q. So to do that, we would have to track those in through

1 Dr. Scheuren to see to what extent he used those. Right?

2 A. That's correct.

3 Q. Okay. Now let me ask you about the period of 1921 to 1951
4 that you've referred to sometimes as the GAO period, settlement
5 period. Correct?

6 A. That's correct.

7 Q. And would it be fair to say that in your calculations and
8 the calculations in your chart, reliance has been made on the
9 GAO settlement packages?

10 A. For the Osage information, yes.

11 Q. For any other information?

12 A. I would have to review. I believe it's just the Osage
13 information, but I would have to review the binder again.

14 Q. Okay. Sitting here today, you can't think of any other
15 place where the settlement packages were used other than in the
16 Osage. Is that right?

17 A. Not that I recall, no.

18 Q. Now, are you aware of a summary judgment that had been
19 issued by this court previously?

20 MR. QUINN: Objection. Relevance, Your Honor.

21 THE COURT: I'll allow it. It's cross-examination.
22 Let's see where he's going with it.

23 BY MR. DORRIS:

24 Q. Ms. Herman, are you aware of a summary judgment that had
25 been previously entered by this court with respect to the GAO

1 settlement packages?

2 A. I know that there was a motion. I don't recall reading it.

3 Q. Okay. When you say a "motion," you don't recall reading the
4 judge's opinion on that?

5 A. No, I do not.

6 Q. Okay. Let me see if I can refresh your recollection.

7 MR. QUINN: Objection.

8 THE COURT: Well, it wouldn't be recollection if she
9 hasn't read it.

10 MR. DORRIS: Well, she says she can't remember if she
11 read it, Your Honor. I think that's what you said.

12 THE COURT: Oh, well, hum the first few bars. Maybe
13 she'll remember it.

14 MR. DORRIS: Fortunately I don't have to hum. For the
15 record, Your Honor, it's at 260 F.Sup 2d, 110. It's an
16 April 28, 2003 order.

17 And if you would bring up the last page, it indicates
18 that "ordered that summary judgment be and hereby granted," and
19 then there are five numbered paragraphs there, Your Honor:

20 "At no time has the General Accounting Office conducted
21 an accounting of any Individual Indian Trust accounts; two, at
22 no time has the GAO conducted a final comprehensive audit of
23 Individual Indian Trust accounts; three, at no time has the GAO
24 engaged in any regular practice of auditing Individual Indian
25 Trust accounts; four, at no time did the GAO settle Individual

1 Indian Trust accounts; and the GAO possesses no copies of
2 statements of outstanding checks for the years 1932 through
3 1955."

4 BY MR. DORRIS:

5 Q. Have you seen that summary judgment order before,
6 Ms. Herman?

7 A. Not that I recall. But I have heard some of these points
8 before.

9 Q. And how if at all was this order, or what you had heard,
10 taken into account in any of your calculations?

11 A. I was relying on the underlying financial documents, not
12 whether or not GAO had audited the accounts. So it didn't come
13 into consideration.

14 Q. You relied on the documents themselves. Correct?

15 A. That's correct.

16 Q. And whether GAO had a regular practice of doing that, or in
17 fact was standing behind any of those reports, you didn't
18 consider that. Correct?

19 A. As I mentioned, I limited my review to the Osage information
20 and those documents.

21 Q. Now let's look -- skip up to the time frame of -- we looked
22 at 1972 through 1985 previously. Let's look back at the front
23 of the schedule. This would be page four, this kind of the
24 master schedule with all of your references. And from 1972 to
25 1985, those are all then on Schedule A-2.1. Is that correct?

1 Or for the most part?

2 A. Yes, they are.

3 Q. Let's look at Schedule A-2.1, which is page 28 of
4 Defendant's Exhibit 372. And is this then the schedule that
5 shows how the numbers on the front page were calculated?

6 A. Some of them, yes.

7 Q. And it shows further reference to other calculations.
8 Right?

9 A. That's correct.

10 Q. Now, one of the most significant changes from this period
11 from what you had done previously is in 1985. Correct?

12 A. That's correct.

13 Q. And you see in 1985 you have total GLDL collections of
14 \$445.7 million. Right?

15 A. That's correct.

16 Q. And you've deducted from that \$19.1 million?

17 A. That's correct.

18 Q. And that is identified as a beginning balance. Correct?

19 A. The sum of the beginning balance transactions for that time
20 frame. Right.

21 Q. Now, when I look at the \$19 million number, I don't see any
22 further schedule or support whatsoever included for it. Is that
23 right?

24 A. That was a summary written against the database. There is
25 not a separate schedule for that number, no.

1 Q. Nor a separate run from that database. You didn't include
2 that. Correct?

3 A. I'm sorry?

4 Q. You didn't include the run itself?

5 A. That would represent potentially tens of thousands of
6 transactions.

7 Q. Okay. But the long and short of it is, is that almost
8 \$20 million has been deleted from a spreadsheet that you
9 otherwise are relying on, and there is no other documentation
10 whatsoever in all of your supporting materials to support this
11 deduction. Correct?

12 A. No additional materials have been provided for that number,
13 no.

14 Q. Okay. Now, did you know that -- at least believe that
15 beginning balances were included in that total when you
16 testified here in October of 2007?

