IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**Civil Action No. 1:96 CV 01285 (JR)**
DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,	)	
	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' PROPOSED FINDINGS OF FACT

Plaintiffs hereby submit their Proposed Findings of Fact and Conclusions of Law pursuant to the Court's Order of October 29, 2007.

I. BACKGROUND/DEVELOPMENT OF 2007 HSA PLAN

Background of the IIM Trusts

1. The general background of the Individual Indian Money ("IIM") trusts at issue in this lawsuit has been extensively described in prior decisions of this Court and the Court of Appeals. However, a brief overview of the historical background of this case may be helpful to an understanding of some of the detailed findings which follow.

2. In 1887, Congress passed the General Allotment Act, 24 Stat. 388. Known as the Dawes Act, it authorized the President to divide any Indian reservation into separate plots, and assign the portions to individual tribal members, according to a prescribed formula. Any "surplus" lands that were not allotted to individual Indians were opened to settlement by non-Indians. *Cobell v. Norton,* 283 F. Supp. 2d 66, 74 (D.D.C. 2003) (*Cobell X*).

3. Section 5 of the Dawes Act provided that the United States would, for a period of twenty-five years, hold the allotted land in trust for the sole use and benefit of the Indian to whom the allotment had been made, or his heirs. After twenty-five years had passed, the United States would convey full title to the land to the Indian to whom the land had been allotted. The United States was authorized to extend the twenty-five year period, at its discretion. *Cobell X*, 283 F. Supp. 2d at 74.

4. During the trust period, individual accounts were to be set up for each Indian with a stake in the allotted lands, and the lands would be managed for the benefit of the individual allottees. Indians could not sell, lease, or otherwise burden their allotted lands without government approval. *Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001) (*Cobell VI*).

5. By the early twentieth century, it had become evident that the allotment process was an abysmal failure. A comprehensive report issued by Lewis Meriam in 1928, entitled "The Problem of Indian Administration" (commonly known as the "Meriam Report"), concluded that the assumptions underlying the allotment process had been flawed. *Cobell X*, 283 F. Supp. 2d at 75.

6. Influenced by the findings in the Meriam Report, Congress in 1934 passed the Indian Reorganization Act, 48 Stat. 984 ("IRA"). While the IRA ended the practice of allotting Indian lands, it also indefinitely extended the trust period for the lands that then remained in trust. *Cobell X*, 283 F. Supp. 2d at 75. As a result, the United States presently holds approximately 11 million acres of land in trust for the American Indians to whom they were originally allotted, or their heirs. *Id.* at 76.

7. The United States itself is the trustee of this trust, which is known as the IIM trust. However, Congress has designated the Secretary of the Interior and the Secretary of the Treasury

as the trustee-delegates of the United States, and the departments run by these two cabinet secretaries are entrusted with certain trust management responsibilities. The United States has entrusted most of its trust obligations to the Department of the Interior. Within the Interior Department, several agencies perform particular IIM trust functions. These agencies include the Bureau of Indian Affairs ("BIA"), the Bureau of Land Management ("BLM"), the Office of Special Trustee ("OST"), the Office of Historical Trust Accounting ("OHTA") and the Minerals Management Service ("MMS"). The trust responsibilities of the Treasury Department are to maintain and invest IIM funds, under the direction of the Interior Department, and to provide accounting and financial management services. *Cobell X*, 283 F. Supp. 2d at 76.

8. A 1994 Report of the House Committee on Natural Resources discusses the long history of mismanagement of the IIM trust:

> Volumes have been written about improper management of funds within the Bureau of Indian Affairs since its inception….
> Over the years numerous audits and reports on Indian trust funds have been published by the Inspector General of the Department of the Interior, the U.S. General Accounting Office, the Office of Management and Budget, and Congressional Committees. A 1992 report released by the House Committee on Government Operations entitled, "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund" details multiple problems with the management of these funds. The report was the culmination of several years of investigation and multiple Congressional hearings on the subject.
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> Among the problems outlined in the report which persist are:
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> • the inability to give proper accounting of balances to each of the account holders;
> • lack of uniform written policies to govern how accounts are to be managed and under what circumstances funds can be withdrawn;
> • insufficient training of personnel needed to carry out the duties required;
> • inadequate automated and record keeping systems.

> The Office of Management and Budget has consistently, since the 1980's when such a list was first kept, placed the financial management of Indian trust funds as a high risk liability to the United States.

H.R. Rep. No. 103-778, at 9-10 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3468-69 (quoted in *Cobell X*, 283 F. Supp. 2d at 77).

9. The 1992 report entitled "Misplaced Trust" concluded that Interior had made no credible effort to address the problems in trust administration in a wide range of areas, and that Interior had disobeyed many congressional directives aimed at forcing it to correct trust management practices and reconcile the Indian trust accounts. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 12 (D.D.C. 1999) (*Cobell V*).

10. Prompted in large part by the findings of the "Misplaced Trust" report, Congress in 1994 enacted the Indian Trust Fund Management Reform Act, which was signed into law on October 25, 1994 as Pub. L. No. 103-412, 108 Stat. 4239 ("the 1994 Act").

a. Accounting Systems used by Interior in the administration of the IIM trust accounts

11. Interior uses a number of computer systems to manage and administer the IIM trust. However, Interior's historical accounting work to date is focused primarily on only two computer systems: the Integrated Records Management System ("IRMS"), and the Trust Funds Accounting System ("TFAS"). 10/11/07 PM Tr. at 448:2-16 (Herman).

12. The IRMS computer system began in the 1970s at the Billings, Montana regional office. 10/23/07 PM Tr. at 1743:24-1744:2 (Infield). Six IRMS information management centers were eventually established across the country, each with a B1900 computer system. In the early 1990s these six centers were consolidated into the Albuquerque data center and onto a Unisys series A10 system. *Id.* at 1744:6-16. Interior subsequently converted from IRMS to

TFAS during the period from August 1998 to March 2000. 10/11/07 PM Tr. at 450:18-24 (Herman).

13. During much of this period, data was routinely and systematically deleted from the IRMS database after six years because of the limited capacity of the B1900 computers. Even after the switch to the A10 computer system, this policy of deleting information from IRMS continued for a short period. It stopped in 1991 because deleting data made it difficult to research accounts. As a result, the earliest information available on IRMS dates only to 1985. 10/23/07 PM Tr. at 1744:22-1746:10 (Infield).

14. The IRMS database is not, however, a complete electronic record of transactions after 1985 for several reasons. 10/16/07 AM Tr. at 724:10-13) (Herman). First, not all regions started on IRMS in 1985, and some continued to use paper records for years thereafter. "NORC Sample Design Planning Series Part II: Anadarko Agency IIM Transactions Described" (Dec. 19, 2002), AR-357 at 60-16-47 to -50; 10/15/07 PM Tr. at 693:4-697:17 (Herman); *Id*. at 733:1-14 (Herman). Second, there was a considerable amount of data missing from the IRMS system. For example, at the Navajo Agency, over half of the IRMS accounts had missing data; in the Eastern Region, 87 percent of the accounts had missing information; and in Anadarko, approximately 33 percent of the accounts in IRMS had missing information. 10/16/07 AM Tr. at 789:22-790:8 (Herman). Third, there were agencies with information missing for entire months. For example, at the Ramah Navajo Agency, there were 20 months of missing data. 10/15/07 PM Tr. at 698:8-701:8 (Herman); "E-mail from Michelle D. Herman to Tonya Cawood re: Comments on the Accounting Plan" (July 1, 2002), AR-105 at 55-06-01. Fourth, there were instances where beneficiaries had no information on the electronic system. 10/23/07 PM Tr. at

1758:20-22; 1759:1-4 (Infield). Fifth, IRMS does not hold timber transaction data. 10/25/07 AM Tr. at 2042:12-16 (Christie).

15. The Osage Agency is a good example of how unique practices at a particular BIA office or agency must be considered, and shows that Interior's present approach of looking primarily at the IRMS data is inadequate. At Osage, the tribe has its own IBM computer on which it maintains its oil accounting information, production information, and royalty collections, and where it calculates and distributes headright share annuity payments. The BIA has used the computers at the Osage Agency for oil and gas accounting purposes and for distributing quarterly annuity payments, because the BIA did not have its own system. 10/23/07 PM Tr. at 1736:4-23 (Infield).

16. Osage has never used MMS for oil and gas accounting. Also, there is a different process for collecting the individual Indian trust income from oil and gas royalties at Osage. The income from the individual Indian owned oil and gas is distributed among the Osage beneficiaries. Originally, each member of the tribe was allotted one headright share. There are 2,229 headright shares. *Id*. at 1737:4-1738:1. Money collected on individual Indian Osage oil and gas leases was temporarily deposited into the tribal account at Treasury. The collected production revenue and interest earned while such funds were held on deposit in that Treasury account for the benefit of the headright holders were transferred quarterly to a special deposit account, and from there to IIM accounts. *Id*. at 1738:2-21. Thus, to account for all funds collected for the benefit of individual Osage Indians and to ensure that Osage annuitants' account balances are accurate, sampling transactions posted to accounts open on IRMS and TFAS is entirely insufficient. It is necessary to collect and reconcile the data in the Osage computer systems, Osage tribal accounts, and Treasury accounts. *Id*. at 1740:25-1744:114.

17. Additionally, IRMS data is inconsistent, inaccurate, and incomplete. IRMS consists of five separate non-integrated modules, each supporting respective information categories, as follows: IIM accounts; Indians (People File), Leases, land ownership; and oil and gas royalties. The information contained in each of these modules is entered manually, and contains many of the same data elements. It is not integrated or cross-checked for consistency, accuracy or completeness. As a result, the data is inconsistent between the modules. "Trust Management and Improvement Project: High Level Implementation Plan" (July 1998), PX-4154 at 21.

18. Likewise, the financial information within particular modules is often inconsistent in important respects. For example, the control balances within IRMS for the IIM accounts has been found to be out-of-balance with the sum of subsidiary ledgers within that module by as much as $14 million. 10/16/07 AM Tr. at 803:12-804:24 (Herman).

19. While Interior's plan for an accounting during the period from 1985 forward uses almost exclusively the information from the IIM module of IRMS, there are a number of other systems and processes which Interior uses in the administration of the trust. The information on IRMS relies, and is dependent, on revenue data in certain of these other systems. For example, oil and gas revenues are collected by MMS and the collection information is transmitted to the Royalty Distribution and Reporting System ("RDRS"). 10/16/07 PM Tr. at 919:15-920:1 (Winter). The data contained in the RDRS system is important because if it is incorrect, then oil and gas distributions to individual Indian trust beneficiaries will be incorrect. 10/16/07 PM Tr. at 920:14-25 (Winter). Though the RDRS interfaces with MMS to allocate oil and gas revenue among IIM beneficiaries, tribes, States, the federal government, and private parties, Interior is not including and reconciling MMS or RDRS data in the accounting to each beneficiary of all his

or her funds. Interior is simply assuming the accuracy of the MMS and RDRS data, even though it is well known that the MMS and RDRS data are unreliable. 10/24/07 AM Tr. at 1770:7-1771:15; 1775:16-24 (Gambrell); 10/23/07 PM Tr. at 1750:2-17 (Infield); 10/16/07 AM Tr. at 735:1-736:7 (Herman).

20. Interior is also relying on the ownership information in the Land Records Information System ("LRIS") as part of its present accounting effort. LRIS was not, however, used for distribution of funds. BIA agencies used IRMS, MAD, and other methods to determine distribution. In its present plan, Interior is not collecting and reconciling the data in either the IRMS land ownership database, the MAD ownership system, or any of the other individual ownership distribution systems established locally at individual agencies. *Id*. at 761:14-762:9 (Herman). It is not looking at those systems despite the fact that IRMS and LRIS ownership data are inconsistent. 10/25/07 AM Tr. at 2064:6-11 (Christie).

21. Additionally, different employees put different data in the same fields of LRIS, which created chaos. 2/4/02 Contempt II Tr. at 3523:17-24 (Nessi). Anyone who had access to LRIS, as with IRMS, could make changes in data. *Id.* at 3529:9-12. The data could be manipulated without detection because there were no audit trails. *Id.* at 3530:24-3531:7.

22. Not every region or agency used LRIS. 10/16/07 AM Tr. at 760:23-761:6 (Herman); 10/23/07 PM Tr. at 1742:21-1743:1; 743:13-15 (Infield). Alaska did not use it at all. 10/16/07 AM Tr. at 760:23-761:3 (Herman). Within a region, some agencies might use LRIS and others may not. For example, within the jurisdiction of the Muskogee Region were the eight Miami Tribes, the Osage Tribe, and the Five Civilized Tribes. Until the Muskogee Region began using LRIS in 1991, the Miami Tribes used the title plant at the Anadarko Region. However, the remaining tribes continued to use paper records, which were filed with the seventy county

courthouses in Oklahoma. 10/23/07 PM Tr. at 1743:2-12 (Infield). Consequently, LRIS does not have an accurate record of ownership for all twelve regions. 10/16/07 AM Tr. at 760:23-761:6 (Herman).

23. Moreover, LRIS was not used for distribution of trust income. 10/22/07 AM Tr. at 1317:17-25 (Redthunder). LRIS had been downloaded into the IIM module of IRMS to be used for distribution purposes. *Id*. at 1318:19-20. Because title information on LRIS was incomplete and out of date, and could not be used, agencies modified IRMS on a local basis, adopted entirely different systems, or continued to distribute income manually. *Id*. at 1320:14-1321:21. As a result, different agency offices used entirely different procedures and source documents to calculate distributions to IIM accounts. "Department of the Interior Office of Historical Trust Accounting Records Conference" (Feb. 4-6, 2002), AR-58 at 06-02-213 n.83.

24. Another significant and problematic feature of the Interior IIM trust management systems is that the Interior defendants have never employed an accounts receivable system; accordingly, they were unable to track account funds owed to an Indian beneficiary. 10/23/07 AM Tr. at 1545:9-22; 1546:3-1547:17 (Homan); *see also* "Independent Auditors' Report on the Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Financial Statements for Fiscal Years 2006 and 2005 Managed by the Office of the Special Trustee for American Indians" (Dec. 2006), AR-343 at 60-02-34. Without an accounts receivable system, BIA had no choice but to depend entirely on the honesty of each lessee to report how much money it owed, the amount of production, any increases based on cost of living, whether the lessor received a percentage of income generated by the lessee, and, most importantly, the correct amount of income generated from the lease. *See, e.g.,* 10/23/07 PM Tr. at 1699:20-1700:3 (McCarthy). Likewise, without an accounts receivable system, BIA had no proactive method of invoicing

payments from the lessees even when the payments were in default. 10/23/07 PM Tr at 1700:3-6. Similarly, without a standardized accounting system that tracks payments back to leases, the sufficiency of the payment made by the lessee is indeterminable, and an auditor is unable to verify the accuracy of the lessee's payment either as deposited into the Treasury or agent banks or as posted to the beneficiary's account. 10/23/07 AM Tr. at 1547:2-17 (Homan). Because a significant number of lease agreements no longer exist, it will be impossible to ever determine the accuracy of any payment amounts related to those missing leases. *Id*. at 1546:22-1547:7.

25. To compound these problems, the Secretary has admitted that Interior defendants' Information Technology security measures were not adequate to protect Individual Indian trust data. "Testimony of Gale A. Norton before the Committee on Resources, U.S. House of Representatives" (February 6, 2002), AR-607 at 63-9-5.

26. Defendants' Fiduciary Obligations Compliance Plan concedes: "Problems with the quality of the data in title and realty within the Indian trust are caused by a lack of national data standards and quality control and a lack of integrated trust systems. These inconsistencies can have a direct impact on the ability of Interior to administer its fiduciary responsibilities." PX-508 at 34-35.

Inconsistencies between agency and regional offices

27. There existed a lack of consistency among Interior's 12 regions and over 90 agencies in the use of its electronic systems. The information systems of the 12 regional offices were not interfaced with one another and were essentially "islands" unto themselves with no ferry in between. 10/23/07 AM Tr. at 1552:13-24 (Homan). Moreover, no consolidated, integrated accounting system has never existed among the various regions and agencies. 10/23/07 AM Tr. at 1549:23-1550:8 (Homan). There existed no consistency in the application of

accounting policies and in agency and regional offices; consequently, no assurance could be provided that account balances were accurate. "Audit Report, Financial Statements for Fiscal Year 1996 for the Office of the Special Trustee for American Indians Tribal, Individual Indian Monies, and Other Special Trust Funds Managed by the Office of Trust Funds Management" (Jan. 1998), AR-378 at 60-37-59 to 60-37-60. Additionally, agencies were able to adopt their own policies and procedures with respect to trust standards and the management of trust assets. 2/1/02 Contempt II Day 20 Tr. at 3434:5-19 (Nessi).

28. By way of example, using the IRMS database typically involved up to 102 separate systems, since regions and agencies utilized IRMS differently. 10/16/07 AM Tr. at 731:7-16 (Herman). Different regions and different agencies processed transactions differently. 10/15/07 AM Tr. at 572:18-573:15 (Herman). Some agencies did not use IRMS at all; other agencies only used certain components. 10/16/07 AM Tr. at 733:1-14 (Herman). Some agencies continued to use paper records despite the existence of IRMS. *Id*. at 733:9-14 (Herman). Nine of the twelve regions did not consistently use the automated systems on IRMS for leasing data. 2/5/02 Contempt II Tr. at 3745:24-3746:8 (Ridgeway). Likewise, not every agency used RDRS. 10/23/07 PM Tr. at 1749:23-1750:1 (Infield). Seven of the twelve regions had oil and gas leasing. One of those, the Minneapolis region, elected not to use RDRS and continued to distribute income manually. *Id.* Even those regions that did use RDRS resorted to paper records in some circumstances. *Id*. at 1750:2-17. For example, some transactions from MMS would be placed in an error recycle file, the income would be distributed manually, and the error recycle file would be zeroed out. *Id.*

29. While most oil, gas, and mineral payments were handled through MMS, the Osage Agency was an exception. Osage has never used MMS for oil and gas accounting. 10/23/07 PM Tr. at 1737:4-1738:1 (Infield).

Destruction of documents

30. Interior defendants did not have in place a system to ensure trust records were protected and preserved. 6/18/99 Trial 1 Tr. 1168:15 (Gover).

31. The destruction of documents over time creates serious problems for Interior's present accounting efforts. A full accounting of all funds "does not appear to be feasible, given the loss or destruction of certain documents and records of transactions." PX-3334 at 7. *See also* PPX-3340 at 1; PX-3342 at 1. Trust records management at Interior has never been a high priority and, prior to 1995, BIA superintendents and other Interior officials were permitted to destroy trust records at will. 10/25/07 AM Tr. at 2046:7-14; 2048:17-24 (Christie). The experience of Raymond Springwater, a 30 year veteran of the BIA, regarding document destruction is customary. Documents at his heavily agency which had significant oil and gas revenues were stored in a storage shed commonly referred to as the "barn," and trust records were regularly destroyed; when the files became too "thick," agency officials simply destroyed the older records. 1/12/99 Contempt I Tr. 346:16-22 (Springwater).

32. Systematic document destruction continued at BIA until at least 1996. "Memorandum from Hilda A. Manuel, Deputy Commissioner – Indian Affairs, to Area Directors and Agency Superintendents re Preservation of Records Vital to Trust Funds Reconciliation" (Mar. 7, 1995), PX-350; 10/25/07 AM Tr. at 2045:7-2048:24 (Christie).

33. The two individuals Interior defendants consider most knowledgeable regarding Interior's trust records have confirmed the massive destruction of historical trust records within

defendants' custody and control. In 1998, BIA estimated there were 470,054 boxes of IIM documents alone containing 1,425,135,000 pages. However, defendants "experts" determined subsequently that BIA had overestimated the number of pages by approximately one billion due, in part, to document destruction. AR-80 at 54-21-32; *see also* 10/18/07 PM Tr. at 1266:13-1268:15.

34. Systematic IIM trust record destruction in accordance with routine record destruction schedules occurred at NARA records centers. 10/25/07 AM Tr. at 2054:10-2055:6 (Christie). NARA was not provided a definition of "Trust records;" nor was NARA instructed to preserve such records. "E-mail from Joe Christie to John M. Miller et al re Records MOU – Standard for Trust Records Retention" (May 27, 1998), PX-2152; 10/25/07 AM Tr. at 2055:13-2056:4 (Christie). Prior to 1995, agencies did not instruct NARA to exclude trust records from destruction in accordance with ordinary records destruction schedules. *Id*. Trust records included BIA records and all other records relating to IIM Trust assets, whether financial or land, including BLM and MMS records relating to Indian land interests, and Office of Hearing and Appeals records utilized by Interior in the probate process. 10/25/07 AM Tr. at 2056:5-18 (Christie).

35. Defendants' own expert historian Ed Angel has confirmed the destruction of trust records. 10/18/07 PM Tr. at 1268:17-1269:14 (Angel), *see* PX-545.

36. Senior Interior officials have routinely acknowledged the destruction of trust records as an obstacle to performing an accounting of all funds for each beneficiary. According to John M. Miller, then-Deputy Special Trustee: The "database is plagued by missing records, unreliable information, severe security deficiencies and unverifiable audit trails."

"Memorandum from Deputy Special Trustee for Policy, John M. Miller to Special Trustee, Thomas Slonaker, re: Restructuring Trust Reform." PX-4293 at 1.

37. Essential financial records, such as scaling tickets for timber, run tickets for oil, and most IRMS-generated distribution settlement worksheets have been destroyed and copies were generally not made. PX-350; 10/25/07 AM Tr. at 2043:19-2045:3; 2047:11-20; 2054:10-19 (Christie). The distribution settlement worksheet – the critical or key document necessary to the accurate and complete accounting of funds reflected in transactions posted to IRMS – is unavailable because it was routinely destroyed. *Id*. at 2066:14-17. Without a distribution settlement worksheet, it is not possible to verify the accuracy and completeness of an IRMS posting, including correct ownership, collection, and distribution data that corresponded to posted transactions. *Id.* at 2041:24-2042:8; 2063:19-2064:1; 2067:9-16. Unless a distribution worksheet is available, IRMS transactions cannot be validated. *Id*. at 2063:18-2064:1; 2085:24-2086:3.

38. Many of the leases and lease information have also been destroyed. Prior to 2003, if lease ownership records were placed on the Interior defendants' electronic systems, they were retained for no longer than thirteen months. 10/23/07 PM Tr. at 750:18-1751:13 (Infield). Historical lease information is, generally, in "inconsistent states of completeness and availability." "Department of the Interior Office of Historical Trust Accounting, Accounting Conference" (Mar. 18-20, 2002), AR-56 at 04-02-243. Leases valued at less than $25,000 were sent to a federal records center and destroyed after a 10 year holding period. 6/19/03 Trial 1.5 AM Tr. 65:7-66:6 (Newell). Less than 10% of all leases for members of the Five Civilized Tribes exist today. *Id.* at 69:9-12. The loss and destruction of lease documents makes it

impossible to determine the accuracy of lease payments. 10/23/07 AM Tr. at 1546:22-1547:1 (Homan).

39. Finally, regarding payments to the IIM beneficiaries, Treasury destroyed all IIM checks prior to October 1990. "Letter from Sandra L. Chambers to James Parris" (Oct. 19, 1994), PX-3340; "Letter from Leo Warring to Jim R. Parris" (Nov. 22, 1994), PX-3342; 11/24/98 Motions Hearing Tr. at 171:14-172:4 (Locks).

b. Predecessor historical accounting plans

40. Since the passage of the 1994 Act, at least *twelve* separate plans, including the 2007 Plan, have been propounded by defendants ostensibly to remedy longstanding breaches of trust, including the correction of trust data and the preservation of trust records necessary to fulfill the duty to render a historical accounting. None were adequate and none were timely implemented.

IIM Related Systems Improvement Project – The Tiger Team (August 1995)

41. Following passage of the 1994 Act, "Interior developed and issued a Reform Plan (Plan) to improve management of Tribal and Individual Indian Money (IIM) Trust Funds. "The Department recognized numerous problems had been identified through a variety of audits, studies, hearings and other such oversight efforts." "IIM Related Systems Improvement Project: The Tiger Team" (August 1995), PX-607 at 2. The Tiger Team report was touted as "the optimum approach for implementing quality management and accounting [practices]." *Id.* at 5. Notably, however, the "report does not address means to improve the accuracy of previously input data." *Id.* The problems were described in detail, including poor internal controls, inconsistent practices, inadequate auditing of oil and gas revenues, and outdated and inaccurate records. *Id.* 7-8.

42. The Tiger Team plan was to be implemented by December 31, 1996. PX-607 at 157. Three years later, named defendant Kevin Gover confirmed that the trust accounting and management system remained "broken." 6/18/99 Trial 1 Tr. at 1096:19-1097:22 (Gover).

Special Trustee's Strategic Plan (April 1997)

43. In April 1997, the Special Trustee for American Indians, who was then Paul Homan, submitted his Strategic Plan to Implement the Reforms Required by the American Indian Trust Fund Management Reform Act of 1994. PX-615. Many of the Special Trustee's proposals were ultimately accepted by the Secretary and incorporated into the High Level Implementation Plan (HLIP), which was issued in July 1998.

High Level Implementation Plan (1998)

44. The July 1998 High Level Implementation Plan (HLIP) for the Trust Management Improvement Project (TMIP), was filed with this Court on August 3, 1998. PX-4154. The HLIP described thirteen major subprojects "designed to ensure coverage of not only the data clean up and systems improvements, but also to address the longstanding deficiencies cited by external oversight groups with regard to the support systems – records management, training, policy and procedures and internal controls." *Id.* at 8.

45. "Internal Controls" was one of the thirteen subprojects in the HLIP. Its stated objective was to resolve "current and historically documented internal control deficiencies cited across the entire trust management spectrum within the Department. . . ." *Id.* at 65. The HLIP recognized that these problems dated back to the 1800's: "Concerns about the management and accountability for Indian trust funds and management of trust assets are a longstanding issue as far back as the 19th century." *Id.* The HLIP went on to summarize the more recent reports:

> Reviews conducted over the past 15 years by the GAO, the DOI's Inspector General, and independent accounting firms have identified

> serious financial management and internal control problems permeating every aspect of the trust management spectrum. These audit and external oversight findings and recommendations have focused on serious internal control problems and variances in program operations ranging from a lack of standardized policies, practices and procedures to the inability to confirm cash balances, major inadequacies in accounting records and related systems, lack of segregation of duties and deficiencies in field operation and management areas including collections and disbursements of Indian trust funds.

PX-4154 at 65.

46. The HLIP provided that "[a]reas of concern in Internal Controls include (but are not limited to) the following":

- Reconciliation of account balances with U.S. Treasury
- Investment practices
- Inconsistency in applying accounting policies and procedures – Lack of written policies/procedures
- Segregation of duties
- Understaffed operations (accounting, BIA realty/LTRO Offices)
- Lack of adequate training
- Lack of BIA Agency/Area controls in Special Deposit account management
- Lack of timely updating of land ownership records – backlogs
- Lack of an accounts receivable system
- Systems controls/security controls are inadequate
- Trust Fund Accounts are maintained without social security numbers, or categorized as "whereabouts unknown"
- Lack of disbursement policies and procedures/coordination between OST and BIA at field operation level.
- Collection functions lack policies and procedures; adequate oversight/administrative review; separation of duties
- Lack of reconciliation of daily deposits
- Lack of adequate land management systems i.e. (inventory, ownership, accounts receivable, lease management)
- Cash management
- Lack of reconciliation with U.S. Treasury suspense and budget clearing accounts
- Missing records – inconsistent BIA records management practices
- Verification of oil and gas royalty collection data
- Lack of data processing controls
- Inconsistent and insufficient Indian irrigation project payment management
- Inconsistencies in Judgement [sic] Fund distributions and management[.]

PX-4154 at 65-66.

47. One of the first tasks in the Internal Control Subproject was to develop an inventory of all documented internal control weaknesses. It provided:

> The OST will develop an inventory of internal control weaknesses found over the past 15 years in various GAO, Office of the Inspector General (OIG), Congressional, and external reports dealing with weaknesses in the management of Indian trust funds and trust asset management. The OST is gathering a library of reports, which at present include the following array of audits and reports focusing on these areas:
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> - 21 GAO Audits, Statements of Testimony before Congressional committees, letters, and reports highlighting recommendations in over 65 categories of areas of concern and internal controls;
> - 24 OIG Audits conducted since 1988, listing over 40 areas of recommendations;
> - 11 additional OIG audits providing extensive listings of material weaknesses;
> - The U.S. House of Representatives Committee on Government Operations "Synar Report" (102-499) of April, 1992 listing over 27 areas of concern, findings, and recommendations;
> - 2 recent OIG Annual Financial Statement Audits (1995 and 1996) listing over 30 areas of concern and internal control related weaknesses;
> - 5 recently conducted audits in draft report format, highlighting over 25 recommendations in areas of concern;
> - 16 MMS and BLM related audits.

Id. at 66.

48. The Internal Control Subproject was scheduled to be completed by June 1999. *Id.* at 67. The entire HLIP was scheduled to be completed within three years. *Id.* at 69-72.

High Level Implementation Plan (2000)

49. On March 1, 2000, Interior filed its Revised and Updated HLIP dated February 29, 2000 [Dkt. No. 438]. Among other things, it like its unimplemented predecessor plan, provided that "BIA trust records will be cleaned up to ensure accurate land title and resource management information." *Id.* at 16. The revised HLIP acknowledged that the original schedule

of three years had slipped, with milestones extending beyond 2001. For example, the Internal Controls Subproject, which had been scheduled for completion in June 1999, was now being forecast to be complete in December 2000. [Dkt. No. 438 at 146].

Electronic Data Systems Inc. ("EDS") Interim Report and Roadmap for TAAMS and BIA Data Cleanup (2001)

50. On November 20, 2001, defendants filed their next plan to clean up trust data that was known to be internally inconsistent, inaccurate and incomplete. DOI Trust Reform: Interim Report and Roadmap for TAAMS and BIA Data Cleanup (Nov. 12, 2001) [Dkt No. 990]. This was the third of three deliverables that EDS, defendants' contractor, was charged with delivering: the first was delivered October 10, 2001 (*Observations: Highlights and Concerns*) and the second was delivered October 31, 2001 (*Recommendations: "For Comments" Report*). *Id.* at 13. EDS "found significant problems and shortfalls in each area [TAAMS and BIA Data Cleanup], and overall, . . . found that the components have not been well integrated." *Id.* at 16. In addition, EDS concluded "[t]here remain a large amount of anomalies and missing data within the set of information needed to successfully operate TAAMS." *Id*. at 21. "The number, complexity and non-standardization of Title and Realty records within the regions has been a barrier for DOI . . . . [M]issing or conflicting information presents the need to seek out source documents outside of BIA at county offices and other local records locations." *Id.* at 39.

51. The Interim Report and Roadmap for TAAMS and BIA Data Cleanup anticipated that reforms would be completed within three years. *Id.* at 27-30 (timeline showing three-year time frame to complete all recommendations). They were not.

Report to Congress (July 2002)

52. On July 3, 2002, Interior filed with the Court its Report to Congress on the Historical Accounting of Individual Indian Money Accounts. AR-561. That report, dated July 2,

2002, envisioned a transaction-by-transaction reconciliation of all funds in all IIM accounts through December 31, 2000. AR-561 at 25-02-15. The projected cost of the accounting was $2.425 billion over a ten-year period. AR-561 at 25-02-77.

53. To reconcile land-based accounts, Interior planned to assemble all transaction histories, land records, and IIM documents. The 2002 Plan stated: "Interior proposes to reconstruct a financial transaction history for each IIM account, using an approach similar to the reconstruction of the accounts for the named plaintiffs in the *Cobell* litigation." AR-561 at 25-02-30.

54. The 2002 Plan specifically contemplated providing an accounting for former IIM accounts:

> Phase 3 comprises all the remaining IIM accounts that were closed prior to December 31, 2000 . . . . In Phase 3 the closed IIM accounts will be reconciled. The accounts in Phase 3 include former IIM accounts closed due to inactivity, former IIM account holders who received a distribution of proceeds during their lifetime from a closed judgment or per capita account, and deceased account holders whose IIM accounts and allotment interests were the subject of probates.

Id. at 25-02-40 The plan was to go back to the earliest accounts and all transactions and not just back to 1938. "Phase 3 includes the earliest opened IIM accounts and thus potentially the greatest problems with missing documents." *Id.*

55. The proposed historical accounting statement included in the 2002 Plan for a land-based IIM account included ownership information by allotment number and ownership interest. *Id.* at 25-02-87. To reconcile transactions, Interior would, among other things, compile land ownership interests to verify the accuracy of land-based transactions and perform lease variance analyses to "verify both the completeness of Interior's collection and the accuracy of

the distribution of the collected amount to the IIM accounts." AR-561 at 25-02-92. This 2002 Plan was never implemented.

2003 Plan

56. On January 6, 2003, Interior filed with this Court its Historical Accounting Plan for Individual Indian Money Accounts (the "2003 Plan") PX-507. The 2003 Plan represented a dramatic reduction in the scope of the accounting in comparison to the accounting set forth in the 2002 Report to Congress. Instead of purporting to provide an accounting to all present and former beneficiaries of all funds regardless of when the funds were deposited (as it did a few months prior), the 2003 Plan called for providing an HSA only to beneficiaries whose accounts were open as of October 25, 1994. *Id.* at 8. The 2003 Plan would not review any account or transactions after December 31, 2000. *Id.* at 9. It also eliminated any accounting for closed accounts of deceased predecessors. *Id.*

57. Instead of a transaction-by-transaction accounting of all accounts as promised in the 2002 Report to Congress, the 2003 Plan provided for a reconciliation of all transactions over $5,000 and a reconciliation of a sample of transactions below $5,000. *Id.* at 17-18. For the "Electronic Records Era" – a defined term – the 2003 Plan envisioned that (1) all of the estimated 73,500 transactions of $5,000 or more would be reconciled, (2) 80,000 of the estimated 800,000 transactions between $500 and $5,000 would be reconciled, and (3) 80,000 of the estimated 25.6 million transactions under $500 would be reconciled. That is, altogether, the 2003 Plan called for approximately 233,500 transactions from the Electronic Records Era to be reconciled. *Id.* at 63. For the two strata being sampled, the 2003 Plan stated that Interior expected to determine the "accuracy rate of the historical accounting within each of the strata with 99 percent confidence." *Id.* at 3.

58. The 2003 Plan addressed both the breadth and size of the samples. Regarding the proposed breadth of the sampling, the 2003 Plan required samples from every agency, in apparent recognition of the variations between the various agencies. PX-507 at 63. For each of the two sample strata – under $500 and $500 to $5,000 – the 2003 Plan stated 400 transactions from each agency needed to be sampled, or 800 total for each agency. *Id.* This minimum size was then doubled in the 2003 Plan "to afford protection against the possibility that, in some agencies and strata, the observed error rates might be somewhat higher." *Id.* This figure of 800 transactions per strata per agency was then extended to the approximately "100 agencies or agency-like organizational units that are to be sampled separately." *Id.* The 2003 Plan recognized the need for "sufficient agency-level information" because "in some agencies and strata, the error rates may be somewhat higher than expected…." *Id.* at 22 n.21.

59. The sample size was thus set in the 2003 Plan at 80,000 transactions per strata for a total of 160,000 from the Electronic Records Era for transactions less than $5,000. The 2003 Plan indicated that other sample sizes had been considered and had been rejected:

> Other sample sizes were examined, both smaller and larger, ranging from 10,000 to 320,000 nationally (or from 100 to 3,200 by agency). … Gains in higher levels of assurance from samples above 160,000 are very modest under the assumptions being made here. For samples below 160,000, on the other hand, assurance levels drop to what we consider unacceptable levels, particularly so with samples under 80,000.

Id. at 63.

60. For example, the 2003 Plan showed that for a sample size of 20,000 (*i.e.*, 200 transactions per agency), the assurance level fell to 64%. *Id.* at 64 tbl. 2. For a sample size of 10,000 (*i.e.*, 100 transactions per agency), the assurance level fell to 40%. *Id.*

61. Appendix D to the 2003 Plan was the Sample Design and Planning Report prepared by NORC. Among other things, it contemplated that additional sampling would be necessary where non-clerical errors were found:

> Not all errors are random and independent. There could be "pockets" of errors that are systematic, that are due to a procedure that was not well explained, or an algorithm that was incorrectly programmed, or an ownership interest that was misapplied. These errors can cluster together within an IIM account, among owners of the same tract of land, in the same BIA agency or during a particular time period.
>
> By using an *adaptive* approach [citation omitted], the sample procedures are designed to deal with unexpected or systematic patterns or "pockets," if these are detected. When an error is found on a randomly selected transaction, and it is *not* just clerical (e.g., a transposition of digits), then additional work is performed "around" this error. These additional sample tests are chosen with the specific purpose of pursuing and correcting systematic mistakes.

PX-507 at 56 (emphasis in original).

62. The 2003 Plan stated that a similar approach would be taken in the Paper Records Era, reconciling all transactions $5,000 and greater, and sampling transactions under $5,000. *Id.* at 69. However, the 2003 Plan made clear that Interior's statistical consultant, NORC, had not yet determined how transactions from the Paper Records Era would be sampled, acknowledging that: "Analysis efforts have not progressed very far yet on these samples." *Id.* NORC also stated in the 2003 Plan:

> Obviously, before a transaction sample can be selected, and before a sample of supporting documents can be matched to an IIM transaction, the IIM transactions must be located from the paper ledgers and entered into an analyzable electronic database. It is anticipated that this process will begin early in 2003 and will be ongoing as the work on the Electronic Records Era transactions is proceeding.

Id.

63. The 2003 Plan itself projected that there were, for planning purposes, 100,000 transactions in the Paper Records Era of $5,000 or more, and that the number of transactions under $5,000 to be sampled from that era would perhaps total 180,000. PX-507 at 23.

64. The 2003 Plan indicated that the work should take approximately five years to complete and cost an estimated $335 million. The schedule showed work in the various segments occurring concurrently. *Id.* at 32. It provided for completion of the various segments of the 2003 Plan as follows:

Task	Scheduled Completion (approximate)
Judgment and Per Capita Accounts	June 30, 2004
Land-Based Accounts in Electronic Era	August 31, 2005
Land-Based Accounts in Paper Era	September 30, 2006
IIM System Tests	September 30, 2006
Special Deposit Accounts	December 31, 2006

Id.

65. In addition to the land-based accounts, the 2003 Plan stated that all Judgment and Per Capita Accounts open as of October 25, 1994 would be reconciled on a transaction-by-transaction basis. *Id.* at 13. Interior has averred that it has almost completed one-third of these accounts as of January 2003 and projected completing the remaining judgment and per capita reconciliations by June 30, 2004 at a total cost of $2.5 million. *Id.* at 14.

66. A third type of account covered by the 2003 Plan is the Special Deposit Account ("SDA"). These accounts were designed to be temporary accounts for the deposit of trust funds until they were credited to beneficiaries' accounts. *Id.* at 25. The Plan admitted that there had been no uniform practices historically for the use of SDAs by BIA and that funds held in SDAs

had not been distributed in a timely fashion. PX-507 at 25. The 2003 Plan also admitted that interest earned on SDAs had not been distributed to beneficiaries. *Id.*

67. For SDAs, Interior committed to distribute the funds in all SDAs to the correct IIM accounts by early FY 2007, or approximately December 31, 2006. *Id.* at 25, 32.

68. The 2003 Plan also called for the performance of certain system tests to determine if there were significant systematic flaws in the accounting systems. *Id.* One of the tests involved identifying and filling in gaps in the electronic data. *Id.* at 28. The 2003 Plan identified two other system tests: the Posting Test and the Ownership Test. The Posting Test was necessary because reconciliation of recorded (posted) transactions provided no assurance that *all* the transactions were properly posted to the right account. *Id.* at 30. As a result, Interior indicated that it "may" perform additional testing to determine whether all the transaction postings which should be present in an account actually were recorded. *Id.* By way of the Ownership Test, Interior planned to determine, through a statistical sample of allotments, whether land-based collections were properly allocated. *Id.* All of these and other system tests were scheduled to be completed by September 30, 2006 at an estimated cost of $25 million. *Id.* at 30, 32.

69. Pursuant to the 2003 Plan, Interior would provide a HSA to each account holder. The stated purpose of the HSA, according to the 2003 Plan, was to provide sufficient information to account holders so they can "readily ascertain whether Interior has faithfully carried out its IIM Trust Fund accounting duties." *Id.* at 4.

70. The HSAs envisioned by the 2003 Plan would set forth all the transactions in the account, contain a description of the property interests owned as of December 31, 2000, and include Interior's assessment of the accuracy of the account transaction history. *Id.* The 2003

Plan did not indicate what that assessment would state, but the Appendix prepared by Interior's statistical consultant provided the following example: "*For transactions under $5,000, statistical sampling procedures were used to verify the accuracy of the process. With 99 percent confidence, we can say that more than 99 percent of the transactions are accurate.*" PX-507 at 55 (emphasis in original).

Fiduciary Obligations Compliance Plan (January 2003)

71. On January 6, 2003, defendants, pursuant to court order, filed their Fiduciary Obligations Compliance Plan. PX-508. This plan was filed for the express purpose of bringing Interior into compliance with the 1994 Act. It admitted that:

> Interior must provide information that can be used to assess the accuracy of the current balance in each of the IIM accounts. Interior has maintained account ledgers through time, but the accuracy of these ledgers and the supporting trust management systems has been . . . repeatedly criticized by observers from within and outside Interior. Without an assurance that all current account balances are reliable and, if necessary appropriately corrected, Interior cannot ensure an accurate accounting on a going forward basis, no matter how carefully future transactions may be recorded.

Id. at 5.

72. Interior commenced the Fiduciary Obligations Compliance Plan because the "HLIP had not produced satisfactory results." *Id.* at 9. Interior recognized that it had become "abundantly clear," as a result of its repeated failures to implement meaningful reform of the troubled IIM trust, that "expedient measures to effect trust reform are not available." *Id.* at 10.

Comprehensive Trust Management Plan (May 2003)

73. On May 1, 2003, less than four months after defendants filed their Fiduciary Obligations Compliance Plan, defendants filed their Comprehensive Trust Management Plan [Dkt No. 2050]. This plan also recognized that "previous reform results were not satisfactory."

Id. at 13. However, this plan did not assign blame to failures in design or implementation; instead it claimed that "DOI has not achieved the desired improvement in trust management because the tasks were not linked to an overall strategy." [Dkt. No. 2050 at 4]. As the plan notes, "Interior must have an overall strategic plan," and the Comprehensive Trust Management Plan was intended to be that "'big picture'" strategic plan. [Dkt. No. 2050 at 5].

"To-Be" Trust business Model (2004)

74. Defendants completed their "To-Be" Trust Business Model on July 31, 2004; this was filed with the Court on March 15, 2005. [Dkt. No. 2882 Attachment 3] (Notice Regarding Exhibit Attachment). The transmittal letter from the Assistant Secretary-Indian Affairs and the Special Trustee to Interior Employees states that "(with the exception of the processes relating to direct pay for individuals that continues to be studied)[,] . . . the [To-Be] model soon will be a reality." *Id.* (letter from Assistant Secretary – Indian Affairs to AS-IA, BIA and OST Employees re Implementation of Final "To-Be" Trust Business Model). The Assistant Secretary and OST claimed that, "[w]hen implemented, the 'To-Be' Model will transform the current fiduciary trust operations into more efficient, consistent . . . processes that better meet the needs . . . of the beneficiaries." [Dkt. No. 2882, Attachment 3 at 1].

75. The As-Is Plan was never filed with the Court.

Fiduciary Trust Model ("FTM") (2005)

76. Defendants completed the Fiduciary Trust Model ("FTM") five months later, on December 30, 2004 [Dkt. No. 2882, Attachment 2]. As described by the Special Trustee, the "FTM is a business process redesign activity and documents the flow of trust business processes for five major business processes: Beneficiary Relationship Development & Management; *Financial Operations*; *Ownership*; Land and Nature Resources Planning; and Land and Nature

Resources Use and Management." *Id*. Attachment 1 at 2 (transmittal memo from Special Trustee to DOJ) (emphasis added). The Special Trustee represented that "[i]mplementation of the FTM will complete the trust reform initiative of the Department, and ensure that the Department is meeting its statutory trust obligations to beneficiaries." [Dkt. No. 2882, Attachment 1 at 2]. Unfortunately, no timetable for completion of the reforms was provided. Instead the Special Trustee noted that "[i]mplementation of the FTM is expected to occur over a period of several years." *Id*., *see also id.* Attachment 2 at 15 (Interior "is deploying the FTM in stages and will require several years to complete").

c. IIM-related projects preceding those in the 2007 Plan

Audits (including Arthur Andersen, Griffin & Associates, KPMG)

77. Every independent accounting firm that has audited the financial statements of the IIM trust funds has provided a qualified opinion because of, among other things, accounting deficiencies and pervasive internal control weaknesses. 10/23/07 AM Tr. at 1541:17-1544:17 (Homan). *See also* 10/22/07 PM Tr. 1524:17-1528:4 (Homan). The internal controls system is the process by which the trust captures and processes transactions and prevents errors or fraud. Conversely, without internal controls, a system is vulnerable to error and fraud and such error and fraud will more likely go undetected. PX-4283 at 15.

78. A qualified opinion is given when the auditor is unable to comply with Generally Accepted Auditing Standards (GAAS); this typically indicates that an auditor could not apply all the procedures considered necessary. PX-4283 at 15.

79. The first audit by an independent certified public accountant of the IIM trust funds managed by the BIA occurred in 1988 by Arthur Andersen & Co. "Tribal and Individual Indian Monies Trust Funds Managed by the U.S. Department of the Interior Bureau of Indian

Affairs Financial Statements as of September 30, 1989 and 1988, together with Report of Independent Public Accountants" (May 11, 1990). PX-575 at 3. Because of several problems, including "major inadequacies in the accounting and related systems" used to account for the IIM trust funds managed by the Bureau, Arthur Andersen ("AA") qualified its opinion for 1987 and 1988. Note 3 to the financial statements, entitled "ACCOUNTING SYSTEMS AND INTERNAL CONTROL WEAKNESSES," stated:

> The accounting systems and internal control procedures used by the Bureau suffer from a wide variety of system and procedural internal control weaknesses, and other problems, such as out-of-date accounting policy and procedural manuals, inadequate training programs, a lack of minimum standards for key positions in the accounting process, a lack of experienced accounting supervisors across the Bureau, and understaffed accounting operations at all levels. Certain of these internal control weaknesses are so pervasive and fundamental as to render the accounting systems unreliable.

PX-575 at 10. In addition, AA listed sixteen of the "most significant problems," including the irreconcilability of balances between general and subsidiary ledgers, "many instances of inadequate segregation of duties," "misposting of receipts, disbursements and other transactions," and "[r]ecords management [that]…is inadequate." PX-575 at 10-12.

80. In each of its subsequent audits through 1990, AA again issued qualified audit opinions regarding BIA's financial statements for the trust funds, citing, among other things, pervasive internal control weaknesses. PX-695 at 4-5, 12-13. *See e.g.,* PX-571 at 13-14 (identifying material weaknesses), PX-571 at 15-16 (discussing irreconcilability of Treasury Department and Interior Department balances) PX-571 at 115 (noting impossibility to address out-of-balance condition). The result of these deficiencies including "accounting errors," is that "it was not practicable to extend [the] auditing procedures to enable [the auditors] to express an opinion regarding the basis on which cash balances … are stated." PX-571 at 6. *See also*, PX-575 at 10; PX-695 at 4-5, 12-13.

81. There was not another audit of the trust funds by independent certified public accountants until 1996, when the first audit required by the 1994 Indian Trust Reform Act was conducted. There has been an audit every year since 1996. *See e.g.,* AR-633 at 66-5-1, AR-377 at 60-36-1, AR-368 at 60-27-1, AR-374 at 60-33-1. For every audit since 1996, the independent public accountants have audited the financial statements for the Indian trust funds prepared by the Office of the Special Trustee for American Indians ("OST"). Griffin & Associates, P.C. ("Griffin") performed the financial statement audits for fiscal years 1996 through 2000. KPMG, LLP ("KPMG") performed the financial statement audits for fiscal years 2001 through 2006. *Id.*

82. Like AA, in each of the Griffin and KPMG reports, the auditors' opinions were qualified because, *inter alia*, the deficiencies in the accounting system and the unreliability of internal controls were such that the auditors could not express an opinion with respect to the reasonableness of the financial statements and related activity:

> The accounting systems and internal control procedures used by the Bureau [of Indian Affairs] and OTFM have suffered from a variety of system and procedural internal control weaknesses and other problems; such as understaffed accounting operations at all levels, a lack of experienced accounting supervisors, a lack of minimum standards for key positions in the accounting process, inadequate training programs, and out-of-date accounting policy and procedure manuals. Certain of these internal control weaknesses are so pervasive and fundamental as to render certain significant accounting systems unreliable.

"Audit Report, Statement of Assets and Trust Fund Balances at September 30, 1995, of Trust Funds Managed by the Office of Trust Funds Management, Bureau of Indian Affairs" (Dec. 1996), AR-633 at 66-05-24 through 25. After nine specific problems were listed, the report stated: "As a result of the material weaknesses in internal controls referred to above, it is not possible to determine whether cash and trust fund balances as reflected in the accompanying financial statements are fairly stated and presented." AR-633 at 66-05-26.

83. In its last audit of OST, Griffin continued to qualify its opinion because of, among other things, material internal control weaknesses. *See* "Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 2000 and 1999 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (June 2001), AR-636 at 66-08-19. Griffin found the following material weaknesses regarding internal controls: (1) OST relied on BIA's ownership files to record trust receipts in account holders' accounts, AR-633 at 66-08-62; (2) BIA's trust systems lacked security and controls, AR-633 at 66-08-66; (3) funds were accepted into, and disbursed from, trust without supporting documentation, AR-633 at 66-08-67 to -68; and (4) there were unauthorized disbursements from IIM accounts, AR-633 at 66-08-71. In 2001, KPMG assessed the unaddressed recommendations made by Griffin. It consolidated them into two broad areas, each of which it considered to be a material weakness. AR-352 at 60-11-01. KPMG concluded: "It was not practicable to extend our auditing procedures sufficiently to satisfy ourselves as to the fairness of trust fund balances in the accompanying financial statements … due to inadequacies in certain Department of the Interior trust-related systems and processes." *Id.* at 60-11-13.

84. KPMG's audit for the fiscal year ending September 30, 2006, which is the most current external audit at the time of trial, stated that one of the reasons KPMG provided a qualified opinion was because OST's processing of trust transactions relied on unreliable BIA data and unresolved financial reporting from prior periods. "Independent Auditor's Report on the Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Financial Statements for Fiscal Years 2006 and 2005 Managed by the Office of the Special Trustee for American Indians" (Dec. 2006), AR-343 at 60-02-21, 33-34. KPMG considered this condition to be a

material weakness. KPMG noted that the "allocation and distribution of receipts and certain disbursements by OST to trust beneficiaries is significantly dependent and reliant upon the receipt of timely and accurate information derived from records maintained by BIA, MMS, and other Departmental bureaus and offices." AR-343 at 60-02-34. KPMG further stated:

> The financial information systems and internal control procedures used in the processing of Indian trust transactions have suffered historically from a variety of system and procedural internal control weaknesses. In addition, current management is burdened with the ongoing impact of decades of accumulated discrepancies in the accounting records.

Id.

85. In connection with OST's reliance on BIA, KPMG observed that the "regional and agency offices of BIA perform a critical role in the initial input and subsequent changes to Indian trust financial information." *Id.* KPMG reported that the independent auditors' report on internal controls at BIA as of September 30, 2006 noted the following weaknesses: (a) BIA had not consistently implemented automated systems for tracking and processing activities of the Indian trust assets, (b) BIA had not developed and communicated standardized policies and procedures for establishing, tracking, and pursuing accounts receivable for the Indian trust funds, and (c) BIA did not consistently enter probate orders for land title into the trust management systems in a timely manner. *Id.* KPMG concluded: "[t]he presence of these internal control weaknesses directly impacts OST's ability to process trust transactions on behalf of trust beneficiaries and to provide accurate information to account holders due to the interrelationship between BIA and OST." AR-343 at 60-02-35.

86. In addition, KPMG noted that several significant financial reporting differences from prior periods had not been resolved. The specific ones involving the IIM Trust included: (1) the TFAS control account for IIM account holders has historically not agreed with the sum of

the balances from the subsidiary ledgers in TFAS; (2) a significant number of special deposit accounts continue to require resolution; and (3) the allocation of the historical "undistributed interest" house account – which totaled $2.2 million as of September 30, 2006 – had not been resolved. AR-343 at 60-02-35 through 60-02-36.

87. Paul Homan, the first Special Trustee for American Indians, testified that – based on the AA, Griffin, and KPMG audit reports – the trust information on Interior's accounting systems is unreliable. 10/23/07 AM Tr. at 1556:11-20 (Homan). This conclusion is consistent with his own investigations and studies as Special Trustee. *Id.* Mr. Homan concurred with these independent auditors that Interior's accounting systems have weak internal controls and have suffered from decades of accumulated discrepancies. *Id.* The problems KPMG found in 2006 were weaknesses which preceded Mr. Homan's tenure as Special Trustee and these same weaknesses remain. *Id.* at 1551:2-5, 1551:10-1552:12, 1553:10-19, 1554:5-16, 1554:24-1562:4 (Homan).

88. The conclusions reached by AA, Griffin and KPMG regarding the persistent material weaknesses and significant deficiencies in the trust accounting and management system are in accord with earlier reports by the General Accounting Office ("GAO"). For example, in 1982 the GAO found "[t]he Bureau of Indian Affairs has lost accountability over hundreds of millions of dollars of … trust funds because its automated accounting and financial system produces unreliable information. Also, system operating deficiencies, including inadequate controls over cash receipts and disbursements, prevent the Bureau from discharging its fiduciary responsibilities as trustee for Indian trust funds." PX-4174 at 1. *See also id.* at 3 ("Financial information was unreliable and internal controls inadequate.").

89. Further confirmation that the mismanagement of the Individual Indian Trust has been severe and sustained is provided in reports and audits reviewed by NORC in its "meta-analysis." Initially, NORC drew the conclusion based on its review of these reports, that there was "no widespread fraud of the Indian Trust System" and the "systems have performed far better than generally recognized." AR-440 at 41-02-02. In actuality, reports and audits considered by NORC in its meta-analysis are in stark conflict with these conclusions and do not support NORC's hypothesis that transactions in the paper ledger era have an error rate and other attributes similar to those of transactions sampled in the defined "Electronic Ledger Era." 10/22/07 PM Tr. at 1444:3-13 (Duncan); 10/17/07 AM Tr. at 1046:12-1047:6; 1047:7-23 (Scheuren).

90. These reports indicate long-standing, pervasive, and systemic weaknesses in Interior's trust management systems. *Id.* Examples of the audit reports reviewed by NORC follow.

91. A report reviewing the management of IIM "administered by the Fort Peck Agency, Bureau of Indian Affairs" found, *inter alia,* that "[c]ollections were not deposited in a timely manner, over-the-counter collections were not receipted for or scheduled, and not all collections were recorded or deposited." PX-4513 at NORCMAP_3612, 3622. As a result of these and other identified deficiencies, the report concluded, "there is no reasonable assurance that IIM account holders received all the money due them." *Id.* at 3622.

92. An Audit Report by GAO of the Billings Area Office found, *inter alia,* "numerous instances" of withdrawals that were not authorized and trust records related to disbursements were destroyed routinely. PX-4513 at NORCMAP_2252. Because of these and other severe deficiencies, "it was not possible to make a satisfactory audit of withdrawals from

the IIM accounts." *Id.* Further, the audit notes that when the general ledger accounts are out-of-balance with the subsidiary ledger, "[a]rbitrary adjustments in the general ledger" are made by the regional disbursing officer and concludes that these are "not an acceptable accounting procedure." PX-4513 at NORCMAP_2263.

93. An Audit of the Anadarko Area Office by GAO found, *inter alia,* that at one agency with substantial oil and gas payments, "disbursements made from 73 percent of the individual Indian money accounts examined" were without authorization. PX-4513 at NORCMAP_2239. Numerous accounts showed that unauthorized individuals had signed for disbursement payments instead of the actual beneficiary, in contravention of applicable regulations. PX-4513 at NORCMAP_2240. In addition, 66 percent of the sample accounts reviewed were missing critical authorization information. PX-4513 at NORCMAP_2241.

94. An Audit of the Phoenix Area Office by GAO found, *inter alia*, "adequate records of receipts was not maintained" because it was the practice at the Pima Agency to collect funds and pay directly to the beneficiary without recordation if the individual Indian was located within a few weeks. PX-4513 at NORCMAP_2183. Thus, on the government's ledger, there would be no record of funds actually collected, held and paid by Interior defendants.

95. NORC also apparently reviewed a GAO Accounting and Internal Controls and Procedures" for the Minneapolis Area, which found, *inter alia,* that "the administration of the accounting function is exceedingly lax and deficient." PX-4513 at NORCMAP_2805. Further, "[]because of the deplorable conditions of the accounting records … reconciliations were not possible." *Id.* As in virtually all audit reports for every agency and every area, there existed an out-of-balance condition between "[s]ubsidiary ledgers for the individual Indian money accounts" and "the general ledger control accounts." PX-4513 at NORCMAP_2806. *See also*

10/23/07 AM Tr. at 1549:23-1560:8 (Homan) (describing out-of-balance condition consistently since 1972); 10/23/07 AM Tr. at 1559:1-1560:5 (Homan) (describing cause of the out-of-balance condition).

Tribal Reconciliation Project

96. In May 1991, Interior defendants awarded what was, at inception, a $12 million contract to AA to perform a reconciliation of tribal and Individual Indian Trust accounts. PX-710 at 3, "GAO Report, Financial Management, BIA's Tribal Trust Fund Reconciliation Results" (May 1996). After a "preliminary assessment of the feasibility of reconciling" both tribal and Individual Indian Trust accounts, AA reported that there were sufficient documents to "research tribal trust accounts for fiscal years 1973 to 1992," but that "due to the level of effort and associated cost and the potential for missing documentation, it was not feasible to reconcile Individual Indian Money (IIM) accounts." *Id.*

97. AA was unable to render an accounting of, or reconcile, IIM Trust funds, transactions, and accounts. *Id*. *See also* 10/25/07 AM Tr. at 2077:21-2080:2, 2084:5-17 (Christie); 6/14/99 Trial 1 Tr. at 529:8-530:2 (Christie); PX-710 (reconciliation of IIM considered "impractical"). AA concluded initially that it would cost in excess of $208 million to complete a reconciliation effort of IIM accounts. The results of the IIM reconciliation pilot project, however, were negative and the document collection efforts from agencies, regional offices, federal records centers, and other NARA facilities were not fruitful; these results convinced both AA and Joe Christie – Interior defendants' project manager – that too many critical records were unavailable to complete the reconciliation of IIM accounts and transactions. 10/25/07 AM Tr. at 2083:15-18.

98. Even for the tribal trust reconciliation, the results reported by AA were decidedly poor, although the records for tribal trust were superior to those for individual Indian trust beneficiaries. PX-710 at 3. "Although BIA spent 5 years and about $21 million in a massive effort to locate supporting documentation and reconcile trust fund accounts, tribal accounts could not be fully reconciled or audited due to missing records and the lack of an audit trail in BIA systems." *Id.* at 2. There were significant limitations to the reconciliation, including numerous modifications "in reconciliation scope and methodologies" and certain planned procedures were not performed. *Id.* at 3. But these limitations were not reported to the tribal trust beneficiaries. In addition, BIA abandoned the certification of the reconciliation altogether, even though the certification was merely to "verify that the reconciliation was performed in conformity with the BIA's reconciliation contract requirements but not [to establish] that the reconciliation was as complete an accounting as possible …." *Id.* In other words, the certification BIA proposed was never intended to establish that the reconciliation was a complete accounting. Nevertheless, BIA could not even certify compliance with its own designed "agreed upon procedures."

99. The Tribal Trust Reconciliation Project was not an accounting or audit in accordance with GAAP or GAAS; it was a project that was undertaken in accordance with agreed-upon procedures; Interior could not meet the GAAP or GAAS standards. 10/25/07 AM Tr. at 2071:6-25 (Christie). *See also* PX-4284 at 3-4 (Appendix C). Agreed-upon procedures is any project where the "client" – here Interior – determines the tasks and subject matter of an engagement. At first, AA attempted to perform an audit and reconciliation, but because of systemic and material weaknesses, an audit could not be performed. PX-4284 at 3-4 (Appendix C). Accordingly, the agreed-upon procedures is all that could be performed attempted the poor state of the trust and the trust records.

100. The AA Tribal Trust Reconciliation Project was incomplete at the time the project was terminated by Interior. 10/25/07 AM Tr. at 2084:5-17. Distribution settlement worksheets were targeted for collection by Interior personnel during the project but were not available to perform full reconciliations because they had been routinely destroyed or otherwise were missing. 10/25/07 AM Tr. at 2066:14-17.

101. The results of the AA Report are alarmingly poor. "Although BIA identified about 20,000 boxes of accounting documents and lease records and spent 5 years attempting to reconcile tribal trust accounts, sufficient records were not available to fully reconcile the accounts." PX-710 at 5. Specifically, 14% of the tribes' non-investment transactions were not reconciled – meaning there were no documents whatsoever to support these transactions - which totaled $2.4 billion. PX-710 at 5. Of the remaining "reconciled" transactions, relatively few transactions were reconciled fully or sufficiently. 10/25/07 AM Tr. at 2077:21-2080:9. Many of the reconciled transactions had very limited or no supporting documentation. Partial reconciliations required the concurrence of the affected tribe. *Id.*

102. For the AA reconciliation project, Interior defendants were "not able to determine the total amounts of receipts and disbursements that should have been recorded and had no reconciliation procedure to address the completeness of the accounting records." PX-710 at 5-6. "BIA did not know the universe of leases…." *Id.* at 6.

103. AA attempted to reconcile $21.3 billion of investment transactions which were "tested" by AA – or 16% of total investment transactions – but that effort too was hampered "by missing records." *Id.* at 6.

104. Federal law requires certification of the results of the reconciliation. *Id.* at 8. GAO had suggested that for the certification to be meaningful, Interior defendants must focus on

whether the reconciliation process "resulted in as complete an accounting as possible." *Id.* But Interior defendants' disregarded the GAO's guidance stating that "that the reconciliation procedures, as designed, provided reasonable assurance that the account balances [for tribal trust beneficiaries] [a]re accurate" so they did not need certification. *Id.* No "reasonable assurance" was provided by a CPA.

105. Because the Tribal Reconciliation Project utilized only agreed-upon procedures, it is impermissible to draw any inference from it to support an unsubstantiated or unreconciled transaction or account. 10/25/07 AM Tr. at 2071:20-2072:20. (Christie) It is likewise impermissible to extrapolate characteristics of a substantiated or reconciled transaction or account to an unsubstantiated or unreconciled transaction or account. 10/25/07 AM Tr. at 2071:20-2072:20. The inference and extrapolation limitations of the agreed-upon procedures in the Tribal Trust Reconciliation Project were confirmed repeatedly by Mr. Christie during his tenure to senior officials at the Department of Interior. 10/25/07 AM Tr. at 2072:12-20.

Paragraph 19 Project

106. On November 27, 1996, this Court issued the *First Order for the Production of Information* (Order) [Dkt. No. 16] that required, in part, the production of "[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five named plaintiffs or their predecessors in interest." Order at ¶ 19. Documents subject to this paragraph of the November 27, 1996 Order are commonly referred to as "Paragraph 19" documents. Although Interior defendants represented that they were diligently producing Paragraph 19 documents, in fact, they were not and, ultimately, this Court held defendants in contempt of court for, *inter alia,* failing to comply with the production order. *Cobell II*, 37 F. Supp. 2d 6, 17 (D.D.C. 1999).

107. Ultimately, pursuant to Paragraph 19, defendants searched for relevant trust records that were identified based on names, account numbers, tract numbers and lease numbers of the named plaintiffs and some of their predecessors-in-interest. 6/6/03 Trial 1.5 PM Tr. at 54:6-54:8, 56:11-57:7 (Brunner).

108. The trust records gathered pursuant to the Paragraph 19 search were reviewed by an Ernst & Young partner, Joseph Rosenbaum. 6/6/03 Trial 1.5 AM Tr. at 53:3-10 (Rosenbaum). This review process resulted in a report ("Rosenbaum Report") that purported to analyze the availability of transactional documents and the transactional history of four of the five named plaintiffs and their predecessors-in-interest. *Id.* at 57:11-16. Interior defendants at times characterized the Rosenbaum Report (sometimes referred as the Ernst & Young Report, which is a misnomer because the firm never adopted the report as its own) as an "accounting." Indeed, one named defendant averred that it discharged its accounting obligation. *See* 2/13/02 Contempt II Tr. at 4330:12-24 (Norton).

109. This report is essentially an analysis of an Interior-created so-called "virtual ledger," that contained some of the transactional history for the named Plaintiffs with links to allegedly supporting documents. The virtual ledger was not reviewed for accuracy by any independent contractor and the documents allegedly supporting transactions were linked by the Department of the Interior. PX-4281 at 1. There was no verification or independent review of the accuracy of the virtual ledger or the underlying source documents. 6/9/03 Trial 1.5 AM Tr. at 79:3-22 (Rosenbaum). The virtual ledger already contained the links to the supporting documents when Ernst & Young received it. 6/9/03 Trial 1.5 AM Tr. at 79:3-22 (Rosenbaum).

110. Initially, Interior defendants characterized this report as an accounting for the named plaintiffs. Interior defendants later changed their position when plaintiffs moved for a trial to determine if indeed the Rosenbaum Report was an adequate accounting. "Plaintiffs' Motion To Set Date Certain For Trial Of Adequacy Of Final "Accounting" For Named Plaintiffs" at 3 (December 30, 2004) [Dkt. No. 2798] (stating that because "trustee-delegates insist that they have rendered a complete and accurate accounting for three of the four named plaintiffs and their predecessors in interests[,] . . . this Court should now set a date certain for trial of these accountings"). Instead, defendants asserted it was merely "an expert witness report commissioned to assess the massive 'Paragraph 19' document collection undertaken as part of this litigation." "Defendants' Opposition To Plaintiffs' Motion To Set Date Certain For Trial Of Adequacy Of Final "Accounting" For Named Plaintiffs" (January 13, 2005) [Dkt. No. 2813 at 15, n.4].

111. In fact, the report is not an accounting as it fails to comply with ordinary applicable standards and does not confirm accurate account balances. *See* 5/5/03 Trial 1.5 PM Tr. at 32:10-16 (Homan) (discussing failure to comply with accounting standards). The

Rosenbaum Report also does not satisfy any auditing standards promulgated by professional CPA's or bank examiners. 5/5/03 Trial 1.5 AM Tr. at 10:11-16 (Homan).

112. In fact, a review of the virtual ledger demonstrates that documents identified as linked to particular transactions do not support the transaction as recorded and appear to be erroneously linked. 7/3/03 Trial 1.5 AM Tr. at 34:2-36:15.354 (Duncan). In other instances, while a document relates to a transaction, it is insufficient to support the transaction as recorded. 7/3/03 Trial 1.5 AM Tr. at 39:19-42:9 (Duncan); 7/3/03 Trial 1.5 PM Tr. at 17:10-18:20.356 (Duncan).

113. Further, as the analysis underlying the report assumed that all documents and information provided by Interior defendants were accurate; there was no independent verification. 6/10/03 Trial 1.5 PM Tr. at 66:14-20 (Rosenbaum).

114. While Rosenbaum confirmed that it is important to verify the accuracy and completeness of the ownership records, he did not perform an independent verification of the land records and simply relied on the records as recorded in LRIS. 6/10/03 Trial 1.5 AM Tr. at 62:13-64:12 (Rosenbaum); 6/9/03 Trial 1.5 AM Tr. at 70:20-71:21 (Rosenbaum).

115. Further, Rosenbaum did not examine any direct pay transactions or perform any work covering assets and transactions that tribes were managing or administering pursuant to contract or compact. 6/10/03 Trial 1.5 PM Tr. at 44:13-23 (Rosenbaum) (direct pay not included); 6/10/03 Trial 1.5 AM Tr. at 84:13-85:21 (Rosenbaum). In addition, Rosenbaum did not consider individual Indian trust assets for the five named plaintiffs or predecessors that had escheated to unconstitutionally tribes under the *Youpee* regulations. 6/11/03 Trial 1.5 AM Tr. at 7:18:23 (Rosenbaum). Rosenbaum did not perform any analysis as to what income should have been posted to the individual Indian trust beneficiaries' accounts. 6/11/03 Trial 1.5 AM Tr. at

30:14-20 (Rosenbaum). Rosenbaum also failed to adequately examine disbursements from the IIM accounts reviewed. The standard utilized for what constitutes a supported disbursement – "reasonable competent evidence" – is undefined and does not meet Generally Accepted Accounting Principles or Generally Accepted Auditing Standards which would typically cover a Certified Public Accountants' review of disbursement transactions. 6/10/03 Trial 1.5 AM Tr. at 91:15-92:12 (Rosenbaum). In particular, review of the five named plaintiffs' documents disclosed that very few, if any, disbursements were properly supported. 7/3/03 Trial 1.5 AM Tr. at 44:15-46:11 (Duncan); 7/3/03 Trial 1.5 PM Tr. at 19:3-22 (Duncan). Rosenbaum failed to review documents to determine whether individual Indian trust beneficiaries were ever paid their trust funds; it was sufficient for his analysis to identify those documents evidencing money flowing out of an individual Indian trust account:

> Q. So you are concluding only that the disbursement was made from the account, not that the trust beneficiaries received the funds, is that correct?
> A. That is correct.

6/10/03 Trial 1.5 PM Tr. at 84:25-85:3 (Rosenbaum); *see also* 6/10/03 Trial 1.5 PM Tr. at 86:2-18 (Rosenbaum); 6/10/03 Trial 1.5 PM Tr. at 82:23-83:15 (Rosenbaum).

116. Interior defendants' expert admitted that the results of the Ernst & Young "reconciliation" work that had been undertaken for the named plaintiffs under Paragraph 19 of the First Order of Production, dated November 27, 1996, cannot be relied on because the work is not complete and it is not representative of the target population. *See* 10/17/07 PM Tr. at 1068:13-22 (Scheuren); DX-6 at 13.

117. Accordingly, the "Paragraph 19" Report is not an accounting for the named plaintiffs and is of no value as it does not follow accounting standards and does not establish

accurate account balances. What it does confirm is that insufficient trust records are available to perform the accounting declared by this Court.

Time Project

118. DataCom Sciences, Inc. ("DataCom") contracted with the Interior defendants to examine the accuracy of *current* ownership document information in LRIS. On June 27, 2000, DataCom obtained a stratified random sample of 93 tracts from the LRIS system at the Rocky Mountain Land Title Records Office ("LTRO"). That system contained records of 239,311 tracts. PX-4352 at 2. A total of 541 current ownership documents were identified in connection with those 93 tracts. *Id.* DataCom then compared those 541 documents to the corresponding data stored in LRIS. *Id.*

119. For the TIME report, it was assumed the paper records were correct. 2/1/02 Contempt II, Tr. 3363:13-3364:2 (Nessi).

120. Of the 541 documents on LRIS, 163 or 30.1% were found to have errors. Additionally, 18 or 3.3% of the documents could not be located on LRIS or were not complete, for a total error rate of 33.4%. PX-4352 at 2; 6/5/03 Contempt II Tr. 3797:17-3798:16 (Ridgeway).

121. DataCom then reviewed the 541 documents based on the nature of the error. Certain information in a document was categorized as a "mandatory element" such as the tract number, document number, legal description, acreage, identity of owner, fraction of interest and whether the property was subject to an encumbrance. *Id*. at 5. Within the 541 documents, there were 13,688 entries which were "mandatory elements" as defined by DataCom. Of those mandatory entries, 1900 or 13.88% were in error. *Id.* at 3. Interior defendants considered the degree of error in the LRIS records to be "significant." 2/1/02 Contempt II Tr. 3366:15-3367:21.

122. While NORC has speculated about the accuracy of the TIME Project's findings, *see NORC Analysis of LRIS Tract History Reports* dated February 28, 2003, AR-405 at 50-2-8, no subsequent research has been performed which undermine DataCom's conclusions. NORC also examined the LRIS database, but its work was limited and far less rigorous. NORC merely selected 99 probates and allegedly "verified" that the heirs listed in the probate order received the correct share of the land. *Id.* 50-2-6. DataCom, on the other hand, performed a thorough examination and looked at far more information to determine its accuracy, *id.* at 50-2-8, as well as examining other key title documents including trust patents, restricted fee patents, fee patents, and deeds to trust status, as well. PX-4352 at 11.

123. In its analysis, NORC had a limited definition of error. An error was only found if the probate distribution went to the wrong individual or he or she received the wrong amount. If a document was not located on LRIS due to the extensive probate and filing backlog, it was not considered an error because the backlog was "well known" and NORC wanted to examine it "within its known capacities and limitations." AR-405 at 50-2-6. Additionally, even a wrong date, wrong name, or wrong IIM number would not be an error, despite the fact the latter had been a "problem historically." *Id.* at 50-2-6 to 50-2-7. Unlike DataCom, NORC made no attempt to examine the accuracy of a title documents' legal description, acreage, encumbrances and other material information. Finally, and most importantly, NORC's sampling was small and could not "*be used to make statistical inference about the population* as a whole at conventional assurance levels." *Id.* at 50-2-5 (emphasis in original). Instead, NORC concluded its study "will need to be supplemented by additional research." *Id.* Despite the passage of four and one-half years since NORC's report was prepared, that "additional research" has not been performed.

124. Because the TIME report is the most rigorous and valid assessment of the reliability of LRIS, it is deserving of considerable evidentiary weight. Since at least one-third of the information on LRIS is incorrect, this Court should find that the ownership information in LRIS is not sufficiently reliable for use in the accounting and that ownership will have to be otherwise verified.

Mass Cancellation

125. On November 30, 1990, under the authority of the Competitive Equality Banking Act of 1987, the Department of the Treasury cancelled all outstanding (*i.e.,* non-negotiated) checks. According to BIA employee Kathy Ramirez, approximately 57,000 of these mass cancelled checks were IIM checks issued between 1954 and September 30, 1989. *See* 10/11/07 AM Tr. at 323:17 – 324:17 (Ramirez); *see also* DX-210.

126. The approximately 57,000 checks cancelled by the Department of the Treasury represented roughly $1,847,000 in IIM Trust funds. DX-225 at 1.

127. After cancelling the non-negotiated checks, Treasury retained the associated trust funds in the government's own accounts – commingling said trust funds with the government's funds – rather than returning them to be credited to the appropriate IIM Trust accounts (*i.e*., those accounts that were debited at the time the checks were issued). 10/11/07 AM Tr. at 326:15-17 (Ramirez); 10/11/07 PM Tr. at 421:21-25.

128. On May 7, 1991, OTFM requested a list of all cancelled IIM checks, but Treasury refused to provide BIA with predicate information to identify the cancelled checks until July 29, 1992. *See* DX-210; 10/11/07 AM Tr. at 328:9-15 (Ramirez). Without this information, BIA was unable to track or account for trust funds held by Treasury that should have been re-credited to IIM Trust accounts. *See* 10/11/07 AM Tr. at 328:14-15 (Ramirez).

129. Over 37,000 checks, representing $618,000.00 in IIM Trust funds, were never identified or recredited to the appropriate IIM Trust account. *See* 10/11/07 PM Tr. at 363:6-16 (Ramirez); DX-226 at 1. This includes five checks with a face value of over $142,000.00. DX-226 at 1.

130. While BIA alleges that it ultimately requested and obtained an appropriation from Congress to recredit to the trust accounts funds in the amount of any such cancelled checks presented by IIM beneficiaries, account balances of IIM beneficiaries who did not present their cancelled trust checks for payment never had their account balances recredited, corrected, and restated notwithstanding that such funds continue to be held by Treasury. 10/11/07 PM Tr. at 365:1-6 (Ramirez); *id.* at 424:4 – 425:1.

131. Under the 2007 Plan, Defendants cannot and will not account to beneficiaries trust funds covered by unidentified checks.

Straw Man Project

132. Following publication of defendants' July 2, 2002 Plan, Fritz Scheuren on his own initiative developed an "operating 'straw man' proposal for an *adaptive approach* to Phase 1." "E-mail from Scheuren to Edwards" (July 8, 2002), AR-304 at 14-2-4 (emphasis added); *see also* 10/17/07 PM Tr. at 1080:4-10 (Scheuren admits authoring the Straw Man approach: "I also wrote this. I know I wrote this."). As drafted, Scheuren "offer[ed] just a single approach – one that might be employed to do . . . the 'Electronic Era' cases." AR-167 at 57-29-1. Scheuren coined this approach "simply a 'Straw Man Approach.'" *Id.*

133. "Straw Man" is typically defined as follows:

> "An argument or opponent set up so as to be easily refuted or defeated." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006); or

> "A fabricated or conveniently weak or innocuous . . . object, matter, etc., used as a seeming adversary or argument." *Dictionary.com Unabridged (v 1.1)* (based on the RANDOM HOUSE UNABRIDGED DICTIONARY) (2006); or
>
> "A made-up version of an opponent's argument that can easily be defeated. To accuse people of attacking a straw man is to suggest that they are avoiding worthier opponents and more valid criticisms of their own position." THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY (3rd ed. 2005).

134. As Dwight Duncan testified, a "straw man" is "[g]enerally speaking [an] argument [that] is a fallacy. It's meant to distract. But it's really just to put something up that everyone can take shots at." 10/22/07 PM Tr. at 1448:11-13 (Duncan).

135. Scheuren generally described the Straw Man approach as the selection of large initial samples of approximately 2,500 transactions per agency; with 80 agencies this sample is approximately 200,000 transactions. AR-167 at 57-29-3. In the event the error rates at particular agencies are "large," the Straw Man approach would be "adapt[ed]" by sampling additional transactions. *Id.*

136. Scheuren described the benefits of this Straw Man approach, including but not limited to: cost, scalability to whatever budget is available, and speed. AR-167 at 57-29-1.

137. Scheuren identified the most significant benefit of the Straw Man approach as follows: "The use of an adaptive strategy links up nicely with the legitimate payment of a cash settlement, since inherently an adaptive approach admits its error, *even though it may well manage to keep it less than would have been the case in a full accounting*." AR-167 at 57-29-2 (emphasis added).

138. The Straw Man approach demonstrates that the NORC sampling analysis ultimately utilized, admittedly, cannot meet the standards required by trust law. Scheuren explained that "[w]hat is an 'acceptable accounting' needs definition. *Clearly we are not talking*

about the standards used in the Court case." AR-170 at 57-32-02 (emphasis added). Scheuren, on cross examination flipped, claiming that this was just a "question[]" he was posing to his client, the Department of Interior, but that he would not endorse a lower standard "anymore." 10/17/07 PM Tr. at 1081:1-25. Scheuren later flopped, recanting his admission, and claiming that he did not "think that [he] can be held accountable for not putting a period there." *Id.* at 1082:7-9. In other words, this was little more than a question he posed to his client and that he never advocated that a lower standard be applied to the historical accounting.

139. Defendants' use of adaptive strategies artificially lowers error rates and renders any HSA "meaningless" to the individual Indian trust beneficiary who receives it. *Id.*, 10/22/07 PM Tr. at 1449:6-19; *see also generally* 1448:2-1449:19 (background).

140. The adaptive strategies reflected in the Straw Man approach proposed by Dr. Scheuren were accepted and incorporated into defendants' 2003 and 2007 Plans. Defendants selected certain methodologies, including adaptive statistical methods, with the goal of lowering the error rate, thereby reducing the amounts they may owe to the plaintiff class; this renders the HSA meaningless.

d. Establishment of AIRR in Lenexa

141. According to the 2007 Plan, the American Indian Records Repository is the "Federal Records Center" at Lenexa, Kansas. It is represented that "[m]ore than 155,000 boxes of Indian records, comprising over 300 million pages," are located at AIRR. 2007 Plan, AR-566 at 33-03-10. Interior's Office of Historical Trust Accounting ("OHTA") has a team of records searchers at the AIRR and works with OTR and NARA to retrieve relevant boxes to search for documents needed for the historical accounting. *Id.* While the 2007 Plan indicates there are 155,000 boxes in storage, this was subsequently clarified by the Special Trustee, who confirmed

that only 117,000 of these boxes contained Indian trust records. The proportion of individual versus tribal trust records is not disclosed. *See* June 12, 2007 Swimmer Declaration [Dkt. No. 3340-4 at 2 (¶¶ 6-7). Of these 117,000 boxes, only 9,300 have been "scanned or partially scanned" – less than 8 percent (9,300/117,000). *Id.* at 2 (¶ 6).

142. Interior defendants' representation in the 2007 Plan regarding the number of boxes at AIRR is in sharp contrast to their understanding at the start of this litigation of the number of boxes containing IIM related information. In 1998, BIA estimated there were 470,054 boxes of IIM documents alone containing 1,425,135,000 pages. However, it was subsequently determined that this had been overstated by approximately 85% due, in part, to document destruction. AR-80 at 54-21-32; *see also* 10/18/07 PM Tr. at 1266:13-1268:15.

143. The principal goal of records management is to ensure that adequate and proper documentation is created and maintained. 6/24/99 Trial 1 Tr. at 1976:8-11 (Rossman). However, prior to 1999, Interior defendants did not have a records management system in place that provided consistent guidance to agencies; rather, each agency developed its own method of recording and maintaining information. 1/22/99 Contempt I Tr. at 1367:16-1368:23 (Rossman); *accord* 6/24/99 Trial 1 Tr. at 1873:20-1880:8 (Rossman). Furthermore, the BIA staff in charge of the system-less records management did not possess the adequate skill set necessary to perform their jobs. 6/24/99 Trial 1 Tr. at 2033:5 – 2035:22 (Rossman). The creation of AIRR was intended to resolve defendants' records management problems. However, the record reveals that the same problems remain.

144. The completeness of documents stored at the AIRR and the accuracy of indexes and inventories of such documents are unverified. Defendants know that AIRR documents are

incomplete and that inventories and indexes have proven to be inaccurate. 10/11/07 PM Tr. at 416:23-417:23 (Ramirez).

145. Many records collected and stored at AIRR, including those used by the defendants as exhibits to Ms. Ramirez's testimony, do not contain information relevant to IIM trust beneficiaries. *Id.* at 400:17-402:19. By way of example, Interior defendants introduced photographs of account ledgers, but could not say if they had anything to do with the individual Indian trust. *Id.* Similarly, they produced photographs of boxes of documents from Lenexa, but had not verified what they contained. *Id.* at 399:7-19. The procedures and exhibits that Ms. Ramirez described for documenting IIM transactions were used in a presentation to support the *document collection process* (as opposed to a reconciliation of transactions) that defendants employed in the Paragraph 19 document search; this is not the process that is being employed in the 2007 Plan. 10/11/07 PM Tr. at 403:3-22.

146. The inaccuracy and incompleteness of the records at the AIRR is demonstrated by the defendants use at trial of, and reliance on, a reconciliation document that is incomplete and that reflects a sum total that is not supported by extant sub-totals. *Id.* at 415:15-416:1.

147. In practice, document requests from Lenexa by Interior defendants' contractors have been outstanding for over a year. 10/15/07 AM Tr. at 505:11-14 (Herman). This is consistent with the parties' recent discovery efforts.

148. On May 18, 2007, Plaintiffs filed a request for production. [Dkt. No. 3326]. Therein, they requested, among other items, the trust documents for approximately ninety beneficiaries, fifty of whom were recipients of judgment fund accountings already completed by trustee-delegates. *Id.* at 1. Defendants filed objections on June 13, 2007 [Dkt. No. 3340], and claimed that such a production would entail "thousands of hours of labor, cost millions of

dollars, and require months at a minimum." *Id*. at 15. A breakdown of the estimated costs follows:

> Treasury estimates that such a search for responsive documents would cost $7.8M for the requested beneficiaries ($3.9M X 2). "Treasury Declaration" [Dkt. No. 3340-2 at 5-6 (¶¶ 8-9)].
>
> The Special Trustee estimates that a search for records at AIRR could cost between $9.3M and $37.4M at a blended rate of $40.00. "Swimmer Declaration" [Dkt. No. 3340-4 at 2 (¶ 9)].
>
> The Special Trustee estimates that a separate search would also have to be conducted at the Office of the Special Trustee; this would cost approximately $2.8M. [Dkt. No. 3340-4] (Swimmer Declaration) at ¶ 10. It would cost an additional $225K for the Judgment Fund accounts. *Id.* at 3 (¶ 11).
>
> In sum, searching the AIRR would cost between $9.3M and $37.4M, at a blended rate of $40.00. Adding the Office of the Special Trustee and Treasury would increase the potential cost of production for ninety beneficiaries to almost $50M. At least seven other Interior offices, including MMS and BLM, are not included in this estimate. *Id.* at 3-4 (¶ 14).

149. Interior defendants have no understanding of what documents they actually have at Lenexa, or whether they will be useful for the historical accounting. They do not know if they have sufficient records to do an accounting for any particular year over the life of the trust. 10/18/07 PM Tr. at 1261:5-10 (Angel).

150. Accordingly, Interior defendants failed to establish that documents collected and deposited at the AIRR are complete and accurate or that they are sufficient or reasonably available to support an accounting of beneficiaries' trust funds. *See* 10/11/07 PM Tr. at 416:23-417:23, 428:23-429:25 (Ramirez).

e. Changes To Historical Accounting Project Reflected In 2007 Plan.

151. On May 31, 2007, Interior published its "Plan for Completing the Historical Accounting of Individual Indian Money Accounts" (the "2007 Plan"). AR-564 at 33-1-1; AR-

565 at 33-2-1; AR-566 at 33-3-1. According to Interior, the "2007 plan builds upon and replaces" the 2003 plan. AR-565 at 33-2-3.

152. Part 2 of the 2007 Plan discusses modifications to the historical accounting project since the publication of the 2003 Plan. *See* AR-566 at 33-3-1. The more significant of these changes included (a) a significant reduction in the breadth and number of transactions to be reconciled as part of the statistical sampling, (b) a suspension of the reconciliation of the judgment and per capita accounts, (c) eliminating work on the SDAs from the accounting altogether, (d) deleting asset statements from the accounting, (e) a lengthy delay to the scheduled completion of the accounting, and (f) an administrative appeals process. AR-566 at 33-3-20 to 28. That is, in comparison to the 2003 Plan, the 2007 Plan called for an extended timeframe within which to supposedly complete a dramatically reduced amount of work. It also now includes a draconian "appeals" process aimed at divesting this Court of jurisdiction. *See* discussion *infra* Section II. f.

153. There is a dramatic decrease in the number of transactions to be reconciled in the 2007 Plan as compared to the 2003 Plan. While the 2003 Plan called for over 233,000 transactions to be reconciled from the Electronic Records Era, the 2007 Plan only requires the reconciliation of 6,599 transactions from the Electronic Records Era. *See* AR-566 at 33-3-23. This represents less than 3 percent of the number of transactions that were to be sampled under the 2003 Plan. AR-566 at 33-3-22 to 33-3-23; *see* 10/17/07 AM Tr. at 990:12-991:10 (Scheuren); 10/17/07 PM Tr. at 1100:7-1103:12 (Lasater); 10/10/07 PM Tr. at 105:7-17 (Cason). A similar reduction is anticipated in the Paper Records Era. *See* AR-566 at 33-3-23 through 24.

154. During his Trial 1.5 testimony, Dr. Lasater, Interior defendants' statistician, opined that the sampling plan in the 2003 Plan was reasonable, citing three primary points: (a)

the size of the sample was approximately twice the size it had to be based on Dr. Lasater's own calculations, (b) each agency would be well represented in the sample, and (c) if the error rate exceeded the near zero rate which was expected, the sample size could be increased. 10/17/07 PM Tr. at 1100:15-1102:6, 1102:7-1103:8, 1107:22-1108:16 (Lasater).

155. Under the 2003 Plan, at least 400 transactions from each agency were to be included in the samples for each of the eras. 10/17/07 PM Tr. at 1107:22-1108:5 (Lasater); *see also* PX-507 at 64-65 (2003 Plan, App. D). This was important because of the recognized and significant differences in the management and administration of trust assets from region to region and agency to agency. *Id.*

156. Under the 2007 Plan, by contrast, there is no requirement that even a single transaction from each agency will be sampled. It is not clear how many agencies there are where not a single transaction was sampled in the Litigation Support Accounting Project ("LSA"), but there were at least some. 10/17/07 PM Tr. at 1108:6-16 (Lasater).

157. Dr. Lasater acknowledged his prior testimony that his own calculations showed that the *minimum* adequate size of the sample was approximately half of the size from the 2003 Plan, or, for example, 80,000 transactions from the Electronic Records Era. *Id.* at 1101:16-1102:16. He never explained how a sample that was a small fraction (less than 3 percent) of the original sample size could now be considered adequate. This is particularly puzzling since the "error rate" obtained in the LSA is *higher* than the near zero rate he expected in his earlier calculations. *Id.* at 1103:1-12. Based on his earlier work, this would have necessitated a larger sample rather than a smaller one. Significantly, Dr. Lasater also acknowledged his prior opinion that it was important to have a number of transactions from each of the agencies included in the sample. *Id.* at 1107:22-1108:16. He did not explain the discrepancy.

158. Dr. Lasater's testimony is contradicted by his earlier testimony regarding both the size and breadth of the sample. His earlier testimony was more persuasive in that it is not driven by his present need to justify the dramatic reduction in sample size. In light of Dr. Lasater's earlier, more candid testimony, the reductions in the 2007 Plan are not justified. The current sample size is inadequate.