17 A. I believe I did, yes.

18 Q. You did know it, but you had not made this adjustment at the
19 time?

20 A. As I mentioned, OHTA has begun rekeying transactions from
21 the paper time frame. These transactions have been rekeyed and
22 so now we're able to identify them.

23 Q. Okay. But you did know it or you didn't know it when you
24 testified in October 2007?

25 A. Not the amount of the transactions. That beginning balances

1 were included in these numbers, yes, but not the amount.

2 Q. Okay. So it was really through some rekeying process that
3 this has been discovered for 1985?

4 A. The amount, not the fact that it occurred. Yes.

5 Q. And did you note anything in your prior exhibits that this
6 was an adjustment that was pending or anything?

7 A. I'm sorry, in AR-171?

8 Q. Yes.

9 A. Not that I recall, no.

10 Q. So are the other numbers above it, then, on these total
11 collections, do those all have beginning balances in them?

12 A. These numbers would include beginning balances as IRMS came
13 on line. So that would be I believe from the late '70s forward.

14 Q. Okay. So IRMS came on line, but you don't have the
15 electronic data before February of 1985. Correct?

16 A. That's correct. Unless it's been rekeyed.

17 Q. And, well, when you say rekeyed, you've gone back and looked
18 at hard copies to then manually enter in information?

19 A. Yes.

20 Q. And do you have hard copies for all the data of fiscal year
21 1985 and 1984?

22 A. Not yet, no.

23 Q. But what you have rekeyed, you think that it shows beginning
24 balance of over \$19 million?

25 A. Yes, it does.

1 Q. So that \$19 million just disappears entirely out of the
2 collections. Correct?

3 A. It's been reduced from the total collection number, yes.

4 Q. Now let me ask this: You refer to -- for example,
5 footnote four says that information is coming from the IIM
6 system balance report. So that's the reporting ending balance?

7 A. That's correct.

8 Q. That same IIM system report, does that provide collections
9 information?

10 A. I would have to look at this specific report to tell you
11 that.

12 Q. You don't know whether it does or doesn't?

13 A. Each one of these is referenced to different reports, so we
14 would have to flip back to the report itself.

15 Q. Okay. Well, the collections report is not referenced to
16 anything that I see by footnote.

17 A. What collection report, sir?

18 Q. The first three columns don't have any footnotes, but I
19 guess the references mean we go back to that spreadsheet that --

20 A. I believe we looked at that spreadsheet on Thursday, sir.

21 Q. That's the spreadsheet, then, that came from information
22 that Chavarria, Dunne & Lamey provided to you?

23 A. The first column, yes, sir.

24 Q. Now let me ask you to look now over at the next schedule,
25 which would be page A-3.1. Now, do you see on A-3.1, these are

1 then where you're showing receipts and other information from
2 1986 forward. Correct?

3 A. That's correct.

4 Q. And then look under for other receipts, IRMS data, do you
5 see there the first for 1986, the first number is 133.3 million?

6 A. Yes, I do.

7 Q. And then next to it shows an adjustment where it's been
8 adjusted downward for 122.7 million. Do you see that?

9 A. Yes, I do.

10 Q. Now let's bring up the first -- the year and the first three
11 columns of this report dealing with interest for the first four
12 lines or so. Now, it may be easier to follow it on the screen.
13 Do you see that, for example, in 1986 you're indicating that the
14 IRMS data shows that there's \$27 million in interest. Correct?

15 A. That's correct.

16 Q. But that the reported data from going to a separate
17 investment report is at \$37.5 million. Correct?

18 A. That's correct.

19 Q. And you've used that \$37.5 million in your spreadsheet for
20 interest. Correct?

21 A. That's correct.

22 Q. And you've noted, well, between what IRMS had for interest
23 and what the investment report said had for interest, there was
24 actually \$10.6 million more in interest earned than what's
25 reflected in the IRMS data. Correct?

1 A. The interest column here for the IRMS data is based on the
2 system coding, as we discussed earlier, and not all interest in
3 the system is coded as such. Which is why I relied on the
4 investment report for the interest number.

5 Q. You said the investment report is a better indication of how
6 much interest was collected. Right?

7 A. Was earned, yes.

8 Q. Was earned. Because the IRMS data itself only shows that
9 \$27 million was earned when you look at that coding. Correct?

10 A. That's correct.

11 Q. But then you took this difference of 10.6 million and you
12 then deducted that from the total that's collected in the IRMS
13 system. Correct?

14 A. From the other receipts number, not from the total.

15 Q. Okay. So in other words, what you were assuming was that in
16 fact this other \$10 million that was shown as interest in the
17 investment report was reflected in the IRMS number?

18 A. Yes, I did.

19 Q. Even though you can't find it there. Right?

20 A. It's not coded as such, no.

21 Q. So you said it must be there somewhere, so I'm going to take
22 it out, away. Correct?

23 A. I believe I adjusted other receipts downward the same amount
24 that I adjusted interest upwards.

25 Q. Okay. Well, you used a better report for interest at

1 \$37.5 million. Correct?

2 A. I believe I said that I felt that in IRMS, not all of the
3 transactions are coded as interest, and so I used the interest
4 report to determine the interest number.