159. The statistical sampling completed in connection with the LSA Project was far less than the statistical sampling proposed in the 2003 Plan. However, defendants now contend that the LSA Project sampling work satisfies defendants' declared fiduciary duties with respect to land-based accounts in the Electronic Ledger Era. 10/17/07 AM Tr. at 990:12-991:10 (Scheuren); 10/17/07 PM Tr. at 1100:7-1103:12 (Lasater). It does not.

160. The 2003 Plan anticipated completing all judgment and per capita accounts by the end of FY 2004. *See* PX-507 at 34. The 2007 Plan admits that defendants were unable to reconcile 13,600 accounts, or approximately 14% of all judgment and per capita accounts for whom they acknowledge a fiduciary duty to account. AR-566 at 33-3-24. There is no timetable to complete these reconciliations. *Id.*; *see also* AR-565 at 33-2-13.

161. The 2003 Plan anticipated completing the Electronic Records Era by the end of FY 2005; the Paper Records Era by the end of FY 2006; and, all historical accounting activity was to be completed by FY 2007. *See* 2003 Plan, PX-507 at 34. On the other hand, the 2007 Plan now anticipates the "IIM historical accounting continuing *through* FY 2011." AR-566 at 33-3-25 (emphasis added). The 2007 Plan "shows" reconciliation activities "continuing through" FY 2011. *Id.* This is strong evidence that the historical accounting activities will not be complete in the next three fiscal years. *Cf. Cobell X*, 283 F. Supp. 2d at 225 ("It is not that the Court believes Interior is incapable of formulating an adequate plan for an accounting; rather, it

is that the Court has no confidence that Interior is willing to actually *implement* an adequate accounting." (emphasis in original)).

162. The 2003 Plan identified $67.9 million in un-cleared balances in SDAs. AR-566 at 33-3-27. The identification and distribution of these amounts was part of the historical accounting activity. *Id.* The 2007 Plan states that it will not refer to the ongoing work clearing SDAs because clearing those amounts would not be reflected in any HSA, as any such distributions would post-date the December 31, 2000 terminal date for the historical accounting. *Id.* No documentation was included in the Administrative Record regarding the work completed to date clearing SDAs.

163. Defendants are unable to confirm the number of beneficiaries or accounts that will receive historical statements of account; consequently the numbers continue to fluctuate as the historical accounting work progresses. AR-566 at 33-3-27 to 33-3-28. Defendants have identified this as a material change from the 2003 Plan, but the 2003 Plan clearly states that the reported numbers of accounts are "approximate[]." *See* PX-507 at 4 (Executive Summary) (identifying "approximately 42,200 Judgment and Per Capita IIM accounts;" and "approximately 200,000 land-based IIM accounts").

164. The 2003 Plan indicated that it would provide a statement of non-financial assets belonging to each beneficiary as of December 31, 2000. AR-566 at 33-3-28. The 2007 Plan states that such a statement "will add little value and may, in fact, increase confusion on the part of recipients of the HSA package." *Id.*; *see also* 10/10/07 PM Tr. at 147:16-148:24 (Cason). The 2007 will not provide any asset statement. *Id.*

f. Rationale for 2007 Plan

165. Interior grossly underestimated the costs to reconcile transactions. Interior estimates that implementing the 2003 Plan "is now estimated to cost about five times the original cost estimate;" or $1.675 billion ($335M X 5). AR-566 at 33-3-5; *see also,* 2003 Plan, PX-507 at 3 (estimating cost of the accounting to be $335 million). The 2007 Plan notes that earlier per transaction cost estimates would be approximately $100 per transaction. AR-566 at 33-3-9. Defendants' experience to date indicates a projected cost of $3,000 to $3,500 per transaction – defendants' original estimates were off by a factor of at least 30, and potentially by a factor of 35. *Id.*

166. Interior grossly underestimated the time to reconcile transactions. The 2003 Plan anticipated completing the Electronic Records Era by the end of FY 2005; the Paper Records Era by the end of FY 2006; and, all historical accounting activity was to be completed by FY 2007. *See* 2003 Plan, PX-507 at 33. As of the end of FY 2007, Interior has still not developed a plan to reconcile the paper ledger era; defendants submitted no plan for the paper ledger era.

167. Interior grossly underestimated the availability of documentation to reconcile transactions. The 2003 Plan estimated that almost 250,000 transactions would be reconciled; however, defendants were able to reconcile little more than 6,500 of the projected transactions – less than 3%. AR-566 at 33-3-22, 23. *See also*, 10/17/07 AM Tr. at 990:12-991:10 (Scheuren); 10/17/07 PM Tr. at 1100:7-1103:12 (Lasater); 10/10/07 PM Tr. at 105:7-17 (Cason). The low rate of completion is undoubtedly a result, at least in part, of the unavailability of documentation to reconcile transactions; by way of example defendants estimated that it might cost $50M to retrieve documents for approximately 90 beneficiaries identified by plaintiffs – 50 of whom were identified by defendants as having HSA's prepared. *See supra* § I.d. (the estimated cost to comply with plaintiffs' request for production was estimated to cost perhaps as much as $50M).

168. It quickly became apparent to defendants that the 2003 Plan filed with the Court could not be completed. Interior defendants' experts reported to the Court that it was never even started. DX-159 at 6 (Lasater Expert Report) ("The January 6, 2003 Plan was not able to be implemented"); and DX-6 at 7 (Scheuren Expert Report) ("the sample design described [in the 2003 Plan] was not carried out"). Defendants needed to find another strategy. Congress passed the FY 2004 Interior Appropriations Bill that provided defendants with the basis to halt work on the 2003 Plan (to the extent it had even begun); this provided the rationale for the LSA. AR-566 at 33-3-13. However, defendants fail to note that this appropriation expired on its own terms at the end of the fiscal year. *See* Department of the Interior and Related Agencies Appropriations Act, 2004; Pub. L. 108-108 at 23. Defendants were not barred from re-commencing the 2003 Plan after the appropriation expired; they just chose not to. AR-566 at 33-3-13.

169. It should be noted that Interior was telling the Court and plaintiffs the exact opposite story – *i.e.*, that Interior was continuing to implement the 2003 Plan. In a Progress Report filed with the Court, Secretary Norton herself represented: "Although the district court's order has been stayed pending appeal, *Interior has nonetheless continued its accounting work, consistent with its own 2003 accounting plan* and the funding provided by Congress, and has made substantial progress." "Progress Report" (September 1, 2005), AR-563 at 27-2-3 (emphasis added).

170. The reality is that defendants were pursuing a strategy to reduce their liability in this litigation. AR-566 at 33-3-13. By its own terms – indeed, defendants have not even attempted to conceal their ultimate goal, choosing to caption the plan as a Litigation Support Accounting ("LSA") – the LSA "was specifically designed to provide factual information for ongoing *settlement discussions*." *Id.* (emphasis added). After the appropriation expired (2004)

and defendants completed the LSA in September 30, 2005 (AR-438 at 40-2-1), defendants did little with respect to the historical accounting – no further work was conducted in either the electronic or paper ledger era – since they had satisfied themselves that they had reduced their liability to an acceptable level; less than 1% error rate and a "dollar exposure" of no more than $86 million by NORC's estimate. "Memo from NORC to Edwards" (January 26, 2007), AR-442 at 42-2-2.

171. This type of "dollar exposure" reporting is consistent with efforts to minimize a party's liability in litigation It is not the type of reporting performed by a trustee engaged in the rendering of a historical accounting to meet fiduciary duties declared by this Court. Duncan September 17, 2007 Rebuttal Report, PX-4484 at 9-10, 17-18.

172. That defendants utilized the historical accounting process, including the LSA, to further their litigation goals and reduce their liability in these proceedings is amply supported by the record. Indeed, one of NORC's goals in designing the 2007 Plan and the LSA was to limit defendants' potential litigation exposure in the event that IIM trust records supporting sampled transactions could not be located. Jim Cason, the architect of the 2007 Plan, testified as follows:

> Q: Now, was one of the ideas behind the LSA an effort to -- that this approach would reduce the government's potential liability?
> Cason: That was one of the elements, yes.

10/10/07 PM Tr. at 205:16-19 (Cason). "Managing Historical Accounting Records", AR-168 at 57-30-3; "Memorandum from Fritz Scheuren to Jeffrey Zippin re: Assurance Level Options" (Jan. 29, 2007), AR-441 at 42-1-2 n.1.

173. Defendants' rationale for the 2007 Plan is based, in part, on better information about the costs, duration and difficulty in identifying and retrieving documents. However, defendants' overriding rationale in changing the 2007 Plan was to attempt to legitimize, at least

before this Court, an extensive effort to reconcile transactions wherein the primary goal was the reduction in defendants' liability to the plaintiff class.

II. AREAS WITHIN THE SCOPE OF THE 2007 HSA PLAN

a. Information contained within Historical Statements of Account ("HSAs").

Information contained within Historical Statements of Account ("HSAs") is Inadequate, Confusing and Misleading

174. Defendants represent that the HSA, the product of the reconciliation exercise, will report to each beneficiary his or her transaction history, a listing of all transactions posted to his or her account, and "Interior's conclusions" regarding the accuracy and completeness of the list of transactions posted to IRMS or TFAS. "2007 Plan", AR-565 at 33-02-03 to 33-02-04, 33-02-06 to 33-02-11.

175. Defendants will report in the HSA their opinion and conclusion – not the opinion and conclusion of an independent certified public accountant – that transactions posted to IRMS and TFAS probably are correct. "Draft Discussion Paper on Statistical Sampling," AR-278 at 11-18-01; "2007 Plan", AR-565 at 33-02-06; 10/25/07 PM Tr. at 2142:1-17 (Dunne).

176. Interior defendants stated objective of this process is to: (1) report to beneficiaries that data in IRMS and TFAS are correct, AR-565 at 33-02-09; (2) mail HSAs to an estimated 268,000 beneficiaries covering "post-1985 electronic ledger era" transactions recorded in land-based accounts through December 31, 2000, *id.* at 33-02-10; and, (3) mail a second set of HSAs to an estimated 65,000 of the 268,000 beneficiaries regarding "pre-1985 paper ledger era" transactions recorded in land-based accounts open prior to 1985, irrespective of whether each such beneficiary's account balances or paper ledger era transactions are reconciled. *Id*. at 33-02-10. Importantly, this process will exclude from the reconciliation transactions relating to at least

159,249 accounts in the electronic ledger era in conformity with defendants' narrow definition of the scope of their accounting duty. 10/16/07 AM Tr. at 810:9-811:6 (Herman).

177. There is material information that will be omitted from the HSA. The HSA does not, as it must, provide sufficient information to the beneficiary about the trustee-delegates' management and administration of his or her trust assets to enable the beneficiary to enforce rights under the trust or to prevent or redress a breach of trust. PX-4285 at 3; "National Fiduciary Accounting Standards" (April 15, 1990), AR-380 at 60-39-07; *see generally* PX-4210; 10/23/07 AM Tr. at 1581:6-19 (Homan).

178. To be adequate, a statement of account must report to each beneficiary the results of the accounting, including complete, accurate, and verified information about all trust funds, the date the account was opened, the verified opening balance, the current balance, all financial transactions, the nature and amount of trust property – whether or not such property produces income – ownership verification, and appraisal valuations. PX-4285 at 3; 10/24/07 PM Tr. at 1887:2-10 (Fitzgerald); 10/23/07 AM Tr. at 1578:17-1579:8 (Homan). The HSA does not provide this requisite information; nor does it provide the "detailed statement of the debits and credits between parties to a fiduciary relationship" along with "a precise list or enumeration of financial transactions." PX-4285 at 3; *see also* 10/24/07 PM Tr. at 1886:19-1887:16 (Fitzgerald).

179. The HSA does not, as it must, report on the accuracy of the first deposit in the beneficiary's account, all transactions thereafter (until the account is closed and the underlying assets have been transferred out of trust), and the reconciled balances and transactions of the beneficiary's predecessors-in-interest in order to establish an accurate opening balance. AR-511 at 61-37-01 through 03. Such omissions are endorsed by defendants notwithstanding their

admission that they, as trustee-delegates, must verify the accuracy of, and establish, the opening balance of each beneficiary's account, beginning on the date of the original or initial allotment – not the date of enactment of the 1994 Trust Reform Act (October 25, 1994) – in order to determine and report an accurate final or closing balance of that account. 10/10/07 PM Tr. at 112:25-113:3 (Cason); 10/24/07 PM Tr. at 1904:11-1905:5 (Fitzgerald); 10/17/07 PM Tr. at 1106:13-1107:21 (Lasater); 10/23/07 AM Tr. at 1575:9-1576:15 (Homan); AR-509 at 61-35-31. Accordingly, the HSA does not, as it must, report an accurate closing balance, in part, because defendants will not verify the beneficiary's opening balances and account for all funds of the beneficiary and his or her predecessors-in-interest since the date of the original allotment or the inception of the trust. 10/23/07 AM Tr. at 1575:9-1576:15 (Homan); 10/24/07 PM Tr. at 1904:11-1905:5 (Fitzgerald); 10/10/07 PM Tr. at 139:21-145:8 (Cason); PX-4285 at 7; AR-511 at 61-37-02.

180. Further, the HSA does not disclose to the beneficiary that, in fact, his or her account balances have not been reconciled. DX-109 at 1; 10/17/07 AM Tr. at 1012:4-10 (Scheuren); 10/17/07 PM Tr. at 1084:9-25 (Scheuren).

181. An accurate statement of the beneficiary's ownership interest in his or her trust assets is not included in the HSA, although defendants admit that they have a duty to provide that information to each beneficiary. AR-278 at 11-18-01. The HSA does not, as it must, describe in particular lands and subsurface rights defendants hold, and have held, in trust for the benefit of the individual Indian beneficiary, the nature and scope of the beneficial interest(s) owned by that beneficiary in such assets, the location and legal boundaries of such lands and subsurface rights, all leases and encumbrances, the disposition of assets if no longer held in trust and supporting documentation. 10/10/07 PM Tr. at 147:16-148:24, 171:16-21 (Cason); 10/24/07 PM Tr. at

1892:2-4 (Fitzgerald); "Preparing the Historical Accounting of Individual Indian Money Accounts" (Oct. 26, 2001), AR-231 at 10-18-06; 12/18/02 Dep. Tr. at 41:10-19, 85:3-6; 103:5-17 (Edwards); 10/23/07 AM Tr. at 1568:8-10, 1569:1-1570:1 (Homan).

182. The HSA does not, as it must, inform the beneficiary that transactions are reconciled in accordance with "agreed-upon procedures," not the more rigorous attestation or audit standards. *See* 10/24/07 AM Tr. at 1825:12-1827:21 (Pallais); 10/25/07 PM Tr. at 2125:25-2126:3 (Dunne). The HSA does not inform the beneficiary that Interior defendants could not meet traditional audit standards. The HSA does not, as it must, report trustee-delegates' bookkeeping methods involved in making a financial record of transactions and in the preparation of statements concerning the assets, liabilities, and operating results of operations. *See* PX-4285 at 3. The HSA does not, as it must, report the specific procedures employed – alternative and otherwise – and judgments made by defendants and their contractors in the LSA reconciliations. In fact, defendants' description of the activities they have performed with respect to the LSA is "unintelligible." PX-4284 at 7-8. Accordingly, the HSA does not, and cannot, provide an opinion or reasonable assurance from an independent certified public accounting firm that the beneficiary's trust balances are correct or fairly stated or that defendants have rendered a complete and accurate accounting of all funds. 10/24/07 AM Tr. at 1827:22-1828:8 (Pallais); 10/25/07 PM Tr. at 2142:7-17 (Dunne).

183. The HSA does not, as it must, provide documentation that defendants considered and relied on in their reconciliation of posted transactions. Without this information, the beneficiary cannot determine whether or not defendants' statements and conclusions about the accuracy of the beneficiary's transactions and account balances are reasonable. The failure to provide such documentation is especially unreasonable here because many available documents

do not directly support individual postings and reconciliations (*e.g.*, Schedules of Collection and SF 215 Deposit Tickets) and key source documents are missing or have been destroyed systemically (*e.g.*, the distribution settlement worksheets, scaling tickets). AR-229 at 10-16-04; 10/25/07 AM Tr. at 2041:24-2042:8, 2045:7-2048:24, 2063:19-2064:1, 2066:10-17; 2067:9-16, 2085:24-2086:3 (Christie); PX-350.

184. The HSA does not, as it must, include a statement of interest accrued and accruing. DX-109 at 1. In addition, the HSA does not itemize each transaction involving the sale, redemption, or other disposition of securities purchased with the beneficiary's trust funds. AR-380 at 60-39-10; *see* PX-4285 at 3. Nor does it itemize each security purchased with the beneficiary's trust funds or state the carrying value of each such security. AR-380 at 60-39-11 Because of a known but unreconciled interest discrepancy that affects all accounts, HSAs that have been transmitted to beneficiaries for judgment and per capita accounts include a disclaimer of reliability. "Background on Issues for Discussion" (Oct. 29, 2002), AR-86 at 54-27-04.

185. The HSA excludes transactions that have occurred, but which have not been posted to the beneficiary's account on IRMS or TFAS. 10/15/07 AM Tr. at 520:8-521:1 (Herman).

186. The HSA excludes beneficiaries' funds held in SDAs. 10/15/07 PM Tr. at 645:13-646:13 (Herman).

187. The HSA does not, and cannot, provide reasonable assurances about the statistical probability that the beneficiary's account balances are correct or stated fairly or that a full accounting of the beneficiary's trust funds has been rendered. 10/25/07 PM Tr. at 2161:11-23, 2163:3-16, 2164:15-17, 2167:10-16, 2169:11-13 (Hinkins); 10/22/07 AM Tr. at 1358:10-14, 1359:13-17, 1374:20-1375:2 (Duncan); 10/22/07 PM Tr. at 1407:7-13, 1445:5-21; 10/17/07 AM

Tr. at 1031:25-1032:8 (Scheuren); 10/17/07 PM Tr. at 1063:12-20 (Scheuren); AR-235 at 08-02-04 through 05; DX-4 at 36-37.

188. The HSA does not, as it must, disclose to beneficiaries that defendants' conclusion about the probability that transactions are accurate does not necessarily mean that a single transaction posted to that beneficiary's account has been reconciled. 10/17/07 PM Tr. at 1108:6-16 (Lasater); *Id.* at 1084:9-25 (Scheuren). Of even greater concern, the HSA is confusing and misleading because it fails to explain that omitted, purged, and other categories of accounts or transactions that have occurred are excluded from the electronic ledger era and, thus, are beyond the scope of the reconciliation; nor does it describe the impact that such exclusions have on the accuracy and completeness of any accounting of the beneficiary's funds and his or her trust balances. 10/25/07 PM Tr. at 2172:12-19, 2173:14-22, 2178:6-13 (Hinkins); 10/24/07 AM Tr. at 1859:6-1860:21 (Pallais); 10/22/07 AM Tr. at 1360:19-21, 1366:1-3, 1373:1-2 (Duncan); 7/9/99 Trial 1 Tr. at 3858:10-24 (Babbitt). Because of the importance of the HSA to the accounting process, defendants' consultants acknowledge that it must not be transmitted or issued until they confirm whether, and the extent to which, transactions are omitted, purged, or otherwise missing from the beneficiary's account. 10/11/07 PM Tr. at 445:4-7 (Herman).

189. The HSA does not, as it must, report on the amount of funds that are owed, but which defendants have failed to collect. 10/24/07 PM Tr. at 1906:21-1908:8 (Fitzgerald); PX-4285 at 9.

190. The HSA does not, as it must, report on the amount of collected funds, which should have been posted to the beneficiary's account. PX-4285 at 9.

191. The HSA does not, as it must, report on the amount of administrative fees charged to the beneficiary's account, or paid to defendants on behalf of the beneficiary, in connection with defendants' administration of the IIM Trust. 10/11/07 AM Tr. at 232:25-233:4 (Cason).

192. The HSA does not, as it must, report the nature and scope of the beneficiary's escheated *Youpee* interests as well as the amount of revenue generated therefrom. *Id.* at 240:3-14.

193. Accordingly, the HSAs described in the 2007 Plan do not provide sufficient information to a beneficiary about the management of his or her trust assets to enable the beneficiary to determine whether fiduciary duties have been discharged faithfully. Furthermore, the information provided to a beneficiary is confusing and misleading and will not enable the beneficiary to determine whether defendants' statements about the accuracy of transactions and trust balances are true and correct. Finally, the HSA does not discharge the trust duties declared by this Court and its disclosures are so inadequate and defective that its transmission to a beneficiary would further unduly delay the accounting declared by this Court.

b. Beneficiaries receiving HSAs under 2007 HSA Plan

194. The 2007 Plan states that an HSA will be provided for accounts open on or after October 25, 1994, with the following temporal limitations:

i. Beneficiaries with accounts closed before October 25, 1994 will not receive an HSA for those accounts. AR-565 at 33-02-03.

ii. Beneficiaries with accounts opened after December 31, 2000 will not receive an HSA for those accounts. AR-565 at 33-02-06.

iii. There will be no review of transactions prior to 1938.

195. Defendants currently estimate that they may provide an HSA to 364,772 beneficiaries. AR-565 at 33-02-11. However, this is not a confirmed number of beneficiaries since the "number changes over time as Interior's research continues." *Id*. Consequently, today, defendants do not know the scope of the beneficiary class to whom they admit they owe fiduciary accounting duties.

c. Transactions to be reconciled under 2007 HSA Plan

i. Judgment/Per Capita Accounts

196. The 2007 Plan abandoned a stated objective of the 2003 Plan to reconcile all judgment funds and per capita transactions, and admits that further reconciliation has been postponed indefinitely. *Id.* at 33-02-13.

197. Defendants represent that they have reconciled 83,711 judgment funds and per capita transactions using transaction-by-transaction reconciliation for accounts that were opened on or after October 25, 1994 through December 31, 2000 and that remain on IRMS or TFAS. *Id.* at 33-02-11 through 13.

198. Defendants state that 13,112 of identified 96,823 judgment funds and per capita transactions in the electronic ledger era have not been reconciled. *Id.* at 33-02-12. However, to date, through the continuing work of FTI in the DCV Project, defendants have now identified 193,658 judgment/per capita accounts on IRMS and TFAS. Applying defendants' temporal limitation on the scope of the reconciliation (accounts open on or after October 25, 1994 through December 31, 2000), all transactions relating to 95,873 – or 49.5% – of the accounts held by beneficiaries identified by FTI with judgment/per capita funds have been excluded from the reconciliation. DX-152A at 279. This admission is troubling, *inter alia,* because defendants

concede that they have been withholding judgment and per capita funds from beneficiaries since the 1800's. DX-10 at 9.

199. CD&L confirmed that in the reconciliation of judgment funds and per capita accounts, it complied with AICPA "consulting services" standards – not attestation or audit standards under GAAP and GAAS. The contractor explained this important difference as follows:

200. Consulting services differ fundamentally from the accountant's function of attesting to assertions of other parties or performing accounting services. In an attest service, the accountant expresses a conclusion about the reliability of a written assertion that is the responsibility of another party, the asserter. Accounting services require the knowledge of accounting principles and applying professional judgment. In a consulting service, the accountant develops the findings, conclusions, and recommendations presented. The nature and scope of work is determined solely by the agreement between the accountant and the client. Generally, the work is performed only for the use and benefit of the client. AR-13 at 01-06-08. Accordingly, the contractor, can only provide a low level of assurance that the beneficiary's account balances and per capita funds are accurate and complete.

201. Defendants admit that "because of a known interest discrepancy that affects ALL accounts, OHTA had to include a disclaimer statement in the recent mailing of the first group of judgment account statements." AR-86 at 54-27-04. Defendants admit that a full reconciliation of judgment funds requires confirmation of principal and interest from Treasury, which is impossible without adequate predicate information; however, defendants produced no such confirmations from Treasury. AR-50 at 59-08-11 through 12. CD&L states that interest transactions posted to sampled judgment funds accounts seem "reasonable," but it provides no

assurance that the posted interest transactions are accurate and complete because it did not compute the amount of interest actually earned and accrued on defendants' investment of a beneficiary's funds. *Id.* at 59-08-14. Plaintiffs discuss defendants' "analysis" of the pooled investments and testing of the interest factor *infra* at Part II.d.i.

202. Defendants did not include in the Administrative Record and otherwise did not produce copies of documents they relied on with respect to the full or "partial reconciliation" of judgment and per capita funds. Nor do they otherwise explain their determinations and "analysis." Thus, it is not possible to determine that the reconciliations completed to date are accurate and complete. AR-44 at 59-02-08.

203. For judgment funds, defendants admit to a projected error rate of 6.1% in their sampling results, even after resorting to unexplained alternative procedures. AR-359 at 60-18-03.

204. High dollar judgment awards were removed from testing by CD&L because source documentation was missing. AR-253 at 08-20-12.

205. CD&L did not verify the accuracy and completeness of per capita payments. AR-224 at 10-11-01.

206. CD&L was unable to verify that the roll of recipients of per capita payments is accurate or complete. *Id.* at 10-11-02.

207. The reconciliation of judgment and per capita accounts completed by CD&L does not establish accurate account balances for the affected beneficiaries and does not result in an accounting of all funds. *Id.* at 10-11-01; AR-228 at 10-15-01.

208. CD&L confirmed that, notwithstanding the ASM requirement to verify that each beneficiary was paid his or her judgment and per capita funds, "[t]he testwork [sic] does not verify that every enrolled participant received payment." AR-314 at 19-07-02.

209. Grant Thornton's quality control assessment of CD&L's reconciliation work is limited to whether or not CD&L complied with AICPA consulting standards and agreed-upon procedures, not whether CD&L had performed an adequate accounting of judgment funds and per capita payments. AR-228 at 10-15-01.

210. Accordingly, the 2007 Plan as designed and implemented does not and will not result in an accounting of all judgment and per capita funds for each beneficiary.

ii. Land-Based Accounts

1. "Electronic Ledger Era" (1985-2000) – Reconciliations complete as a result of the Litigation Supporting Accounting project

211. Defendants' definition of the electronic ledger era – *i.e.*, all transactions "still available" and posted to IRMS and TFAS from 1985-2000 – is admittedly "confusing" and "misleading." 10/25/07 PM Tr. at 2172:16-19, 2173:14-22, 2178:6-13 (Hinkins); "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts (All Regions): Litigation Support Accounting Project for the Electronic Records Era" (1985-2000) (Sept. 30, 2005), AR-438 at 40-02-01; "2007 Plan", AR-565 at 33-02-04; AR-64 at 54-05-01; AR-435 at 38-01-01. NORC cannot provide a clear definition of the electronic ledger era. 10/17/07 AM Tr. at 1035:4-1038:5 (Scheuren).

212. Defendants do not know the number of accounts or the number of transactions in the electronic ledger era. 10/25/07 PM Tr. at 2170:3-22, 2171:16-25 (Hinkins); 10/17/07 AM Tr. at 1038:18-1039:5 (Scheuren). Defendants do not know the total number of transactions or accounts in the target population from which samples should have been, and should be, drawn.

10/22/07 AM Tr. at 1365:11-15 (Duncan); AR-191 at 56-22-18. Because defendants do not know the number of transactions and accounts in the target population, they could not, and cannot, determine the target population in the electronic ledger era. 10/22/07 AM Tr. at 1366:10-12 (Duncan). NORC expected that missing data problems would preclude a complete roster of accounts. "Pre-Design Report on Sampling and Economic Applications: Comprehensive Historical Accounting Plan for Individual Indian Money Accounts" (October 22, 2001), AR-373 at 60-32-08.

213. To date, defendants have identified 559,831 land-based and judgment/per capita accounts as NAAN's (IIM accounts on IRMS with new account numbers assigned for purposes of the reconciliation) on the IRMS database, and the number continues to grow as the DCV Project progresses. However, only 355,320 of those accounts are within the temporal scope of the accounting as defined by defendants – *i.e.,* accounts open on or after October 25, 1994 through December 31, 2000. As a result, all transactions – posted and omitted or purged – relating to 204,511 accounts, or 37% of the known accounts on IRMS, have been excluded from the reconciliation altogether. DX-152A at 271-72.

214. To date, a total of 452,029 land-based accounts have been identified on the combined IRMS and TFAS databases, and this number continues to grow as the DCV Project progresses. Based on defendants' temporal definition of scope, posted transactions relating to the 183,123 accounts, or 41% of the land-based accounts on IRMS and TFAS, have been excluded from defendants' reconciliation. DX-152A at 279.

215. Nonetheless, defendants represent that they have reconciled 6,600 non-interest transactions and, thereby, have completed their reconciliation of land-based transactions in the electronic ledger era. Of that total, 4,500 "low dollar" transactions, each of which is less than

$100,000 in stated value, were sampled from an estimated 28.8 million "low dollar" credit and debit transactions posted to open accounts on IRMS and TFAS. 2007 Plan, AR-565 at 33-02-14 through 33-02-15; 10/22/07 AM Tr. at 1373:1-2 (Duncan); PX-4285 at 9.

216. In 2004, LSA reconciliation work on 5,128 sampled transactions, a number reduced from 20,357 samples that previously had been selected, was halted. Of the 4,500 "low-dollar" transactions reconciled, 3,316 appear to have been selected from the 5,128. No explanation has been provided as to why 1,378 of the 5,128 transaction samples could not be reconciled. PX-4284 at 15-16.

217. Neither the Administrative Record nor the 2007 Plan provide an intelligible description of what defendants actually did to reconcile the 4,500 sampled land-based transactions. Defendants did not produce workpapers, accounting codes to breakdown the reconciliations, or any other documentation that their contractors relied on in the reconciliation process. Therefore, there is no way to ascertain for any individual transaction what work had been performed, what formed the basis of the reconciliation conclusion, and whether the reconciliation process itself, is sound. Thus, there is no identified rationale or basis for defendants' conclusion that "no further reconciliation is necessary for the electronic ledger era." PX-4284 at 8; "2007 Plan", AR-566 at 33-03-14.

218. What is clear is that the statistical sampling does not verify or validate the accuracy of the sampled transactions or the accounts from which the samples are drawn. 10/17/07 AM Tr. at 1031:25-1032:8 (Scheuren).

219. Interest transactions were excluded from the reconciliation. "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts: Litigation Support Accounting Project Interim Report" (Dec. 28, 2004), AR-416 at 51-09-07.

220. Statistical sampling is unable to detect omissions such as receipts that should have been posted to an account from collected funds. AR-235 at 08-02-04. Because only posted transactions have been reconciled, the reconciliation did not, and does not, address the issue of completeness, *i.e.*, whether all transactions which occurred were properly posted. 10/24/07 AM Tr. 1859:18-1860:21 (Pallais); 10/25/07 PM Tr. at 2175:24-2176:6 (Hinkins); 10/17/07 AM Tr. at 1033:2-11, 1034:1-7 (Scheuren); AR-427 at 52-03-04.

221. Post-1985 transactions were "written over" and deleted from IRMS and TFAS databases and were excluded from the sampling and reconciliation. 10/17/07 AM Tr. at 1036:2-15 (Scheuren); AR-427 at 52-03-04. There are no electronic data available in IRMS prior to February 1985 and for intermittent months thereafter. "IRMS Database Analysis: Procedures and Findings Report" (July 20, 2001), AR-233 at 10-20-05. Gaps in data exist throughout the existence of IRMS and limit the accuracy and completeness of any accounting that relies on IRMS. *Id.* The reconciliation performed did nothing to resolve missing data problems, including monies deposited in Treasury and misallocated among government, tribal and individual accounts. 10/22/07 AM Tr. at 1369:12-1370:7 (Duncan). As a result, no inferences about error rates and other attributes of transactions missing or omitted from IRMS and TFAS may be made from samples drawn from posted transactions defendants say they have reconciled. 10/22/07 AM Tr. at 1365:16-22 (Duncan); 10/22/07 PM Tr. at 1510:8-10 (Duncan); PX-4485 at 3. Because the LSA project relied on posted transactions, omitted or unrecorded deposits collections were not discovered. AR-435 at 38-01-01.

222. Because of poor records management and missing and destroyed documents, developing a complete list of leases, contracts, and permits executed in the electronic ledger era is "intractable." *Id*.

223. Transactions relating to administrative accounts – SDAs – range and grazing leases, and transfer payments were excluded from the LSA when it became clear that missing records caused the data search and collection effort to be too difficult. AR-416 at 51-09-10 n.8, 51-09-17.

224. Beginning balances could not, and cannot, be established for a number of accounts posted to IRMS, creating out-of-balance conditions. AR-233 at 10-20-05.

225. Reliance on data in IRMS is unreasonable because accounts and transactions that should have been posted to IRMS were not, and inconsistencies exist in the reporting and coding of transactions by and among the various BIA agencies. *Id.* at 10-20-07.

226. No external validations were performed in the reconciliation process to ensure that all beneficiaries have accounts recorded on IRMS, that transactions posted to IRMS are accurate and complete, and that all collected funds are posted to the correct accounts, or, if posted, are recorded in the correct amount. *Id.*

227. 12,448 accounts recorded on IRMS had no transaction data. *Id.* at n.7.

228. Correcting entries could not be associated with original postings to IRMS because of complexity and missing data. *Id.* at 10-20-15.

229. High dollar transactions could not be matched electronically. *Id.*

230. Cancelled check transactions could not be off-set with corresponding initial disbursements. *Id.*

231. Less than 1% of the debit dollars were linked to their opposing entries because the reference fields are inconsistent across transactions, and transactions can only be matched electronically where the references are identical or similar. *Id.* at 10-20-16 through 17.

232. KPMG was unable to link and reconcile non-interest transfers to debit transactions in Alaska. "Drawing the Debit Sample for Alaska" (Dec. 10, 2003), AR-385 at 46-03-07 through 8, 11.

233. As a result of these identified deficiencies, reconciliation efforts have been ineffective with respect to the entire electronic ledger era because of non-coverage issues and missing data. 10/25/07 PM Tr. at 2148:6-2149:8, 2152:6-16 (Hinkins); 10/22/07 AM Tr. at 1360:15-1361:13 (Duncan); DX-4 at 10.

234. Because account balances were not tested in conjunction with the LSA project transaction sampling, defendants may not rely on the results of the electronic ledger era reconciliation to make statistical statements about the accuracy or completeness of account balances. 10/17/07 AM Tr. at 1105:11-1106:12 (Lasater); 10/25/07 PM Tr. at 2164:15-2165:7 (Hinkins).

235. The statistical sampling conducted in the LSA project was far less than the statistical sampling proposed in the 2003 Plan, but defendants contend that the LSA project sampling and reconciliation work satisfies accounting duties declared by this Court with respect to the electronic ledger era. 10/17/07 AM Tr. at 990:12-991:10 (Scheuren); 10/17/07 PM Tr. at 1100:7-1103:12 (Lasater).

236. The scope reconciliations, in part, are explained by the fact that the LSA was never designed to discharge the accounting duty declared by this Court. Defendants concede that the LSA project was designed solely to support the settlement negotiations that occurred at that time. "2007 Plan," AR-566 at 33-03-13; PX-4284 at 8 n.24. Defendants developed the LSA project "to conduct a reconciliation of selected land-based IIM account transactions in the IIM Trust Fund in support of settlement negotiations." "OHTA Litigation Support Accounting After

Action Review" (Nov. 23, 2004), AR-63 at 54-04-03. Simply put, in designing the 2007 Plan and the LSA, a principal goal was to limit defendants' potential litigation exposure. AR-168 at 57-30-03; AR-441 at 42-01-02.

237. Accordingly, defendants' definition of the electronic ledger era as the relevant accounting period is confusing and misleading.

238. Further, the LSA Project and the 2007 Plan as designed and implemented do not, and will not, provide an adequate accounting to each member of the certified class for all funds and cannot result in the establishment of accurate account balances as mandated by this Court.

239. Finally, the LSA and 2007 Plan as designed and implemented are so defective that they have unduly delayed the accounting declared by this Court.

2. "Paper Ledger Era" (pre-1985)

240. Defendants have developed no plans to reconcile transactions in the paper ledger era. While no date certain has been set, they say that in the future a statistical sample will be drawn from transactions in the paper ledger era to test NORC's hypothesis that such transactions are statistically identical as transactions in the electronic ledger era. "2007 Plan," AR-565 at 33-02-15; 10/22/07 PM Tr. at 1437:9-1438:2 (Duncan); 10/25/07 PM Tr. at 2175:24-2177:5 (Hinkins); 10/17/07 AM Tr. at 1040:17-25, 1041:8-1042:23 (Scheuren); 10/17/07 PM Tr. at 1063:21-1064:25 (Scheuren). Defendants also say that if they find that the transaction error rates in both eras are statistically the same, then they will not reconcile paper ledger era transactions. However, if defendants find that the error rate for the two eras are statistically different, then paper ledger era samples will be drawn and reconciled some time in the future. "2007 Plan," AR-565 at 33-02-15.

241. There are two independent reasons why defendants argument fails. First, defendants' flawed definition of "error rate" is meaningless and accordingly a flawed way to test this hypothesis. 10/22/07 PM Tr. at 1438:3-1439:3, 1440:12-25 (Duncan). Second, there is no reason to believe that the quality of records in the paper ledger era is the same as that of the electronic ledger era.

242. Documents considered by NORC in its meta-analysis are in conflict with conclusions stated by NORC in its meta-analysis. The audits, reports and other material do not support NORC's hypothesis that transactions in the paper ledger era have error rate and other attributes similar to those of transactions sampled in the electronic ledger era. *Id.* at 1444:3-13. In fact, documentation in the Administrative Record demonstrates that records in the paper ledger era are significantly less accurate and complete than records in the electronic ledger era. *Id.* at 1438:3-1439:3, 1439:21-1440:3 (Duncan).

243. Therefore, inferences made from transactions sampled in the electronic ledger era cannot be used to support statements about the accuracy and completeness of transactions in the paper ledger era. *Id.* at 1441:1-10 (Duncan).

244. Because of missing, destroyed and otherwise unavailable data, defendants do not know the total number of transactions or accounts in the target population from which samples should be drawn. 10/22/07 AM Tr. at 1365:11-15 (Duncan); AR-191 at 56-22-18; PX-4284 at 19. Because defendants do not know the number of transactions and accounts in the target population, they cannot determine the target population for either the electronic ledger era or the paper ledger era. 10/22/07 AM Tr. at 1366:10-12 (Duncan); 10/17/07 AM Tr. at 1038:18-1039:5 (Scheuren). Defendants admit that "[i]t would be entirely speculative to guess how many accounts there have been altogether since the inception of the allotments." AR-191 at 56-22-18.

245. Accordingly, because defendants have done nothing to develop and implement an accounting plan for paper ledger era accounts and transactions more than thirteen years after enactment of the 1994 Trust Reform Act and eight years after this Court declared the government's duty to account to each beneficiary for all trust funds, such failure is powerful evidence that defendants have repudiated the fiduciary accounting duty that the government owes to the plaintiff class.

246. Further, because neither the LSA nor the 2007 Plan will provide an accounting of "all funds" or establish accurate account balances for any beneficiary who has had, or should have had, an account in the paper ledger era, the LSA and 2007 Plan are so defective that they have unduly delayed the accounting declared by this Court.

247. Finally, the failure to reconcile all accounts and transactions in the paper ledger era is so defective that defendants have unduly delayed the accounting declared by this Court.

d. Reconciliation process

i. Accounting Standards Manual

248. The 2007 Plan states that the Accounting Standards Manual – also known as the "ASM" – is: "[t]he compilation of standards used by OHTA and its contractors to provide uniform guidance on reconciliation of IIM accounts and transactions and examples of actual accounting and other documents in use in the Historical accounting period." "2007 Plan Part I", AR-565 at 33-02-30; *see also* 10/15/07 AM Tr. at 576:15-20 (Herman).

249. Interior did not require that individuals preparing the ASM have training or experience in accounting that key contractors did not. 10/15/07 AM Tr. at 579:16-21 (*e.g.,* Ms. Herman is neither a certified public accountant nor an accountant "by training"; nonetheless, she helped "develop" the ASM).

250. The ASM makes a number of assumptions that limit the scope of the reconciliation work. "Accounting Standards Manual" (ASM) (Mar. 30, 2007), AR-8 at 44-01-08. A few assumptions are discussed below:

> The interest factor will be utilized to test interest posted to individual accounts; the pooled investments will not be examined. *Id*. (*see* Part II.j, *infra,* for a discussion of this assumption).
>
> Recorded land ownership interests are assumed to be correct and will not be tested as part of the 2007 Plan. *Id*. (*see* Part II.j, *infra,* for a discussion of this assumption).
>
> MMS sales reports will not be verified against production documents; defendants assume that the MMS audits are sufficient to ensure the accuracy and completeness of collected oil and gas revenue. *Id*.

251. Further, the ASM permits transactions to be considered "reconciled" even though there is insufficient evidence to support that transaction. By way of example, it is not a component of the account reconciliation project to determine that disbursements have been made to a beneficiary. 10/15/07 PM Tr. at 673:3-19 (Herman). The ASM is silent in that regard. 10/15/07 PM Tr. at 673:13-19 (Herman). Thus, defendants will not verify that beneficiaries' endorsements on the back of canceled checks are valid. 10/15/07 PM Tr. at 672:17-22 (Herman). Accordingly, the ASM's reconciliation procedures are irrelevant and do not, and cannot, verify the validity of disbursements from the IIM Trust.

252. There are pervasive material weaknesses in Interior's internal controls and accounting systems. 10/24/07 AM Tr. at 1840:7-1841:2 (Pallais). As such, reconciliation work to date is, at best, inconclusive, because it relies exclusively on defendants' internal documents. 10/25/07 PM Tr. at 2139:2-6 (Dunne); *see also* 10/24/07 AM Tr. at 1848:18-1849:9 (Pallais). Defendants, thus far, have reconciled all transactions with "Level One" or "Level Two" documents as defined by the ASM. 10/25/07 PM Tr. at 2114:14-2115:6 (Dunne). These Level

One and Two documents are internal Interior Department documents. 10/24/07 AM Tr. at 1851:17-20 (Pallais); *see also* 10/25/07 PM Tr. at 2139:2-6 (Dunne).

253. Based on the weight of the testimony provided by Mr. Pallais and Ms. Dunne, the procedures set forth in the ASM will not result in a reliable determination that transactions as recorded accurately reflect proper receipts, disbursements, and other IIM Trust Fund activities.

ii. Materials relied upon According to the ASM

254. The ASM is a 581 page document. *See "*Accounting Standards Manual" (ASM), AR-8 at 44-01-01 to 581. Approximately 350 of those pages consist of exemplars of documents that contractors rely on to reconcile IIM transactions. *See Id.* 44-01-178 to -529. Even this list is non-exclusive; certain documents are identified as "Not Currently Available," *Id.* at 44-01-10, and the ASM expressly recognizes that it "will be refined and updated with additional documents." *Id.*at 44-01-07; *see also Id.*at 44-01-08 ("As the reconciliation progresses and additional, substantially different documents are identified by the accounting firms, they will be incorporated into this *Manual*.").

255. The ASM requires that reconciliation contractors prepare and file working papers which include the supporting hard copy documents, the Accounting Reconciliation Tool, and any other electronic data. *Id.* at 44-01-162; *see also Id.* at 44-01-163 (more detail). The working papers are supposed to "provide evidence that the work was performed in accordance with professional standards." *Id.* at 44-01-162. Those workpapers must be retained "in accordance with the accounting firm contractor's retention requirements or for a period of five years after the conclusion of any litigation . . . ." *Id.* at 44-01-164. However, no trust documents or accountant workpapers are included in the Administrative Record or the record of this trial despite plaintiffs' requests for production.

256. Thus, Interior defendants have failed to establish that their procedures are sufficient to determine the accuracy of "reconciled" transactions.

257. Every independent public accounting firm that has audited Interior's financial statements related to IIM trust funds has qualified its opinion because of pervasive material weaknesses in internal controls of Interior's accounting systems. 10/24/07 AM Tr. at 1819:22-1820:15; 1840:7-1841:2, 1843:2-1845:5 (Pallais); *see also, e.g., "*Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 1998 and 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (May 2000), AR-635 at 66-07-03; "Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 2000 and 1999 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (June 2001), AR-636 at 66-08-03. Interior's systems historically have not had effective controls and the data housed in Interior's computer systems are unreliable. 10/17/07 AM Tr. at 1057:2-25 (Scheuren); *see also* "Major Improvements Needed In The Bureau of Indian Affairs' Accounting System" (Sept. 8, 1982), PX-4174 at 3-6, 13-21, 23-28; 10/24/07 AM Tr. 1796:21-1798:4 (Gambrell).

258. Much of the reconciliation work is, at best, inconclusive, because it relies upon the internally generated documents of defendants. 10/25/07 PM Tr. at 2139:2-6 (Dunne); 10/24/07 AM Tr. at 1848:18-1849:9 (Pallais). A reconciliation based principally on internally generated documents is unsound and in clear disregard of good accounting and auditing practices where, as here, there is substantial indisputable evidence that material weaknesses in the internal controls, accounting systems, and control activities render internal documentation unreliable.

10/24/07 AM Tr. at 1831:15-25 (Pallais); 10/25/07 PM Tr. at 2130:12-20 (Dunne); 10/17/07 AM Tr. at 1051:11-1053:16 (Scheuren); 10/24/07 AM Tr. at 1799:19-1800:18; 1803:21-1804:8 (Gambrell); *see also* "Pre-Design Report: Sampling and Other Statistical and Economic Applications" (Oct. 15, 2001), AR-119 at 55-20-12. Both parties' expert witnesses on accounting agreed that where there are material weaknesses in an entity's internal controls, the documents generated by that accounting system are not reliable, and third party documents are essential to a complete and accurate accounting. 10/24/07 AM Tr. at 1819:25-1820:15; 1855:12-22 (Pallais); 10/25/07 PM Tr. at 2130:12-20 (Dunne).

259. Even reconciliation exhibits that defendants introduced at trial and admittedly have used in presentations since 1999 demonstrate that documents collected and deposited at the AIRR are incomplete and inaccurate, and that they are insufficient to substantiate an accounting of all funds. 10/11/07 PM Tr. at 416:23-417:23; 428:23-429:25 (Ramirez). Further, defendants cannot establish that BIA and OST records (MMS, BLM, Bureau of Reclamation, U.S. Geological Survey, and other Interior agency, bureau, and office records are not held in AIRR) deposited in AIRR are complete and accurate, or that they can provide adequate support for the establishment of accurate account balances. *Id*.

iii. Systems relied upon

260. The 2007 Plan identifies two principal systems to be relied on for the reconciliation: transactions systems, IRMS and its successor TFAS, and ownership systems, LRIS and TAAMS.

261. The IRMS system has separate modules – IIM, leases, ownership, people and distribution. Ms. Herman, defendants' database contractor, was only tasked to analyze the IIM

module. 10/15/07 PM Tr. at 688:12-16 (Herman). Some agencies and areas have used these modules, and others have not. 10/15/07 PM Tr. at 686:12-688:1 (Herman).

262. The sample frame was designed in conjunction with the LSA and the 2007 Plan and the sample was drawn exclusively from a limited number of available transactions that were posted to open accounts on IRMS and TFAS. 10/17/07 PM Tr. at 1099:4-14 (Lasater); 10/17/07 AM Tr. at 1012:4-10 (Scheuren); 10/17/07 PM Tr. at 1084:9-25 (Scheuren).

263. However, the IRMS and TFAS databases are incomplete and often inaccurate. 10/22/07 AM Tr. at 1384:24-1385:15; 1386:20-1387:12; 1388:23-1389:4 (Duncan); 10/24/07 AM Tr. at 1794:5-11 (Gambrell); 10/25/07 AM Tr. at 2042:1-4; 2063:24-2064:1 (Christie); "Memorandum from Susan Hinkins to Jeffrey P. Zippin re "Land to Dollar" Completeness Test at Horton Agency" (Potawatomi Tribe) (Mar. 31, 2007), AR-435 at 38-01-01; "Data Completeness Validation: Interim Overall Report" (Sept. 30, 2007), DX-152A at 16-17, 269. Some post-1985 transactions have been "written over" or deleted from IRMS and TFAS databases and are unavailable for sampling. 10/17/07 AM Tr. at 1036:8-15 (Scheuren); *see also "*Sample Design Planning Report 2007" (Mar. 15, 2007), AR-427 at 52-03-04.

264. Because of systemic purges and omissions, there is no electronic data available in IRMS prior to February 1985 and for intermittent months thereafter. "IRMS Database Analysis, Procedures and Findings Report" (July 20, 2001), AR-233 at 10-20-05; 10/23/07 PM Tr. at 1744:22-1746:11 (Infield). IRMS contains inaccurate data. 10/25/07 AM Tr. at 2042:1-4; 2063:24-2064:1 (Christie); 6/18/99 Trial 1 Tr. at 1153:3-24 (Gover). IRMS has inaccurate information, in part, because of open systems where unauthorized manipulation of data can occur without detection. 6/18/99 Trial 1 Tr. at 1153:3-24 (Gover).

265. The LSA project utilized ownership information provided by the LRIS. 10/15/07 PM Tr. at 614:10-17; 639:24-640:5 (Herman); 10/16/07 AM Tr. at 760:6-8 (Herman). However, LRIS, historically, was not relied on for the distribution of trust funds. 10/16/07 AM Tr. at 761:14-762:9 (Herman).

266. Ms. Herman has observed instances where information on LRIS was improperly recorded. 10/16/07 AM Tr. at 760:12-16 (Herman). Not every region or agency used LRIS. Alaska did not use it at all. LRIS cannot provide an accurate record of ownership for all 12 regions. 10/16/07 AM Tr. at 760:23-761:6 (Herman).

267. Other problems with LRIS include rights-of-way data that are incomplete. "Cadastral Resurvey Pilot: General Summary" (June 2003), AR-394 at 48-01-10. LRIS data with respect to irrigation agreements are incomplete. *Id.* LRIS data with respect to water rights are incomplete. *Id.* LRIS data with respect to leases are incomplete; few leases are recorded and those that are recorded provide a minimal amount of information. *Id.*; *see also* 2/5/02 Contempt II Tr. at 3747:3-5 (Ridgeway); 6/23/99 Trial 1 Tr. at 1740:9-1741:10 (Erwin).

There are numerous other systems essential to the accounting but not used in the 2007 Plan.

268. Treasury has systems which also record individual Indian trust funds balances, but Ms. Herman has not been tasked with determining whether there is a discrepancy between what Treasury says should be on Interior's trust systems and what is actually posted on IRMS. 10/16/07 AM Tr. at 741:1-5; 741:20-23 (Herman).

269. There is an oil and gas distribution system called RDRS—Royalty Distribution Reporting System. It interfaces with MMS to allocate oil and gas revenue among individual Indian trust beneficiaries, tribes, States, the federal government, and private parties; however, defendants are not reconciling MMS or RDRS IIM Trust data as part of the 2007 Plan, even

though MMS and RDRS systems and data are unreliable. 10/15/07 PM Tr. at 688:2-11 (Herman); 10/16/07 PM Tr. at 735:1-736:7 (Herman); 10/24/07 AM Tr. at 1770:7-1771:15; 1775:14-24 (Gambrell); 10/23/07 PM Tr. at 1750:2-17 (Infield). The best defendants' database contractor is able to say is that she does not know whether information received by BIA from MMS is accurate. 10/16/07 AM Tr. at 740:23-25 (Herman). However, Kevin Gambrell, the former director of the Federal Indian Minerals Office, Farmington, New Mexico, has testified that BIA and MMS databases are so incomplete and inaccurate that Interior's bureaus themselves purchase industry databases to ensure that production and revenue from government lands are reasonably accurate. 10/24/07 AM Tr. at 1796:21-1797:9 (Gambrell). They did not do the same for Indian land. *Id.*

270. BIA used IRMS, MAD, GLAD and other ad hoc systems for distribution of individual Indian trust revenues. Ms. Herman did not test these other ownership systems or the data housed therein. 10/16/07 AM Tr. at 761:14-762:9 (Herman).

271. Defendants' experts acknowledge that IRMS is just a "starting point" for an historical accounting. 10/16/07 AM Tr. at 733:734:9 (Herman). Defendants admit, and the former director of Interior's Federal Indian Minerals Office confirms, that to minimize error "all of the electronic data systems [need to] be cross-checked … not just TFAS with IRMS but also LRIS and the MMS automated systems …[,]" and corroborated with third-party data. "Managing Historical Accounting Records" (undated), AR-168 at 57-30-08; 10/25/07 AM Tr. at 2056:5-18 (Christie); 10/24/07 AM Tr. at 1776:9-14; 1794:22-1795:2; 1796:21-197:9 (Gambrell); *see also* 10/23/07 PM Tr. at 1759:16-160:5 (Infield).

272. In its data completeness study, FTI did not perform external validation testing to determine if all beneficiaries have accounts open on IRMS or TFAS. "Data Completeness Validation: Interim Status Report" (June 12, 2007), AR-342 at 34-01-07.

273. Pervasive inadequacies in accounting systems and subsystems render them unreliable. "Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 2000 and 1999 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (June 2001), AR-374 at 60-33-02, 10, 24.

iv. Contractors involved

274. Interior defendants have retained five accounting firms to work on various projects. Three of these firms – Clifton Gunderson LLC (new firm through 2007 merger with Chavarria, Dunne & Lamey LLC), Deloitte & Touche LLP, and Reznick Group, P.C. – are performing reconciliations and account analyses; one firm – FTI Consulting, Inc. – is conducting forensic accounting; and one firm – Grant Thornton LLP – is performing quality control reviews of all aspects of the historical accounting. Interior defendants have retained a statistical consultant, the National Opinion Research Center (NORC), that works on statistical matters in the historical accounting. Interior defendants have retained two historians – Morgan, Angel & Associates, L.L.C., and Historical Research Associates Inc., that provide information on leasing, the allotment process, reservation histories, and other matters. "2007 Plan Part I", AR-565 at 33-02-07.

275. Interior defendants retained Bank of America to provide trust advice from the perspective of a national bank with a large trust department. *See, e.g., "*E-mail from William A. Wood" (Dec. 31, 2002), AR-445 at 22-03-02, 03. Interior defendants also retained Hughes &

Bentzen to serve as their counsel, advising them with respect to the legal requirements of trust law. *See, e.g.,* "Letter from Michael P. Bentzen to John McClanahan" (Apr. 2, 2003), AR-612 at 64-02-02.

v. Error rate; definition of "error"

276. Central to attribute sampling, which is part of the 2007 Plan, is the definition of "deviation." An attribute is the control procedure that is being tested and a "deviation" is a departure from the performance of the prescribed internal procedure. Attribute sampling conclusions are expressed in terms of an "error rate," which here is calculated by dividing the number of deviations by the number of transactions sampled. What is, or is not, a deviation is critical to attribute sampling since the conclusion is the percentage of deviations found in the transactions sampled. Significantly, however, error rates do not reflect the magnitude of the deviation, only the existence of the deviation. "Expert Report of Dwight J Duncan, CFA" (Aug. 23, 2007), PX-4284 at 25-26.

277. The 2007 Plan defines "*difference* or *error*" as "the actual transaction posting to an account [that] is different from the amount expected to be posted based on the contemporaneous records." "2007 Plan Part I," AR-565 at 33-02-30 (emphasis in original).

278. The 2007 Plan defines "*difference rate/error rate*" as "how often a *difference* or *error* is observed, such as one *difference/error* per 100 transactions, or expressed as a percentage, one percent." *Id.* (emphasis in original).

279. Transactions that defendants *do not treat as deviations or errors* fall into three basic categories: (1) transactions posted to IRMS or TFAS that under Interior defendants' self-determined standards they conclude are generally consistent with hardcopy supporting documents discovered; (2) missing, erroneous, or omitted transactions, because they were never

posted or they were purged, altered, erroneously posted, or never should have been posted; and (3) transactions where no supporting documentation has been found. PX-4284 at 27. The term "error" is erroneously defined by defendants in the 2007 Plan because unreconciled transactions, missing transactions, and absent and missing documents "do not imply" and are not considered "errors" unless a hardcopy document is discovered that directly contradicts the sampled credit or disbursement transaction. 10/10/07 PM Tr. at 187:14-188:8; 190:20-191:1 (Cason); 10/22/07 AM Tr. at 1397:6-14; 1398:12-22; 1435:1-1436:8 (Duncan); 10/16/07 AM Tr. at 789:15-20 (Herman); "A Statistical Evaluation of Preliminary Eastern Region Sample Results" (Mar. 2004), AR-411 at 51-04-04, 14; "Managing Historical Accounting Records" (undated), AR-168 at 57-30-03, 10; "2007 Plan Part I", AR-565 at 33-02-14, 16. Accordingly, the 2007 Plan's definition of "error," which does not treat unreconciled or missing transactions as errors, is unreasonably narrow. 10/22/07 PM Tr. at 1427:13-1428:5; 1432:8-24; 1434:23-1435:24 (Duncan).

280. Examples of transactions that defendants do not consider deviations or errors are: (1) a collection posted to the correct account in the wrong amount; (2) a collection posted to the wrong account in the correct amount; (3) a collection posted to the wrong account in the wrong amount; (4) a disbursement posted to the right account in the correct amount; (5) a disbursement posted to the wrong account in the right amount; and (6) a disbursement posted to the wrong account in the wrong amount. PX-4284 at 27.

281. Given defendants' narrow definition of "error" and its application in the reconciliation process, the stated 1% error rate is meaningless because it does not permit defendants to state that transactions were posted accurately or completely, and it provides no assurance that account balances are accurate. *Id.* at 28.

282. In that regard, the reconciliation process determines whether a transaction is "reconciled" or "not reconciled." For reconciled transactions, defendants decide whether they have "error" or "no error." But only transactions that are reconciled and found in error are included in the calculation of the error rate. Therefore, the term "reconciled" is as meaningless as are the terms "error" and "error rate." *Id.* Because the stated "error" rate is meaningless, statements made by defendants about the accuracy and completeness of an IIM beneficiary's account balances are also meaningless to the trust beneficiary. 10/22/07 PM Tr. at 1435:25-1436:20 (Duncan).

283. Complicating the "error rate" confusion caused by the 2007 Plan and the ASM is the term "net error rate," where, as here, defendants offset an error made with respect to one beneficiary with an unrelated error made with respect to another beneficiary. That results in a misstatement of the magnitude of transaction errors in the account of every beneficiary, positively and negatively, including the few whose accounts were sampled. PX-4284 at 25.

284. Defendants have assumed a 1% error rate for sampled transactions. "NORC Sample Design Planning Report" (Feb. 24, 2003), AR-402 at 49-06-03. The Eastern Region testing provides no support for the assumed 1% error rate. 10/22/07 PM Tr. at 1408:15-24; 1426:7-1432:24 (Duncan); "Accountants Report on the Reconciliation of the Eastern Region Land-Based Non-Interest Individual Indian Money Transactions" (Sept. 22, 2003), AR-353 at 60-12-02 to -10. An appropriate definition of "error" would be expected to yield an error rate much larger than the one percent rate endorsed by defendants. 10/17/07 PM Tr. at 1091:3-1092:2; 1092:10-1093:1 (Lasater); 10/22/07 PM Tr. at 1434:23-1436:8 (Duncan); "Expert Report of Joseph R. Rosenbaum" (Feb. 28, 2003), PX-506 at 8-9; "U.S. Department of the Interior Bureau of Indian Affairs Tribal Trust Funds Reconciliation Project: Agreed-Upon

Procedures and Findings for July 1, 1972 through September 30, 1992" (Dec. 31, 1995), PX-36 at 3, 9.

285. For judgment fund accounts, defendants admit to a projected error rate of 6.1% in sampling results after utilizing undefined alternative procedures. "Fax from Caren L. Dunne to Harry Corley" (Nov. 14, 2002), AR-359 at 60-18-03.

286. The 2007 Plan retains the same critical flaw that had undermined the soundness of the 2003 Plan, the sampling of transactions rather than accounts. This is so because the selection of transactions (as opposed to accounts) as the sampling unit ensures a lower error rate. Of course, the selection of transactions then precludes any judgment about the accuracy of account balances. Nevertheless, trust accounts open on or after October 25, 1994 (through December 31, 2000) have on average 137 posted transactions. And, even if one assumes that a 1% error rate is valid (and it is not), each transaction in each account has, in accordance with the 1% error rate, a 99% chance of being correct. When the probabilities are applied to the average number of posted transactions per account, there is only a 25% probability that all of the posted transactions are correct and a 75% probability that at least one posted transaction is erroneous in each account. Therefore, in fact, assuming unreasonably that there are no omitted or purged transactions, there is still a 75% probability that the account balance is in error. As such, defendants can provide no reasonable assurance that trust balances are accurate or that posted transactions are stated accurately. PX-4284 at 24.

287. Statistical sampling is unable to detect errors of omission such as credits that should have been posted to an account from collected funds. "Sample Design Planning Report" (attachment to e-mail from Susan Hinkins) (Dec. 20, 2002), AR-235 at 8-02-04.

288. NORC recommended against a drastic reduction in sample size, similar to the reduction that occurred, because of the unreasonable risk that errors would not be discovered, which it acknowledges would make the sampling plan vulnerable to challenge, as here it does. "E-Mail from Fritz Scheuren to Harold Corley re More on Sampling" (Dec. 3, 2002), AR-263 at 11-04-02.

289. Defendants' unreasonably narrow definition of "error" is the reason NORC concluded that no errors exist in sampled data sets that independent certified public accounting firms have determined are incomplete and without adequate support. 10/22/07 AM Tr. at 1395:5-25; 1396:7-22; 1397:4-10; 1398:4-18; 1399:21-24 (Duncan); AR-411 at 51-04-04, -14.

290. "Stark differences" between error rates stated by NORC (near-zero) and those found by DataCom (more than 30%) in the TIME project are solely attributable to NORC's unreasonably narrow definition of "error." 10/22/07 PM Tr. at 1447:5-1448:1 (Duncan); "NORC Analysis of LRIS Tract History Reports" (Feb. 28, 2003), AR-405 at 50-02-08.

291. Inferences and extrapolations from the stated error rate or other attributes of sampled transactions cannot be used to state the accuracy, completeness, or any other attribute of accounts. 10/22/07 AM Tr. at 1365:16-1366:3; 1381:7-16;1; 10/22/07 PM Tr. at 1414:25-1416:5; 1442:17-1443:1; 1509:20-1510:10 (Duncan).

292. According to defendants' own records, by excluding missing documents from the definition of error, defendants have resolved "the missing record problem for disbursements in a way that does not treat the failure to find the supporting documentation as an error in the account." AR-168 at 57-30-03, -10.

293. Notwithstanding vigorous efforts of defendants and their contractors to create the illusion that IIM Trust data has a near-zero error rate, the beneficiaries must deal with reality and

the adverse consequences of error that pervade every aspect of defendants' trust management systems. For example, collections, lease rental rate, and royalty rate data in MMS are erroneous. 10/24/07 AM Tr. at 1770:21-1771:2; 1771:12-15. (Gambrell).

294. BLM data, including unitized lease data – leases that collectively cover IIM Trust lands, tribal trust lands, federal government lands, state government lands, and lands held by private parties – and related unit allocation data are erroneous. 10/24/07 AM Tr. at 1771:14-25; 1775:11-12 (Gambrell).

295. Further, because oil, gas, and mineral production and collection data are known to be erroneous, MMS, BLM, and BIA in practice verify production and revenue data using third-party data, including the PI Dwight database, to increase the likelihood that the correct amount of lease and royalty revenues are collected from production on government lands. 10/24/07 AM Tr. at 1796:21-1797:9 (Gambrell). Nonetheless, Interior eschews third-party data and knowingly relies on erroneous MMS, BLM and BIA oil, gas, and mineral production and revenue data with respect to IIM Trust lands. 10/24/07 AM Tr. at 1798:9-1799:1 (Gambrell).

296. Defendants admit that "there are an infinite number of ways [that] an erroneously assumed boundary can impact the IIM account;" nonetheless, cadastral survey and boundary verifications are not included in the 2007 Plan. 10/17/07 PM Tr. at 1071:2-15; 1074:8-18 (Scheuren); "Cadastral Resurvey Pilot: BLM Acreage and Location Results" (June 9, 2003), AR-395 at 48-02-26. Acreage data in IRMS and LRIS must be verified against current cadastral survey acreage to quantify the errors caused by the use of erroneous data, but neither the LSA nor the 2007 Plan do so. *Id.* at 48-02-09. Inaccurate acreage data will result in understated rental and irrigation fees. *Id.* at 48-02-13. "There are an infinite number of ways an erroneously assumed allotment can impact an IIM account." *Id.* at 48-02-26. Relying on erroneous acreage

to allocate and calculate the amount of income collected from IIM trust lands will not result in an accounting of all funds or the establishment of accurate account balances. "Memorandum from Bob Anderson, Acting Assistant Director, Minerals, Realty & Resource Protection, to Bert Edwards re First Report of the Office of Historical Trust Accounting Cadastral Survey Pilot" (Sept. 26, 2002), AR-366 at 60-25-02.

297. As a result of defendants' failure to timely update land ownership records at Area and Agency offices, land-based trust fund disbursements cannot be assumed to be accurate. "Statement of Assets and Trust Fund Balances of the Trust Funds Managed by the Office of Trust Funds Management, Bureau of Indian Affairs" (Dec. 1996), AR-379 at 60-38-24.

298. Because IIM Trust funds are pooled and invested, errors proportionally affect each beneficiary whose funds are in the pool. "Office of Historical Trust Accounting IIM Trust Funds System Level Issues" (attachment to e-mail from Greg Chavarria to Jeffrey P. Zippin) (Nov. 1, 2002), AR-361 at 60-20-02.

299. Limitations in the Bolt II investment accounting system and computational errors relating to amortization and accretion of investment premiums and discounts have rendered account balances inaccurate. "Audit Report, Financial Statements for Fiscal Year 1996 for the Office of the Special Trustee for American Indians Tribal, Individual Indian Monies, and Other Special Trust Funds Managed by the Office of Trust Funds Management" (Jan. 1998), AR-378 at 60-37-49.

300. Unresolved historical errors in transactions posted to SDAs include errors that occurred during the conversion from manual to automated systems in 1977, incorrect per capita distributions, and canceled check claims. *Id.* at 60-37-51.

301. Because no consistency existed in the application of accounting policies and procedures to receipts and disbursements in BIA agency and area offices, there can be no assurance that account balances are accurate. AR-378 at 60-37-59 through 60.

302. There is an unreconciled $21 million difference between the IIM detailed subsidiary ledger and the general ledger control account. "Audit Report, Financial Statements for Fiscal Year 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (Mar. 1999), AR-377 at 60-36-46.

303. There is an unreconciled $34 million difference between total cash balances reflected in OTFM systems and balances held by Treasury. *Id.* at 60-36-28.

304. Numerous collections and receipts on IRMS are erroneously encoded. *Id.* at 60-36-83.

305. In the OmniTrust system, lease payments were erroneously encoded as land sales. *Id.*

306. Defendants concur in Griffin's determination that errors and control weaknesses have pervaded IIM Trust management systems. AR-377 at 60-36-85.

307. Critical disbursement documents are missing or contain errors. AR-376 at 60-35-34.

308. This is no assurance regarding the accuracy of receipts and disbursements posted to accounts because reference codes for numerous receipts and disbursements are erroneous. *Id.*

309. There is no assurance that data, including ownership information, housed in systems that interface with OTFM are accurate. "Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 2000 and 1999 for the Office of the Special Trustee for

American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (June 2001), AR-374 at 60-33-24.

310. Major deficiencies in accounting systems controls and records cause them to be unreliable. "Audit Report, Independent Auditors Report on the Financial Statements for Fiscal Years 1999 and 1998 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (Jan. 2001), AR-375 at 60-34-02, -03.

311. Differences have existed between Banker's Trust, OTFM's trust funds custodian, and trust data contained in the OmniTrust system, including maturity dates, interest rates and differences in the par value of securities purchased with pooled IIM Trust funds, which have caused inaccuracies in trust accounts because the differences were not resolved when the securities mature and were redeemed or sold. *Id.* at 60-34-64.

312. Inventories of certain records accessions in OTR's facilities are incomplete, non-existent, inaccurate or in incompatible formats. "Memorandum from Jeff Zippin to Ethel Abeita, Acting Director, Office of Trust Records, re Coordination of Records Between Office of Trust Records (OTR) and Office of Historical Trust Accounting" (OHTA) (Aug. 13, 2002), AR-452 at 22-10-02.

313. In IRMS and TFAS, accounts are identified to the wrong individual. "Data Completeness Validation: Interim Status Report" (June 12, 2007), AR-342 at 34-01-07.

314. Accordingly, the definition of "error" employed by defendants in the 2007 Plan is unreasonable and the 1% or near-zero error-rate assumed and reported by defendants is untenable and cannot be relied on to support the accounting declared by this Court.

315. Further, defendants' definition of "error" is meaningless and its application in the reconciliation is so defective that it has thwarted the accounting declared by this Court.

vi. Data from Eastern Region reconciliation project

What Was Done In The Eastern Region Pilot Study

316. The Eastern Region reconciliation project was one of the first pilot projects undertaken by defendants; the transactions in the Eastern Region were reconciled by Deloitte & Touche. *See generally* "Accountants Report on the Reconciliation of the Eastern Region Land-Based Non-Interest Individual Indian Money Transactions" (Sept. 22, 2003), AR-353 at 60-12-01. This particular region is unique in these proceedings because it is the only accountants' report that substantively addresses reconciliation issues and is included in the Administrative Record. 10/22/07 AM Tr. at 1383:4-14 (Duncan). However, no supporting documents or workpapers were appended to the report or otherwise provided in the Administrative Record. 10/22/07 AM Tr. at 1383:12-14 (Duncan).

317. This accountant's report indicates that 42 of 289 transactions – approximately 15% – were reconciled using "alternative procedures." There is no description of the alternative procedures and, therefore, no way to determine whether they are valid. There were 6 transactions Deloitte was unable to reconcile. AR-353 at 60-12-02 through 03.

318. There is a significant missing data problem in the Eastern Region; a comparison of the balance file to the transaction register indicates that almost 87 percent of all the accounts in the Eastern Region have missing data. 10/16/07 AM Tr. at 789:22-790:8 (Herman).

319. Deloitte & Touche requested copies of 101 checks for Eastern Region IIM accounts – all were for recent years. "United States Department of Interior Office of Historical Trust Accounting Accountants Conference" (July 22-23, 2003), AR-53 at 03-02-106 (letter dated

July 10, 2003 from Charles F. Schwan to Robert Mauri re Request for Treasury Documents for Individual Indian Money (IIM) Accounts). Treasury, however, found only 50 checks. AR-53 at 03-02-106. Images of nine checks were on CP&R, but the checks themselves were destroyed. *Id*. Twenty-eight checks were not on CP&R and were issued prior to mass cancellation. *Id*. Twelve checks were not on CP&R and were issued subsequent to mass cancellation. AR-53 at 3-02-107.

320. Defendants have not described or explained the "alternate procedures" that are used to reconcile transactions posted to IRMS or TFAS in the absence of directly supporting source documents. 10/22/07 AM Tr. at 1399:1-15 (Duncan); 10/22/07 PM Tr. at 1421:16-24 (Duncan). Deloitte "reconciled" transactions in the Eastern Region by re-computing transaction amounts, which had no "directly relevant documents" using unexplained Interior "business practice[s]." AR-353 at 60-12-02.

321. No "error" was found because un-reconciled transactions and missing documents are not considered "errors"; an error is found only where a hardcopy document directly contradicted a posted transaction. 10/22/07 AM Tr. at 1397:6-14; 1398:12-22; 10/22/07 PM Tr. at 1435:1-1436:8 (Duncan); "A Statistical Evaluation of Preliminary Eastern Sample Results" (Mar. 2004), AR-411 at 51-04-04, -14; "Managing Historical Accounting Records" (undated), AR-168 at 57-30-03, -10; "2007 Plan Part I" AR-565 at 33-02-14.

322. Defendants' unreasonably narrow definition of "error" is the reason NORC concludes that no errors exist in sampled data sets that independent certified public accounting firms have determined are incomplete and without adequate support. 10/22/07 AM Tr. at 1395:5-25; 1396:7-22; 1397:4-10; 1398:4-18; 1399:21-24 (Duncan); *see also* AR-411 at 51-04-04, 14.

323. Eastern Region testing provides no support for the assumed 1 percent error rate. 10/22/07 PM Tr. at 1408:15-24; 1426:7-1432:24 (Duncan); AR-353 at 60-12-02, 10.

324. Accordingly, the application of unexplained "alternative procedures," the absence of relevant disbursement documentation, the unreasonable definition of "error," and the massive missing data problem in the Eastern Region demonstrate that the assumed 1% error rate for individual Indian trust accounts in the Eastern Region is pure conjecture and without support.

e. Mailing HSAs to beneficiaries

325. According to the 2007 Plan, Interior defendants contend that Interior's duty to account is met with mailing the HSA. "Historical Accounting Project, Part 1, Plan for Completing the Historical Accounting of Individual Indian Money Accounts," (May 31, 2007), AR-565 at 33-02-09. Interior defendants will mail the assembled HSA package "to the most current address available, but many of the HSA packages will be prepared and sent to former account holders for whom Interior does not have current address information." *Id.* Interior defendants acknowledge that "[m]any of these may be returned. Also, many of the current account holders are "whereabouts unknown" for whom Interior does not have a good address. Notwithstanding the substantive issues surrounding the content of the HSAs, based on those admissions alone, merely mailing the HSAs will not discharge Interior's duty to account as some beneficiaries will not receive their HSA.

326. Indeed, a significant number of the HSAs mailed to date failed to reach the intended beneficiary. As noted by Grant Thornton in its quality control check regarding certain judgment funds, a "significant number of accountholders" have their address listed as in the care of the superintendent. "Report on Quality Control Check of IIM Historical Accounting Project of CD&L by Grant Thornton," (December 19, 2002), AR-45 at 59-03-11.

327. Interior defendants' quality control procedures are not designed to detect, *inter alia*, whether HSAs are transmitted to beneficiaries who have reached the age of maturity or whose address is listed as anything other than the Department of the Interior's address. *See generally* "Sampling and Quality Control for IIM Account Statements Mailings," prepared by NORC, (November 15, 2002), AR-152 at 57-14-04. Under the 2007 Plan, quality control with respect to mailing HSAs is defined as: (1) the envelope includes relevant inserts; and, (2) those inserts are consistent with respect to the listed addresses. *Id.* Interior defendants will perform the quality control test by relying upon statistical sampling. *Id.* at 57-14-05. This sampling process was designed to avoid burdening the reviewer, rather than ensuring the accuracy of the addresses. *Id.*

328. Not all of the HSAs mailed by the Interior defendants will reach the correct beneficiary in a timely fashion, if at all.

f. Anticipated administrative appeals process

329. Defendants state that once they mail a HSA to a class member they have "met" their duty to account, whether or not they have accounted for all funds, established accurate balances for each account, or fully reconciled all transactions in the electronic and paper ledger eras. "2007 Plan Part I", AR-565 at 33-02-09.

330. Nevertheless, if a class member does not object to the HSA within 90 days of the date of such statement, draft procedural rules that would govern the administrative appeals process provide that the HSA is "conclusively deemed accurate and complete for all purposes," including for all purposes of this litigation. "Pls.' Opp'n to Defs.' Mot. to Rescind or, in the Alternative, to Amend the Class Communication Orders and Mem. in Supp. Thereof" [Dkt. No. 3356] (July 6, 2007) ("Pls.' Acctg. Admin. Appeals Br.") [Dkt. No. 3356 Ex. 1 at 26] (25 C.F.R.

§ 116.408(a)). The 90 day "objection" rule that would govern the administrative appeals process runs from the issuance date printed on the HSA, not from the date the HSA is delivered to the Indian trust beneficiary. [Dkt. No. 3356 Ex. 1 at 24-25] (25 C.F.R. §§ 116.401, 116.404(b)).

331. Extensions of time to file objections to the HSA are absolutely barred by draft procedural rules that would govern the administrative appeals process. *Id.* at 26 (25 C.F.R. § 116.407)).

332. If a class member does not object to the HSA within 90 days of the date of such statement, draft procedural rules that would govern the administrative appeals process provide that each such Indian beneficiary has "abandoned all . . . rights" and is forever barred from seeking a review or appeal of, or administrative relief from, such abandonment in order to obtain the full and accurate accounting declared by this Court. *Id.* at 26, 28 (25 C.F.R. §§ 116.408(b), 116.413(a)).

333. If a class member does not object to the HSA within 90 days of the date of such statement, draft procedural rules that would govern the administrative appeals process provide that each such Indian beneficiary has failed to exhaust administrative remedies and is barred from challenging defendants' decision in this or any other Court. *Id.* at 27 (25 C.F.R. § 116.408(c)).

334. If a class member does not object to the HSA within 90 days of the date of such statement, draft procedural rules that would govern the administrative appeals process provide that the HSA is conclusive and binding on the beneficiary, but would not be construed as "final agency action of the Department that is subject to judicial review." *Id.* at 30 (25 C.F.R. § 116.420(a)).

335. Draft procedural rules that would govern the administrative appeals process provide that each beneficiary must include with his or her objection "[a]ll supporting documents, arguments, or any other supporting information that the beneficiary believes relates to any error(s) or omission(s) in the account statement," notwithstanding defendants' failure to produce critical source documents in this litigation and defendants' record of inadvertent and systemic document destruction. [Dkt. No. 3356 Ex. 1 at 26] (25 C.F.R. § 116.405(d)).

336. Draft procedural rules contemplate that individual beneficiaries will proceed through this administrative morass *pro se*. *Id.* at 24. (25 C.F.R. § 116.402).

337. Even where the beneficiary gets past this first considerable obstacle and timely and properly objects, if Interior defendants do not provide any relief at this stage, draft procedural rules that would govern the administrative appeals process require a beneficiary to file within 45 days of a decision regarding his or her objections to an HSA, a written request for review. *Id.* at 27 (25 C.F.R. § 116.411) The *pro se* beneficiary has a limited right to review only objections initially and timely raised with the initial objection filed. *Id.* at 27 (25 C.F.R. § 116.413. No "new facts" or evidence will be considered. *Id.* As with the first stage, if the beneficiary fails to properly or timely present his case at this stage "account statement at issue will be conclusively deemed accurate and complete for all purposes" and he or she will have no ability to seek Court review according to the draft procedural rules. *Id.* at 27 (25 C.F.R. § 116.416).

338. Even where the beneficiary properly meets all requirements of this second hurdle, draft procedural rules that would govern the administrative appeals process require a beneficiary, to file within 45 days of a decision regarding his or her objections to an HSA, a written notice of appeal to the Interior Board of Indian Appeals ("IBIA") on any such decision, but the right of

appeal is limited to the specific issues raised in, and documents provided in support of, the objection, further interfering with the right of class members to participate in this litigation, including their right to a full and accurate accounting. [Dkt. No. 3356 Ex. 1 at 29-30] (25 C.F.R. §§ 116.418(a), 116.419).

339. Draft procedural rules that would govern the administrative appeals process would interfere with the jurisdiction of this Court over matters central to this litigation and would interfere with plaintiffs' right as a certified class to enforce trust duties declared by this Court. *See id.* at 1, 19-30 (25 C.F.R. §§ 116.001; 116.201 *et seq.*).

340. Draft procedural rules that would govern the administrative appeals process solely address matters central to this litigation and would undermine the integrity of these proceedings. *Id.*

341. Draft procedural rules that would govern the administrative appeals process break up the class and interfere with this Court's authority to decide the adequacy or impossibility of the declared accounting. *Id.*

342. Defendants have failed to provide this Court a copy of draft procedural rules they have circulated in Indian Country that would govern the administrative appeals process and nullify the February 4, 1997 class certification order by forcing each member of the class to proceed in that process on an individual basis, even prior to a determination by this Court of the adequacy of the accounting. *See, e.g.,* Pls.' Acctg. Admin. Appeals Br. at 1-2; Order Certifying Class Action (Feb. 4, 1997) [Dkt. No. 27 at 2-3].

343. Draft procedural rules that would govern the administrative appeals process restrict plaintiffs' access to information that is necessary to determine the adequacy of the

accounting and limit plaintiffs' ability to challenge such adequacy. *See, e.g., "*Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 Ex. 1 at 19-20] (25 C.F.R. § 116.204(f)).

344. Draft procedural rules that would govern the administrative appeals process interfere with plaintiffs' right to challenge the propriety of exclusions to the accounting in conformity with the May 2007 Plan, including temporal, system, and other exclusions identified by this Court in section III of the template provided to the parties by this Court on October 29, 2007 [Dkt. No. 3447]. *See, e.g.,* "Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 Ex. 1 at 19-20] at 19-21 (25 C.F.R. §§ 116.202(a)-(b) (limiting scope to certain sampled transactions for some accounts open on October 25, 1994; excluding transactions for accounts open after December 31, 2000); 25 C.F.R. §§ 116.205, 116.208 (excluding direct pay transactions and IIM funds administered by tribes under compact, contract, or cooperative agreement)).

345. Draft procedural rules that would govern the administrative appeals process interfere with plaintiffs' right to challenge the defendants' refusal to render the declared accounting of all funds for each beneficiary. *Id.* at 1, 19-30 (25 C.F.R. §§ 116.001; 116.201 *et seq.*).

346. Draft procedural rules that would govern the administrative appeals process interfere with plaintiffs' right to challenge defendants' refusal to establish accurate account balances for each beneficiary. *Id.*

347. Draft procedural rules that would govern the administrative appeals process interfere with the rights of all former beneficiaries to a full and accurate accounting, including deceased members of the class and members of the class whose accounts have been closed or purged from defendants' trust management systems. *See, e.g., id.* at 19 (25 C.F.R. § 202(a)).

348. Draft procedural rules that would govern the administrative appeals process deny to individual Indian trust beneficiaries critical financial resources that are available to the class in this litigation, without which a beneficiary cannot retain effective counsel, accountants, statisticians, and other experts essential to the enforcement of accounting duties declared by this Court. [Dkt. No. 3356 Ex. 1 at 24-25] (25 C.F. R. §116.402); Order Certifying Class Action at 2 ¶ 4.

349. Draft procedural rules that would govern the administrative appeals process interfere with the attorney-client relationship of the class to class counsel, a relationship that was established as a matter of law on February 4, 1997. Order Certifying Class Action at 2 ¶ 4.

350. Draft procedural rules that would govern the administrative appeals process do not require defendants to provide to Indian beneficiaries supporting documents and other information essential to an effective challenge and objection to defendants' HSA's. *See generally "*Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 Ex. 1 at 19-30] (25 C.F.R. §§ 116.201 *et seq.*).

351. Defense counsel have conceded that language identical to that which is included in draft procedural rules that would govern the administrative appeals process is intended to extinguish or otherwise interfere with the right of the plaintiff class to a full and accurate accounting. "Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 Ex. 2 at 3-4] .

352. This Court has found defendants' post-hoc representations that deny such language would "extinguish the rights of class members to a full and accurate accounting" are demonstrably false. *Cobell v. Norton,* 213 F.R.D. 33, 38 (D.D.C. 2003).

353. HSAs which defendants impermissibly transmitted to 1200 children, elderly, and infirm members of the class, provide notice to beneficiaries with language identical to, or that

have the same effect as, language in draft procedural rules that would govern the administrative appeals process, language this Court has found would extinguish the right of plaintiffs to a full and accurate accounting and otherwise interfere with plaintiffs' rights in this litigation. *Cobell v. Norton,* 212 F.R.D. 14, 17-18 (D.D.C. 2002).

354. Draft procedural rules that would govern the administrative appeals process have the identical language, or language that has the same effect as, that which this Court has found would interfere with the right of plaintiffs to obtain a full and accurate accounting of all funds. *See* "Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 at 4]; *Cobell*, 212 F.R.D. at 16, 18; "Pls.' Acctg. Admin. Appeals Br." [Dkt. No. 3356 Ex. 1 at 24-30] (25 C.F.R. §§ 116.401; 116.404(b); 116.405(d); 116.407; 116.408(a)-(c); 116.413(a); 116.415; 116.416(a)-(d); 116.418(a); 116.419(a)-(d)).

355. Accordingly, the procedures set forth in the anticipated administrative appeals process are so defective and onerous that they would interfere with, and extinguish, the right of the plaintiff class to the accounting declared by this Court.

g. Data Completeness Validation project

i. DCV work completed as of Sept. 30, 2007 report

The Purpose of the Data Completeness Validation ("DCV") Project

356. According to the 2007 Plan, the DCV project is intended to "ensure that HSAs are complete and contain all transactions recorded during the electronic ledger era." "Historical Accounting Project, Part 2" (May 31, 2007) (the "2007 Plan"), AR-566 at 33-3-15. The project has three goals: 1) to identify and resolve gaps in the electronic data; 2) to verify the transfer of accounts and balances through system conversions (from paper ledgers to the IRMS and from IRMS to TFAS); and 3) to assess the integrity of the underlying electronic data. *Id*. The DCV

project is limited to examination of two electronic systems, the IIM module of IRMS and its successor, TFAS. *Id*.; 10/15/07 PM Tr. at 679:14-680:12 (Herman). The Plan makes the representation that assumptions about "missing records" and "account inaccuracies" were mistaken, and the work to date indicates that IRMS and TFAS "were very reliable." "2007 Plan," AR-566 at 33-3-7. However, the testimony at trial has indicated this representation is not accurate.

357. The testimony disclosed important limitations on what the DCV is intended to show.

a. First, the DCV will not verify the accuracy of account information, as that is not a goal of the test. 10/22/07 AM Tr. 1384:24-1385:15, 1386:20-1387:12 (Duncan); 10/16/07 AM Tr. 805:7-19; 813:5-9 (Herman).

b. Second, it does not determine that the amount of funds coming into and going out of IIM accounts is correct, or that payments of trust income are actually made to the correct beneficiary. 10/15/07 PM Tr. at 673:6-12 (Herman); 10/16/07 AM Tr. at 805:7-19, 813:5-9 (Herman). Those individuals performing the DCV review are not necessarily licensed accountants or individuals with accounting degrees, and accounting standards are not applied to determine the sufficiency of any transaction. 10/15/07 PM Tr. at 673:13-677:23 (Herman).

c. Third, the DCV does no external validations of IRMS or TFAS. 10/16/07 AM Tr. at 771:15-772:21 (Herman). Accordingly, although the Secretary has indicated that the Plan must identify all beneficiaries who should be on the electronic systems but are not, and thousands of beneficiaries have been identified as not having accounts on IRMS or TFAS, once the DCV is completed the Interior defendants will not be able to represent that all beneficiaries

who should have accounts on those systems in fact do so. 7/9/99 Trial 1 Tr. at 3858:10-14 (Babbitt); 10/15/07 PM Tr. 701:6-711:11 (Herman); 10/16/07 AM Tr. at 77:15-772:21 (Herman).

d. Finally, it is acknowledged that IRMS is only a "starting point" for a historical accounting. 10/16/07 AM Tr. at 733:15-734:9 (Herman). There are other electronic systems that are "relevant" to a historical accounting. *Id*. at 734:10-25. For example, while it is acknowledged that BIA relies on MMS in posting oil, gas and mineral revenues on IRMS, and the MMS data is reported to be inaccurate, the DCV does not evaluate the MMS systems. *Id*. at 735:1-738:18. Accordingly, Interior defendants will make no representations regarding the accuracy of those postings. *Id*. at 738:15-18, 740:23-25. Likewise, while SDA accounts are within the IIM module of IRMS and contain individual Indian funds, the DCV does not verify that those funds are properly deposited in an IIM account. *Id*. at 751:22-752:2; 756:5-758:13. Finally, the DCV does not test those systems responsible for the actual distribution of funds to the correct beneficiary, including the ownership module of IRMS, MAD and RDRS. *Id*. at 761:14-762:9; 10/15/07 PM Tr. at 688:2-16 (Herman). Therefore, upon completion of the DCV, no representation will be made regarding the existence or validity of any disbursement.

Problems Encountered with the IRMS and TFAS Systems

358. The contractor currently having principal involvement with the DCV Project is FTI Consultants, Inc. ("FTI"). The employee of FTI overseeing the project is Michelle Herman ("Ms. Herman"). Ms. Herman has been involved in the analysis of the IIM module of IRMS since 1997 through her prior employment with Arthur Andersen and KPMG, each of which is or has been a contractor of the Interior defendants. 10/15/07 PM Tr. at 678:2-679:1(Herman). Ms. Herman is not licensed as a certified public accountant and has no degree in accounting. *Id*. at 678:9-12.

359. Before beginning a review and testing of the IIM module of IRMS, neither Arthur Andersen, KPMG, nor FTI confirmed that the IIM database they received from Interior is, in fact, identical to the IIM database on Interior's systems. 10/15/07 PM Tr. at 686:3-11 (Herman).

360. It is essential to identify whether there are transactions missing from the IRMS database before issuing HSAs. 10/11/07 PM Tr. at 445:4-7 (Herman). Equally important is the need to have complete information, including as complete a population of accounts and accountholders as possible, before a sampling plan under the LSA can be designed. 10/15/07 PM Tr. at 688:25-690:18 (Herman). Significant gaps were, in fact, discovered in the IIM module of IRMS. *Id*. at 705:11-24; 10/16/07 AM Tr. at 718:9-19 (Herman). The gaps were of two types. First, while the IRMS system was first used in the 1970's, the earliest available electronic records begin in February 1985. 10/23/07 PM Tr. at 1743:24-1744:2 (Infield). However, due to the failure of many agencies to initially use IRMS, and the systematic deletion of IIM trust data on that system, IIM account information on IRMS for many agencies was not available until months or years after February of 1985. 10/20/07 1321:12-21 (Redthunder); 10/23/07 PM Tr. at 1744:2-1746:11 (Infield); 10/16/07 AM Tr. at 733:9-14 (Herman); 10/15/07 PM Tr. at 693:1-695:9 (Herman); "NORC Sample Design Planning Series Part II – Andarko Agency IIM Transactions Described" (December 19, 2002), AR-357 at 60-16-47 through 50. Secondly, significant gaps existed within the information provided by those agencies that did report transactions on the IRMS system. AR-357 at 60-16-47 through 50; 10/15/07 PM Tr. at 698:8-701:8 (Herman). For example, within the Albuquerque Region, there were eleven to twenty-three months of missing data for each agency. AR-357 at 60-16-47. Within the Eastern Region there existed eighteen to thirty-seven months of missing data for each agency. AR-60-16-48. At least 40% of agencies had missing data. 10/16/07 AM Tr. at 720:16-721:7 (Herman). These

gaps affected a large number of accounts and transactions. 10/15/07 PM Tr. at 705:9-24 (Herman). In July 2001 it was estimated that 74,734 known accounts were affected by information gaps. *Id*. Accordingly, IRMS did not contain a complete record of transactions after 1985. 10/16/07 AM Tr. at 724:10-13 (Herman).