5 Q. So if I look at these first five columns under "adjustment"
6 and total them up, my math is there is \$114.4 million in
7 interest that you believe is in IRMS that is not coded as
8 interest in IRMS that you've deducted out?

9 A. That I've added into interest and deducted from other
10 receipts, yes.

11 Q. And you added it into interest because you're using the
12 investment reports that are included in your summary. Correct?

13 A. That's correct.

14 Q. Now, when we look over at the IRMS data, if you'll come
15 across the sheet a little bit, under the column "other receipts,
16 IRMS data," do you see there it says that we should go and look
17 at IRMS/TFAS, page one?

18 A. Yes, I do.

19 Q. Look at the first number, just so we can make sure we're at
20 the right spot. It's talking about other receipts, 133.3. Do
21 you see that?

22 A. Yes, I do.

23 Q. So let's go and look in the back, toward the back of the
24 notebook, it's about six or so tabs, IRMS/TFAS. And we then
25 would be at Bates page 127. Are you with me?

1 A. Yes, I am.

2 Q. So I'm on Defendant's Exhibit 372, Bates page 127, and it
3 now says, this is IRMS and TFAS collection and disbursement
4 data. Do you see that?

5 A. Yes, I do.

6 Q. Now, this says, "adjusted for beginning balances and mapped
7 transactions." Do you see that?

8 A. Yes, I do.

9 Q. And I don't see any footnote next to the beginning balances
10 or mapped transactions part of the title. Correct?

11 A. That's correct.

12 Q. And we saw on Friday, in Plaintiffs' Exhibit 119 -- I tell
13 you what. If you'll stay here on this exhibit --

14 MR. DORRIS: Can you bring up 119?

15 BY MR. DORRIS:

16 Q. This is Plaintiffs' 119 that's on the screen, Ms. Herman.
17 You'll recall what I indicated to you, through my calculations I
18 believe there was \$243.3 million less in your revenue numbers
19 between the October version of AR-171 and your present version
20 of DX-371. Do you remember us looking at this for a few minutes
21 on Thursday?

22 A. Yes, I do.

23 Q. And I think you indicated that most of that you would
24 believe would be based on adjustments for beginning balances and
25 mapped transactions. Correct?

1 A. I believe most of the beginning balances had already been
2 addressed in AR-171, although I'm not certain. I believe the
3 majority of this is our transaction mapping.

4 Q. Okay. And what I'm wanting now when I look in all this
5 notebook where you're showing all the work, this \$243.3 million
6 adjustment downward in revenues, is there anywhere in this
7 notebook where I can find that calculation or detail to support
8 it?

9 A. No. That's based on summarizing the data set.

10 Q. So other than just this language at the top of this one page
11 is the only place that even indicates what's happened to that
12 \$243 million. Right?

13 A. I believe so, yes.

14 Q. Do you have any workpapers to support it?

15 A. We have the query that we wrote to generate the numbers.

16 Q. Do you have any computer printouts to support it?

17 A. Just the query, as I mentioned.

18 Q. Do you have any summaries that would identify what the
19 various transactions that were mapped were and the amounts of
20 those?

21 A. The mapped transactions don't come into the analysis, so I
22 have the query that runs off of our tables that I could show
23 you, that's all.

24 Q. Oh, okay. So let me see if I've got this right. Since you
25 were here in October, there were some -- well, wait a second. I

1 said October, but didn't you on Thursday testify that AR-171 had
2 actually been prepared in March of 2007?

3 A. Yes, it was.

4 Q. So there had been some transaction mapping since March of
5 2007 that has changed the information that's in the database.
6 Correct?

7 A. It's not that it's changed the information in the database,
8 it's changed the way we've summarized the information.

9 Q. Okay. So it changes the summary of the information in the
10 database?

11 A. That's correct.

12 Q. Okay. And now to go back and try to find what those changes
13 in the summary were and what caused them to change, you don't
14 have a list of that and you can't produce a list of that, can
15 you?

16 A. I could produce a list of transactions that we had mapped
17 between that time frame and this time frame.

18 Q. And then would that show me where this \$243 million is, that
19 list of mapped transactions?

20 A. I believe it would, but I would have to prepare that before
21 I could tell you with certainty.

22 Q. Okay. But you've not tried to prepare that?

23 A. No, I have not.

24 Q. And have you done any cross-checking to verify that in fact
25 most of this \$243.3 million comes from transaction mapping?

1 A. I did look at some of the years with the largest differences
2 and evaluate that, yes.

3 Q. And you have not provided any support or documentation for
4 that process of evaluation, have you?

5 A. No, I have not.

6 Q. So really, when it really comes down to it today, what
7 you're telling us is, we've done a lot more work on the
8 database, and trust you that \$243.3 million shouldn't have been
9 in there to begin with. Is that right?

10 A. I'm saying that we've identified more transfers, yes, that
11 should not have been included initially.

12 Q. Now, transfers, more transfers. Those would be intrafund
13 transfers?

14 A. I'm sorry, they would be transfers within and without.

15 Q. Well, I take it with losing 243, they're more out than
16 they're in?

17 A. No. If monies had been disbursed to the Tribal Trust, that
18 would be considered a disbursement in this schedule, not a
19 transfer.