361. No attempt has been made by the Interior defendants, as part of the DCV project, to identify paper records to fill in the missing account information for those agencies whose data was not available on IRMS until after February 1985. *Id*. at 723:1-15. For the 40% of agencies that were on the IRMS system but had months of missing data, FTI has requested that the Interior defendants provide written transaction registers if available to fill the gaps in the electronic records. *Id*. at 722:2-9; 723:23-724:3. They have not all been located. *Id*. While Interior defendants had available to them information regarding those agencies for which paper ledgers had been provided, and were offered the opportunity to provide that information to the Court, they did not do so. *Id*.

362. Arthur Andersen, Interior defendants' accountants, reported that erroneous IIM balance information was transferred from the manual ledger cards to IRMS. *Id*. at 726:22-727:11. FTI, likewise, noted erroneous originating balances in its review of IRMS *Id*. at 727:18-25. It is acknowledged that beginning balances on IRMS will have to be evaluated as part of the DCV effort. *Id*. at 728:1-4. However, FTI has not yet undertaken a search for the paper records necessary to make that evaluation, and has no idea how long it would take to locate those records, if they exist at all. *Id*. at 728:1-12.

363. In addition to significant gaps in the IRMS transactional records, there existed significant inconsistencies in the data within the IIM module of IRMS, itself. *Id*. at 786:15-787:17. FTI compared the transactional information within the IIM module of IRMS to two files

generated by IRMS that identify balance information at certain points in time, IRMS master files and IM500 reports. 10/16/07 AM Tr. at 793:21-795:9. Master files give balances for open accounts on the IIM system at the point they are created. *Id*. at 776:7-10. IM500's, on the other hand, identify overall balances by agency as opposed to individual account balances at a given point in time. *Id*. at 794:5-13.

a. Only ten electronic master files are available for the period 1996 to 2000. *Id*. at 776:2-21; 779:7-21. FTI has attempted to locate other hard copy balance files for transactions since 1985, but balance files covering all accounts and transactions do not exist. *Id*. at 776:22-777:4; *see* DX-152A at 66.

b. Balances in the master files are supposed to match the sum of the credits and debits for any particular account in the transactional files for the same period. When the data in the balance file and the transactional file do not match, that indicates that some data is missing from the account, but it does not indicate how much data or dollars are missing. As revealed by the DCV, the variances were significant. In July 2003, Interior defendants' accountant KPMG reported that thirty-two percent of all accounts then identified on IRMS had an out of balance condition between the balance and master files. 10/16/07 PM Tr. at 828:16-829:14 (Herman). By way of example, in Navajo over fifty percent of the accounts had missing data. *Id.* at 789:22-790:3 (Herman). In the Eastern Region, over 87 percent of the accounts had missing data. *Id*. at 790:4-6. In Anadarko, it is estimated that thirty-three percent of the accounts had missing transactions. *Id*. at 790:7-8. Approximately twenty percent of the known account data on IRMS after 1985 had no master or balance files with which a comparison could be made, so that the Interior defendants do not know the extent of missing data during those periods. *Id*. at 783:11-19.

c. CD&L, another of Interior defendants' accountants, began comparing IRMS IM 500 balance reports to agency balances of the IIM accounts in 2001, over six years ago. *Id*. at 794:24-794:23; *see* DX-152A at 221-252. Once again, IM 500 reports could not be located for many years, particularly in the 1980's. DX-152A at 221; 10/16/07 AM Tr. at 796:7-16 (Herman). FTI began investigating the IM 500's about one and one-half years ago and requested that Interior defendants locate the missing reports about six months ago but, to date, none have been produced. 10/16/07 AM Tr. at 796:7-16. As with the master files, the agency account balances in the IM 500 reports should be identical to the agency account balances in the IRMS transactional records at the time the IM 500 was prepared. *Id*. at 795:5-7. However, once again, significant discrepancies were found. *Id*. at 795:84-25. Errors in account information were identified, in some regions, for over half of the years in question, and often reached several million dollars. DX-152A at 234-235, 237. FTI is now identifying time periods, based on the IM 500s, for which paper records should be sought to help identify missing or erroneous transactions. DX-152A at 22.

d. However, Interior defendants' use of IM 500's in an attempt to reconcile IRMS account balances is problematic, as the account balance information on the IM 500s, themselves, is inaccurate. First, the IM 500s are internally inconsistent. Discrepancies were identified by CD&L between the cash and liability balances of the IIM 500 reports. DX-152A at 224; *see* 10/16/07 AM Tr. at 800:4-801:2 (Herman). Those discrepancies totaled twenty-two million dollars in the Aberdeen Region, almost two million dollars in the Muskogee Region, and over two million dollars in the Sacramento Region. DX-152A at 239, 244, 246. However, no effort has been made to resolve those discrepancies. 10/16/07 AM Tr. at 800:4-801:2 (Herman). Secondly, the balances reported on the IM 500s are markedly different from IIM account

balances reported by the Interior defendants' auditors. By way of example, in 1995 Griffin & Associates identified a $14.6 million dollar difference between the audit balance and the IM 500 balance for that year. *Id*. at 803:12-804:24. No effort has been undertaken to resolve this difference. *Id*. Accordingly, at this point the Interior defendants have made no determination as to what the accurate IRMS account balances should be.

364. Despite the importance of having as complete a population of accounts and accountholders as possible before designing a sampling, NORC's sampling was based on account data provided by FTI in December 2003, at about the time the DCV project began but prior to investigation of the significant gaps in the IRMS database. 10/15/07 PM Tr. at 688:25-690:18 (Herman), 683:2-684:19. However, even now, FTI is unable to estimate the population of accounts or transactions even in the electronic era. 10/16/07 AM Tr. at 772:22-773:10 (Herman).

365. FTI is unable to say whether the significant instances of missing and incorrect data are the result of mistake or intentional alteration. *Id*. at 806:5-18. The testing performed as part of the DCV cannot detect fraud. 10/15/07 AM Tr. at 537:15-18 (Herman).

Testing Performed at the Time of Trial

366. FTI merged the original IRMS and TFAS databases into a combined dataset. DX-152A at 13. Only open accounts with non-zero balances had been converted from IRMS to TFAS. *Id*. at 18. FTI represented that the ending balance of transferred IRMS accounts corresponded to the opening TFAS balance. *Id*. at 19.

367. FTI determined that account numbers may have changed without processing of a balance transfer from the original account to the new account. *Id*. at 28. Therefore, the existing account number could not be used to uniquely identify an account. *Id*. FTI assigned a Native

American Account Number ("NAAN") to each account to be used across all systems. *Id*. To date it has assigned 747,993 NAANS. *Id*.

368. FTI has focused its study on IRMS/TFAS transactions in six of the twelve regions. 10/15/07 AM Tr. at 481:5-482:15 (Herman). With respect to each region, FTI is conducting a variety of tests, including transaction mapping and comparison of transactional and balance information on the IIM module of the IRMS database to the IIM 500's and master files.

a. In transaction mapping, the goal is to trace transfer transactions from one account to another within the IRMS or TFAS systems. However, that cannot be done if transfers are made between SDAs. DX-152A at 33. No effort has been made to verify collections or disbursements. 10/16/07 AM Tr. 813:2-9 (Herman).

b. In comparing balance files to transactional files, 55,436 of 418,603 NAANs for which corresponding balances exist, or approximately 13.2%, continue to contain errors after data restoration was completed. *Id.* at 785:20-786:10; DX-152A at 271. For 25% of the NAANS, or 141,228 of 559,831, no corresponding balance file was found. DX-152A at 271. As part of the data restoration efforts, approximately 7300 accounts have been discovered that were *not* on the IRMS system. 10/16/07 AM Tr. at 808:9-15 (Herman). Additionally, 458,520 transactions totaling $29,950,177 have been identified as being off the IRMS system. DX-152A at 269.

c. In attempting to restore transactions to IRMS, FTI has made approximately 85,000 requests for documents from AIRR. 10/11/07 PM Tr. at 466:4-6 (Herman). About 30,000 to 35,000 of those requests are outstanding. *Id*. at 566:7-11. It can take over a year to retrieve a document from Lenexa if it exists. 10/15/07 AM Tr. at 505:11-14 (Herman).

369. The DCV work is incomplete and offers no meaningful insight into the completeness of transaction histories for trust beneficiaries. 10/22/07 AM Tr. at 1393:4-19 (Duncan). Of the three goals identified in the Plan for the DCV test, none have been met. Gaps in the database have not been resolved and account balances that have been transferred from the paper ledger to IRMS have not been determined. Moreover the final goal of the DCV – to verify the integrity of the underlying electronic data – is not possible, as the accuracy of account information is outside the scope of the work performed.

ii. Evidence regarding percentage of missing data restored through the DCV project thus far

370. Four to eight employees of FTI spent three to four years in an attempt to match transactions in the computer for the DCV project. 10/15/07 AM Tr. at 502:19-503:9 (Herman). The remaining work will take longer as FTI is down to the manual review of the population. *Id*. That work is substantial.

371. For the 102 agencies at BIA there is a combined total of 19,890 months of data on IRMS. PX-4486. There were a combined total of 2,027 months where there were gaps in the electronic records and the data was missing. *Id*. It is estimated that there are approximately 6,190,670 transactions totaling $1,520,197,587 in missing throughput. *Id*.; 10/22/07 AM Tr. at 1387:13-1390:14 (Duncan). Put another way, to date FTI has identified and restored only 458,520, or 7.41%, of the estimated missing transactions, and only $29,950,177, or 1.97%, of the estimated missing throughput. *Id*.

372. No data in the paper era has been restored. FTI has not begun to search for paper records prior to 1985. 10/16/07 AM Tr. at 723:5-20 (Herman). Nor has FTI begun the process of verifying opening balance information for accounts that were transferred from manual ledgers

to IRMS. *Id*. at Tr. 728:1-12. At least 65,000 land based accounts are known to exist prior to the electronic era. 10/11/07 PM Tr. at 443:5-11 (Herman).

373. Finally, in conducting the DCV tests, FTI has relied on LRIS for ownership information. 10/15/07 PM Tr. at 639:24-640:5 (Herman). However, LRIS is known to be inaccurate, has not been adequately tested, and, while it is the system of record, is not a system that is used to disburse trust funds. 10/16/07 AM Tr. 761:14-762:9 (Herman); *see* Part II.j, *infra*. Accordingly, no determination has been made as to the accuracy and completeness of ownership interests or the validity of disbursements.

h. Posting Test/Land-to-Dollar Test

i. Pilot test at Horton Agency – conclusions, limitations

Background of the Posting Test/Land-to-Dollars Test.

374. Interior defendants concluded that it is essential in any accounting to identify all beneficiaries and allotments that ought to be on their electronic systems but are not. 7/9/99 Trial 1 Tr. at 3858:10-3859:5 (Babbitt). Because the LSA project looks only at transactions posted to IRMS and TFAS, the "failure to collect, deposit, and record collection transactions" would not be discovered through the LSA project testing. "Memorandum from Jeffrey P. Zippin to Susan Hinkins re "Land to Dollar" Completeness Test at Horton Agency" (Potawatomi Tribe) (Mar. 31, 2007), AR-435 at 38-01-01.

375. In order to rectify this deficiency, the May 31, 2007 Plan contemplates a posting or land-to-dollars test to verify that funds collected by BIA, in fact, were deposited into IIM accounts. "2007 Plan Part I", AR-565 at 33-02-21. Specifically, the Interior defendants are attempting to examine income that is "*expected to have been generated* from leased allotments

(based on contemporaneous contract or production records) to verify that the money was, in fact, received and entered the IIM trust fund system." *Id.* (emphasis in original).

376. The Interior defendants acknowledge that this test is essential to address the "accuracy and completeness" objective of the Plan. *Id*.

Predecessor to the Pilot Test at the Horton Agency.

377. The Interior defendants represent in their Plan that the land-to-dollars testing began in 2006. *Id*. However, the Administrative Record reveals that land-to-dollar testing actually began in 2003. In a report dated October 2003, NORC details the results of a prototype land-to-dollar test in the Alaska Region. "NORC Sample Design Planning Series – Part V: Alaska Region Receipt Prototype Sample – Design and Findings" (Oct. 2003), AR-389 at 47-03-01. The test was not successful.

378. In order to check the completeness of the database of electronic transactions, NORC determined it would sample "income-producing documents" associated with allotments, such as leases, contracts and rights-of-way to verify that all related financial transactions were properly posted to the correct account in IRMS. AR-389 at 47-03-09. According to NORC, the test was necessary to "determine whether the BIA's systems provide sufficiently complete coverage of all trust lands so they can be relied upon to benchmark the financial accounting." AR-389 at 47-03-10. A small prototype sample was selected from records at Lee's Summit. Frequently, the results were disappointing to the government because related transactions could not be found on IRMS without additional documents or information. This was compounded by the fact that there were multiple sources of documents in multiple locations over varying points of time and subject to considerable regional variation in practice. AR-389 at 47-03-09 to 10.

379. Based on the Alaska land-to-dollar test, NORC determined it would need to rethink the land-to-dollar testing. AR-389 at 47-03-10. It concluded it would have to collaborate with OHTA staff and the historian contactors to determine how to design a more effective sampling plan. *Id*. However, the Administrative Record reveals that no further land-to-dollar testing was conducted for another three years.

The Horton Agency Pilot Test.

380. Interior defendants state in their Plan that an unnamed "pilot test" determined that there is no evidence money that should have been received did not find its way into an IIM account. AR-565 at 33-02-21. However, the conclusion is overstated. Subsequent to the failed Alaska pilot, the Interior defendants completed one additional pilot test at the Horton Agency, which is summarized in a report from NORC dated March 31, 2007. *See* AR-435 at 38-01-01 through 05. The test revealed additional problems with – not successes in – the land-to-dollars testing process.

381. The Horton Agency was not selected randomly for the performance of the land-to-dollar testing. It was judgmentally selected for two reasons. First, it was a simple income structure, mostly farming and grazing, with "fairly straightforward document collection," so it was assumed to have readily available income histories for tracts of land. AR-435 at 38-01-02. Other agencies were expected to be more "challenging." *Id*. Secondly, no transactions from the Horton Agency had been sampled in the LSA project, so that agency had not been burdened with production efforts. *Id*.

382. While the Plan called for the examination of "contemporaneous contract or production records" to determine income "expected to have been generated from leased allotments," (AR-565 at 33-02-21), there exists no complete and accurate inventory of such

documents. AR-435 at 38-01-01. Developing a list of leases, contracts, or permits, even in the electronic records era, was considered "often intractable." *Id.*; *see also* 10/11/07 AM Tr. at 245:16-246:10 (Cason).

383. That the Interior defendants would have difficulty finding or identifying relevant contracts, including leases, is understandable. Prior to 2003, if lease ownership records were placed on the Interior defendants' electronic systems they were kept on that system only five weeks. 10/23/07 PM Tr. at 1750:18-1751:13 (Infield). If they were placed on a daily backup tape they were overwritten after two weeks. *Id*. If they were placed on a monthly backup tape they were deleted forever after thirteen months. *Id*. Seventy-five percent of leases were never recorded on the electronic systems at all. 2/5/02 Contempt II Tr. at 3747: 3-5; *see also* 6/23/99 Trial 1 Tr. at 1740:9–1741:10 (Erwin). Moreover, as verified by the Interior defendants' accountants, CD&L, historical lease information is in "inconsistent states of completeness and availability." "Department of the Interior Office of Historical Trust Accounting: Accounting Conference" (March 18-20, 2002), AR-56 at 4-02-243. The loss and destruction of lease documents makes it impossible to determine the accuracy of lease payments. 10/23/07 AM Tr. at 1546:22-1547:1 (Homan).

384. Because of the unavailability of lease, contract or permit documentation, NORC looked to the land within reservation maps and selected 21 allotments out of 812 within the Horton Agency. AR-435 at 38-01-03. In addition, NORC reviewed all available data at the agency to determine each type of revenue generating activity at the agency during the period 1985 to 2000. *Id.* The only source of revenue generating activity identified in the documentation is farming and grazing. *Id*. According to Interior defendants' witness Michelle Herman, the goal of the test was to recreate a revenue history of the selected allotments and

determine whether funds that should have been collected had been collected. 10/11/07 PM Tr. 446:21-24 (Herman).

385. Over half of the 21 selected allotments were excluded from the testing for a variety of reasons. AR-435 at 38-01-03.

(a) Seven of the allotments were not within the trust as of 1985, and NORC limited the scope of its testing to the period 1985 to 2000. *Id*.

(b) Despite the belief at the Horton Agency that farming and grazing constituted the only activity, two of the sampled allotments involved subsurface ownership interests. *Id*. NORC limited its testing to farming and grazing and these allotments were excluded as outside the scope.

(c) One of the allotments was less than three acres in size and a determination was made that, due to its size, NORC would not find farming or grazing activity. *Id*.

(d) One of the allotments was large enough to expect leasing revenue but no leasing activity was evident. Accordingly, it too was excluded from the sample as outside the scope. *Id*.

386. After excluding these allotments from the sample, only 10 allotments remained, which admittedly is a very small sample. 10/16/07 PM Tr. at 830:16-18 (Herman). Of these, three to four years were selected for each tract and examined. AR-435 at 38-01-04. For two of the selections, no leases or other evidence of revenue generating activity were found. *Id*. For the other selections, supporting documents were found, although one was determined to be out of scope as a payment was made prior to 1985. *Id*.

387. The Horton Agency test did no more than identify, for the period 1985 to 2000, where a farming or grazing lease or similar document was located for a selected allotment, whether a lease payment was posted to TFAS. No explanation was provided about allotments that should have been generating revenue but where no lease was found. Additionally, NORC did not explain why only records of farming and grazing activity were identified at the Horton Agency when two allotments involved subsurface ownership interests. And, the test did not address the accuracy of any revenue posting, or determine that disbursements were made to the proper beneficiary. As a result, no statistical conclusions could be drawn from the testing. AR-435 at 38-01-03.

388. NORC concluded that a process needed to be developed to "establish the necessary steps for 'due diligence' in determining whether or not there is evidence of potentially missing revenue." AR-435 at 38-01-03; *see also* AR-435 at 38-01-04. Moreover, the land-to-dollars test does not resolve missing data problems. 10/22/07 AM Tr. at 1369:12-1370:7 (Duncan). For example, it does not discern monies deposited at Treasury and misallocated to government, tribal, and individual accounts. *Id.* at 1369:12-24 (Duncan). At this point, the Interior defendants have not identified an accurate or effective land-to-dollars testing procedure.

ii. Plans for future posting tests

389. The Interior defendants suggest they have other land-to-dollar tests underway, 10/15/07 AM Tr. at 587: 3-13 (Herman) However, they introduced no evidence of any such test during the trial or in the Administrative Record.

390. The Interior defendants are proceeding with land-to-dollar tests despite the acknowledgement of NORC, the contractor principally responsible for the Interior defendants' sampling, that no plans have been developed to identify allotments with missing revenues, the

principal purpose of the test. NORC has not been tasked with designing the land-to-dollars test. 10/25/07 PM Tr. at 2171:12-2172:5 (Hinkins). Two certified public accountants testified at trial. Both testified they knew of no methodology that could be used to overcome this obstacle. Don Pallais, a CPA with 30 years of accounting experience, testified he could identify no process or procedure that could be utilized to solve the completeness dilemma in the land-to-dollar testing, given the absence of a complete set of revenue generating documents like leases. 10/24/07 AM Tr. at 1855:5-11 (Pallais). Caren Dunne, Interior's testifying expert on accounting, admitted that she knew of no such test to solve this problem. Furthermore, she had not been asked to develop such a test. 10/25/07 PM Tr. at 2137:16-2138:22 (Dunne). To the best of her knowledge, no one has been able to solve this problem. 10/24/07 PM Tr. at 2138:25-2139:1 (Dunne).

391. Additional obstacles to land-to-dollars testing have not been addressed. For example, essential financial documents such as scaling tickets for timber have been destroyed and copies have not been retained. 10/25/07 AM Tr. at 2047:11-24 (Christie). IRMS does not hold timber transaction data. 10/25/07 AM Tr. at 2042:12-16 (Christie). Moreover, IRMS-generated distribution settlement worksheets have been destroyed and copies generally were not retained. 10/25/07 AM Tr. at 2047:11-24 (Christie). Without a distribution settlement worksheet, it is not possible to verify the accuracy and completeness of an IRMS posting. 10/25/07 AM Tr. at 2041:24-2042:8; 2063:19-2064:1; 2067:9-16 (Christie). The Interior defendants do not explain how a land-to-dollar posting test could be successfully accomplished in light of essential missing documents.

392. Moreover, subsurface interests are even more problematic. Electronic systems at MMS, which collect oil, gas and mineral production revenue data are known to be inaccurate and unreliable. 10/24/07 AM Tr. at 1770:7-1771:15 (Gambrell). Twenty-five to thirty percent of

MMS data is erroneous. 10/16/07 AM Tr. at 738:8-18 (Herman). The Interior defendants are not sure that money collected by MMS is ever accurately reported to BIA and posted to the correct accounts in the correct amount. 10/23/07 PM Tr. at 1754:23-1755:20 (Infield). However, the systems at MMS are excluded from defendants' reconciliation work. 10/10/07 PM Tr. at 162:24-163:14 (Cason).

393. Despite the passage of eight years since being ordered to perform this accounting and the passage of four years since land-to-dollar testing began, the Interior defendants are unable to develop an effective plan to quantify missing non-interest revenue transactions and other data.

i. Interest Recalculation Project

Problems With Defendants' Historical Calculation Of Interest Earnings.

394. Interior has concerns that interest earned on the investment of pooled trust funds may not have been calculated properly. 10/24/07 PM Tr. at 1964:5-9 (Zippin). OHTA's accountants recognize problems with defendants' historical accrual and posting of interest to the individual Indian trust accounts. *See generally* "Fax from Greg J. Chavarria to Bert Edwards" (Sept. 13, 2002), AR-367 at 60-26-1; "E-mail from Greg Chavarria to Jeffrey Zippin re Systems Issues" (Nov. 1, 2002), AR-361 at 60-20-01 (communications from CD&L regarding problems with defendants' calculation of interest earnings); *see also* "Background on Issues for Discussion" (Oct. 29, 2002), AR-86 at 54-27-04 ("[B]ecause of a known interest discrepancy that affects ALL accounts, OHTA had to include a disclaimer statement in the recent mailing of the first group of judgment account statements.").

395. A number of "known management and accounting issues" affect the investment of the pooled individual Indian trust funds. AR-361 at 60-20-02. Historical variances exist

between transactions posted to the investment pool and the transactions posted to individual accounts. *Id*. The investment pool has been under or over invested throughout the existence of the IIM Trust; this directly affects the earnings of the pool and the proportioned allocations to the beneficiaries. *Id*. Further, individual Indian Trust accounts have sustained losses as a result of failed financial institutions, AR-361 at 60-20-03, and IIM Trust funds were used to "fund [] losses sustained by the Tribal Trust accounts," as a result of failed financial institutions. *Id*. The historical methods utilized to distribute the investment pool's earnings have varied over time; there is a "systematic" problem with the distribution of earnings to the incorrect accounts but that has not been solved. *Id*.

Issues And Problems With The Historical Calculation Of Interest Earnings Affected All IIM Accounts.

396. "Any errors in the monthly calculation would affect all accounts receiving interest." AR-86 at 54-27-04. *See also* AR-361 at 60-20-01. An error in the determination or calculation of investment earnings will result in a misstatement of the interest earned by the entire pool. "Office of Historical Trust Accounting Investments/Interest Discussion Points" (undated), AR-234 at 10-21-01. Because the individual Indian trust funds are commingled, effects to the pool impact every beneficiary with trust funds in the pool. 6/14/99 Trial 1 Tr. at 520:12-15 (Christie).

Defendants' Retesting of the "Interest Factor."

397. The 2007 Plan provides that interest posted to an individual beneficiary's trust account will be "recalculated using the interest factor." 10/24/07 PM Tr. at 1963:23-1964:4 (Zippin). "*See also* Accounting Standards Manual" (Mar. 30, 2007), AR-8 at 44-01-18 through 20 (indicating application of the interest factor to the pool of IIM accounts).

398. Defendants started publishing an interest factor on October 1, 1966. AR-8 at AR-44-01-19. There is nothing in the record to indicate that defendants have a plan to test or recalculate interest earnings prior to October 1, 1966.

399. The interest factor "is not about interest earned; it's about the total amount that was available to be paid from the interest, and the factor is what [Interior] use[d] to apply to the money in the [trust] accounts." 10/24/07 PM Tr. at 1966:10-17 (Zippin); *see also* 10/24/07 PM Tr. at 1967:14-21 (Zippin understands that using the interest factor "assumes" that the pooled funds are accurately recorded).

400. The interest factor has not been consistently applied to the individual Indian trust accounts. Consequently, the interest income posted to accounts did not necessarily reflect actual earnings of the pool. AR-361 at 60-20-03; *see also* AR-367 at 60-26-02 ("The calculated interest factor used for distribution is not the same as the yields achieved on invested funds."); AR-86 at 54-27-054 ("[C]alculation of the interest factor has not been consistently applied and as a result does not necessarily result in the distribution of all earnings.").

401. By way of comparison, the testing of interest earned by tribal trust funds is given much more scrutiny than the testing of interest earned by the individual Indian trust beneficiaries. *See generally* AR-8 at 44-01-22 through 30 (tribal trust section of the Accounting Standards Manual) (NOTE: this section of the ASM is identifiable to tribal trust funds, as opposed to Individual Indian Trust funds, based on the repeated references to "tribal trust" funds and "Tribe name," as well as its referral to the prior section for information on the "IIM Trust Fund," (AR-8 at 44-01-22)). The testing of interest earned by the tribal trust funds includes testing of: investment maturities and redemptions, *id*.; investment purchases (AR-8 at 44-01-24);

investment reports (AR-8 at 44-01-26); investment correspondence (AR-8 at 44-01-28); and, other miscellaneous but relevant investment documents (AR-8 at 44-01-30).

Defendants Have No Plan to Examine The Actual Investments Made By The Pooled Individual Indian Trust Funds.

402. In a November 1, 2002 e-mail to Bert Edwards, Director – OHTA, Mr. Chavarria outlined the advantages and the disadvantages of various approaches to calculate or recalculate the return on investment for Individual Indian Trust funds. *See generally* AR-361 at 60-20-03 through 05. The methods considered by the government included: (1) verification of actual earnings and investment pool transactions; (2) reasonableness calculation; (3) assume benchmark yield, (4) distribute based on historical methods; and (5) distribute based on average balances. *Id.* Interior elected to utilize the "distribute based on historical methods" approach, which recalculates interest to the accounts based on the historical method applied at the time. AR-361 at 60-20-04; *see also* AR-8 at 44-01-19. The advantages and disadvantages to this particular approach were identified as follows:

> **Advantage**: This approach would likely result in lower error rates, as the assumption is that the method applied historically was correct.
>
> **Disadvantage**: There may be criticism as a result of not attempting to correct inequities in historically applied methods (i.e. interest applied to month-end balances as opposed to average balances which more closely approximates [sic] the basis of earnings).

AR-361 at 60-20-05.

403. The 2007 Plan's recalculation of the interest factor will not cure the problem if the pooled funds do not accurately reflect the beneficiaries' assets that were available for investment. 10/24/07 PM Tr. at 1968:15-25 (Zippin). Most of the identified problems with the historical calculation of interest method are not detectable through the procedures outlined in the 2007 Plan

inasmuch they impact the pooled trust funds that are not tested. "Preparing the Historical Accounting of Individual Indian Money Accounts: Briefing for Accountants Roundtable" (Dec. 20, 2001), AR-116 at 55-17-37.

404. Interior's trust contractor, the Bank of America, noted that the recalculation of the interest factor, as proposed in the 2007 Plan, "is of minimal value if the actual balance on which the interest is calculated [is] believed to be inaccurate." "Office of Historical Trust Accounting, Bank of America Contract #1435-01-02-CT-85121" (undated), AR-579 at 31-06-01.

405. The reality is that the historical problems with the calculation of interest earned on the investment of pooled Trust funds are so complicated that "there is no practical way of going back and making corrections for the past errors." PX-4513 at NORCMAP_00003475.

j. Land Title Records Office Test

Background of the Land Title Records Office ("LTRO") Test.

406. As expressed by the Interior defendants' accountants, Ernst & Young, "[o]ne of the cornerstones of the historical accounting project will be the ownership of the trust land. To perform the historical accounting, project teams will need the ownership records for subject land and will need to know that the ownership records are correct." "Office of Historical Trust Accounting, Accounting Methods" (attachment to e-mail from Ryan Bilbrey to Tamarah Harris) (Mar. 12, 2002), AR-25 at 01-18-03. This was confirmed by NORC, which reported that land ownership records must be verified to insure the distribution of income for land is correctly allocated. "Sample Design Planning Report" (attachment to e-mail from Susan Hinkins) (Dec. 20, 2002), AR-235 at 08-02-07. The Interior defendants acknowledge it is part of their fiduciary responsibility to verify correct ownership information during the reconciliation process. 6/22/99 Trial 1 Tr. 1530:14-23 (Erwin).

407. It is no secret that the Interior defendants' land ownership records are inaccurate. In 1992, the House Committee on Government Operations identified problems with those records. "Department of the Interior Office of Historical Trust Accounting Records Conference" (Feb. 4-6, 2002), AR-58 at 06-02-185 to 253. Citing reports from the Interior defendants' accountant Arthur Andersen, the General Accounting Office, and the Office of Inspector General, the Committee found that ownership records are not properly updated or are inaccurate, as a result of which "revenue distributions were being made to closed IIM estate accounts, lease payments were not collected in a timely manner, and revenues were being posted to the wrong accounts." AR-58 at 06-02-213. The Secretary, in previous testimony in this case, acknowledged the existence of data integrity problems with both LRIS and IRMS, which includes an ownership module. 7/9/99 Trial 1 Tr. at 3872:13-3873:14 (Babbitt). Problems with ownership records were confirmed by testimony at trial. Electronic land ownership records are both incomplete and inconsistent, 10/25/07 AM Tr. 2064:6-11 (Christie), and may not be relied on to verify the accuracy of posted transactions. *Id*. at 2042:1-4, 2063:23-2064:1; 10/20/07 AM Tr. 1319:2-1320:13 (Redthunder). Many regional offices did not use LRIS until the 1990s. 10/23/07 PM Tr. 1742:21-1743:14 (Infield). When the IRMS ownership module was first used, it was already out of date. The ownership data generally was eight to ten years old. 10/22/07 AM Tr. at 1318:21-1319:1 (Redthunder). While documents were sent from the agency to the LTRO for recording, the documents were not encoded into LRIS, Interior's system of record. *Id.* at 1319:2-17. For example, the Northwest Region LTRO was described as having large stacks of land records, in no particular order, that had never been encoded, and when a title request was made, records would have to be reviewed manually. *Id.* at 1319:20-1320:13. Many agencies

which were unable to use LRIS or IRMS modified IRMS on a local basis to suit their needs, or utilized their own land records systems. *Id.* at 1320:14-1322:2.

408. Despite this well-documented history of problems, Defendants represent in their Plan that they "tested the land title records, as recorded on maps and contained in electronic and paper records, to verify the accuracy and suitability of these records for use in the historical accounting." "2007 Plan Part I", AR-565 at 33-02-19. Based on statistical sampling performed by NORC of selected allotments, and the tracing of ownership histories, including probates, they conclude "that the records at the LTROs – both paper records and electronic systems – [are] accurate and suitable to rely upon when examining ownership in reconciling account transactions." *Id*. The conclusions are materially inconsistent with the record of these proceedings and overwhelming evidence in the Administrative Record.

Performance of the LTRO Test.

409. In a report dated November 25, 2001, NORC stated that it was taking the lead on a pilot project designed to check the completeness and consistency of land records underlying the IIM trust. "Design Report on Sampling and Economic Applications: Comprehensive Historical Accounting Plan for Individual Indian Money Accounts" (Nov. 26, 2001), AR-399 at 49-03-17. However, in Interior defendants' Tenth Report to the Court dated August 1, 2002 and their Eleventh Report to the Court dated November 1, 2002, Interior indicated the project was placed on hold, but would resume in the last quarter of 2002. "Status Report to the Court Number 10" (Aug. 1, 2002), AR-552 at 24-21-08; "Status Report to the Court Number 11" (Nov. 1, 2002), AR-551 at 24-20-08. In its Thirteenth Report to the Court, however, Interior indicated that NORC's comparison of probate information to tract history information had been completed and the project was concluded. Based on NORC's work, the Interior defendants represented in error that NORC "determined that the LRIS data examined adequately reflected the land ownership reported by the [BIA] LTROs," and "[a]s a result of the project, Interior is confident in the information held within the LTROs for use in the historical accounting." "Status Report to the Court Number Thirteen" (May 1, 2003), AR-549 at 24-18-02.

410. The conclusions of the LTRO test are set forth in four reports published by NORC. "Individual Land Title and Record Office Reports" (March 2003), AR-404 at 50-01-01 through 56; "Land Title Pilot Procedural Documentation" (March 28, 2003), AR-406 at 50-3-01 through 38, "NORC Analysis of LRIS Tract History Reports" (February 28, 2003), AR-405 at 50-02-01 through 29; "Land Title Project Summary" (March 2003), AR-407 at 50-04-01 through 15. According to those reports, the LTRO test had two aspects: first, NORC was to assess the coverage and completeness of the land records; and second, it was to examine chain of title

through sale and probate to learn about the connection between the LTRO systems and actual IIM accounts. AR-407 at 50-04-05. The general goal of the testing was to determine if the land title systems could support the historical accounting. *Id*. In order to accomplish this, NORC envisioned taking a small sampling of tracts from each of the LTROs to be used as part of a test of the overall completeness of the current land records. A subsample of probates connected to those tracts would then be taken to verify that ownership changes were consistently and accurately recorded in the LTROs records and IIM accounts. *Id*.

411. The test required that members of OHTA and NORC meet with the regional offices for the purpose of explaining the testing procedure. During a meeting at the Rocky Mountain Regional Office, Darryl LaCounte, then the Deputy Realty Officer for the Rocky Mountain Regional Office, confirmed the problems that would be encountered in using the land records in the historical accounting. "Memorandum from Harry Corley re Meeting with Representatives of the Bureau of Indian Affairs, Rocky Mountain Office, Billings, Montana" (Mar. 28, 2002), AR-305 at 14-03-02. According to Mr. LaCounte, a complete historical accounting could not be done given the fractionated interests of different tracts, the difficulties in determining ownership for all accounts with missing information, and the difficulties in matching ownership with all revenue bearing accounts. *Id*.

412. NORC's testing immediately ran into obstacles. NORC recognized that LRIS was "central" to the historical accounting, *id*., AR-405 at 50-02-23, and inaccuracies or omissions in that system necessarily would affect the integrity of the accounting. AR-405 at 50-02-10. In that regard, NORC acknowledged the importance of "verifying the ownership of the relevant tracts of land for the relevant period of time *in the past"* in order to "certify the accuracy of a historical (land-based) income transaction." AR-405 at 50-02-05 (emphasis in original). Accordingly,

NORC anticipated using reports generated by LRIS for the testing. However, for much of the testing LRIS was unavailable, requiring that NORC use those title indexes at the individual LTRO to the extent they were available. AR-407 at 50-04-06. Despite the fact that each LTRO operated under a unique filing system and procedure, no conclusions could be made with respect to the completeness of land records at each LTRO. *Id*. Moreover, the scope of the testing was substantially narrowed. AR-407 at 50-04-07. Because electronic data was presented back to the mid-1980s, probate collection was limited to recent beneficiaries who could be expected to have IIM accounts available electronically. *Id.* Given this limitation, the probates selected for examination were unrelated to the tracts that had been sampled in each region. *Id*.

413. The probate examination was similarly limited. NORC collected only ninety-nine probate samples. AR-405 at 50-02-06. It acknowledged the sample size was small, so small, in fact, that it could not "*be used to make statistical inference* about the population as a whole at conventional assurance levels." AR-405 at 50-02-05 (emphasis in original). As a result, it was classified as only part of a "*sample design* phase" to help defendants understand "how the system works," and additional research was necessary. *Id*. (emphasis in original). Its work was limited in nature: a comparison of a list of heirs in each of the ninety-nine probate orders to actual beneficial owners of the land recorded in the Tract History Report, and a verification that each heir received his or her correct share of the land. *Id*. The examination concluded that the 99 probates were "accurately" recorded on the Tract History Reports, but acknowledged that a very narrow definition of error was employed to reach that conclusion. AR-405 at 50-02-06. It was not an error if title information in the electronic systems was inaccurate due to the existing backlog in recording of probate and title records. *Id*. Similarly, erroneous IIM account numbers, misspelling of beneficiary names, and inaccurate document numbers were considered

"irregularities" and not errors, although NORC conceded they would have an impact on the historical accounting. AR-405 at 50-02-06 through 7. Candidly, NORC admitted that its conclusion had at best marginal utility because it was only looking at the reliability and accuracy of LRIS "*within its known capacities and limitations.*" AR-405 at 50-02-06 (emphasis in original).

414. In fact, NORC reached no conclusions about the accuracy or suitability of relying on records at the LTROs when performing the historical accounting. AR-405 at 50-02-08, 23. Instead, NORC's reports candidly reveal the following:

(a) Testing of LRIS is only a "first step;" further analysis of LRIS was necessary. AR-405 at 50-02-08. Further testing requires larger samples that would be "more challenging," both statistically and in terms of implementation. AR-405 at 50-02-22 through 23.

(b) Further testing is required to determine the accuracy of Tract History Reports. *Id*.

(c) An examination of inconsistencies within LRIS is "essential" to the historical accounting. AR-407 at 50-04-14. For example, NORCs limited sampling revealed unresolved updates from when LRIS was first installed. *Id*. Resolution of inconsistencies and data gaps in LRIS for the historical accounting may require "substantial maintenance and data clean-up." AR-405 at 50-02-07 through 8.

(d) Because testing was limited to recent beneficiaries, no attempt was made to reach conclusions about the accuracy of records in the paper ledger era. AR-407 at 50-04-07.

415. Equally important, however, is that NORC reached no conclusions about the accuracy of disbursements, if any, to beneficiaries. As NORC acknowledged, LRIS is not a

distribution system. AR-405 at 50-02-10. Distributions are processed through other systems including the ownership module of IRMS, TFAS, RDRS and MAD, and manually. *Id*.; *see also* 10/23/07 PM Tr. 1750:2-17 (Infield); 10/16/07 AM Tr. 761:14–762:9 (Herman). However, NORC's examination was limited in nature and scope to LRIS. AR-405 at 50-02-05.

III. AREAS OUTSIDE THE SCOPE OF THE 2007 HSA PLAN

a. Account sampling (*i.e.*, reconciliation of all transactions within sampled accounts)

416. Defendants have no plans to sample accounts; instead defendants tasked their statistical contractor with sampling transactions. 10/25/07 PM Tr. at 2164:15-17; 2167:10-16 (Hinkins); 10/17/07 PM Tr. at 1084:13-1085:5, 1105:7-10 (Scheuren).

417. Defendants are limiting their sampling plan to accounts recorded on Interior's electronic systems; specifically, NORC has designed plans to sample some transactions posted to IRMS and TFAS in a limited number of open accounts. 10/17/07 PM Tr. at 1084:9-25; 1012:4-10 (Scheuren). In addition, defendants plainly cannot sample transactions that are not recorded in Interior's trust systems since the transactions are not available to be sampled. 10/22/07 AM Tr. at 1360:19-21, 1366:1-3, 1373:1-2 (Duncan); 10/17/07 AM Tr. at 1036:2-15 (Scheuren); *see also* "Sample Design Planning Report 2007," AR-427 at 52-03-04.

418. Defendants can make no inference or judgment about transactions that are missing or omitted from Interior's electronic systems because such missing transactions were not available to be sampled. 10/22/07 AM Tr. at 1365:16-22, 1510:8-10 (Duncan); 10/25/07 PM Tr. at 2151:15-18, 2152:9-16 (Hinkins); *see also* DX-4 at 8-9. Defendants do not know how to reconcile transactions that are missing or purged from Interior's trust systems. 10/25/07 PM Tr. at 2175:24-2176:6 (Hinkins). NORC has not designed any plan to sample transactions in the electronic era that are omitted or purged from IRMS or TFAS. 10/17/07 AM Tr. at 1033:2-11,

1034:1-7 (Scheuren); *see also* "Sample Design Planning Report 2007," AR-427 at 52-03-03 to 52-04-04.

419. No individual Indian land-based account will have every transaction reconciled. 10/10/07 PM Tr. at 111:8-10 (Cason). But, defendants' database contractor concedes that due to missing data, it is not possible to sample all transactions in any given account. 10/15/07 PM Tr. at 699:11-23 (Herman).

420. A sampling of accounts would result in an error rate that is higher than the error rate associated with transaction sampling. 10/25/07 PM Tr. at 2167:20-2168:8 (Hinkins); 10/22/07 PM Tr. at 1414:25-1417:5 (Duncan); *see also* "Statistical Sampling Strategy: The Scientific Logic of Using Sampling Approaches," AR-264 at 11-05-04.

b. Reconciliation of account balances

Following Completion Of The 2007 Plan Defendants Will Still Not Be Able To Make Any Judgments About Account Balances.

421. Individual Indian trust account balances are known to be unreliable and inaccurate; Interior's auditors have reported this finding for over a decade. *See e.g.*, "Audit Report – Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds managed by the Office of Trust Funds Management, Bureau of Indian Affairs" (December 1996), AR-379 at 60-38-22; "Audit Report – Independent Auditors' Report on the Office of Special Trustee for American Indians Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Financial Statements for Fiscal Years 2001 and 2000 Managed by the Office of Trust Funds Management" (April 2002), AR-369 at 60-28-02, 28.

422. Defendants also admit that statements of account are likely to have errors in balances attributable to historical accounting issues prior to the implementation of TFAS. "Request for Information and Assistance – Historical Accounting Plan" (December 27, 2001),

AR-216 at 10-03-01. Then-named-defendant, Kevin Gover, testified in Trial 1 that an accounting had never been performed and accordingly there is no way to determine if stated balances on the individual Indian trust are accurate. 6/18/99 Trial 1 Tr. at 1101:2 (Gover).

423. This was confirmed in Interior defendants' January 6, 2003 Fiduciary Obligations Compliance Plan when it was stated:

> Interior must provide information that can be used to assess the accuracy of the current balance in each of IIM accounts. Interior has maintained account ledgers through time, but the accuracy of these ledgers and the supporting trust management systems has been . . . repeatedly criticized by observers from within and outside Interior. Without an assurance that all current account balances are reliable and, if necessary appropriately corrected, Interior cannot ensure an accurate accounting on a going forward basis, no matter how carefully future transactions may be recorded.

PX-508 at 5.

424. Defendants recognize that they have a fiduciary obligation to ensure that individual Indian's trust account balances are accurately stated; the 2007 Plan states that Interior will provide each IIM account holder with Interior's conclusions about "the accuracy of the … account balance as of December 31, 2000." "Historical Accounting Project: Plan for Completing the Historical Accounting of Individual Indian Money Accounts" [the "2007 Plan"], AR-565 at 33-02-06. *See also* "The Historical Accounting Plan for Individual Indian Money Accounts" (January 6, 2003) [draft], AR-637 at 66-09-09 ("Interior has determined our historical accounting obligation is to verify the account statements and balances for IIM account holders."), and AR-116 at 55-17-03 which identifies the mission of OHTA:

> The accounting will include, at an appropriate level of detail, an assessment of the accuracy of the balances in IIM accounts, reports to individual beneficiaries of the money and real property held in trust for their benefit, and reports to individual beneficiaries that contain sufficient information to allow beneficiaries to determine whether the trust has been faithfully performed.

Id.

425. The 2007 Plan is not designed to make any statement about the accuracy of an individual Indian's account balance. 10/10/07 PM Tr. at 112:9-113:6 (Cason); 10/22/07 AM Tr. at 1358:10-14, 1359:13-17, 1374:20-1375:2; 10/22/07 PM Tr. at 1407:7-13, 1445:5-21 (Duncan); "Sample Design Planning Report Prepared by NORC," AR-235 at 08-02-04 through 5; *see also* DX-4 at 36.

426. NORC has not been tasked with developing a statistical sampling plan that would result in the establishment or determination of accurate account balances. 10/25/07 PM Tr. at 2161:11-23, 2163:3-16, 2167:10-16 (Hinkins); DX-4 at 36. The results of NORC's statistical analyses and conclusions made from sampling certain transactions posted to IRMS and TFAS may not, and are not intended to, be used to establish or state the accuracy of account balances. 10/17/07 AM Tr. 974:7-975:1; 10/17/07 PM Tr. at 1063:12-20, 1105:11-1106:19 (Scheuren).

427. Defendants' failure to task NORC with the development of a sampling plan that would result in the establishment or determination of accurate account balances is in conflict with the 2007 Plan, which states that Interior will provide each IIM account holder with Interior's conclusions about "the accuracy of the … account balance as of December 31, 2000." 2007 Plan, AR-565 at 33-02-06.

c. Reconciliation of opening balances

Defendants Will Not Be Able To Make Any Judgments About Current Account Balances Until They Examine Opening Balances.

428. Defendants admit that it is not possible to make a judgment about the final account balance of an individual Indian's trust account without verifying the opening balance of the account. 10/10/07 PM Tr. at 112:25-113 (Cason). *See also Cobell VI,* 240 F.3d. at 1102 ("appellants concede that 'some type of review of past transactions may indeed be necessary to accurately state opening balances,'" this does not mean that the plaintiffs have a judicially

enforceable right to a complete historical accounting." (*quoting* defendants' appellate reply brief).

429. Defendants' statistical expert is in accord that opening balances must be verified in order to determine accurate current balances. 10/17/07 AM Tr. at 1106:13-1107:21 (Lasater). However, the Director of OHTA, Bert Edwards, has opined that beginning balances cannot be established for a number of individual Indian trust accounts. "Request for Information and Assistance – Historical Accounting Plan" (December 27, 2002), AR-216 at 10-03-01, 7.

430. Ordinarily, an accounting is performed back to the last accounting provided, and where no accounting had been rendered, the accounting goes "back to the date when the trustee had responsibility for the trust property." 10/24/07 PM Tr. at 1904:10-1905:5 (Fitzgerald); *see also*, 10/23/07 AM Tr. at 1578:17-1579:8 (Homan) (discussing elements ordinarily included in an accounting, including a review of opening balances).

431. Despite defendants' acknowledgement of a fiduciary responsibility to account for the opening balance of individual Indians' trust accounts, the reality is that defendants undertook a sampling plan – the LSA – that expressly identified "opening balances" as "out of scope;" they were "removed . . . from the sampling population prior to sample selection." "Reconciliation of the High Dollar And National Sample Transactions From Land-Based IIM Accounts (All Regions) – Litigation Support Accounting Project for the Electronic Records Era (1985-2000)" (September 30, 2005), AR-438 at 40-02-28.

432. The former Special Trustee was asked to review defendants' 2007 Plan and was in accord that the Plan would not account for opening balances in the individual Indian trust accounts. 10/23/07 AM Tr. at 1568:8-10, 1569:1-1570:1 (Homan).

433. Without first determining the accuracy of opening balances in individual Indian trust accounts, no sound judgment can be made about the accuracy of current account balances. 10/23/07 AM Tr. at 1581:6-19 (Homan).

434. The 2007 Plan will not, and cannot, result in the establishment of accurate current account balances for each – or for any – member of the plaintiff class since defendants have not, and will not, determine the correct opening balances.

d. Reconciliation of DOI records and Treasury records

There Is An Out-Of-Balance Condition Between Balances Reflected On Behalf Of The Individual Indian Trust Beneficiaries At The Departments Of The Interior And Treasury.

435. There is a longstanding, un-reconciled difference – also referred to as an "out-of-balance" condition – between balances recorded for the benefit of individual Indian trust beneficiaries on accounting ledgers at the Departments of Treasury and Interior. 10/23/07 AM Tr. at 1557:5-1558:21 (Homan). Until 1971, both the Treasury Department and the BIA maintained accounting records that tracked Trust Fund balances. *Id.* at 1557:16-24. However, Treasury did not perform "daily reconciliation procedures … to ensure that all balances and transactions clearing Treasury have been properly accounted for in the trust funds." "Office of Historical Accounting IIM Trust Funds System Level Issues" [draft] (November 1, 2002), AR-361 at 60-20-02. Interior, too, did not perform such reconciliations, at least prior to 1992. *Id*.

436. The Director of the Office of Trust Reporting has acknowledged that individual Indian trust balances recorded at Interior do not match IIM Trust cash balances stated on the books of the Department of Treasury and that this imbalance has existed "for the majority of the life of the trust." 10/16/07 PM Tr. at 905:4-7 (Winter). This fund imbalance has contributed to the unbroken series of qualified and adverse opinions of every independent certified public

accounting firm that has performed an audit of defendants' management of the Individual Indian Trust (However, neither the IIM Trust, itself, nor the assets of the Trust has ever been audited). *See* "Fiduciary Obligations Compliance Plan," PX-508 at 64.

437. There has been unquantified "'leakage' of IIM funds from the system" and this "leakage" has contributed to variances in the Interior and Treasury accounting ledgers. AR-86 at 54-27-04. The out-of-balance condition has been exacerbated, at least in part, by Treasury's failure to reconcile daily all IIM funds collected and deposited in the Treasury, where, as here, defendants know that "[d]eposits made into Treasury may not have been credited to the IIM accounts." *Id*.

438. Because there was no reconciliation of the out-of-balance condition prior to 1992, there are unresolved concerns about the accuracy and validity of posted disbursements from the Individual Indian Trust. AR-361 at 60-20-05. A further discussion of the out-of-balance condition and its effect upon disbursements is found *infra* at § V.b.

439. The out-of-balance condition indicates a material unreconciled problem in accounting records at Interior and Treasury, but it does not quantify the nature and scope of that problem. 10/16/07 PM Tr. at 906:9-23 (Winter); *see also id*. at 909:17-24. An out-of-balance condition can indicate errors in the account. *Id*. at 914:10-14. Where, as here, Treasury's records reflect a materially lower balance than Interior's, the out-of-balance condition results in "lower interest earning[s]" because fewer IIM Trust funds are credited to the pooled investments, *i.e,* the purchased government securities, and fewer funds, are available for credit to the Trust when the securities are redeemed. *Id*. at 917:18-22.

440. To date, the historical out-of balance-condition between Interior and Treasury remains unreconciled. 10/23/07 AM Tr. at 1557:25-1558:4 (Homan).

The Out-Of-Balance Condition Indicates A Substantial Problem With Interior's Historical Management Of The Individual Indian Trust And It Is Not Being Examined As Part Of The 2007 Plan.

441. There is little dispute that eliminating out-of-balance conditions is an important control activity for trust systems. 10/16/07 PM Tr. at 907:2-7 (Winter). Reconciliation of the historical out-of-balance condition is excluded from the 2007 Plan. *Id*. at 907:14-18.

442. Despite recognizing the importance of the "system level issue" that "[d]eposits made into Treasury may not have been credited to the IIM accounts," defendants have excluded, and have no plans to verify, the IIM Trust funds that have been collected and deposited into the Treasury that have not been posted to the pooled 14X6039 account at Treasury or any other IIM account. 10/22/07 AM Tr. at 1371:23-1372:20 (Duncan); *see also* AR-86 at 54-27-04.

443. When the BIA assumed exclusive control over the accounting functions in 1971, there was a net difference in account balances of over $70 million between the respective ledgers maintained by BIA and Treasury. 10/23/07 AM Tr. at 1557:5-1558:21 (Homan). At least as of 1997, there was an un-reconciled difference of $34,000,000 between total cash balances reflected on Interior's OTFM books and the balances reported on Treasury's books. AR-377 at 60-36-72. Further confusion exists because there is also an un-reconciled $21,000,000 difference between the IIM detailed subsidiary ledger and the general ledger control account; defendants do not know whether any of the recorded balances are correct; nor do they know the nature and scope of the systemic errors or the impact such errors have on the accuracy of stated balances in IIM accounts.

444. Even so, "'system level' issues – management of the fund balances at Interior and Treasury … would not be addressed solely by reconciling each IIM account." "Background on

Issues for Discussion," AR-86 at 54-27-05. Both interest and system level issues must be resolved for an accounting of all funds and to establish accurate account balances. *Id*.

Interior's Trust Contractor Has Opined That The 2007 Plan Does Not Sufficiently Address The Out-Of-Balance Condition.

445. Bank of America, OHTA's retained institutional trust expert, expressed concerns about the effectiveness of Interior's approach to the accounting declared by this Court. *See generally*, AR-579 at 31-06-01. Specifically, Bank of America identified various "'issues' which may impair the accuracy of [IIM] accounting statements." *Id*. Bank of America identified the out-of-balance condition between the detail IIM ledger and the general ledger, and the out-of-balance condition between Interior's records and the records of the Department of Treasury, as issues which may impair the accuracy of the historical statements of account. *Id*.

e. Asset statements

446. One of the major concerns of the Federal Tribal Task Force, after interviewing allottees across Indian country in the mid 1990's, was that when allottees received a check they did not know what the money was for as they did not know what land they owned and whether or not it was leased. 10/23/07 PM Tr. at 1752:23-1753:9 (Infield). Failure of Interior defendants to account for an allottee's trust assets impairs that allottee's ability to protect his or her interest in trust land and to understand whether a HSA fairly states his or her assets or the income generated from the sale or lease of his or her trust assets; effectively challenging the statements in a HSA would be problematic. Specifically, the allottee would have no ability to identify whether or not his trust property was properly leased and whether the income received is correct. *Id.* at 1753:10-15. Moreover, if the land is the target of condemnation proceedings, notice would be posted on the land itself. If the beneficiary is unaware of his or her ownership interest in that

land, the property would be condemned without the knowledge of to the beneficiary and without a hearing. 10/25/07 AM Tr. at 2003:18-2007:14 (Willett).

447. Interior defendants' consulting experts confirmed that the accounting must include trust assets. In that regard, defendants' retained trust counsel, Michael P. Bentzen, formally opined that as trustee, defendants must provide an accounting of the real property held for each beneficiary as well as each transaction related to that asset. *See* AR-612 at 64-02-02, 5. According to Mr. Bentzen, to render a fiduciary accounting, defendants, at a minimum, "should provide a description of the tract(s) of land involved and the state of the title of the tract(s) of land as of the time such beneficial holder acquired his/her interest therein, as well as a description of any changes to the state of the title thereafter, *i.e.*, sales and impositions or releases of liens, rights of way or encumbrances, to the date of the accounting. The accounting should also include a detailed recitation of all transactions relative to the land, such as leases and easements, during said period, and a traditional accounting of receipts of income and disbursements during the course of such beneficiary's interest through and including the date of the accounting." *Id.* at 64-02-04 to -05.

448. Defendants' independent certified public accountants concur. According to Ernst & Young, an adequate accounting requires that defendants verify the accuracy of ownership records at all relevant times. "Ernst & Young Report: Office of Historical Trust Accounting, Accounting Methods" (March 12, 2002), AR-025 at 01-18-03. As the accountants have explained, ownership of the trust land is "[o]ne of the cornerstones of the historical accounting project," and as such defendants, as fiduciaries, must provide a statement to each beneficiary that accurately describes his or her ownership interests in each Trust asset. *Id.*

449. Interior defendants' statistical contractor, NORC, also concurs. According to NORC, "[l]and ownership allotment records are the starting point for the IIM accounts and need to be fully linked to the IIM file, so that assets and income stream can be examined together." "Predesign Report on Sampling and Economic Applications" (October 22, 2001), AR-403 at 49-07-09. In order to certify the accuracy of a historical land based income tract transaction, you need to verify the ownership of the relevant tracts of land for the relevant periods of time in the past. "NORC Analysis of LRIS Tract History Reports" (February 28, 2003), AR-405 at 50-02-01 to -29. Further, "in order to check that the distribution of income for land is correctly allocated, the land ownership records must be verified." AR-235 at 08-02-07.

450. The Interior defendants, in fact, conceded that an accounting of the underlying trust assets is necessary for a complete and accurate historical accounting and is essential if the government is to fulfill its fiduciary duties. According to the Secretary, it is important to identify all properties held in trust, including those assets that are not recorded on trust management systems. 7/9/99 Trial 1 Tr. at 3858:10-24 (Babbitt). In 2002, OHTA determined that the accounting would include each beneficiary's ownership interest in allotments and leases, contracts, or other sources of income related to the allotments. AR-227 at 10-14-18. OHTA would locate and examine transaction histories, land records and leases, and IIM documents. AR-227 at 10-14-17. In meetings with Department of the Interior officials, there was a consensus on this issue which was described in "Status Report to the Court Number Nine." "Secretarial Issues Document" (June 6, 2002), AR-227 at 10-14-15, 17. *See* "Ninth Report to the Court" (May 1, 2002), AR-553 at 24-22-04.

451. In *Cobell X*, this Court agreed. This Court found that "both this Court and the D.C. Circuit have determined that the scope of Interior's duty to account is not limited by the

terms of the 1994 Act." *Cobell X*, 283 F. Supp. 2d at 174. Citing the Court of Appeals decision in *Cobell VI*, it noted

> The 1994 Act requires that the Interior Department perform an "adequate" accounting. This indicates that the accounting must be sufficient to serve the purposes for which a trust accounting is typically conducted.

Cobell VI, 240 F.3d at 1103. This Court found that "[i]nasmuch as black-letter trust law mandates that an accounting include a full disclosure and description of each item of property constituting the corpus of the trust at its inception, Interior's historical accounting must include such a full disclosure and description." *Cobell X*, 283 F. Supp. 2d at 175-76. "The allotted lands themselves are the 'trust corpus' or 'trust assets' or 'trust property,' which are held in trust by the United States. Not only does the IIM trust contain these lands, they are an indispensable element of the trust. These lands generate income, which Interior (as trustee-delegate) must distribute to the IIM beneficiaries. The IIM accounts are the means by which this income is distributed to the beneficiaries. In short, the monies deposited into the IIM accounts represent the *income* generated by the allotted lands held in trust by the United States, not the *corpus,* which is made up of the lands themselves." *Cobell X,* 283 F. Supp. 2d at 177 (emphasis in original). Moreover, this Court pointed to "[s]ection 101 of the 1994 Act" which "also mandates the inclusion of an accounting of assets within the historical accounting, in that it provides: 'the Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (1) Providing adequate systems for accounting for and reporting trust fund balances.'" *Cobell X*, 283 F. Supp. 2d at 176, n.57 (quoting 25 U.S.C. § 162a(d)(1)). *Cobell X* found: "It is difficult to understand how an adequate system for accounting for and reporting trust balances could be maintained without an understanding of how the assets in the trust-the allotted lands-were affected over time." *Cobell X*, 283 F. Supp. 2d at

176, n.57. Therefore, this Court, in fact, held: "Interior's argument that it has no duty to account for the assets held in trust, as opposed to the funds (income) generated from these assets, is without merit. The Court concludes that the accounting conducted by Interior must include an accounting of all assets held in the trust, from the inception of the trust in 1887 until the present." *Cobell X*, 283 F. Supp. 2d at 177.

452. Despite admissions of the Secretary and those of defendants' employees, consultants, and experts, and in disregard of this Court's express findings in *Cobell X*, the 2007 Plan excludes from the accounting an asset statement that describes a beneficiary's divided and undivided ownership interests in the Trust *corpus*. 10/10/07 PM Tr. at 170:171:25 (Cason). Specifically, the Department of the Interior will not provide information that explains and verifies the individual Indian's beneficial interest in allotted land. *Id*. There exists nothing in the record of these proceedings – including testimony and the Administrative Record – to support defendants' exclusion of verified asset statements from the accounting declared by this Court.

453. To render an adequate accounting, defendants must provide an accounting of all trust assets, including the land and other assets, even if those assets do not produce funds. 10/24/07 PM Tr. at 1909:24-1910:21 (Fitzgerald)." "Any accounting is necessarily incomplete and misleading without an accounting of those assets." PX-4285 at 9. It is especially important to identify the entirety of the *corpus* of the trust to ensure that the beneficiary always has complete information about his trust assets. 10/24/07 PM Tr. at 1910:16-21 (Fitzgerald).

454. When a trustee provides an accounting to a beneficiary, it ordinarily includes verification of ownership information and verification of assets to be administered in the trust. 10/23/07 AM Tr. at 1578:17-1579:8 (Homan). Without this information, the beneficiary is not able to make informed judgments about his or her account. *Id.* at 1581:6-19. Accordingly,

HSAs necessarily are inadequate if they do not provide a verified description of the assets held in trust. *Id.* at 1568:8-10, 1569:1-1570:1. Because nonfinancial asset information is essential to an adequate accounting, implementation of the 2007 Plan cannot, and will not, discharge the accounting duties declared by this Court.

f. Special Deposit Accounts

455. Special Deposit Accounts ("SDAs") are accounts that were established to hold individual Indian trust monies until ownership of the funds could be determined. 10/22/07 AM Tr. at 1332:5-1336:6 (Redthunder). They are essentially holding accounts in the IIM Trust for monies generated from leases until they are transferred into an individual beneficiaries IIM account. "A Historical Review of Business Activity on Allotted Lands of Selected Indian Reservations: the Administration of Mineral Leases, Agricultural Leases, Timber Sales and Revenues Deposited in Individual Indian Money Accounts: Introductory Report" (September 30, 2001), AR-232 at 10-19-25.

456. For example, when income is received from trust property with multiple owners, it will first be deposited into an SDA to decide how the funds are to be allocated before transfer to an IIM account. 10/15/07 AM Tr. at 560:13-23 (Herman); 10/16/07 AM Tr. at 714:2-16 (Herman). In addition SDAs may include performance bonds as well as administrative fees collected by the Interior defendants through their management of trust assets. *Id*. at 742:11-19; 6/21/99 Trial 1 Tr. at 1246:17-1247:16. Moreover, SDAs may include funds in the name of corporate entities that nonetheless are the funds of IIM beneficiaries. 6/23/99 Trial 1 Tr. at 1764:17-25 (Erwin).

457. SDAs are set up within the IIM system and receipts deposited into SDAs are posted on the IIM module of the IRMS database. 10/16/07 AM Tr. at 748:7-14 (Herman).

458. SDAs have been used for a long period of time, and a significant amount of money has been deposited in them. 10/16/07 AM Tr. at 743:19-745:4 (Herman). Often, money remains in SDAs for an extended period before it is ever disbursed. *Id*. For example, in 1998 Griffin and Associates, Interior defendants' auditors, identified 104 million dollars in 24,000 SDAs within the IIM system. *Id.* at 744:12-745:4 (Herman). Interest earned on funds held in SDAs often has not been disbursed to the beneficiaries. PX-571 at 78; 10/22/07 AM Tr. at 1333:8-19 (Redthunder). Unfortunately, Interior defendants acknowledge that data regarding SDAs provided to this Court in quarterly reports have not been accurate. "Memorandum from Bert T. Edwards to Douglas A. Lords re Request for SDA Meeting/Information Sharing" (August 13, 2002), AR-223 at 10-10-01.

459. Historically, there has been poor documentation and limited controls on the use of SDAs. External auditors have identified inadequate controls and a lack of management reporting and accountability for funds held in SDAs. "Audit Report, Financial Statements for Fiscal Year 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (March 1999), AR-377 at 60-36-72. Auditors have described the absence of controls and poor documentation relating to SDAs as "an almost hopeless tangle." PX-4513 at NORCMAP_00003475. They lack documentation to support disbursements to third parties. *Id*. Similarly, there is virtually no support for the transfer of IIM Trust funds between SDA accounts. 10/25/07 AM Tr. at 2067:23-2068:13 (Christie). Once trust funds are transferred from one SDA to another, the audit trail ends and there is no ability to trace the funds. *Id*.[1]

[1] Mr. Christie identified this phenomenon in the context of the Paragraph 19 document search for the named plaintiffs, and had no explanation for why trust funds would be transferred between SDA accounts. While he did not know if this was a regular practice, it was a practice

460. Although defendants have transferred some funds held in SDAs to beneficiaries' accounts, Cason testified that no time frame has been established for the completion of that process. 10/10/07 PM Tr. at 159:3-160:3 (Cason). Notably, no documentation has been produced and no details have been provided in the Administrative Record that explain or justify disbursements from SDAs that have held funds for many years. The Administrative Record, in fact, reveals that in a meeting on January 17, 2007 Mr. Cason determined that, while SDAs were included in prior accounting plans, they were "unrelated to preparing historical statements of account." "Changes to the Historical Accounting Plan Option Papers" (attachment to Note from Jeff Zippin re Administrative Records for the 2007 Plan) (January 22, 2007), AR-600 at 63-02-16. Accordingly, in the 2007 Plan, Interior defendants report that SDAs are now excluded from the historical accounting, as defendants have recast SDA cleanup as only "trust reform." "2007 Plan Part II," AR-566 at 33-03-27. This change of position is confirmed in the record. In July 2003, Ms. Herman at FTI and Ms. Hinkins at NORC were tasked with resolving the issue of inappropriate "leakage" of IIM funds to non-Indians from SDA accounts. 10/16/07 AM Tr. 756:24-758:13 (Herman). However, plans to test SDAs as part of the historical accounting were halted. 10/16/07 AM Tr. at 758-13:759:4. Therefore, there is no verification, as part of the historical accounting, that hundreds of millions of dollars of IIM Trust funds that have been, and continue to be, posted to and held in SDA accounts have been transferred to the correct beneficiary's account in the correct amount. 10/16/07 AM Tr. at 750:5-9; 751:22-752:2; 756:5-23 (Herman). Similarly, transfers and disbursements from SDAs have been excluded from NORC's sample frames and sampling work. "Drawing the Credit Sample for Alaska" (September 30, 2003), AR-384 at 46-02-06.

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that was also identified by Ms. Herman in her review of accounts. 10/16/07 AM Tr. at 756:5-18 (Herman).

461. However, in order to account for all funds and establish accurate account balances, defendants must account for and verify all individual Indian trust funds that have been collected by the government, including funds posted to SDAs. 10/16/07 AM Tr. at 756:5-18 (Herman). As explained by one of defendants' many certified public accounting firms, CD&L, by only sampling transactions relating to specifically identified individual Indian trust accounts and by excluding transactions posted to SDAs, only funds posted to an individual Indian account are captured, not the collected funds. "E-mail from Caren L. Dunne to Jeffrey P. Ziffin & Bert Edwards re 5 x 6 Matrix of Balances and Transactions" (December 5, 2002), AR-240 at 08-07-01. CD&L confirmed the accounting of funds held in SDAs is required for an "accurate" accounting. "Department of the Interior, Office of Historical Trust Accounting, Accounting Conference" (March 18-20, 2002), AR-56 at 04-02-235. Similarly, FTI advised that the reconciliation of SDAs in the historical accounting is "imperative" for an adequate accounting and this review must include, at a minimum, all non-zero balance accounts and all zero balance accounts with direct disbursements. AR-056 at 04-02-222. A third contractor, Bank of America, added that the un-reconciled balances in SDA accounts would impair the accuracy of historical statements of accounts. "Office of Historical Trust Accounting, Bank of America Contract #1435-01-02-CT-85121" (undated), AR-579 at 31-06-01. Every expert that discussed the issue has concluded that for the historical accounting to be adequate, it must include SDAs. Defendants must provide an accounting of all trust funds collected from trust lands, whether or not they are misdeposited or deposited into accounts other than the accounts of individual Indian trust beneficiaries. 10/24/07 PM Tr. at 1908:8 (Fitzgerald). Accordingly, it is not possible to render an accounting of all funds to each beneficiary unless the accounting includes all funds deposited in SDAs. Further, it is not possible to state accurately the trust balances of each

beneficiary unless all such funds have been included within the scope of the accounting. Finally, the failure to include such funds in the accounting is so defective that it has unduly delayed the accounting declared by this Court.

g/h. Predecessor accounts/Probate determinations

462. The *Cobell* class consists of all "present and former beneficiaries" of the Individual Indian Trust. (February 4, 1997) "Class Certification Order," [Dkt No. 27 at 1]. This Court has held that plaintiffs are entitled to an accounting of "all funds." *Cobell V*, 91 F. Supp. 2d at 41. To complete an accounting, trustee delegates, accordingly, must provide an accounting of all trust funds irrespective of whether the former beneficiary is living or deceased. 10/24/07 PM Tr. at 1903:7-13 (Fitzgerald). This is consistent with ordinary fiduciary practice. *Id*. at 1923:10-18 (Fitzgerald). Simply put, "[t]o deny the accounting of all funds for former beneficiaries, living and dead, is inconsistent with a trustee's fiduciary obligation to such beneficiaries," PX-4285 at 8, and it is in disregard of the Class Certification Order.

463. Here too, the Interior defendants have conceded this point. As admitted by current Special Trustee Ross Swimmer, "[i]n order to establish an accurate beginning balance for . . . living beneficiaries, we would have to go back in time to when the trust was first established with an ancestor of the living beneficiary and do an accounting for their transactions as well." "The starting and ending dates are when the money from the trust asset first was collected for an allottee and ends when the trust asset goes out of trust." "Letter from Ross Swimmer to Secretary Norton" (April 3, 2002), AR-511 at 61-37-02. Additionally, Mr. Swimmer candidly confessed that "[p]redecessor accounts should be included in the accounting in order to determine the correct beginning balance of current accountholders." *Id.*

464. Special Trustee Swimmer's admissions are consistent with the conclusions stated by the Interior defendants' expert consultants. As explained by defendants' statistical expert, who currently is associated with FTI, David Lasater, "[i]n order to determine accurate account balances you have to start with an accurate opening balance." 10/17/07 PM Tr. at 1106:13-19 (Lasater). It was Dr. Lasater's prior expert testimony in this case that the Court of Appeals considered when it held, "[i]ndeed, the government's own expert acknowledged that one could not determine an accurate account balance without confirming historical account balances." *Cobell VI,* 240 F.3d at 1102. Interior defendants' consultant Deloitte & Touche reached the same conclusion and instructed defendants that the accounting must begin at the date of the original allotment and that to ensure that the accounting is viable, opening balances must be established. 10/23/07 AM Tr. 1575:9-1576:15 (Homan). *See also* AR-056 at 04-02-330 (in which Deloitte & Touche reported to Interior defendants that reconciling predecessor accounts as part of the effort to reconcile current IIM accounts is necessary and beyond dispute). It is not possible for historical account balances for both present and former beneficiaries to be determined without accounting for the funds of deceased beneficiaries and predecessors-in-interest. Nor is it possible to provide an accounting of all funds to each beneficiary without accounting for the funds of deceased beneficiaries and all predecessors-in-interest.

465. This Court has so ruled, holding that "no adequate historical accounting can exclude transactions that occurred during the life of IIM beneficiaries who are now deceased." *Cobell X*, 283 F. Supp. 2d at 175. "The Court has already concluded that Interior's historical accounting must account for all funds within the IIM trust since the date of inception of the trust. Consistent with this conclusion, the Court also concludes that Interior must include in its

historical accounting all transactions that occurred during the lives of IIM beneficiaries who are now deceased." *Cobell X*, 283 F. Supp. 2d at 175.

466. Nevertheless, defendants refuse to do what this Court has held they must do and what the Special Trustee and defendants' experts have said they must do to render an adequate accounting; render an accounting of all funds held for the benefit of deceased beneficiaries and predecessors-in-interest. *See* 10/25/07 AM Tr. at 2015:7-12 (Willet) (*citing* "2003 Plan," PX-507 at 9). *See also* PX-4285 at 7. They resist, relying on the erroneous claim that the probate process settles the account and thereby discharges defendants' declared duty to account.

467. Interior neither settles accounts nor provides an accounting though the probate process. Judge Sally Mann Willett, who was an Administrative Law Judge (ALJ) in the Office of Hearings and Appeals (OHA) between 1978 and 1996, testified at trial. 10/25/07 AM Tr. at 1988:10-12. She, as an ALJ, probated thousands of estates during that period of time. *Id*. at 1990:6-8. Probating the estates of individual Indian trust beneficiaries' has been an official process in the administration of the Individual Indian Trust since the 1910s, but unofficially it has been an important part of IIM Trust management since the General Allotment Act in 1887. *Id*. at 2009:10-18. The probate process for the individual Indian trust is initiated and prosecuted by the U.S. Government; this leaves the individual Indian trust beneficiary unrepresented. *Id*. at 2015:20-23; *see also id.* at 1991:7-12 (even if requested, legal representation is prohibited). The U.S. Government is also the legal custodian of the trust assets and, through the BIA, prepares the probate file that contains an inventory of the assets, a death certificate, a last will and testament (if available), and any documents related to adoptions, divorces and marriages. *Id*. at 1991:7-12 and Tr. at 1993:17-1994:9. The probate file is the basis upon which probate determinations are made by an ALJ. *Id.* at 2001:8-10. Once the probate file is prepared by the BIA, it is put in a

queue to be adjudicated by the ALJ. *See generally* 10/25/07 AM Tr. at 1994:14-1995:17. Following the probate of the estate, the probate file, order and related documents are recorded at the Land Title Records Office (LTRO) to reflect changes, if any, in ownership; this is the equivalent of the county recorder office for non-Indians. *Id*. at 1996:1-17.

468. Importantly, the ALJ may not assess the accuracy and completeness of the trust assets recorded in the probate file. *Id.* at 1999:3-13. The ALJ, typically, does not make an inquiry behind the information in the probate file unless it is raised by a party; even then, however, such inquiries are narrow in scope and "fact-specific." *Id*. For example, the ALJ has no authority to investigate the accuracy of reported income collected pursuant to a particular lease and does not have access to such documentation. *Id.* at 2003:4-12; *see also id.* at 2025:9-2026:12. The ALJ's determinations are limited to the information before the judge at that point in time. *Id.* at 2015:7-2016:12. It is "[u]nbelievably common" for probate orders to be subsequently modified for a variety of reasons, including due to the fact that Interior defendants' records are out of date or were not posted. *Id*. at 2016:13-19. *See also* "NORC Analysis of LRIS Tract History Reports" (February 28, 2003), AR-405 at 50-02-01. (There are frequent modifications or corrections to probates made by administrative law judges; they change the list of errors or correct the inventory. The number of such administrative corrections is evidence that significant errors, in fact, occur.); PX-1747 at 39-40. Whether the corrections are accurate and complete is unresolved.

469. It is true that, depending on the particular jurisdiction, in the private sector, through probate, heirs will receive an accounting of the estate. 10/24/07 PM Tr. 1902:14-1903:1 (Fitzgerald). However, here, the probate process does not result in an accounting; nor does it "settle" accounts. *Id*. at 1903:20-24 (Fitzgerald). This is confirmed in *Estate of Ervin Lyle*

Waits, 2001 WL 254024 (I.B.I.A. February 28, 2001), where the IBIA made clear that an Indian trust beneficiary may not obtain an accounting through probate. There, heirs sought a "full accounting of [Decedent's IIM] account in its entirety from inception" including "any and all financial activity regarding this account." *Id.* at *2 (internal quotations and citations omitted; alterations in original). The IBIA held that the request for the accounting "goes far beyond the scope of this probate proceeding." *Id.* Heirs could not simply seek an accounting; they had to have specific evidence that the stated "amount [wa]s incorrect." *Id.* That, of course, is the point of the accounting, to reveal whether the stated balance is correct or not, and to quantify the variances, if any. But the IBIA further explained that "[i]n the absence of an assertion that [the heirs] have some specific information suggesting that the reported amount is incorrect, the [IBIA] will not require additional proceedings in the context of this probate to prove correctness of amounts in the Decedent's IIM account." *Id.* *See also* 10/25/07 AM Tr. at 2003:4-12 (Willet); *id.* at 2025:9-2026:12.

470. As confirmed by a BIA official with 40 years of experience in probate matters at the Department of the Interior, often beneficiary-heirs have requested that defendants provide an accounting of the assets of the probated estate, but such requests were never granted 10/22/07 AM Tr. at 1334:10-1335:20 (Redthunder).

471. Cason, the Associate Deputy Secretary, admitted that the probate process at Interior does not provide Indian heirs an accounting of the deceased beneficiary's estate. The probate process merely identifies and confirms the rightful heirs of the deceased beneficiary, and restates what BIA records reflect are the assets and account balances of the deceased beneficiary. *See* 10/10/07 PM Tr. at 139:21–144:24 (Cason).

472. In fact, "Interior's Courts of Probate have not determined and do not assure the accuracy or completeness of the decedent's estate or purport to settle the trust accounts of deceased beneficiaries." PX-4285 at 7. Interior's "probate process does not determine the accuracy of transactions that have occurred over the life of the trust, which is a necessary part of any accounting." *Id.* "[T]he probate officials will accept the information without question." 10/24/07 PM Tr. at 1903: 11-19 (Fitzgerald).

473. The Interior defendants are treating the closing or ending IIM account balance of the deceased beneficiary and the opening IIM account balance(s) of that deceased beneficiary's heir(s) as final and conclusive. They are not and will not perform an accounting of a deceased individual Indian's IIM account and, therefore, they are not verifying the accuracy of the opening balance of any IIM account for any current individual Indian beneficiary. *See* 10/10/07 PM Tr. at 139:21-144:24 (Cason). *See also* AR-511 at 61-37-02. That also means, of course, that the accounting under the 2007 Plan necessarily excludes all former or deceased beneficiaries in conflict with the *Class Certification Order.* As the Court explained in *Cobell X,* 283 F. Supp. 2d at 174-75:

> Suppose Beneficiary X died intestate in 1990. Following an heirship proceeding conducted by Interior, X's property was divided equally among four persons determined to be X's heirs, all IIM beneficiaries, who are still living. Now suppose that during X's life, X never received $500 that was supposed to have been disbursed to him from the IIM trust fund, and that the available records make clear that X never received this sum. In such an instance, it would be appropriate for Interior to treat the heirship proceeding as presumptively valid, and to conclude that the four persons designated as X's heirs were entitled to equal portions of X's property upon his death. But if the transactions occurring in X's account during X's life were to be excluded from Interior's proposed accounting, X's heirs would not receive the $500 to which they are entitled, in equal portions, as X's heirs. In other words, if these transactions were to be excluded from Interior's proposed accounting, then X's heirs-who are living IIM beneficiaries-would never discover that the balances of their respective trust accounts are $125 lower than they presently should be.

474. It is unreasonable for Interior defendants to exclude deceased beneficiaries from the accounting. PX-4285 at 7.

475. With respect to the accounting of beneficiary-decedents' estates, the problem is acute, given defendants failure to timely probate estates. Despite assurances provided to this Court by the Secretary that the probate backlog would be "wiped out" by January 1, 2001, 7/9/99 Trial 1 Tr. at 3822:14 (Babbitt), the probate backlog has increased. In 1996, at the time Judge Willett retired from Interior, there was a reported probate backlog of 3600 to 3800 estates. 10/25/07 AM Tr. 2009:22-25 (Willett). Today, approximately 53,802 Indian estates are awaiting probate. *Id.* at 1997:5-15. Due to fractionated interests, a single beneficiary-decedent estate may affect a large number of existing and future allottees. *Id.* at 2011:13-2012:12. However, because of inefficiencies of the Department of Interior, an Indian estate may remain pending for ten years or more years. 2/5/02 Contempt II Tr. at 3788:14-23 (Ridgeway). Further, complexities caused by the probate backlog are exacerbated by subsequently deceased heirs to an estates held in abeyance causing an Indian estate, itself, to become an heir of a pre-existing backlogged estate. 10/25/07 AM Tr. at 2012:13-2 (Willett).

476. The probate backlog is exacerbated further by delays in the recordation of land titles. Even when a probate is completed, there is a lengthy delay in the recording of the probate order on defendants' electronic systems. *Id.* at 1998:4-1999:2.

477. If the estate includes trust land, the trust income is tied to the land and there is no disbursement until the probate order is posted to defendants' electronic systems. *Id.* at 2013:10-17. An ever-increasing 53,802 pending beneficiary-decedent estates affect ownership interests and declared accounting rights of more than one hundred thousand current beneficiaries who are members of the plaintiff class. Further, the accounting rights of nearly 54,000 former

beneficiaries who are members of the plaintiff class are also affected. Accordingly, the exclusion of predecessor accounts, probated estates, and estates in probate from the accounting in accordance with the 2007 Plan necessarily makes it impossible to render an accounting of all funds to each current and former beneficiary of the IIM Trust. Further, unless all funds held in predecessor accounts, probated estates, and estates in probate are included in the accounting, defendants cannot, and will not, provide each beneficiary (or his or her estate) an accurate statement of account balances in accordance with the accounting declared by this Court. Finally, the exclusion of predecessor accounts, probated estates, and pending estates is so defective that the accounting mandated by this Court will not, and cannot, be rendered to each beneficiary

i. Cadastral surveys

478. Cadastral surveys establish and ascertain the size, boundaries, and location of Indian trust land. "Cadastral Resurvey Pilot General Summary of NORC" (June 2003), AR-394 at 48-01-04. Responsibility for conducting cadastral surveys lies with the Bureau of Land Management ("BLM"). *Id*.

479. BLM and BIA concede the existence of errors in surveys of Indian lands. "Design of Plan for GIS System Using Natural Resource Industry Production Database" (attachment to Memorandum re Gustavson Report)(May 31, 2006), AR-345 at 60-04-19. There are significant areas of Indian land that were surveyed prior to 1910. *Id*.; "Cadastral Resurvey Pilot BLM Acreage and Location Results" (June 29, 2003), AR-395 at 48-02-11 through 12. Surveys made prior to 1910 were poorly executed and have the largest errors in acreage. AR-395 at 48-02-12. Discrepancies in the range of 9% to 20% are "typical" of pre-1910 surveys. AR-395 at 48-02-09.

480. To compound the problem, acreage information about IIM Trust lands is obtained from various sources, including BLM, the U.S Geographical Data Survey, LRIS, IRMS, and Tribal Government Information Systems. AR-395 at 48-02-09 These sources frequently have inconsistent information regarding acreage for the same tracts. *Id*., AR-395 at 48-02-14. For example, the Colville tribe in Washington conducted private surveys of Indian land, finding them to be materially inconsistent with BLM surveys. 10/22/07 AM Tr. at 1327:20-1328:7 (Redthunder).

481. NORC conducted an initial pilot test to examine cadastral surveys. However, only 22 parcels were sampled; they were judgmentally sampled, not randomly sampled, and they did not solely involve tracts with pre-1910 surveys. AR-394 at 48-01-05. Each of the tracts selected for sampling had been surveyed more than once in the past. *Id*. While errors were within a 5% margin, NORC acknowledged that the margin was not typical for 19th century surveys. AR-395 at 48-02-09. Additionally, the sample was unrepresentative of IIM Trust lands and too small to provide reasonable assurance on the accuracy of the boundaries, and any conclusions made would be limited to lands that had been resurveyed, not to IIM Trust lands in general. AR-394 at 48-01-05. In a second sampling conducted of 15 allotments, the survey error ranged from a positive 20.7% to a negative 8.9%, which, in terms of acreage, translated into a range of plus 9.54 acres to negative 3.57 acres. AR-395 at 48-02-09. These were characterized by NORC as "typical" of the accuracy of 19th century surveys. *Id*. NORC noted that the degree of error in older surveys varied greatly by region, and recommended development of an accounting standard that states when existing cadastral information should not be relied on without confirmation. AR-394 at 48-01-11.

482. However, under the 2007 Plan, defendants assume the accuracy of boundaries of IIM Trust land, refusing to correct errors in individual Indian ownership records that result from inaccurate or erroneous surveys currently existing in the Department's land record and ownership systems. 10/10/07 PM Tr. at 179:19-22; Tr. at 180:21-24 (Cason).

483. Where survey boundaries are incorrect, income generated from the trust land is not allocated to the proper beneficiary. 10/20/07 AM Tr. at 1328:20-1329:4 (Redthunder). Accordingly, as Mr. Cason acknowledged, inaccurate or erroneous land descriptions that currently exist in the Interior defendants' systems invariably affect the accuracy of the accounting. 10/10/07 PM Tr. at 175:10-25. This is confirmed by NORC, which advised the Interior defendants that "[a]n inaccurate accounting in an IIM can result from the use of an erroneous (unofficial) acreage to calculate income," AR-395 at 48-02-21, as it can lead to "an incorrect determination of the income that the owners of a tract should receive." AR-394 at 48-01-04. *See also* "First Report of the Office of Historical Trust Accounting Cadastral Survey Pilot Acreage Error" (Attachment to Memorandum from Bob Anderson to Bert Edwards) (September 26, 2002), AR-366 at 60-25-02. This was further confirmed in the candid comments by Donald Buhler, Chief of the Department of Cadastral Surveying for BLM, who reported to this Court in Interior defendants' Eighth Quarterly Report the following: "The resources that generate the money for the Individual Indian Money (IIM) accounts come from the land. There will never be a true and accurate accounting of Indian Trust Assets until there is a [sic] true and accurate data about the location of land ownership and trust resources." PX-488 at 73. No witness testified, and there exists no documentation in the Administrative Record, to support defendants' conclusion that the correction of highly erroneous surveys of Indian trust lands is not essential to fulfill their trust obligations to properly distribute and account for IIM funds.

Accordingly, unless cadastral surveys are included in the accounting, it is not possible for defendants to render an accounting of all funds to each beneficiary. Further, the exclusion of cadastral surveys from the 2007 Plan means that defendants will not, and can not, establish an accurate account balance for each individual Indian who owns a beneficial interest in trust land. Finally, the exclusion of cadastral surveys means that the 2007 Plan is so defective that it has unduly delayed the accounting declared by this Court.

j. IIM trust funds managed by compacting/contracting tribes utilizing their own record systems

484. "The Indian Self-Determination Act and Education Assistance Act of 1975 ("Self-Determination Act"), Pub. L. No. 93-638, 88 Stat. 2203, 25 U.S.C. § 450, as amended, 'creates a mechanism for the transfer to Indian tribes of programs previously carried out by the Bureau of Indian Affairs ... or by other agencies within the Department of the Interior.'" *Cobell X*, 283 F. Supp. 2d 66, 180 (quoting Memorandum from John D. Leshy, Office of the Solicitor to Ken Rossman, Director, Office of Trust Litigation Support and Records 2 (Nov. 28, 2000)) (hereafter "Leshy Memorandum"); *see also* PX-4285 at 8 ("Through compacting and contracting tribes, the Department pays a tribe, as its agent, to perform certain of the Department's fiduciary responsibilities."). Pursuant to the Self-Determination Act, Interior defendants permit compacting and contracting of "the management or administration, at a local level, of certain aspects of IIM trust management." *Cobell X,* 283 F. Supp. 2d at 180.

485. Approximately 50 percent of the tribes manage realty functions under compacts and contracts authorized under the Self-Determination Act. 6/18/99 Trial 1 Tr. at 1182:10-1183:10.

486. Defendants acknowledge that their trust responsibilities are not diminished in any way by entering into a compacting or contracting agreement with a tribe. 6/22/99 Trial 1 Tr. at

1579:2-25; 10/20/07 AM Tr. at 1341:4-7 (Redthunder). Defendants retain the fiduciary responsibility to ensure that all trust information is accurate and to develop and implement procedures for such purpose. 6/22/99 Trial 1 Tr. at 1580:11-25. Compacting tribes, as agents of the U.S. government, are required to follow policies and procedures prescribed by Interior defendants. 6/21/99 Trial 1 Tr. at 1377:11-1378:9. They are supervised regarding records management issues to the same extent that Interior's own bureaus, offices, and agencies are supervised, *e.g.*, defendants expressly retain the right to retrieve and review all trust documents. 6/23/99 Trial 1 Tr. at 1680:2-1681:14. Trust records remain the property of the United States government. *Id*; 6/21/99 Trial 1 Tr. at 1377:11-1378:9. And, with respect to any Individual Indian Trust asset under delegated administration by a tribe under contract, compact, and cooperative agreement, the records created and maintained by the tribe are trust records and, therefore, are assets of the IIM Trust. The contracting/compacting tribes must be reviewed annually by defendants' internal auditing staff or by third party auditors, which reviews have been performed since 1997. 6/21/99 Trial 1 Tr. at 1377:11-1378:9; 6/23/99 Trial 1 Tr. at 1684:11-1686:2; 6/17/99 Trial 1 at Tr. 965:15-966:6. IIM Trust records created and maintained by compacting and contracting tribes are subject to data cleanup and correction efforts to the same extent trust records created and maintained by the defendants are required to be accurate and complete. 6/21/99 Trial 1 Tr. at 1378:18-1379:2. All leases are required to be reviewed and approved by BIA. 6/18/99 Trial 1 Tr. at 1068:20-25. Since 1999, the Interior defendants have insisted that compacting and contracting tribes use Interior's electronic systems to discharge administrative and fiduciary duties assigned or delegated to them under contract or compact. 6/17/99 Trial 1 Tr. at 993:24-994:10; *see also* 6/21/99 Trial 1 Tr. at 1379:3-13. Should a compacting or contracting tribe neglect its administrative responsibilities or delegated fiduciary

duties, it is incumbent upon defendants to terminate the contract or compact. 6/22/99 Trial 1 Tr. at 1594:2-1595:16.