20 Q. Okay. So you're not talking about transfers to Tribal
21 Trusts, then, as part of this \$243 million number. Correct?

22 A. As you saw with our example from several days ago with the
23 timber, it's not quite as straightforward.

24 Q. I don't understand that, but let me go back to my question.
25 I'm trying to at least find out a little bit about this money.

1 Okay? And I understood you to say that if it was a transfer to
2 Tribal Trusts, that would be considered to be a disbursement and
3 not a transfer?

4 A. Only the component that went to the Tribal Trust. If monies
5 stayed within the IIM system, that would be considered a
6 transfer.

7 Q. Okay. And I had understood you to say earlier that this
8 transaction mapping had found where transfers had been made that
9 you believe should not be included, and that therefore this
10 \$243 million comes out of the revenues?

11 A. Transfers within the IIM system, yes.

12 Q. Okay. So these are transfers within the IIM system?

13 A. That's correct.

14 Q. And so you've taken those out of your calculations, but
15 sitting here today, you can't tell us any of those that in fact
16 were taken out. Correct?

17 A. Not as I sit here, no.

18 Q. How long would it take you to put that information together?

19 A. I'm not certain.

20 Q. Okay. Now, as we look at Plaintiffs' Exhibit 119, do you
21 recall in your data completeness validation study that you
22 referred to and talked about CD&L providing information about
23 what the IIM500 reports showed as compared to the electronic
24 information for many of these years?

25 A. Yes, I do.

1 Q. Now I want you to look, if we could bring up AR-255 from the
2 administrative record of the October 2007 trial, and do you see
3 that that is an October 12, 2002 letter from Greg Chavarria to
4 Mr. Zippin? Do you see that?

5 A. Yes, I do.

6 Q. And he's enclosing hard and electronic copies of the
7 Individual Indian Monies data presentation materials. Do you
8 see that?

9 A. Yes, I do.

10 Q. Now I would ask you to go over and -- let's go over and look
11 at page five of this document, which is from -- as you look
12 through the exhibit, this is from Chavarria, Dunne & Lamey, and
13 you see up in the heading it says "Individual Indian Monies
14 total receipt dollars by revenue type, fiscal years 1986 through
15 2001"?

16 A. Yes, I do.

17 Q. And now, in all fairness, look over to the right. Do you
18 see where it does say that it's January 12, 2002, but it's
19 tentative and preliminary and subject to change? Do you see
20 that?

21 A. Yes, I do.

22 Q. That's kind of the same thing as saying, here it is, but
23 there may be further work that would need to be done on it. Is
24 that the way you would interpret that?

25 A. Yes, I would.

1 Q. Have you ever seen this document before?

2 A. Not that I recall.

3 Q. Okay. So that this has never been provided to you?

4 A. Not that I recall, no.

5 Q. Can you tell me whether or not the revenue numbers on this
6 exhibit are greater or less than those that you have used in
7 your calculations?

8 A. As I said, I haven't seen this before, so no, I couldn't
9 tell you.

10 Q. Well, let me bring up what we'll mark as Plaintiffs'
11 Exhibit 132 that compares those numbers to the numbers that you
12 have on your Defendant's Exhibit 371.

13 MR. QUINN: Mr. Dorris, can I have a copy, please, of
14 the exhibit?

15 MR. DORRIS: Yes, I'm sorry.

16 BY MR. DORRIS:

17 Q. This is a document that was prepared that just compares the
18 revenues from CD&L's study in their letter to those that you've
19 used in your 371. Do you see that?

20 A. Yes, I do.

21 Q. And I would tell you that if I've done the math right,
22 they're showing \$275.75 million more in revenues during this
23 period based on their reading of the electronic information than
24 you've shown. Correct?

25 A. I believe the schedule said receipts, so I don't know what

1 information Mr. Chavarria was summarizing. He could have been
2 counting credits, he could have been counting things coded as
3 collections. I don't have a basis to make that comparison.

4 Q. Had you been provided that spreadsheet from Mr. Chavarria
5 before, it's something you would have wanted to look into.

6 Correct?

7 A. I would have asked him how he summarized the information,
8 yes.

9 Q. To try to determine why there are those differences. Right?

10 A. That's correct.

11 Q. Now let's talk about your database for a minute. You keep
12 referring to this as the IRMS -- I don't know if I said that
13 very well, IRMS and the TFAS, T-F-A-S, database. Correct?

14 A. That's how I've referred to it, correct.

15 Q. But more fairly it would be called the FTI database.

16 Correct?

17 A. It's an excerpt from the IRMS system of the IRMS database,
18 and monthly downloads provided by the Office of the Special
19 Trustee.

20 Q. But then you and your staff have taken that database and
21 made a number of modifications to it, whether adding in
22 information or doing transaction mapping or the like. Correct?

23 A. We've added a record identifier, we've added a source field,
24 which is our transaction mapping number, and as transactions are
25 data entered, we add those to the data set.

1 Q. But now, for example, this transaction mapping that you've
2 done and how that changes the summary that is generated by that
3 database, that's something that you've done that actually is not
4 in the current IRMS electronic data that the Department of
5 Interior would have. Correct?