487. The Solicitor of Interior concurs. As this Court has found, in quoting the Solicitor's opinion, "'the fact that a tribe takes over federal duties by entering into one or more contracts or a compacting program *does not extinguish the federal trust responsibility.*'" *Cobell X*, 283 F. Supp. 2d. at 180 (quoting the Leshy Memorandum at 3) (emphasis added). As found by this Court, "Interior's Office of the Solicitor has acknowledged that the 1994 Act 'unequivocally requires the Secretary to account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian .... Nothing in the [1994] Act suggests that this mandate would be waived if the records relating to that trust responsibility were generated in the context of an Indian self-determination contract or compact program, or if the records were simply being held by a tribe.'" *Cobell X*, 283 F. Supp. 2d at 182 (quoting Leshy Memorandum at 5 (footnote and internal quotation omitted)). This is in conformity with a legal opinion issued by then Deputy Solicitor Ann Shields (September 16, 1994), that states that Interior retains undiminished its fiduciary duty to prudently manage IIM Trust assets administered by compacting and contracting tribes. The Secretary must do so or the government would be in breach of the trust duties owed to the beneficiary class. 6/22/99 Trial 1 Tr. at 1591:20-1596:5.

488. In *Cobell X,* this Court confirmed the validity of the Leshy and Shields opinions, stating that Interior defendants' "historical accounting must include an accounting of IIM accounts whose *assets are administered or managed by Tribes pursuant to contract, compact, or other form of agreement.*" *Cobell X*, 283 F. Supp. 2d at 181 (emphasis added).

489. During the Trial 1.5, Associate Deputy Secretary Cason under oath conceded that the principles set forth in the Leshey and Shields opinions are "consistent with [his] understanding." *see discussion in Cobell X*, 283 F. Supp. 2d at 180 citing 6/4/03 Trial 1.5 PM Tr. at 40:17-25, (there is no diminishment of Interior defendants' trust duties when they compact or contract a function); 6/5/03 Trial 1.5 PM Tr. at 52:12-14; PX-4193 at 5 (same).

490. During the October 10, 2007 trial, Mr. Cason, further conceded that defendants have an obligation to render an accounting to beneficiaries whose funds or other assets are administered by compacting and contracting tribes, including such beneficiaries whose transactions have not been posted to Interior's electronic systems. 10/10/07 PM Tr. at 122:20-123:6. However, defendants have not developed a plan to do so. *Id.*

491. The Self-Determination Act, itself, states that trust duties are not diminished when a tribe administers the IIM Trust and carries out trust obligations under contracts and compacts. For example: 25 U.S.C.A. § 458cc(b)(9) mandates that "[e]ach funding agreement shall … *prohibit the Secretary from waiving, modifying, or diminishing in any way* the trust responsibility of the United States with respect to Indian tribes *and individual Indians* that exists under treaties, Executive orders, and other laws." (emphasis added). In addition, 25 U.S.C.A. § 458ff(b) reaffirms that "[n]othing in this subchapter shall be construed to diminish the Federal trust responsibility to Indian tribes, individual Indians, or Indians with trust allotments." "These federal statutes and the Solicitor's opinion are in accord with common law trust standards which do not permit a trustee to relieve itself from fiduciary duties through … delegation of those duties to another party." PX-4285 at 8-9.

492. Tribes act as agents of the United States when they compact and contract. 10/24/07 PM Tr. at 1926:5-7 (Fitzgerald). "[T]he responsibility for the management of the trust

assets always remains with the trustee," even where certain administrative duties are delegated to an agent. 10/24/07 PM Tr. at 1906:8-16 (Fitzgerald). In the "private sector," trust assets are often administered by a person or entity retained by the trustee, but this does not diminish the trust duties owed to beneficiaries. *Id*. at 1906:3-20.

493. Proceeds from the sale or lease of individual Indian trust lands and trust resources are individual Indian trust funds. 1/13/99 Contempt I Tr. at 452:9-15 (Madison). Thus, defendants have a responsibility to account for such funds, irrespective of whether deposited in a specific account.

494. Despite Interior defendants' admission that they have a fiduciary duty to account to each beneficiary for all funds that have been collected, deposited, allocated, invested and disbursed by tribes in accordance with the terms of contracts and compacts – and this Court's restatement of that duty in *Cobell X*, – defendants, in the 2007 Plan, have excluded such funds from the accounting. 10/10/07 PM Tr. at 118:21-123:6 (Cason).

495. The 2007 Plan will eliminate from the accounting any funds that are administered by a compacting or contracting tribe or where the underlying asset management is performed by a tribe pursuant to compact, contract or cooperative agreement. PX-4285 at 8-9; 10/24/07 PM Tr. at 1905:6-12 (Fitzgerald).

496. To complete the accounting declared by this Court, defendants must provide an accounting of all trust funds irrespective of whether a tribe is involved in any aspect of the management or administration of the trust assets or funds pursuant to compact, contract or cooperative agreement. PX-4285 at 8-9.

497. The total amount of individual Indian trust funds deposited into IIM accounts (at least $13.6 billion through 2002 and at least $14.3 billion through 2005) does not include IIM

Trust funds collected and disbursed by tribes pursuant to contract or compact. 10/10/07 PM Tr. at 125:1-13 (Cason).

k. Direct pay accounts

498. Funds derived from Individual Indian Trust lands that are paid directly to an individual Indian lessor by a third-party lessee, "direct pay funds," are trust assets. *See* 10/10/07 PM Tr. at 131:13-20 (Cason).

499. Trust funds "derive their trust character not because they are deposited in a specific account, but because they are proceeds from the trustee's management of Indian trust assets. Without an accounting of these monies, it is not possible to account for all funds." PX-4285 at 7; *see also* 1/13/99 Contempt I Tr. at 452:9-15 (Madison). As this Court found in *Cobell X*: "'it is settled beyond debate, of course, that the direct income from a trust allotment partakes of the character of the corpus of the allotment itself and is subject to all the authorities and responsibilities of the trust undertaking relating to the allotment itself.'" *Cobell X*, 283 F. Supp. 2d at 178 (quoting Lease of Restricted Land - Federal Supervision Over Rentals Payable Directly to Lessor, 72 Interior Dec. 83 (Feb. 17, 1965), *available at* 1965 WL 12755 (citing *Squire v. Capoeman,* 351 U.S. 1 (1956)). "Revenue derived solely from the sale or lease of trust land and the oil & gas, timber, coal, hard rock minerals, precious metals and other resources [*i.e.* Indian trust assets] from such lands are by definition trust funds." PX-4285 at 7.

500. Interior defendants have long recognized their fiduciary duty to supervise and enforce direct pay lease obligations and transactions related thereto. On November 1, 1960, the then Solicitor (now Senator) Theodore Stevens advised Interior defendants, in the context of rents and royalties paid directly to Indian trust beneficiaries by oil and gas companies, that the Secretary has a duty to verify the accuracy of the lessee's rental and royalty payments when

administering oil and gas leases given the trust nature of the leased land. PX-686 at 1. Regulations require that "the lessee furnish statements containing information from which the accuracy of the lease payments may be determined, whether the payment be transmitted to the Department or directly to the landowner." *Id.* Should the payment not be made or should it be made inaccurately or untimely, the Secretary, as trustee-delegate, has a duty to take appropriate action, including canceling the lease. *Id.*

501. In fact, in 1988, Interior's auditors, Arthur Andersen & Co., urged Interior defendants to account for direct payments. PX-575 at 69. Arthur Andersen explained: "[P]ayments on sales and leases are sometimes made directly to land owners …. increase[] the risk of error in payment to the individual going undetected." *Id.* As a consequence, Arthur Andersen "recommend[ed] all sales be accounted for within the Trust Fund general ledger at the time of the sale and proceeds either be processed through the Bureau or monitored by the Bureau to ensure proper payment is made." *Id.* The Administrative Record is devoid of evidence that Interior defendants have done so.

502. Defendants in practice have exercised control over IIM Trust lands the proceeds of which are required to be paid to beneficiaries pursuant to direct pay leases (both cash and crop share) because such leases are negotiated, supervised, and enforced by the government. 10/25/07 AM Tr. at 2037:16-2039:2 (Christie). As Sharon Redthunder explained, direct pay leases are recorded in the IRMS system with a notation to indicate the status as direct pay. 10/22/07 AM Tr. at 1338:17-19 (Redthunder). Copies of canceled checks paid directly to beneficiaries are maintained in a file at the agency office. *Id.* at 1338:20-23. Agency offices also report the direct pay acreages, allotted land and income for all direct pay leases to the regional office and the

central office of the BIA, via form 5-5425[2]. 10/22/07 AM Tr. at 1338:24-1340:9 (Redthunder). BIA has lease compliance officers to ensure that the terms of beneficiaries' leases are followed; these lease compliance officers have responsibility with respect to both direct pay leases and leases in which payment is directed toward the Interior Department. *Id.* at 1338:2-13. Similarly, as Joe Christie testified, cancelled or negotiated direct pay checks have been provided by lessees to the BIA Winnebago Agency, and beneficiary-payee endorsements are verifiable against a beneficiary's signature on leases on file in agency offices. *Id*. at 2037:16-2039. Therefore, verification systems are in place, Interior defendants can account for direct pay funds, and they must account for such funds or the accounting rendered will not, and cannot, account to each beneficiary for all of his or her funds in accordance with this Court's mandate.

503. Direct pay is not unique to the IIM trust. With other trusts, it is "not …uncommon" for direct pay to occur. A trustee may arrange for a beneficiary to receive a trust fund payment directly from a business, enterprise or lessee. However, the trustee must still account for such directly paid proceeds if produced from a trust asset and must ensure that proper payment is made. 10/24/07 PM Tr. at 1900:23-1902:6 (Fitzgerald).

504. In *Cobell* X this Court agreed. It found that defendants have comprehensive control in the direct pay context. *Cobell X*, 283 F. Supp. 2d at 179-80. This Court noted the findings of fact in *Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996), where allottees "had collectively entered into a direct pay lease for the use of their land as a commercial golf course pursuant to 25 U.S.C. § 415(a)." *Cobell X*, 283 F. Supp. 2d at 178-79. This Court further noted

[2] This Court inquired as to whether a copy of this form could be provided. *Id.* at 1339:17-1340:12. Ms. Redthunder, upon completion of her testimony, contacted the Colville agency to see about obtaining a copy. She learned that she had mistakenly referred to the document as a 5-147 Report. Instead, the number was 5-5425. However, because Interior defendants had discontinued using that particular form number, she was unable to obtain a copy of the form.

that in *Brown* the trustee-delegates had found "control or supervision" in the *Mitchell II* sense and explained:

> It is plain that the allottees do not control the leasing of their lands. First, they can only grant those leases of which the Secretary approves. Second, they can grant leases only on terms and forms that the Secretary dictates. Third, an allottee cannot cancel a lease without the Secretary's prior approval under 25 C.F.R. § 162.14. Fourth, the Secretary can cancel a lease without the allottee-lessor's consent.... Nor may the Secretary's power be considered a mere oversight power, inasmuch as its exercise is a necessary prerequisite to the execution of a valid and binding lease. Oversight power is an after-the-fact power to review transactions that have been negotiated and executed by others. The Secretary's approval power over leases, by contrast, must be exercised *before* any valid leasing transaction can occur. *Brown,* 86 F.3d at 1561-62 (emphasis in original) (internal citations omitted). …
>
> [B]y virtue of the control they place in the hands of the Secretary, section 415(a) and the implementing regulations of part 162 impose upon the government a fiduciary duty in the commercial leasing context. *Id.* at 1563.

Cobell X, 283 F. Supp. 2d at 179 (quoting *Brown*); *see also* 10/22/07 AM Tr. at 1336:22-1337:23 (Redthunder) (Interior is responsible for drafting direct pay leases, ensuring receipt of a canceled check confirming payment to beneficiaries in accordance with the terms of the lease, and enforcing the lease.).

505. This Court agreed: "The Secretary of the Interior has a duty to verify the accuracy of the lessee's rental and royalty payments when administering oil and gas leases on allotted Indian lands under the Act of March 3, 1909, 39 Stat. 781, 783, as amended in the Act of August 9, 1955, 69 Stat. 539, 540, 25 U.S.C.A. 396. This duty arises because of the trust or restricted character of the leased lands and the relationship between the Indian landowner and the United States which has been likened to that of a guardian and ward.'" *Cobell X*, 283 F. Supp. 2d at 178 (quoting "Regulation Authorizing Lessees of Allotted Indian Land to Pay Rental and Royalty Directly to the Indian Owner" (Nov. 1, 1960), *available at* 1960 WL 12652 (internal citations omitted)). "The Act of March 3, 1909, as amended, *supra,* does not refer to any

specific duty but contains broad language authorizing the Secretary of the Interior to perform any and all acts and make such rules and regulations as may be necessary." 1960 WL 12652 (internal quotation omitted). The duty to account does not turn on whether lease payments are made directly to the beneficiary; a finding of control is the key, whether the exercise of control, is found in practice or control is found in statute, regulation, order, or otherwise, *e.g.,* "[T]he regulations of this Department pertaining to oil and gas leasing on Indian land provide that the lessee furnish statements containing information from which the accuracy of the lease payments may be determined, whether the payment be transmitted to the Department or directly to the Indian landowner." *Id*. Further, "[i]n the event payment is inaccurate and the amount due is not paid by the lessee, then appropriate action must be taken to cancel the lease and/or take such other suitable action against the lessee and his bondsman as is provided for in the lease or in the applicable regulations." *Id.*

506. However, defendants are not accounting for direct pay funds. 10/10/07 PM Tr. at 124:15-21, 129:18-130:4 (Cason). Direct pay transactions and accounts will not be reconciled or considered in the 2007 Plan and there will be no analysis of the rate or significance of errors in those transactions or accounts. "2007 Plan," AR-565 at 33-02-05; *see also* PX-4285 at 6-7. Errors and fraud will never be identified, addressed, or corrected. 2007 Plan, AR-565 at 33-02-05. In that regard, defendants have excluded, and have no plans to sample, direct pay transactions. *See* "Preparing the Historical Accounting of Individual Indian Money Accounts: Briefing for Accountants Roundtable" (December 20, 2001), AR-116 at 55-17-37.

507. The exclusion of direct payments is so defective that that the accounting of all funds that defendants owe to each beneficiary will not, and cannot, be rendered. As such, the

2007 Plan is so defective that it has further unduly delayed the accounting declared by this Court on December 21, 1999. PX-686 at 1.

508. The total amount of individual Indian trust funds posted to Department of the Interior systems (at least $13.6 billion through 2002 and at least $14.3 billion through 2005) does not include direct pay funds. 10/10/07 PM Tr. at 124:22-25 (Cason).

l. Routine collection of third party records

509. On December 21, 1999, this Court ordered Interior defendants to "establish written policies and procedures for collecting from outside sources missing information necessary to render an accurate accounting of the IIM trust." *Cobell V*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999). This Court criticized Interior defendants for "delaying planning for the gathering of missing documentation necessary to render an accounting." *Id.* at 49. The Court of Appeals concluded that requiring such policies was a "reasonable step[] toward the federal government's fiduciary obligations to IIM trust beneficiaries." *Cobell VI*, 240 F.3d 1081, 1106 (D.C. Cir. 2001).

510. Notwithstanding this Court's mandate on December 21, 1999, there is no evidence in these proceedings, including without limitation the Administrative Record, that Interior defendants have begun to collect third-party records. *See, e.g.,* 10/10/07 PM Tr. 137:6-139:17 (Cason); 10/17/07 PM Tr. at 1132:11-1134:8 (Haspel).

511. The failure to preserve and collect third-party records is so defective that it has unduly delayed – and no doubt has heightened already serious concerns about the impossibility of an adequate accounting of all funds inasmuch as third-parties have never been instructed to preserve such records – the accounting declared by this Court, and is a key reason why defendants in their reconciliation process have had to resort to unexplained alternative

procedures in the absence of directly supporting source documents. The record evidence establishes numerous "data gaps" in information essential to the historical accounting due to the loss and destruction of trust records. These include the following:

a. FTI identified significant data gaps in the information needed to complete the DCV testing. 10/15/07 PM Tr. at 705:9-24 (Herman); 10/16/07 AM Tr. at 718:9-19 (Herman). Only 7.4% of the estimated missing transactions have been identified, and some requests for documents from Lenexa have been outstanding for over a year. PX-4486; 10/22/07 AM Tr. at 1387:13-1390:4 (Duncan); 10/15/07 AM Tr. at 505:11-14 (Herman). However, no attempt was made to identify and retrieve such documents from third parties.

b. The Land-To-Dollars test has been at an impasse for four years because of the absence of lease records. "NORC Memo – Land to Dollars completeness test at Horton Agency ("Potowatomi Tribe")" (March 31, 2007), AR-435 at 38-01-01; *see also* 10/11/07 AM Tr. at 245:16-246:10 (Cason). Lease records were typically not recorded or retained, and have been characterized as being in "inconsistent states of completeness and availability." "Department of the Interior Office of Historical Trust Accounting Conference," (March 18-20, 2002), AR-056 at 04-02-243; 10/23/07 PM Tr. at 1750:18-1751:13 (Infield); 2/5/02 Contempt II Tr. at 3747:3-5 (Ridgeway). The absence of leases also has impacted the statistical sampling performed by NORC. For example, due to the absence of range and grazing leases, those types of transactions were excluded from the sampling and deferred until an alternative method of reconciliation could be developed. "Reconciliation of the High Dollar and National Sample Transactions from Land-Based IIM Accounts; Litigation Support Accounting Project Interim Report" (December 28, 2004), AR-416 at 51-09-10 n.8, 17, 26. Given that FTI and NORC are only concentrating on the post-1985 era, the probability that such documents continue to be in the custody of third parties

since the time of this Court's mandate in 1999 is diminishing. Nonetheless, no effort has been made to obtain lease records from third parties.

c. Records of trust payments have been a continual problem due, in part, to the destruction of Treasury checks and other records. PX-3340 at 1; PX-3342 at 1. NORC recommended that an effort be made to ensure that third party banks retain records necessary for the accounting, particularly small banks in Indian Country that may have retained cancelled checks for longer than the standard seven years. "Sample Design Planning Report Prepared by NORC," AR-235 at 08-02-07. However, nothing was done.

d. Finally, records from MMS are known to be inaccurate. Third party documents are essential to determine accuracy and completeness of production and revenue generated from Indian mineral and oil and gas leases. 10/24/07 AM Tr. at 1775:20-1776:14 (Gambrell). For example, the Navajo Nation looks to third party records to verify production and revenue data because of the unreliability of MMS data. *Id.* at 1775:16, 1776:19-20. Recognizing this concern, on October 17, 2002, then Solicitor William Myers advised Interior defendants to require lessees and royalty payers to produce for inspection and copying necessary records that are over six years old and still in their possession, because of the right of the lessee otherwise to destroy such records after six years under the Federal Oil and Gas Royalty Management Act, 30 U.S.C. § 1701 *et seq.* AR-447 at 22-05-08, 21. However, five years later Interior defendants still have not done so.

512. The collection of third party documents is fundamental to the establishment of accurate account balances and an accounting of all funds, particularly given the need of defendants to resort to unsound alternative procedures due to the loss and destruction of supporting source documents and due to concerns about the reliability of internally generated

documents. In fact, defendants' failure to preserve and collect third-party documents helps explain why the ASM improperly permits transactions to be reconciled based solely on defendants' internally generated documents. 10/24/07 AM Tr. at 1848:18-1849:2, 1851:17-20 (Pallais). Defendants' own testifying accounting expert agrees that collection of third-party records is important to an accurate and complete accounting where, as here, there are pervasive material weaknesses with internal accounting controls. Documents generated by that accounting system are deemed unreliable and insufficient to support an accounting, requiring that support be found in third party documents. *Id.* at 1819:25-1820:15; 1840:7-1841:2, 1855:12-22, *see also* 10/25/07 PM Tr. at 2130:12-20 (Dunne). The ASM, itself, identifies documents important to a sound reconciliation that necessarily would be in the custody of third parties – if they were instructed to preserve them (and they were not). AR-008 at 44-01-35 (checks drawn on third-party banks), AR-008 at 44-01-45,62 (Tribal resolutions) AR-008 at 44-1-65 to 44-01-120, (Tribal rolls[3]), AR-008 at 44-01-67 (oil and gas leases), AR-008 at 44-01-95 (farming and grazing leases), AR-008 at 44-01-74 (lessee oil sale and royalty reports), AR-008 at 44-1-87, (lessee mineral sale and royalty reports) and AR-008 at 44-01-102 (timber contracts). Interior defendants, and their contractors, concede that they do not have many of these documents. However, after eight years, no action has been taken by defendants to collect such essential records.

[3] Tribal rolls are particularly important to verify the identity of all qualified beneficiaries when disbursing judgment and per capita funds. On July 26, 2002, then Special Trustee Tom Slonaker criticized Interior defendants' accounting firm CD&L for not correctly identifying every beneficiary of an account when reviewing judgment and per capita payments. AR-224 at 10-11-02. CD&L conceded that the test performed on judgment funds "does not verify that every enrolled participant received payment" and tribal rolls were not being reviewed, despite the express provisions of the ASM. AR-314 at 19-07-02.

513. Accordingly, it is not possible to render an accounting to each beneficiary of all his or her funds unless all relevant third-party records have been preserved and collected. Further, it is not possible to establish accurate account balances for each member of the class unless all relevant third-records have been preserved and collected.

m. Analysis of MMS systems

514. The Minerals Management Service ("MMS") is the bureau of the Department of the Interior that manages individual Indian gas, oil and other mineral resources and collects the revenues derived therefrom. 10/10/07 PM Tr. at 132:7–133:10 (Cason). MMS maintains IIM trust information on its systems in the form of lease level information and resource production information related to individual Indian gas, oil and other mineral resources. *Id*. at 161:16–162:19. Revenues derived from the individual Indian gas, oil and other mineral resources are collected and deposited in the Department of the Treasury. *Id*. at 132:7–133:10. MMS, which does not maintain information that identifies the individual Indian lessors for a each lease, reports the amount of money received by lease to BIA and OST. 10/16/07 AM Tr. at 735:12-24 (Herman). *See also* "Fiduciary Obligations Compliance Plan" (January 6, 2003), PX-508 at 25. BIA, which maintains information that identifies the individual Indian lessors for a particular lease, reports the lease and ownership information to OST. OST then distributes the revenues derived from the individual Indian gas, oil and other mineral resources to the IIM accounts. 10/10/07 PM Tr. at 161:16–162:19 (Cason).

515. However, defendants do not verify "oil and gas sales reports received from . . . lessee[s]" by MMS "against production documents," or review for accuracy these transactions through their 2007 Plan. "Accounting Standards Manual," AR-008 at 44-01-08; *see also* 10/10/07 PM Tr. at 162:24–163:14 (Cason). The Department of the Interior does not determine

whether MMS properly reported to BIA and OST the amount of individual Indians funds collected. (10/10/07 PM Tr. at 165:22–166:2.) The sole basis for Interior defendants' refusal to perform such necessary verification is the assumption that such information is accurate based on the MMS's "periodic audit of oil and gas producers," since such audits allegedly verify "actual production against that reported." AR-008 at 44-01-08.

516. However, the MMS audit process is insufficient to establish that oil and gas production and revenue data are accurate and complete. In 2003, the Department of the Interior's Inspector General (IG) audited the audit offices of MMS to determine whether its internal quality control system provided reasonable assurance that MMS audits are performed in accordance with established policies, procedures, and Government Auditing Standards. PX-4280 at 6. The IG selected a sample of 15 audits to review. *Id*. at 11, n.1. This not only demonstrated widespread deficiencies, it disclosed that the MMS auditors themselves had engaged in fraudulent conduct. The IG determined that MMS's internal quality control system does not provide reasonable assurance that MMS audits are performed in accordance with established policies, procedures, and the Government Auditing Standards. *Id*. at 11-12. One of the transactions, for example, disclosed that the audit office was missing all relevant working papers. *Id.* at 11, n.1. "When MMS officials could not locate this audit file, instead of informing [the IG] of that fact, [MMS officials] recreated and backdated the working papers." *Id*. at 13. The recreated papers were back-dated to the time MMS had been told the work had been done rather than the date the replacement working papers were actually created. "MMS then granted a cash award, citing the 'creativity' of the auditor who reconstructed the working papers." *Id.* at 13. Of the remaining 14 audits, the IG found "numerous problems or missing documentation for audit planning, supervision, fieldwork, and/or reporting in 10 of 14 audits." *Id.* at 11.

517. Furthermore, MMS did not in the past, and does not now, conduct regular audits to ensure that MMS systems are trustworthy. 10/24/07 AM Tr. at 1780:7-10 (Gambrell). Indeed, thousands of incomplete individual Indian allotment audits were closed under orders from the Interior Department. *Id*. at 1784:18-19.

518. The information on MMS is inaccurate and has a high error rate. Interior Department's own analysis in the Tiger Team report concluded that there was no mechanism in place to verify that the funds MMS had collected from oil and gas leases are actually reported to BIA for distribution to individual Indian trust beneficiaries. PX-607 at 7-8; 10/23/07 PM Tr. at 1754:23-1755:20 (Infield). Ms. Herman, the government's witness, is familiar with the Tiger Team report's conclusion that 25-30 percent of MMS data was erroneous, but was only tasked with reconciling IRMS and TFAS data. 10/16/07 AM Tr. at 736:24-738:18 (Herman); *see* PX-607 at 34. Herman is unable to state whether information received by BIA from MMS is accurate. 10/16/07 AM Tr. at 740:23-25 (Herman). The House Committee on Government Operations, after concluding its investigation of the IIM trust, found that MMS generated reports with a 26 percent error rate, and given the inability of BIA to verify the accuracy of royalties received from MMS, it could not adequately protect beneficiaries even if it attempted to do so (and it did not). AR-058 at 6-2-23. Contrary to the assumption of Interior defendants, Arthur Andersen was unable to verify and did not verify lease and natural resource and mineral collections to actual leases and contracts. *See* PX-4210 at 24.

519. It is necessary to test the financial/realty records to system records to establish completeness and accuracy of electronic data and determine the reliability of underlying system transactions. "Testing IIM and Related Systems" (March 18, 2002), AR-059 at 06-03-04.

520. Accurate and complete MMS oil, gas, and minerals collections data are essential to an accurate and complete accounting of all funds. 10/24/07 PM Tr. at 1787:16-1788:8 (Gambrell). Accurate and complete MMS oil, gas, and minerals collections data are essential to the establishment of accurate account balances. *Id*. Yet, MMS did not conduct regular audits to ensure that IIM oil, gas, and mineral production and collections data were accurate and complete. 10/24/07 AM Tr. at 1780:16-20.

521. Further, Kevin Gambrell explained the seriousness of concerns about the accuracy and completeness of MMS data as well as BLM and BIA data when he testified that pursuant to a 1996 consent decree, Interior was forced to establish the Federal Indian Minerals Office, Department of the Interior, in Farmington, New Mexico ("FIMO"), which integrated MMS, BLM, and BIA trust management operations in a single office under Gambrell's direction. *Id*. at 1778:10-1779:16. The purpose of FIMO was to ensure the accurate and prompt payment of oil, gas, and mineral revenue generated from trust lands, principally to Navajo individual Indian trust beneficiaries. *Id.* Prior to the establishment of FIMO, Navajo beneficiaries had been both not paid and underpaid royalties, rents, and bonuses from oil and gas and mineral revenue collected from production on their trust lands. *Id*. at 1778:16-1779:16. The proof is in the results: in five years, FIMO collected seven times the underpaid royalties that MMS had collected during the previous 20 years. *Id*. at 1780:4-6. During Gambrell's tenure as director of FIMO (November 1996-January 2004), approximately $7.5 million per year was collected from individual Indian mineral and oil and gas leases and distributed to the beneficiaries. *Id*. at 1806:3-8. Contrary to the statement on page 8 of the Accounting Standards Manual (AR-8 at 44-01-08), the MMS does not conduct periodic audits of oil and gas producers. 10/24/07 AM Tr. at 1781:23-1782:4.

(Gambrell). Contrary to the statement on page 8 of the Accounting Standards Manual, MMS does not perform production verification. 10/24/04 AM Tr. at 1786:23-1788:8 (Gambrell).

522. Accurate and complete MMS production and collection data are essential to accurate distribution of oil, gas, and mineral revenue collections to individual Indian trust beneficiaries. FIMO utilized MMS data, BLM data, LRIS data, and RDRS data as corrected and completed by third party data collected by FIMO – including an industry oil and gas database purchased from PI Dwight and specific records created and maintained by lessees – to ensure the correct allocation and distribution of oil and gas revenue collected from individual Indian trust lands. *Id.* at 1794:22-1795:2.

523. The Navajo Nation independently verified production and revenue data because it did not trust what oil & gas operators had represented. *Id*. at 1776:19-20. The Navajo Nation utilized run tickets from trucking companies and gas pipeline companies to verify production reports. *Id*. at 1776:19-1777:2. The Navajo Nation has not relied on the MMS database because ownership and collection information is incomplete and inaccurate. *Id*. at 1775:20-24.

524. The MMS computer system developed by Accenture to hold and process oil, gas, and mineral production and collections data is untrustworthy and dysfunctional. *Id*. at 1799:19-1800:18, 1803:21-1804:4. As a result of the failure of the Accenture system, individual Indian trust beneficiaries did not receive their royalty payments from October 2001 until June 2002; some of these individual Indian trust accounts remain unreconciled. *Id*. at 1803:21-1804:8.

525. MMS systems and databases are unreliable. *Id*. at 1770:7-1771:15. MMS entries often make no sense. *Id*. at 1770:15-17. Collections data are not timely entered in MMS systems and are erroneous. *Id*. at 1770:21-1771:2. Stated lease rental dates and stated royalty rates are often incorrect. *Id*. at 1771:12-15.

526. "[O]il and gas revenues are more difficult to validate since they rely essentially on self reporting by the industry." "A Historical Review of Business Activity on Allotted Lands of Selected Indian Reservations: The Administration of Mineral Leases, Agricultural Leases, Timber Sales and Revenues Deposited in Individual Indian Money Accounts," AR-232 at 10-19-06.

527. The BLM system – the Automated Land Management Resource System ("ALMRS") – that housed data necessary to the accurate and complete collection, allocation, and distribution of IIM oil, gas, and mineral revenue was also dysfunctional. 10/24/07 AM Tr. at 1798:20-1799:18 (Gambrell).

528. Unitized leases – leases that collectively cover IIM Trust lands, tribal trust lands, federal government lands, state government lands, and lands held by private parties – and related unit allocation agreement data, are inaccurate. *Id*. at 1771:14-25. BLM data utilized by Interior for the allocation of revenues generated from production on unitized leases are incorrect. *Id*. at 1775:11-12.

529. Because of known inaccuracies in Interior's oil, gas, and mineral production and collection data, MMS, BLM, and BIA utilize industry data, in particular the PI Dwight database, to verify accuracy and the completeness of oil and gas production and collection data regarding on-shore and off-shore leases on government lands. *Id*. at 1796:21-1797:9. In contrast to the verification of production and revenue data regarding government lands, MMS, BLM, and BIA do not utilize the PI Dwight database to verify accuracy and the completeness of oil and gas production and collection data regarding individual Indian lands. *Id*. at 1798:9-1799:1.

530. Since MMS production and revenue data is known to be unreliable, defendants' presumption of reliability is untenable. Accordingly, an accounting rendered in accordance with

the 2007 Plan will not, and cannot, result in accounting to each beneficiary for all of his or her funds without first verifying, and where appropriate, correcting the MMS production and revenue data. Further, unless the MMS collection data is reviewed and verified, it is not possible to establish accurate account balances for each beneficiary. Finally, defendants' failure to verify the accuracy and completeness of MMS production and revenue collection data, as well as data related to the allocation of MMS collections and deposits into the Treasury, is so defective that it has unduly delayed the accounting declared by this Court.

n. Administrative fees deducted from IIM accounts

531. Interior defendants have long averred that this is a "free" trust, meaning that the beneficiaries do not pay for the trustee's services, independent of whether or not such services provide value. For example, in their "Fiduciary Obligations Compliance Plan," dated January 6, 2003, (PX-508), Interior defendants assert, without citation, that "Interior, as trustee, is mindful of the importance of recognizing the unique circumstances of all beneficiaries in the management of this trust. The trust that Interior manages is not the typical corpus managed by a private sector trustee where fees are charged as part of normal business practices for the services delivered." *Id*. at 15. To sum up, Interior writes: "The Federal Government *bears the entire cost of administering the Indian trust.*" *Id.* (emphasis added).

532. Interior's representation that this is a "free trust" and that the government "*bears the entire cost of administering the Indian trust*" is, simply put, a complete fabrication. 10/23/07 PM Tr. at 1702:10-1703:5 (McCarthy). Administrative fees are routinely charged for fiduciary services by individual Indian beneficiaries. *See, e.g.,* 10/18/07 AM Tr. at 1235:15-1236:1 (Angel); 10/11/07 AM Tr. at 231:15-21 (Cason); 10/23/07 PM Tr. at 1702:10-1703:5 (McCarthy); 10/22/07 AM Tr. at 1343:14-24 (Redthunder); 6/21/99 Trial 1 Tr. at 1246:17-24

(Erwin). Administrative fees are charged on every lease. 10/23/07 PM Tr. at 1702:19-21 (McCarthy). Sharon Redthunder, a BIA employee, testified that fees are routinely charged by the Interior defendants was routine. 10/22/07 AM Tr. at 1343:14-16 (Redthunder). There were considerable charges for a variety of administrative fees for the management of individual Indian trust assets. *Id.* at 1343:19-24. There is no accounting of these administrative fees charged to individual Indians. *Id.* at 1343:25-1344:2.

533. Fees that range as high as 10% of the value of the transaction. *Id.* at 1343:19-24; 6/23/99 Trial 1 Tr. at 1793:10-1794:16 (Erwin).

534. Fee charged are often excessive. An Interior solicitor admitted that administrative fees were routinely charged well above the maximum permitted by law at the Palm Springs Agency. Fees are often assessed in the thousands of dollars for a single transaction. For example, for a single transaction, where the government was permitted by governing law to charge only $22.50, an administrative fee of $60,000 was charged. 10/23/07 PM Tr. at 1703:6-19 (McCarthy). *See also* PX-4489 at 12-13.

535. The example of excessive fees cited by Field Solicitor McCarthy is not an anomaly. Generally, administrative fees assessed by the Interior defendants are above that which is allowed by law. 10/23/07 PM Tr. at 1729:14-1730:3 (McCarthy).

536. Nonetheless, defendants will not account for the administrative fees that they have charged a beneficiary in connection with their management and administration of the beneficiary's trust assets. 10/11/07 AM Tr. at 232:25-233:4 (Cason). An individual Indian beneficiary will not receive any statement that identifies and explains debits to the beneficiary's account attributable to administrative fees charged. *Id.*

537. Insufficient funds in a beneficiary's account to pay the administrative fees charged has adverse consequences not only to the beneficiary, but also to his or her heirs if the beneficiary is deceased and his or her estate is in probate. Specifically, if there are no funds to pay the fee, the estate is held open, *see* "Email to Jeff Zippin From Bert Edwards" (August 27, 2001) AR-190 at 56-21-02, which exacerbates the probate backlog and the inaccuracy of current ownership information.

538. Defendants' failure to provide an accounting to each beneficiary of all fees charged by defendants for the management and administration of his or her trust assets means that it is impossible to render an accounting of all funds to each beneficiary. Further, such failure will not, and cannot, result in the establishment of accurate account balances for each beneficiary. Finally, the exclusion of administrative fees from the accounting provided in the 2007 Plan is so defective that it has further unduly delayed the accounting declared by this Court on December 21, 1999.

o. Youpee escheated interests

539. Twice, the Congress of the United States has enacted laws to address the fractionation of individual Indian land interests by attempting to escheat so-called "small" interests to the tribe, which has jurisdiction over such land. Indian Land Consolidation Act ("ILCA"), 25 U.S.C. § 2206. On both occasions, the escheatment provisions did not include any compensation – let alone just compensation – as required by the Fifth Amendment to the United States Constitution. Consequently, the United States Supreme Court, first in *Irving v. Hodel*, 481 U.S. 704, 716-18 (1987), and then in *Babbitt v. Youpee*, 519 U.S. 234, 243-45 (1997), struck down the escheat provision as unconstitutional. 10/25/07 AM Tr. at 2016:24-2017:6 (Willett); *see also Cobell X,* 283 F. Supp. 2d at 182 ("[T]he Supreme Court held that [ILCA's escheatment

provision] constituted a taking without just compensation, in violation of the Fifth Amendment. *Hodel v. Irving,* 481 U.S. 704, 716-18 (1987). Although Congress amended the statute in 1984 to attempt to remedy the constitutional infirmity, the Supreme Court struck down the amended statute on the same grounds in 1997. *Babbitt v. Youpee,* 519 U.S. 234, 243-45 (1997).

540. Defendants have estimated that 775,000 beneficial interests of individual Indian trust beneficiaries escheated unconstitutionally to tribes. 10/11/07 AM Tr. at 235:17–238:8 (Cason). They currently affect 81,000 interests in over 15,000 estates. 10/25/07 AM Tr. at 2019:16-22 (Willett). These unconstitutionally escheated interests are commonly referred to as *Youpee* interests. 10/24/07 PM Tr. at 1908:25-1909:23 (Fitzgerald).

541. To complete an accounting, Interior defendants must provide an accounting of all trust funds that are proceeds from trust lands which were unconstitutionally escheated to the tribes through the ILCA. 10/24/07 PM Tr. at 1908:25-1909:23 (Fitzgerald); *see also* PX-4285 at 9. At one time, defendants estimated that to address the *Youpee* issue, it would cost $3 million and would require approximately two to three years to complete. *Cobell X*, 283 F. Supp. 2d at 182.

542. However, defendants will not provide an accounting of any *Youpee* interest and will not provide an accounting of funds generated from such escheated interests. 10/11/07 AM Tr. at 240:3-14 (Cason). No transactions related to *Youpee* interests are included in the population that will be sampled pursuant to the historical accounting. 6/24/03 Trial 1.5 PM Tr. at 85:11-13 (Lasater); *see also* 10/25/07 PM Tr. at 2169:11-13 (Hinkins).

543. Interior defendants have long conceded they have an obligation to account for and return the *Youpee* interests to their rightful owners. 7/9/99 Trial 1 Tr. at 3682:6-12 (Babbitt). In

1998, then-named defendant Kevin Gover ordered the restoration of the interests to the proper beneficiaries. 10/25/07 AM Tr. at 2019:6-9 (Willett).

544. To date, defendants have not restored escheated interests to the beneficiaries. 10/25/07 AM Tr. at 2020:17-2021:13 (Willett). After the decision in *Hodel* in 1987, BIA set about to implement a restoration. *Id*. at 2018:16-2019:3. However, after the decision in *Youpee* a "battle" raged within the Interior Department over restoration of the escheated interests. *Id*. At the conclusion of that battle, the present administration reinterpreted the Supreme Court's decision to mean that even though the escheating statute is unconstitutional, it has no retroactive application. *Id*. at 2020:17-2022:1. As a result, beneficiaries whose trust assets have not been restored continue to be deprived of their trust assets and the income derived therefrom. *Id*.

545. Importantly, one of the adverse consequences of defendants' failure to obey the *Youpee* mandate is that land ownership and title information is inaccurate. *Id*. at 2019:23-2020:16. Specifically, to the extent that ownership data had been "cleaned up" pursuant to the data cleanup subproject, it would remain inaccurate until the *Youpee* interests have been resolved. 2/5/02 Contempt II Tr. at 3790:10-24 (Ridgeway).

546. It has been ten years since the Supreme Court's decision in *Youpee*, yet Interior defendants have excluded from the 2007 Plan an accounting of the *Youpee* interests and all revenue derived therefrom. Accordingly, defendants' failure to provide an accounting to each beneficiary for ownership interests in escheated trust assets and all income earned therefrom means that defendants will not account for funds to each beneficiary. Further, such failure means that defendants will not establish accurate account balances for each beneficiary. Finally, the exclusion from the 2007 Plan of *Youpee* interests and all revenue derived therefrom is so defective that it has unduly delayed the accounting declared by this Court.

p. Outside The Temporal Scope

1. Transactions and Accounts Prior to 1938

Defendants' and Plaintiffs' Experts Are In Accord That the Duty to Account Extends Back to the Inception of the Trust

547. Defendants will not render an historical accounting for accounts or transactions prior to June 24, 1938. "2007 Plan Part I," AR-565 at 33-02-03.

548. The temporal scope of a historical accounting extends back to the last accounting that was rendered or "back to the date when the trustee had responsibility for the trust property." 10/24/07 PM Tr. at 1904:11-1905:5 (Fitzgerald).

549. This conforms to the opinion of defendants' experts, Deloitte & Touche, the independent certified accounting firm that had been tasked with preparing an analysis and report on the temporal scope of defendants' accounting duty:

> Based on the Court's ruling and the explicit language set forth in §4011 of the Trust Fund Management Reform Act of 1994, it is difficult to recommend any date for the beginning of the temporal reconciliation period other than that of the initial deposit into the account.

"Department of the Interior Office of Historical Trust Accounting, Accounting Conference" (March 18-20, 2002), AR-56 at 4-02-331. In addition, Deloitte & Touche explained, "the only viable option from a legal and legislative standpoint is that the historical accounting commence with the date of the initial allotment." AR-56 at 4-02-335; *see also* 10/23/07 AM Tr. at 1575:9-1576:15 (Homan) (reiterating recommendations of Deloitte & Touche); *see generally* AR-56 at 4-02-161 (statement from Morgan Angel that "[i]f OHTA attempts a historical accounting stretching back to the earliest days of IIM, then, it should be noted that legislation, regulations and accounting procedures were in place by the second decade of the twentieth century."); 6/16/03 Trial 1.5 PM Tr. at 70:24-72:6 (Angel) (by the close of the decade ending in 1920, the

BIA had IIM regulations, a bookkeeping and accounting system, and a "clear policy regarding the purpose of individual Indian funds").

550. Deloitte & Touche was also asked to weigh the pros and cons of various starting dates, including 1887, 1921, 1938, and 1951. AR-56 at 4-02-332. With respect to the 1938 starting date, Deloitte & Touche opined that there is a "[l]ack of records to produce [a] complete historical accounting." *Id.* If the accounting goes back to 1887, Deloitte & Touche opined that the "document trail will *undoubtedly* have *extensive* holes." *Id.* (emphasis added).

551. While Deloitte & Touche knew well that an historical accounting prior to 1938 would be difficult as a result of the "extensive holes" in the "document trail," it still recommended that Interior extend its accounting plan back to the inception of the trust. Deloitte & Touche's advice was disregarded in the 2007 Plan. 10/23/07 AM Tr. at 1576:2-15 (Homan).

552. Defendants have long "exercised complete control over individual Indian Trust assets and the revenue generated therefrom." PX-4285 at 6. Such complete control is directly manifested in the statutes enacted by the United States Congress that expressly confer on the Interior Department authority to collect, hold, disburse, manage, and sell trust revenues and assets. Plaintiffs have attached to the Conclusions of Law an appendix of relevant statutes. A few exemplars are provided below:

a. Act of Mar. 11, 1904, ch. 505, 33 Stat. 65 (1904) ("That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas . . . through any lands which have been allotted in severalty to any individual Indian under any law or treaty . . . upon the terms and conditions herein expressed. . . . The compensation to be paid

. . . the individual allottees for such right of way through their lands shall be determined in such a manner as the Secretary of the Interior may direct, and shall be subject to his final approval.");

b. Act of Apr. 26, 1906, ch. 1876, 34 Stat. 145 (1906) ("That after approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes shall be in writing and subject to the approval of the Secretary of the Interior and shall be absolutely void and of no effect without such approval.");

c. 34 Stat. 146 (1906) ("That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any . . . lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this act: *Provided,* That the purchase from and agreements with individual Indians, where the right of

alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.").

553. Regulations were repeatedly promulgated and revised by the Department of the Interior which implement the aforementioned statutes and set standards for defendants' management of IIM Trust lands and the revenue generated therefrom.

a. Regulations of the Indian Office, Apr. 1, 1904, § 301 ("Moneys coming into the hands of agents for rents, leases, and sales of property belonging to individual Indians will be designated as "Individual Indian moneys." They are not to be covered into the United States Treasury, but accounted for as other funds, and paid upon proper vouchers, directly to the Indians to whom they belong.");

b. Regulations Concerning the Handling of Individual Indian Money, 1913, § 44 ("For purposes of accounting, individual Indian moneys are subdivided, according to derivation, into 'Royalties,' 'Rentals,' 'Land and timber sales,' 'Pupil's moneys,' 'Miscellaneous,' and 'Interest on bank accounts,' which latter must be reported directly on the abstract of bank accounts []; for each of these classes, except the last, there is a separate voucher which is to be submitted with the account current whenever transactions occur or balances remain.");

c. As early as 1897, Indian Agents were responsible for collecting, holding, and disbursing such funds. "Report of the Secretary of the Interior" (undated), PX-4330 at 2. Defendants' own expert historian, Dr. Ed Angel, admitted that the Interior Department exercised comprehensive control of the individual

Indian trust funds since the late 1800's. 10/18/07 PM Tr. at 1276:17-21 (Angel). This is confirmed by a Morgan Angel Report prepared for defendants. "The Historical Development of Individual Indian Moneys: Policies and Problems" (Jan. 10, 2000), PX-4476 at 12. A separate Morgan Angel Report opined that "[b]y 1918 Individual Indian Moneys were firmly established in law and public policy." AR-56 at 4-02-161.