6 A. We provide the information quarterly to the Office of
7 Historical Trust Accounting.

8 Q. And do they put that into their system, or do you know?

9 A. It is in the OHTA system, yes.

10 Q. Okay. But in terms of the IRMS database, as I recall in
11 October, you testified that you got that from OHTA, but there
12 was no external validation that you had done to ensure that in
13 fact that was the same information that they had in their
14 system. Do you recall that?

15 A. That who had in their system, sir?

16 Q. That Interior had in the IRMS system.

17 A. The IRMS system is not up and running any longer. That copy
18 was provided by the Office of the Special Trustee to OHTA, who
19 provided it to us.

20 Q. And there was no effort to go back to the Office of the
21 Special Trustee and ensure that the data you had been provided
22 was the same data that they had. Correct?

23 A. I did provide them a summary of the information that we
24 received.

25 Q. And that was the extent of it?

1 A. That's correct.

2 Q. Why, then, there's a difference, then, of \$275 million
3 between CD&L's summary and yours, you can't say, obviously,
4 since you had not seen their summary before. Right?

5 MR. QUINN: Objection. Assumes facts not in evidence,
6 lack of foundation.

7 THE COURT: Well, the question says, "Why this
8 difference is, you can't say because you haven't seen the
9 summary." That's the question. The objection is overruled.

10 A. Without discussing it with Mr. Chavarria, I couldn't explain
11 this to you.

12 MR. DORRIS: Your Honor, I'm close, but it may be 10 or
13 15 more minutes. I don't know if you want to go on, which is
14 fine with me, or you want to take a morning break.

15 THE COURT: Well, it's up to you, the witness, and the
16 court reporter. They're the three most important people in this
17 enterprise.

18 MR. DORRIS: In light of the look I just got, I would
19 move for a short break, Your Honor.

20 THE COURT: We'll take a short break.

21 (Recess taken at 11:37 a.m.)

22 THE COURT: All right, Mr. Dorris.

23 MR. DORRIS: Thank you, Your Honor.

24 BY MR. DORRIS:

25 Q. Ms. Herman, I want to show you the first page of AR-176 from

1 the October trial. And you'll recall that one very well. That
2 was your -- was an exhibit that you had put together to
3 essentially support, in a similar fashion that you've done with
4 this DX-372, your revenue estimate previously. Do you see that?

5 A. Yes, I do.

6 Q. I'm going to ask that we go over to Bates page --

7 A. Sir, however, it looks as if this may have been an earlier
8 binder, because it ends in 2001 and AR-171 ended in 2005.

9 Q. Right. Well, this was what was in the administrative
10 record, and let's go over to page 115 of this time when you put
11 the information together.

12 MR. DORRIS: Can you blow maybe the top part of that
13 up? And let's get a little bigger, right on maybe the top left.

14 BY MR. DORRIS:

15 Q. This appears to me to be that same chart that we looked at
16 from Chavarria, Dunne & Lamey that was in the AR, and it appears
17 that in fact you took interest information from that chart and
18 perhaps other information and used it on your earlier version.
19 Do you see that?

20 A. I would have to look at where these notations are going to
21 be able to tell you that.

22 Q. Okay. But these are notations in a similar sort of manner
23 that you made in what you presented to the Court this time
24 around. Correct?

25 A. They are referencing notations, yes.

1 Q. And if we'll scan over to the far right, the only change
2 that I saw is that it does not have a heading on it like
3 Chavarria, Dunne & Lamey's chart, and did not have the tentative
4 and preliminary. Do you see that what was included in the AR
5 last time supporting certain of your calculations, it does not
6 have those headings on it?

7 A. I see that there are no headings, yes.

8 Q. And you can't tell just from sitting here whether that's the
9 same chart that Chavarria, Dunne & Lamey had or not; you really
10 have to compare the two exhibits?

11 A. That's correct.

12 Q. But that's something we need to do, and I don't need you to
13 do sitting here on the stand at this moment.

14 But if in fact that is the Chavarria, Dunne & Lamey
15 chart, then that's a chart you would have seen before. Right?

16 A. If it is, yes.

17 Q. So when you looked at it today earlier and said you had not
18 seen it, now looking at this chart, do you want to change your
19 answer?

20 A. I didn't recall seeing this chart. This was prepared, I
21 would believe, quite a long time ago.

22 Q. That's fair enough. But you can say that you're not sure --
23 you are relatively sure that you've never asked Greg Chavarria
24 or anyone at Chavarria, Dunne & Lamey about either one of these
25 charts. Correct?

1 A. I may have when we looked at this initially. As I said, I
2 didn't recall seeing the chart.

3 Q. Now, I want to ask you just in general some questions.
4 There were a number of examples, I think five or six examples
5 where we looked at some documents that you were saying showed
6 somewhat the historical flow of funds?

7 A. That's correct.

8 Q. And those -- I understood those were taken from the ART
9 system. Is that correct?

10 A. The copy that we have in Los Angeles of the database.

11 Q. That's where the information comes from, is the ART system?

12 A. That's correct.

13 Q. And so that's the system that is used in the reconciliation
14 process that you testified about last time. Correct?

15 A. That's correct.

16 Q. So you went in and pulled out five or six examples of
17 transactions that you had previously reconciled to go through
18 with us here?

19 A. Those weren't previously reconciled transactions, no.

20 Q. Okay. Those have been reconciled just for this testimony in
21 court?

22 A. No, I don't believe I said that they had been reconciled.
23 We were only showing the flow of monies.

24 Q. So in fact the examples you gave us, you have not actually
25 reconciled everything to do with those particular examples you

1 gave us?

2 A. Not in terms of the Accounting Standards Manual, no.

3 Q. Now, one of the examples, you'll recall, actually had coming
4 out of the IIM system amounts going to be paid to what you
5 thought were employees of one of the tribes. Do you remember
6 that?

7 A. Yes, I do.

8 Q. Why would salaries of Tribal members be paid out of the IIM
9 system?

10 A. I can't tell you that, sir.

11 Q. Okay. And that would go to the whole point that you've not
12 looked behind these to see if in fact it was proper or that
13 people were paid in the correct amount. Right?

14 A. No, we have not assessed whether or not the transaction was
15 proper. However, in that particular example, the timecards had
16 been supplied.

17 Q. Now, you've testified here this time -- Mr. Quinn asked you
18 several times if you had testified as a fact witness, and as
19 part of your responsibility in working with FTI and predecessor
20 employees on behalf of -- are you-all engaged by the Department
21 of Interior?

22 A. We're engaged both by Interior and Justice.

23 Q. And part of your work has been to help Department of
24 Interior and Department of Justice with their litigation
25 strategy. Correct?

1 A. Generally I would say that's correct.

2 Q. In other words, how best to do certain things in court to
3 have the outcome come out the way Department of Justice and
4 Department of Interior want it. Correct?

5 A. I know typically it was responding to questions about the
6 system and information that had been gathered.

7 Q. Okay. So just providing factual information and not
8 actually advice about strategies?

9 A. Myself personally, yes, we did have other members of our
10 team that I believe discussed strategies with Justice.

11 Q. But you have not discussed strategies with Justice?

12 A. To the best of my recollection, no. I've just answered
13 questions about the system, about records that have been
14 available, things of that nature.

15 Q. Let's bring up Defendant's Exhibit 494. Ms. Herman, you can
16 see that this is a copy of your resume' that was in the
17 defendant's exhibits. Correct?

18 A. Yes, it is.

19 Q. And this is something that was prepared by you or FTI?

20 A. Yes, it is.

21 Q. Okay. And looking under professional experience, I've
22 highlighted a couple of things I want to ask you about.

23 A. Uh-huh.

24 Q. Do you see the second highlighted part where it's talking
25 about this case, and then it says, "developed potential

1 litigation strategies"?

2 A. Yes, I do.

3 Q. And are you telling me that that is incorrect on your
4 resume'?

5 A. As I said, I've participated in giving advice on the system
6 and historical data.

7 Q. But you did not develop potential litigation strategies for
8 the Department of Interior and Department of Justice?

9 A. Only to the extent that it involved Paragraph 19 work for
10 Interior.

11 Q. But you did provide potential litigation strategies with
12 respect to Paragraph 19 work?

13 A. No, the manner in which information should be gathered and
14 how that gathering of information should be documented in order
15 to present it in court.

16 Q. Okay. Looking above that, do you see where it talks about
17 23 years of transactional data?

18 A. Yes, I do.

19 THE COURT: What is this document? Ms. Herman, what is
20 this document?

21 THE WITNESS: I believe this is a summary of my
22 experience found on our website, Your Honor.

23 MR. DORRIS: Your Honor, this was in the defendant's
24 exhibits. I didn't know whether it was on their website. I
25 couldn't find it on the website. But it's her resume' that the

1 defendants put in their exhibits.

2 MR. QUINN: We haven't offered it, Your Honor.

3 THE COURT: I mean, if I looked around this room at all
4 the CVs that have been published by all the people around this
5 room and put them all under cross-examination, I think we would
6 have the U.S. Attorney in here. CVs -- move on, thank you. I
7 think what she puts in a CV on a website is not going to sway me
8 in this case.

9 MR. DORRIS: Thank you, Your Honor.

10 THE COURT: Or what you put on your CV isn't going to
11 sway me, or what I put on my CV.

12 BY MR. DORRIS:

13 Q. Ms. Herman, have you compared the plaintiffs' chart of
14 receipts and disbursements and compared that to yours?

15 A. The version in Attachment A, I had looked at the chart. I
16 don't recall if I put the numbers side by side and took the
17 differences between the two.

18 Q. Fair enough. Would you be comfortable saying that the
19 primary difference between the two has to do with the amount of
20 disbursements?

21 A. No, I think one of the major differences is the inclusion of
22 Osage, and most likely the difference prior to 1972 in terms of
23 revenues.

24 Q. Okay. But is there a large difference in terms of
25 disbursements?

1 A. Yes, there is.

2 Q. With respect to disbursements, all of the information that I
3 find in your five notebooks, would it be fair to say that that
4 is summary level information or estimates?

5 A. I believe there are underlying historical documents
6 included, financial documents. I don't think it's all summary,
7 no.

8 Q. Okay. But there are not particular checks or check
9 registers that are included for the vast majority of the
10 disbursements that are reflected on your Defendant's
11 Exhibit 371, are there?

12 A. That's correct.

13 MR. DORRIS: Your Honor, I have nothing further.

14 THE COURT: Thank you. Mr. Quinn?

15 MR. QUINN: Yes, Your Honor. Good morning, Your Honor.

16 THE COURT: Good morning.

17 MR. QUINN: I only have a short amount of redirect.

18 **REDIRECT EXAMINATION**

19 BY MR. QUINN:

20 Q. Ms. Herman, Mr. Dorris was asking you questions last
21 Thursday, and he asked you a number of questions about the flow
22 of funds diagram that you prepared. And he was asking you, I
23 believe, some questions about disbursements out to the Tribal
24 Trust. Do you recall his questioning generally in that respect?

25 A. Yes, I do.

1 Q. Could you just review for me again so I'm clear, in terms of
2 transfers going out to the Tribal Trust, where did they
3 originate within the IIM system?

4 A. From the upper box, the non-individual accounts.

5 Q. And where does the money that's in the accounts in the upper
6 box, where does that come from?

7 A. Direct postings into the system from various sources. It
8 can be transferred in from the tribe, it can be bid deposits, it
9 can be lease monies.

10 Q. When you count transfers into the system in terms of your
11 overall collections number, do you include that in the total?

12 A. To the extent monies transferred in from the Tribal Trust,
13 yes, we do.

14 Q. So if there's a transfer out to the Tribal Trust, would I be
15 able to go back and try to find a collections number, if that's
16 where it came into the system?

17 A. It may have come into a Tribal IIM account or a Special
18 Deposit Account.

19 Q. I believe Mr. Dorris also asked you some questions Thursday
20 about the different disbursement categories that you've come up
21 with for your diagram. Could you review that again, what the
22 categories represent?

23 A. The first disbursement category is referred to as third
24 parties, and that would typically be the refund of bid deposits,
25 bonds, overpayments of leases, and fees that are being returned

1 to the government. The second is the Tribal Trust, which are
2 disbursements from the IIM system to one of the tribes; and the
3 third was the stakeholder category, which would include things
4 like the judgment example that we looked at earlier.

5 Q. Okay. Those three categories you just described on your
6 diagram, where are they -- where is that money coming from in
7 terms of disbursements to destinations fitting that description
8 in your diagram?

9 A. From the non-individual accounts in the system.

10 Q. And those include what types of accounts?

11 A. Special Deposit Accounts, Tribal IIM accounts, and other
12 administrative accounts.

13 Q. And did you have another disbursement category on your
14 diagram?

15 A. Yes, we did. To IIM beneficiaries.

16 Q. Okay. And is that the last one on the diagram here?

17 A. Yes, it is.

18 Q. And this diagram, just so the record is clear, is referring
19 to Defendant's Exhibit 370 for identification.

20 Could you just summarize again what that box represents
21 in terms of your diagram?

22 A. Payments to or on behalf of beneficiaries.

23 Q. Now, in Defendant's Exhibit 371, do you recall that we had
24 testimony about the table you've made of total collections and
25 total disbursements?

1 A. Yes, I do.

2 Q. Where are total collections showing up on your diagram? If
3 we were to try to refer to the diagram and your table,
4 Defendant's Exhibit 371, where do the collections show up on
5 your diagram?

6 A. The collections are represented in the green box and the
7 green arrows on the diagram.

8 Q. So does everything in the green box refer to the total
9 collections that are referred to on your table?

10 A. That's correct.

11 Q. How about on the disbursement side? Mr. Dorris asked you a
12 lot of questions last Thursday about the different kinds of
13 disbursements that are made out of the system. Does it matter
14 which box the disbursement goes to in terms of your total
15 disbursement calculation on 371?

16 A. No. All of these categories would be included in our total
17 disbursement number.

18 Q. Okay.

19 MR. QUINN: Would you be able to put up Plaintiffs'
20 Exhibit 119 that Mr. Dorris was using? It might be simpler than
21 me trying to use the Elmo. Thank you.

22 BY MR. QUINN:

23 Q. Ms. Herman, can you see that, Plaintiffs' Exhibit 119 for
24 identification?

25 A. Yes, I do.

1 Q. And they're comparing revenue figures --

2 A. Yes, sir.

3 Q. -- or collections.

4 Mr. Dorris asked you questions about comparison of
5 collection figures between the AR-171 and what's been marked for
6 identification here as DX-371. If I were to look at a -- do a
7 similar comparison on the disbursement side, what would we
8 expect to see?

9 A. A similar difference as well.

10 Q. So, similar in what way?

11 A. Meaning that the total disbursements would have decreased in
12 addition to the total collections.

13 Q. And why is that?

14 A. Because we're removing the transfers from the analysis.

15 Q. And what transfers in terms of your diagram are you talking
16 about right now?

17 A. Both the transfers within the administrative box and the
18 individual box, as well as the transfers from the non-individual
19 box to the individual box.

20 Q. Okay. In terms of your chart, which is for identification
21 DX-370, are you talking about this arrow here, the ones that go
22 in a circle?

23 A. Both the circular arrows and the transfer from the
24 non-individual to individual accounts.

25 Q. Okay. And again, why is it important to look at those

1 internal transfers?

2 A. Because it represents double counting within the system.

3 Q. Mr. Dorris asked you this morning about some beginning
4 balance calculations that you had made. Do you recall those
5 questions?

6 A. Yes, I do.

7 Q. And I think you talked about a number in the neighborhood of
8 \$19 million that was made in adjustment for one year?

9 A. Yes, I remember.

10 Q. Can you describe what actually you were doing in connection
11 with that \$19 million figure?

12 A. Yes. When beginning balances are posted to the IRMS system,
13 they're reflected as collections, as new money.

14 Q. What does that mean in terms of the total collections
15 figure?

16 A. That you would be overstating the total collections, because
17 that represents the net amount of information that occurred
18 prior for a given account.

19 Q. Does that question of identifying beginning balances and
20 determining whether they're new money or actually a balance
21 that's already in the system present a similar problem to you as
22 the internal transfers and trying to identify those?

23 A. Typically the beginning balances are coded as collections,
24 depending on how the agency actually converted to the system.

25 Q. But is it important to identify those beginning balances

1 that are in the system as such?

2 A. Yes. Otherwise you would be double counting the total
3 collections over time.

4 MR. QUINN: Could we put up Plaintiffs' Exhibit 132 for
5 identification?

6 BY MR. QUINN:

7 Q. Ms. Herman, can you see that?

8 A. Yes, I can.

9 Q. Now, Mr. Dorris asked you some questions about this, and can
10 you describe what we're seeing generally on this chart?

11 A. It appears that it's the total collection number from
12 DX-371, as well as the total collection number from the CD&L
13 transmittal, and a difference between the two.

14 Q. And I know we haven't had time to do that today, but if you
15 were to go -- if we were to go back and prepare a table based on
16 disbursements that may be shown in DX-371 and in the CD&L table
17 that Mr. Dorris showed you, what would you expect to see?

18 A. Assuming that the differences between the two are based on
19 transfers, I would presume that the disbursement number would be
20 lower as well.

21 Q. Do you have a sense of how much lower, sitting here this
22 morning?

23 A. If the difference is due to the double counting of
24 transfers, roughly equal.

25 Q. Now, I'm not clear on whether plaintiffs had marked this as

1 an exhibit.

2 Ms. Herman, I'm going to ask you if you can see --

3 MR. QUINN: See if we can zoom in on that date in the
4 bottom corner here.

5 A. I believe it says May 30th, 2008.

6 BY MR. QUINN:

7 Q. Okay. Just so the record is clear, could you describe what
8 this table is that Mr. Dorris showed you?

9 A. I believe this is the table that was presented to plaintiffs
10 on May 30th, an earlier version of DX-371.

11 Q. Okay.

12 MR. QUINN: Could we go to page two of the table? And
13 if we could zoom in on the notes section, particularly note one.

14 BY MR. QUINN:

15 Q. Can you read that, Ms. Herman, note one of that earlier
16 table?

17 A. Note one reads, "This schedule reflects research performed
18 since the creation of AR-171, and therefore contains different
19 figures from AR-171 and the 2002 report to Congress. The
20 information contained herein is current as of the date of this
21 report. Research is still ongoing, and as a result this
22 schedule may be updated."

23 Q. Okay. And was this schedule updated?

24 A. Yes, it was.

25 Q. And where does that schedule appear in the record today?

1 A. As DX-371.

2 Q. Okay. Thank you. I'm going to ask you about Defendant's
3 Exhibit 371.

4 MR. QUINN: Could we put that up on the...

5 BY MR. QUINN:

6 Q. Ms. Herman, for the record, so it's clear, could you
7 identify this document we put up on the screen as DX-371?

8 A. Yes, it is.

9 Q. And could you describe what this document is, for the
10 record?

11 A. This is our update to AR-171 that we've been discussing.

12 Q. Okay. And you testified about this on Wednesday and
13 Thursday. Right?

14 A. Yes, I did.

15 Q. If we could look at the next page of this.

16 MR. QUINN: And zoom in on the top rows there. Thank
17 you.

18 BY MR. QUINN:

19 Q. I just have a couple of questions, Ms. Herman, about
20 Column L, labeled as the balance difference. What's the total
21 dollar value of the balance difference on your table?

22 A. Negative 158.7 million.

23 Q. And what does that \$158.7 million figure indicate to you?

24 A. That the calculated collections and disbursements were
25 higher than the ending balance in the Trust as of fiscal 2007.

1 Q. Does it indicate that there's money missing in the IIM
2 system?

3 A. It indicates only a difference between what I was able to
4 calculate and what's been reported.

5 Q. Does it indicate that there's additional information that
6 you might need to compare the balance figures?

7 A. Yes, there's certainly additional research that could be
8 performed.

9 MR. QUINN: One moment, Your Honor.

10 Thank you, Ms. Herman. No further questions.

11 THE COURT: All right. Thank you, Ms. Herman. You may
12 step down. You're excused.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: Is it worth starting another witness or
15 should we take a long lunch break today? There's a lot of
16 enthusiasm for lunch over here on this side of the table.

17 MR. QUINN: I think we vote for long lunch break, Your
18 Honor.

19 THE COURT: All right. We'll be in recess until 1:30.

20 (Recess taken at 12:14 p.m.)
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CERTIFICATE OF OFFICIAL COURT REPORTER

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

SIGNATURE OF COURT REPORTER

DATE

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