554. HRA, another of the government's expert historians, confirmed the nature and scope of the comprehensive control exercised by defendants over individual Indian trust assets and funds prior to 1938. "A Historical Review of Business Activity on Allotted Lands of Selected Indian Reservations: the Administration of Mineral Leases, Agricultural Leases, Timber Sales and Revenues Deposited in Individual Indian Money Accounts, Introductory Report" (Sept. 30, 2001), AR-232 at 10-19-01 to -27.

a. "In order to manage the money generated by leases and timber sales, the OIA [Office of Indian Affairs] instituted Individual Indian Money (IIM) accounts during the period 1904 to 1908." AR-232 at 10-19-17.

b. "Indian agents or superintendents *always* had the responsibility of managing the revenues from leases, sales and other sources for Indians, usually through informal accounting systems and local banks." *Id.* (emphasis added).

c. "[B]y 1908, the OIA had begun to develop regulations and formulate procedures to account for the receipt of lease or timber payments and the disbursal of the money to individual Indians." *Id.*

d. "By the 1920s, it had standardized IIM ledger sheets for tracking receipts from leases and timber sales." *Id.*

e. "The first leases sanctioned by the government occurred soon after an 1891 amendment to the Dawes Act (22 Stat. 43) that authorized the leasing of allotments in certain cases." AR-232 at 10-19-18.

f. "By the end of the 1890s, more and more non-Indian settlers sought farming and grazing leases on allotments from their local Indian agents, who administered the leases in an ad-hoc manner." *Id.*

g. "Although Indian Office regulations defined 'Individual Indian Money' as early as 1904, research indicates that the government did not issue a standardized IIM ledger form that was used until 1918. Prior to this date, … agencies used 'cashbooks' or other available ledger forms to record the receipt and disbursement of lease moneys in IIM accounts." AR-232 at 10-19-24. In addition, HRA discussed examples of substantial production during this period when Interior defendants had already established comprehensive control of individual Indian funds and other assets. For example, HRA reports: "Timber contracting on allotted Indian lands began at the turn of the 20th century on several Indian reservations in the Midwest[,] …. the height of pine-timber cutting on the Leech Lake and Fond du Lac Reservations occurred during the 1900s and the 1910s." AR-232 at 10-19-20.

h. As early as "the 1880s, Indian agents in Wisconsin administered large numbers of contracts covering logging operations on individual Indian allotments, and in the following decade Indian agents in Minnesota handled timber contracts for extensive logging operations on ceded Chippewa lands." "The USDA Forest Service and Timber Sales on Allotted Indian Lands"

(attachment to letter from Ted Catton to Crucita Grover)(October 30, 2002), AR-362 at 60-21-06. The Act of June 25, 1910 provided "general authority for cutting timber on Indian tribal and allotted lands." AR-362 at 60-21-05. There were regulations in place as early as 1893. AR-362 at 60-21-17.

The Purpose of the 1938 Act

555. There is nothing in the record that suggests the 1938 Act created the duty to account. Dr. Angel confirmed that the purpose of the 1938 Act was to protect individual Indian Trust beneficiaries and provide assurance that if the funds were deposited in commercial banks such funds would be deposited in interest bearing accounts. 10/18/07 PM Tr. at 1278:15-1279:1 (Angel). The 1938 Act also provides for investment in Treasury securities.

Defendants' Admissions Regarding the Temporal Scope of the Historical Accounting Prior to 1938

556. Interior defendants' admitted as much in their July 2, 2002 accounting plan, which does not exclude transactions prior to 1938. At least as of May 1, 2002, the Secretary of the Interior had expressly recognized that that the historical accounting must extend back to the date of each original allotment. *See, e.g.,* "Ninth Report to the Court" (May 1, 2002), AR-553 at 24-22-04. *See also* "Secretarial Issues Document Version 8.1" (June 6, 2002), AR-227 at 10-14-11.

Defendants' Mismanagement of Individual Indian Trust Assets Prior to 1938

557. Defendants' mismanagement of the Individual Indian Trust may actually have been worse prior to 1938 than it is today. In 1915, one Congressional Report addressing the government's mishandling of Indian trust assets summarized its findings as follows:

> What is of special interest in this inquiry is to note the conditions under which the Indian Office has been required to conduct its business. In no other relation are the agents of the Government under conditions more

> adverse to efficient administration. The influences which make for infidelity to trusteeship, for subversion of properties and funds, for violation of physical and moral welfare have been powerful. The opportunities and inducements to peculation [sic] are much greater than those which have operated with ruinous effect on other branches of public service and on the trustees and officers of our great private corporations. In many instances the integrity of these has been broken down.
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> * * *
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> *In the first place the machinery of the Government has not been adapted to the purpose of administering a trust*. In the second place there has been little sympathy or favorable opinion to demand that an effective business machine be developed. *In fact the public opinion which has dominated the Government has been either hostile or passively indulgent of abuse*. This is one side of the picture. On the other side, behind the sham protection which operated largely as a blind to publicity, *have been at all times great wealth in the form of Indian funds to be subverted; valuable lands, mines, oil fields, and other natural resources to be despoiled or appropriated to the use of the trader*; and large profits to be made by those dealing with trustees who were animated by motives of gain. This has been the situation in which the Indian Service has been for more than a century – *the Indian during all this time having his rights and properties to greater or less extent neglected; the guardian, the Government, in many instances, passive to conditions which have contributed to his undoing*.
>
> * * *
>
> And still, due to the increasing value of his remaining estate, there is left an inducement to *fraud, corruption, and institutional incompetence almost beyond the possibility of comprehension*. The properties and funds of the Indians to-day are estimated at not less than one thousand millions of dollars. … *The Government itself owes many millions of dollars for Indian moneys which it has converted to its own use, and it is of interest to note that it does not know and the officers do not know what is the present condition of the Indian funds in their keeping*. Every community bordering on Indian lands still has in it persons who are using every influence at their command to obtain official action to the end that they may get possession of Indian lands. Great corporations maintain lobbyists and unprincipled agents with a view of getting concessions, leases, and legislation which are favorable to their own selfish purposes, but unfavorable to the Indian.

"Report to the Joint Commission of the Congress of the United States," (1915), PX-681 at 3-4.

558. HRA cited numerous examples of mismanagement, fraud, corruption, and malfeasance in the period prior to 1938. AR-362 at 60-21-07, -15 to -16; *see also* AR-362 at 60-

21-16 n.28 (citing Investigation of the Department of the Interior and of the Bureau of Forestry, Doc. 719, 1911, Vol. 7, p. 3760).

559. Edward Angel, defendants' other expert historian, confirmed that numerous reports from the first three decades of the twentieth century identified major inadequacies of the individual Indian trust management system and that, indeed, "IIM systems and accounting systems were not working well at this time." 5/27/03 Trial 1.5 Tr. at 21:3-22:8 (Angel).

2. Accounts Closed Prior to October 1994

Scope of the Plaintiff Class

560. On February 4, 1997, this Court certified this class to include "present and former beneficiaries" of the IIM trust. Class Certification Order, (February 4, 1997), [Dkt No. 27 at 2-3]. All class members are present or former beneficiaries of the IIM trust, irrespective of whether they have an "IIM account."

Defendants' Pre-1994 Scope Limitation

561. Defendants will not render an accounting and will not provide a historical statement of account to a beneficiary if that beneficiary's IIM account was not open on October 25, 1994. 10/10/07 AM Tr. at 90:14–91:1 (Cason). Pursuant to the 2007 Plan, the Interior defendants will only provide a historical statement of account to a beneficiary with respect to transactions purportedly reconciled if that beneficiary had an IIM account open on October 25, 1994, *Id.*, or had an IIM account opened after October 25, 1994 but before December 31, 2000, *Id.* at 182:20-23 (Cason).

562. The temporal exclusion is inconsistent with Interior defendants' conclusion in their 2002 Plan, which specifically contemplated providing an accounting for former IIM beneficiaries:

> …[C]losed IIM accounts will be reconciled. The accounts in Phase 3 include former IIM accounts closed due to inactivity, former IIM account holders who received a distribution of proceeds during their lifetime from a closed judgment or per capita account, and deceased account holders whose IIM accounts and allotment interests were the subject of probates.

AR-561 at 25-02-30.

563. "The only way to determine accurate trust balances for each present and former beneficiary is to account for all funds from the inception of the trust." PX-4285 at 8.

564. To render an accounting of all funds and to establish accurate account balances for each member of the class, defendants must provide an accounting of all funds held in accounts closed prior to October 25, 1994. PX-4285 at 6; *see also* 10/24/07 PM Tr. at 1898:25-1899:13 (Fitzgerald). "[T]he government's responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties or agreements." PX-4285 at 6 (brackets in original); *see also* PX-4285 at 9, Ex. 4 (Krulitz Letter).

565. "The 2007 Plan's failure to provide for a complete and accurate accounting of the nature and amount of the trust property to *each* beneficiary is … in direct conflict with the Secretary's accounting duty as trustee-delegate." PX-4285 at 6.

3. Temporal Limitations Not Derived as a Result of Cost Considerations

Mr. Cason Is the Decision-Maker For the 2007 Plan Appointed By the Secretary

566. Defendants did not temporally limit the mandated historical accounting because of cost. 10/10/07 AM Tr. at 92:3-9 (Cason). This is reflected in briefing papers prepared by the Office of the Solicitor and the Department of Justice, which were provided to the Secretary:

> This provision, if applied to the historical accounting, could eliminate the need to account for funds that were never deposited or invested pursuant to the 1938 Act – i.e., much of the funds received prior to 1938 . . . . This is a pure legal issue that would be appropriate for the Secretary to resolve and whose resolution could then be used to limit the scope of the accounting that must be described in the January 6 [2003] Plan.

"Unresolved Legal Issues Whose Outcome Could Affect The Scope of the Historical Accounting That Must Be Described In the January 6 Accounting Plan," undated, AR-485 at 61-11-02.

567. Defendants cannot make any estimates about the size, scope, or amount and number of transactions and accounts subject to the pre-1938 limitation, the pre-1994 limitation and the post 2000 limitation; defendants do not know the number of accounts or the number of transactions in either the electronic or paper ledger era. 10/25/07 PM Tr. at 2170:3-22; 2171:16-25 (Hinkins); DX-4 at 8, 10-13; *see also "*White Papers Related to Defining the January 6 Historical Accounting Plan" (November 25, 2002), AR-569 at 30-04-06 (demonstrating that defendants are unable to estimate a cost to do pre-1938 accounts and transactions).

568. Defendants' decision to exclude transactions and accounts prior to June 24, 1938 and October 25, 1994, respectively, is based solely on legal advice provided by the Department of Justice and the Solicitor's Office. Accordingly, the exclusion of transactions and accounts open prior to October 25, 1994, including without limitation all such accounts and transactions prior to June 24, 1938, necessarily means that defendants will not, and cannot, render an accounting to each beneficiary of all his or her funds. Further, the exclusion of such funds means that the accounting will not, and cannot, establish accurate account balances for each member of the plaintiff class. Finally, the exclusion of such funds is so defective that it has further unduly delayed the accounting declared by this Court.

4. Transactions and Accounts After 2000

Defendants Will Not Render an Accounting For Transactions and Accounts After December, 31, 2000

569. Defendants are limiting their historical accounting to transactions and accounts that are open on or after October 25, 1994 through December 31, 2000. 2007 Plan Part I, AR-565 at 33-02-06. The record is silent as to why defendants selected the December 31, 2000 date as the closing date for their historical accounting activities; defendants do not purport to have rendered accountings (however that term is defined) after December 31, 2000. No accountings have been submitted to this Court for review and consideration after December 31, 2000.

570. Accordingly, the exclusion of transactions and accounts open after December 31, 2000 necessarily means that defendants will not, and cannot, render an accounting to each beneficiary of all funds. Further, the exclusion necessarily means that defendants will not, and cannot, establish accurate account balances for each beneficiary. Finally, the exclusion of all funds post December 31, 2000 is so defective that it has unduly delayed the accounting declared by this Court on December 21, 1999.

q. Funds Defendants Have Failed To Collect

571. The 2007 Plan will not account for funds owed to individual Indian trust beneficiaries that Interior defendants have failed to collect n accordance with the terms of lessees, various contracts, royalty agreements, easements, and rights-of-way.

572. A trustee "[a]bsolutely" must account for funds owed but for which a trustee has failed to collect. 10/24/07 PM Tr. 1908:5-8 (Fitzgerald).

573. Defendants admit that they have a fiduciary obligation to collect all proceeds generated from the sale or lease of trust lands and other trust assets belonging to individual Indian trust beneficiaries: "Interior must collect the correct fund amounts in a timely manner for the correct IIM account holders." PX-508 at 6. Furthermore, "[o]nce the funds are collected,

Interior must deposit them in the correct IIM account, properly credit interest earned to the account, and disburse from the account the correct amounts to the correct persons." *Id.*

574. BIA has no accounts receivable system. *Id.* at 34. Accordingly, BIA offices have "no automated capability to track effective dates and termination dates of leases or permits, send invoices for payments due, project the amount of money coming in, or monitor payment compliance." *Id.* As the sole expert on both general trust practices and Interior's trust practices Mr. Fitzgerald testified: "[T]here is no general record of the things owed to the accounts." BIA offices "may not send bills for payments due." 10/24/07 PM Tr. at 1908; PX-508 at 6.

575. The failure to have an accounts receivable system consistently has been authorized by external auditors. The inability of Interior defendants to track monies owed back to leasing agreements has been identified repeatedly as a serious deficiency. 10/23/07 AM Tr. at 1545:9-25, 1546:3-1547:17 (Homan); *see* AR-343 at 60-2-34. Without an accounting system that tracks payments back to leases, the sufficiency of the payment amount is indeterminable, and an auditor is unable to verify the accuracy of the payment amount posted. 10/23/07 AM Tr. at 1547:2-17 (Homan). Because relatively few leases even exist, it will be impossible to ever determine the accuracy of any collections related to those missing leases. 10/23/07 AM Tr. at 1546:22-1547:1 (Homan). The problems in not having in place an accounts receivables system are staggering. An Interior Department Field Solicitor testified that collections was based on essentially an "honor" system. 10/23/07 AM Tr. at 1698:22-1699:19(McCarthy) If a lessee does not pay, Interior defendants will not enforce the lease terms and collect the unpaid lease obligation. 10/23/07 PM Tr. at 1706:5-1707:4; PX-4497 at 6; PX-4499. Furthermore, there is no verification of accuracy of the payment. PX-4497 at 6; PX-4499. BIA depends entirely on the lessee to report how much money is owed, any increases due to cost of living, and the

amount of income generated. 10/23/07 PM Tr. at 1699:20-1700:3 (McCarthy). BIA has no proactive method of invoicing payments even when the payments are in default. 10/23/07 PM Tr. at 1700:3-6 (McCarthy).

576. As a result, a substantial amount of trust income has gone uncollected, and may be uncollectible. 10/23/07 PM Tr. at 1695:17-1696:4 (McCarthy); PX-4494 at 2.

577. One particular concern involves payments that are based on the percentage of profits derived from a business lease. Interior defendants rely entirely on the lessee to report its profits, as the basis of this calculation. 10/23/07 PM Tr. at 1699:20-1700:3 (McCarthy). Interior defendants do not play any role in monitoring the payments, auditing the revenues, or comparing the amounts paid to the amounts called for by the lease. 10/23/07 PM Tr. at 1700:23-25 (McCarthy). Interior does not prudently manage the revenue system. 10/23/07 PM Tr. at 1707:6-9; PX-4499.

578. The need for an accounting of monies owed, but not collected, is manifest in light of these deficiencies, especially the lack of a receivables system for all times material to this trial. In light of the absence of a "general record of the things owed to the accounts," and Interior defendants' reliance on an honor system for determining the accuracy and collection of payments, an accounting of funds owed is critical. 10/24/07 PM Tr. at 1908: 9-24 (Fitzgerald). This is information the beneficiary needs to protect his or her interests.

IV. COST OF PERFORMING THE HISTORICAL ACCOUNTING.

579. From the record of these proceedings and as noted with clarity in the Administrative Record, missing records and other serious problems associated with defendants' failure to manage the Individual Indian Trust prudently are the reasons why it is now extremely

difficult to provide a reliable estimate on the cost of the historical accounting declared by this Court on December 21, 1999.

> Due to the significant number and scope of assumptions inherent in estimating the work associated with these tests, it is difficult to estimate the expected costs with any certainty or precision. For example, the cost for the "Completeness of Data" tests will vary significantly based on the amount of pre-electronic era records that are to be recovered and data entered, on the number of transactions that are identified during the periods for which data is missing, *etc*. Further, the cost of the "Interest Earnings and Balances" test will vary significantly depending on the number of accounts in which the interest posted does not match the recalculated amounts, and thus require individualized research, and the number of points in time at which we compare the fund level balances.
>
> These types of issues are the primary factors in determining the ultimate costs of these tests, and yet they can be estimated only with extreme uncertainty and to a very broad range of possible values. As such, any estimate of costs may not even be accurate to within an order of magnitude.

AR-178 at 56-09-04.

580. While the estimated cost of performing the mandated historical accounting may be unreliable, it is certainly high. However, the extreme difficulties and costs associated with the accounting are solely attributable to the defendants' long-standing failure to discharge trust duties the government owes to the plaintiff class.

581. The creation and preservation of trust records is critical to the discharge of fiduciary duties. 10/24/07 PM Tr. at 1889:17-1890:6 (Fitzgerald); *see also* PX-4285 at 21-23. Indeed, it has been confirmed by the Court of Appeals as a subsidiary duty of the declared duty to account. *Cobell VI*, 240 F.3d 1081, 1105 (D.C. Cir. 2001). However, in breach of the fiduciary duty to account, the Interior defendants never maintained and stored individual Indian records in a manner that would facilitate a comprehensive accounting. 10/11/07 AM Tr. at 250:8-21 (Cason). Indeed, to the extent necessary source documents still exist, it can take over a year to retrieve from Lenexa (AIRR) a single document that supports a single transaction posted

to IRMS or TFAS. 10/15/07 AM Tr. at 505:11-14 (Herman). Defendants' failure to establish an adequate records management system throughout the existence of the 120 year old trust is the reason why the cost of the accounting is so high. 10/11/07 AM Tr. at 250:8-21 (Cason); *see also supra* Part I.a.

582. Under these circumstances, there is no rational basis for relieving defendants of their duty to render an adequate accounting to each member of the class. Nor is there any rational basis that would justify a Court imposed limit on the nature and scope of the government's accounting duty or shift the responsibility and burden of the government's accounting duty to plaintiff-beneficiaries who have been, and continue to be, harmed as a consequence of defendants' failure to maintain trust records and otherwise manage the trust in accordance with the government's fiduciary duties. *See, e.g., supra* Parts I.a, I.d (discussing Interior defendants opposition to plaintiffs' May 18, 2007, RFP wherein defendants stated it could cost $30 million to search for, collect, and produce some trust records for fewer than forty (40) members of a class that consists of at least 500,000 beneficiaries. [Dkt. No. 3340 at 16-18.]).

583. Contrary to representations made in the 2003 Fiduciary Obligations Compliance Plan (PX-508), the government historically has charged, and continues to charge, fees for its administration of the Individual Indian Trust. *See, e.g.,* 10/23/07 PM Tr. at 1701:18-1702:19 (McCarthy); *see supra* Part III.n (discussing the nature and scope of fees charged by the defendants). Interior defendants are expressly authorized to charge administrative fees for the management of the Individual Indian Trust. 6/21/99 Trial 1 Tr. at 1246:17-24 (Erwin); *see generally* 25 U.S.C. § 413; *see also* 10/11/07 AM Tr. at 231:15-232:24 (Cason).

584. Whether or not trustees may unilaterally limit trust duties they otherwise owe to beneficiaries because the beneficiaries are not paying the trustee to manage the trust, here, defendants regularly charge and are paid administrative fees. 10/23/07 PM Tr. at 1702:19-21 (McCarthy). Moreover, it is evident that administrative fees assessed by the Interior defendants have grossly exceeded legal limits. *Id.* at 1702:22-1703:5, 1729:16. For example, the Interior defendants assessed an administrative fee in the amount of $60,000, when the maximum fee permitted is $22.50. *Id.* at 1703:6-19; *accord* PX-4489. Thus, while Individual Indian Trust beneficiaries have been paying substantial administrative fees to the Interior defendants for the management of the IIM Trust (sometimes in excess of the legal limits), Interior defendants have done little or nothing to maintain the beneficiaries' trust records in accordance with the government's fiduciary duties.

585. Finally, as noted by Plaintiffs' testifying accounting expert, Don Pallais, accounting duties may not be excused or extinguished simply because of expense.

> SAS No. 31 recognizes the economic limits of evidence-gathering. It discusses cost/benefit tradeoffs of evidence-gathering activities as follows:
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> > An auditor typically works within economic limits; the auditor's opinion, to be economically useful, must be formed within a reasonable length of time and at reasonable cost. The auditor must decide, again exercising professional judgment, whether the evidential matter available to him or her within the limits of time and cost is sufficient to justify expression of an opinion.
> >
> > As a guiding rule, there should be a rational relationship between the cost of obtaining evidence and the usefulness of the information obtained. The matter of difficulty and expense involved in testing a particular item is not in itself a valid basis for omitting the test. AU 326.23, 24
>
> Thus, it recognizes limitations due to cost considerations, but does not allow the omission of a necessary procedure merely because it is costly.

PX-4283 at 12-13.

a. Cost of historical accounting work completed so far

586. To date, Interior defendants represent that they have expended approximately $271,000,000 on their historical accounting projects. "2007 Plan," AR-565 at 33-02-03.

587. In FY 2006, Interior defendants paid $23,839,704.72 to the three accounting firms that are performing reconciliations and account analyses: $16,533,357.34 to Chavarria Dunne & Lamey LLC; $6,520,867.50 to Deloitte & Touche LLP; and $785,479.88 to Reznick Group, P.C. *See* "Government Spending: FY2006 Year End Review Office of Historical Trust Accounting" (November 29, 2006), AR-175 at 56-06-06. Yet, when defendants' reconciliation work is complete, no accountant will provide an opinion, conclusion, or reasonable assurance that a particular beneficiary's account balance is accurate. *See* 10/24/07 AM Tr. at 1827:22-1828:8 (Pallais); *accord* 10/25/07 PM Tr. at 2132:24-2133:3 (Dunne).

588. Interior defendants also contracted with FTI Consulting to perform system tests. AR-565 at 33-02-07. FTI Consulting bills approximately 50,000 hours/year on the historical accounting project. 10/11/07 PM Tr. at 465:12-15 (Herman). In FY 2006 alone, Interior defendants paid FTI Consulting $6,090,000. AR-175 at 56-06-06. Nevertheless, the DCV that is the product of FTI's study will not result in, or provide to any beneficiary, an opinion, conclusion, or reasonable assurance about the accuracy of his or her account information, including account balances. 10/16/07 AM Tr. at 805:7-19 (Herman).

589. According to Dr. Hinkins, since 2001, NORC's contract continues for the next two years, with Interior paying NORC approximately $1.2 million per year in fees. 10/25/07 PM Tr. at 2159:18-2160:6 (Hinkins). However, it seems that Dr. Hinkins was modest in her recollection of the fees paid to NORC by defendants. According to documents in the Administrative Record, the Interior defendants, in fact, had paid NORC more than three times

the amount Dr. Hinkins testified to - $3,944,804.91 in FY 2006. AR-175 at 56-06-06. But, notwithstanding the substantial fees it has received, NORC has not even been asked to design a statistical accounting plan that would provide a beneficiary with an opinion, conclusion, or assurance that his or her account balances are accurate. *See* 10/25/07 PM Tr. at 2161:11-23; 2163:3-16; 2164:15-17; 2167:10-16 (Hinkins); 10/17/07 PM Tr. at 1063:12-20; 10/17/07 AM Tr. at 1031:25-1032:8 (Scheuren); 10/10/07 PM Tr. at 112:9–113:6 (Cason); *see also* DX-4 at 36.

590. Thus, in FY 2006 alone, Interior defendants spent $33,874,509.63 on no less than five firms to perform accounting and statistical design and analysis, yet upon completion of the 2007 Plan none of them will provide an opinion, conclusion or assurance to a single trust beneficiary that his or her account balances are accurate.

591. Interior defendants also paid $6,464,490.34 to Ecompex in FY 2006. AR-175 at 56-06-06. Ecompex is the contractor tasked with organizing and searching the AIRR at Lenexa.

592. Previously, the Interior defendants paid another contractor, DataCom, approximately $25,000,000 for a data cleanup project. 2/5/02 Contempt II Tr. at 3762:3-6 (Ridgeway). That project was never completed. *See supra* Part I.c.

b. Anticipated cost of completing 2007 HSA Plan

593. Assuming that the Interior defendants complete the 2007 Plan at a cost of $144,000,000, no beneficiary will be provided assurances from an independent accounting firm that his or her trust balances are accurate. 10/25/07 PM Tr. at 2142:7-17 (Hinkins). Plaintiffs' statistical expert, Dwight Duncan, confirmed that, as designed, defendants' plan cannot result in a determination of accurate account balances. 10/22/07 AM Tr. at 1358:10-14, 1359:13-17, 1374:20-1375:2; 10/22/07 PM Tr. 1407:7-13, 1445:5-21 (Duncan). As the Interior defendants have admitted, they must verify the opening balance of an individual Indian's IIM account in

order to report accurately the final account balance of that individual Indian's IIM account. 10/10/07 PM Tr. at 113:1-3 (Cason). Dr. Lasater confirmed that opening balances must be verified in order to establish accurate account balances. 10/17/07 PM Tr. at 1106:13-1107:21 (Lasater). Without verification of the accuracy of opening account balances, defendants cannot provide to any beneficiary reasonable assurance that his or her account balance is accurate. And, as noted, NORC's sampling design will not support any statement about the accuracy of a beneficiary's account balance. 10/10/07 PM 112:9-113:6 (Cason); *see also* DX-4 at 36. Nor will any accountant render any such opinion or assurance. 10/24/07 AM Tr. at 1827:22-1828:8 (Pallais); 10/25/07 PM Tr. at 2132:24-2133:3 (Dunne).

c. Other cost estimates for performing the accounting.

594. During the hearing, Interior defendants' witness, Abe Haspel, provided an estimate of costs associated with an accounting that applies the same methodology and limitations employed in the 2007 Plan, but assumes that defendants do not prevail on their temporal limitations (*e.g.,* land-based accounts open on or after October 25, 1994 through December 31, 2000), and probate limitations (*e.g.,* accounts of predecessors-in-interest will not receive a HSA). Defendants' new cost estimates are calculated with two different starting dates: June 25, 1938 (the date of enactment of the Act of 1938), and 1909 (the earliest discovered aggregate IIM Trust fund balance). Defendants estimate that a reconciliation of each land-based account that was open *from 1938* through 2006 will cost between *$2.304 and $2.586 billion*. And, defendants estimate that a reconciliation *from 1909* through 2006 will cost between *$2.797 and $3.220 billion*. 10/17/07 PM Tr. at 1125:5-11 (Haspel); DX-98_COR at 2; DX-99_COR at 1. Simply put, an accounting back to 1938 will increase the cost of the historical accounting by

roughly a factor of 18 ($2.586 billion / $144 million). An accounting back to 1909 will increase the cost by roughly a factor of over 22 ($3.220 billion / $144 million).

595. Prior to the recent estimates provided by defendants, their best estimate of the cost of a full historical accounting in accordance with the February 23, 2005, Structural Injunction had been $12,958,729,632. *See* DX-100 at 1.

596. Mr. Homan testified, based on his experience with, and knowledge of, the accounting challenges, that the government's original cost estimate of $2.5 billion to restate IIM Trust Fund financials and complete the historical accounting is not unreasonable. *See* PX-4210 at 6, n. 4.

597. However, the Interior defendants admit that cost was not the reason they established temporal limitations on the declared accounting duty; they did so solely based on defense counsel's interpretation of the law. 10/10/07 AM Tr. at 92:3-9 (Cason).

d. Congressional appropriations for HSA work.

598. Congress has appropriated approximately $239 million for the HSA work. *See* DX-102. Below is the breakdown of appropriations on a yearly basis:

FY 2001[4] - $800,000;
FY 2002 - $8,500,000;
FY 2003 - $15,896,000;
FY 2004 - $44,446,000;
FY 2005 - $57,194,000;
FY 2006 - $56,353,000; and
FY 2007[5] (Projected) - $56,384,000

Id.

[4] Since the Office of Historical Trust Accounting (OHTA) was created by Secretarial Order in July 2001, it had no official budget request or appropriation in FY 2001 and no official budget request in FY 2002. Funds used during those time periods had been included in the budget for the Office of the Special Trustee for American Indians since budget requests are made two years in advance.

[5] Awaiting congressional action.

599. Interior defendants' historically have had enormous difficulty prudently discharging their trust duties, even with adequate funding. *See* 6/16/03 Trial 1.5 PM Tr. at 63:6-24 (Angel); *see also* PX-4475 at 38-39 (discussing that the lack of appropriations is not the source of the breaches of trust).

600. Although Congress has limited the funding of the historical accounting to the amounts above, the Chairman of the House Committee on Resources – the committee in charge of appropriating money for Interior defendants' historical accounting efforts – has recognized that whatever approach Interior defendants have selected, it "should be sufficient to ensure beneficiaries of the trust that they can rely on their account balances." AR-184 at 56-15-01.

601. Accordingly, based on the record evidence of this proceeding, defendants' cost estimates are unreliable and do not provide an accurate estimate on the cost of the accounting declared by this Court, an accounting that requires defendants to provide each present and former beneficiary an accounting of all his or her funds and that requires defendants to establish accurate account balances for each member of the class.

602. Further, that whatever the cost is to discharge the accounting duty declared by this Court, defendants must bear that burden because they alone are responsible for the difficulties and costs that were foreseeable as a consequence of long-term mismanagement of the Individual Indian Trust.

603. Further, whatever the cost of defendants' reconciliation project, it is no benefit to the beneficiaries where, as here, it will not result in an accounting to each beneficiary of all his or her funds and will not result in the establishment of accurate account balances.

604. Further, the continued expenditure of enormous sums of money to contractors is unreasonable where, as here, the reconciliation project will not result in an accounting to each

beneficiary all his or her trust funds and will not result in the establishment of accurate account balances.

605. Further, the continued expenditure of funds in support of a reconciliation project that will not, and cannot, result in an accounting of all trust funds and will not result in the establishment of accurate account balances is so defective that it will further unduly delay the discharge of defendants' declared accounting duty.

606. Further, the continued expenditure of funds in support of a reconciliation project that cannot, and will not, result in an accounting to each beneficiary of all his or her funds and cannot, and will not, result in the establishment of accurate account balances provides no legitimate benefit to defendants where, as here, the accounting duties declared by this Court will not be discharged.

V. THROUGHPUT.

607. The Interior defendants disregard trust funds collected and deposited in the Treasury and agent banks and include only receipts posted to IIM accounts in their throughput calculations. 10/10/07 PM Tr. at 154:14-156:14; 164:15-19 (Cason).

608. Interior defendants do not explain why they exclude from their throughput calculations trust funds collected and deposited in the Treasury and agent banks. This is particularly glaring given their admission that "[d]eposits made into Treasury may not have been credited to the IIM accounts." "Background on Issues for Discussion," AR-86 at 54-27-04; *see also* 10/22/07 AM Tr. at 1371:23-1372:20 (Duncan).

609. Prior to 1992 – for more than 100 years – neither Interior nor Treasury reconciled IIM collections and deposits placed in the Treasury and agent banks, and Interior defendants

provide no assurance that all such deposits have been posted to Individual Indian Trust accounts. AR-361 at 60-20-05.

610. Funds collected from the sale or lease of IIM Trust lands and their natural resources routinely are deposited in SDAs before they are transferred to IIM accounts. 10/15/07 AM Tr. at 560:14-23 (Herman); 10/16/07 AM Tr. at 742:2-16; 750:13-15 (Herman). Throughout the history of the IIM Trust, beneficiaries' funds have remained in SDAs for years and were not disbursed to the beneficiaries. For example, in FY 1997 alone $151,000,000 was held in 27,000 SDAs in the IIM subsidiary ledger. *See* "Audit Report – Financial Statements for Fiscal Year 1997 for the Office of the Special Trustee for American Indians Tribal and other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (March 1999), AR-377 at 60-36-72. Therefore, to state fairly the throughput for the IIM Trust, all trust funds held in SDAs must be included in throughput calculations. However, the Interior defendants will not verify that IIM Trust funds posted to SDAs are included in their throughput estimates. 10/16/07 AM Tr. at 750:5-9; 751:22–752:2 (Herman); *see supra* Part III.f (acknowledging that trust funds remain undistributed in SDAs and have been withheld from the plaintiff class). Thus, IIM funds held in SDAs are excluded from defendants' throughput calculations.

a. Total amount of money collected by the government on behalf of IIM Beneficiaries.

611. Defendants' throughput estimate of $14.3 billion in nominal dollars is a conservative calculation of funds collected from the sale and lease of IIM Trust lands from 1909 through 2005. 10/23/07 PM Tr. at 1654:14-1655:15, 1677:8-20–1678:1 (Fasold); *see also* PX-4501; AR-171 at 56-2-4 to -6.

612. Defendants and plaintiffs agree that more than $13 billion in nominal dollars have been collected from 1909 through 2002. *See* 10/23/07 PM Tr. at 1651:8-1652:6 (Fasold); *accord* 10/10/07 PM Tr. at 217:10-17 (Cason).

613. Defendants have not estimated the amount of IIM Trust funds collected from 1887 to 1909. 10/16/07 PM Tr. at 841:2-6 (Herman). This is because they were unable to find collection data and aggregate year-end balances prior to 1909, not because IIM Trust funds were not being collected during that period. 10/18/07 PM Tr. at 1278:3-14 (Angel). Defendants' admit that income from the sale and lease of allotted land, timber, and subsurface rights had been collected continuously prior to 1909 – in fact, with respect to timber sales since the 1850's – but transaction records no longer exist. *Id.* at 1277:16-1278:14; *see also* "Email from Michelle Herman to Bert Edwards, et. al re: Comments on the Accounting Plan" (July 1, 2002), AR-105 at 55-06-01; "Letter from Ted Catton, Associate Historian, to Crucita Grover, OHTA" and attached report re: the absence of timber sales records (OHTA) (October 30, 2002), AR-362 at 60-21-06, 15-19, 24; "A Historical Review of Business Activity on Allotted Lands of Selected Indian Reservations: the Administration of Mineral Leases, Agricultural Leases, Timber Sales and Revenues Deposited in Individual Money Accounts, Introductory Report", (September 30, 2001), AR-232 at 10-19-17, 18, 20-21.

614. Further, defendants' throughput estimates do not include trust revenue paid directly by lessees to beneficiaries pursuant to direct pay contracts negotiated by and between the Interior defendants and the lessees. 10/10/07 PM Tr. at 217:20-24 (Cason). Nor are IIM trust revenues that are collected and disbursed by tribes (of which defendants admit there are at least two) as agent of the government pursuant to contract, compact, or cooperative agreement included in defendants' throughput estimates. *Id.* at 125:1-13.

615. Interior defendants estimate that receipts posted to IIM Trust accounts constitute approximately 77% of trust funds collected. DX-365 at 1; *accord* 10/23/07 PM Tr. at 1665:3-18 (Fasold). Thus, of the estimated $14.3 billion in nominal dollars collected between 1909 and 2005, only $10.1 billion (through 2006) was posted to IIM accounts; more than $4 billion in nominal dollars is currently withheld from plaintiffs' accounts and remains in the general Treasury. 10/23/07 PM Tr. at 1654:14-1655:15, 1677:8-20 (Fasold); *see* DX-365 at 1; *see also* PX-4501; AR-171 at 56-02-04 through 06.

616. Admittedly, defendants' throughput estimate is a "rough one." AR-430 at 52-06-03. As NORC candidly has acknowledged, there are "evident weaknesses" in defendants' original $13 billion estimate. *Id.* In fact, receipt and disbursement data from 1887 to 1971 have either vanished or have been disregarded in their entirety by defendants. 10/18/07 AM Tr. at 1222:6 – 1223:10 (Angel). Instead, defendants use *year-end balances* from 1909 through 1971 to estimate *throughput* for that period because they assume that year-end balances "roughly" equal posted receipts. 10/18/07 AM Tr. 1170:3-9, 1222:6-1223:10 (Angel); "A Statistical Estimate of Receipts Credited to IIM Trust Funds" (July 30, 2002), AR-368 at 60-27-02.

617. Thus, Interior defendants' throughput estimate is speculation. *See* 10/16/07 PM Tr. at 836:1-25 (Herman); *accord* 10/18/07 AM Tr. at 1222:6-1223:10 (Angel). A year-end balance and total posted receipts for a given year cannot be the same unless no funds were disbursed and no interest was earned on the funds held by the government. *See* 10/18/07 AM Tr. at 1222:6-1223:10; 1229:4-14 (Angel); *accord* 10/23/07 PM Tr. at 1658:7-14 (Fasold). For example, defendants estimate that throughput for 1968 was $66.3 million because that was the year-end balance discovered by defendants' historian. *See* AR-368 at 60-27-05; *accord* DX-94 at 4; DX-72 at 4; 10/18/07 AM Tr. at 1164:5-12 (Angel). However, a 1969 BIA internal audit of

IIM accounts (the only internal audit that reported on the Individual Indian Trust as a whole) found that "[c]ash receipts are running at the rate of $121 million per year." "Audit of Individual Indian Money Accounts" (March 1969); PX-4513 at NORCMAP_00003472. This means that the posted receipts (not collections) as audited are nearly twice the amount of the aggregate year-end balance. Accordingly, by ignoring collections, defendants' assumption that year-end balances equal posted receipts is unsound and materially understates throughput.

618. Interior defendants have not verified the accuracy of the year-end balances that they have relied upon for their throughput estimate. And, defendants' contractors do not vouch for the accuracy of such balances. *See* 10/18/07 PM Tr. at 1257:15-1259:13 (Angel); 10/15/07 PM Tr. at 661:2-20 (Herman).

619. Interior defendants' reliance on year-end balances as a proxy for posted receipts is improper for another equally important reason – pervasive problems that have plagued IIM system for decades preclude independent auditors from providing any assurance to anyone that trust fund balances are accurate or that they are fairly stated:

- "[I]t is not possible to determine whether cash and Trust Fund balances . . . are fairly stated." "Audit Report – Financial Statements for the Fiscal Year 1996 for the Office of the Special Trustee for American Indians Tribal, Individual Indian Monies, and Other Special Trust Funds Managed by the Office of Trust Funds Management" (January 1998), AR-378 at 60-37-29.

- OTFM IIM trust fund balances are unreliable. *See* "Audit Report – Statement of Assets and Trust Fund Balances at September 30, 1995, of the Trust Funds Managed by the Office of Trust Funds Management, Bureau of Indian Affairs" (December 1976), AR-379 at 60-38-22.

- "Griffin and Associates issued a qualified opinion because cash and overnight investments could not be independently verified, cash balances were materially greater than those reported by the U.S. Treasury, [and] major deficiencies in accounting systems controls and records caused the systems to be unreliable … . These conditions prevented the cash and trust funds balances and the receipts and disbursements from being audited." "Audit Report – Financial Statements for Fiscal Year 1996 for the Office of the Special Trustee for American Indians Tribal, Individual Indian Monies, and Other Special Trust

Funds Managed by the Office of Trust Funds Management"(January 1998), PX-4513 at NORCMAP_00000385-386.

- "Griffin and Associates issued qualified opinions because cash balances were materially greater than those reported by the U.S. Treasury, [and] major deficiencies in the accounting systems' controls and records caused the systems to be unreliable …. . These conditions prevented the cash and Trust Funds balances and the receipts and disbursements from being audited." "Audit Report – Independent Auditors Report on the Financial Statements for Fiscal Years 2000 and 1999 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management"(June 2001), PX-4513 at NORCMAP_00000705.

- "Arthur Andersen could not confirm cash balances and trust balances because of inadequacies in accounting records and related systems, and because of the existence of accounting errors." "Audits of Individual Indian Monies: 1940 to 1990," AR-597 at 32-17-82 (internal quotation omitted).

- Like Arthur Anderson and Griffin, KPMG reported that it was impracticable to extend auditing procedures sufficiently to satisfy its auditors as to the fairness of trust fund balances due to inadequacies in trust-related systems and processes. *See* "Independent Auditors' Report of the Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Financial Statements for Fiscal Years 2006 and 2005 Managed by the Office of the Special Trustee for American Indians" (December 2006), AR-343 at 60-02-02 to -03.

- "[I]t was not practicable to extend our auditing procedures sufficiently to satisfy ourselves a*s* to the fairness of trust fund balances in the accompanying financial statements as of September 30, 2001 due to inadequacies in certain Department of the Interior trust related accounting systems." "Audit Report – Independent Auditors' Report on the Office of Special Trustee for American Indians Tribal and Other Trust Funds and Individual Indian Monies Trust Funds Financial Statements for Fiscal Years 2001 and 2000 Managed by the Office of Trust Funds Management" (April 2002), AR-369 at 60-28-28.

- Interior defendants have concurred in their auditors' findings regarding discrepancies in balances at the trust fund level. "Indian Trust Funds – Individual Indian Accounts" (July 25, 2002), AR-603 at 63-05-07.

b. Total amount of money distributed to IIM beneficiaries.

620. Retained trust counsel has advised the Interior defendants that it is their burden to prove that trust funds have been disbursed in the correct amount to the correct beneficiary where, as here, the disbursements have been challenged by the beneficiaries:

> If a trustee fails to keep proper records of his trust it is usually stated that, "all presumptions are against him." Bogert at § 962. The trustee has the burden of showing on the accounting how much principal and income he received and from whom, how much disbursed and to whom, and what is on hand at the time. Bogert at § 962. If the trustee claims he has received less than the beneficiaries allege he received and has no written records to back his claim due to his own faulty system of keeping accounts, the court will be strongly inclined to charge him with the sum he is alleged to have received. Bogert at § 962. If the trustee "claims that he made payments to creditors or beneficiaries, these disbursements are disputed, and the trustee has no written evidence to substantiate his position due to a faulty record system, the court will tend to disallow the item." Bogert at § 962.

AR-616 at 64-06-03. Interior defendants' trust counsel explained that the general presumption that payments properly mailed have been received by a beneficiary does not apply where, as here, the loss or destruction of trust records, including checks, was intentional. *Id.* at 64-06-07. Nonetheless, the Interior defendants have proffered no evidence regarding disbursements in support of their throughput calculations.

621. Interior defendants do not quantify the disbursements for the period 1909 to 1971 inclusive. *See* AR-171 at 56-02-04. During that same period, the defendants provided information that discloses approximately $3.2 billion in posted credits to IIM accounts. *See* PX-4501; AR-171 at 56-02-04; *accord* 10/23/07 PM Tr. at 1667:3-22.

622. Further, Interior defendants have provided no evidence that the collected funds have been disbursed to the beneficiaries. None exists. Prior audits confirm that Interior defendants have not disbursed to the beneficiaries all receipts posted, let alone the collected funds. Of the 811 responses to requests for information in the 1989 and 1990 audits, 360 beneficiaries responded that they did not receive payments listed on their account statements. Fifty-seven did not even know of the existence of the accounts they were asked to confirm. One hundred nineteen did not receive their semi-annual IIM statements. In fact, of the 811, only 32 confirmed that their statements were accurate. AR-597 at 32-17-83. Similarly, the Office of the

Inspector General (OIG) audited IIM accounts administered by five BIA agencies for the three years ending September 30, 1983, and concluded that a significant number of disbursements from those accounts were not supported by proper documentation. *See* PX-1747 at 7. The OIG investigated 1,410 disbursements posted to IIM ledger cards and by mail requested that beneficiaries confirm receipt of the selected disbursements. Of the 851 responses, beneficiaries confirmed that they did not receive 103 disbursements totaling $327,952. *Id.* at 50 (The invalid disbursements average $3,184 per transaction.).

623. At least prior to 1985, Interior defendants had no system that could monitor and ensure the proper payment of oil and gas royalty income to IIM beneficiaries. *See generally* PX-561. In 1985, the Committee on Government Operations issued a report entitled "Indian Oil and Gas Royalty Payments: Problems Persist." *Id.* A principal finding of the Committee was that the problems discovered were not new or unique and that they had persisted for at least the past two decades. Those problems included defendants' failure to develop a royalty collection and distribution system that could ensure correct payments to the allottees. *Id.* at 12, 17.

624. Defendants understand their duty to verify the accuracy and completeness of interest earnings and disbursements. "NORC Design Report on Sampling and Economic Applications – Comprehensive Historical Accounting Plan For Individual Indian Money Accounts" (November 25, 2001), AR-372 at 60-31-09. However, they admit that "[u]nfortunately, there is no practical way of going back and making corrections for the past errors." PX-4513 at NORCMAP_00003475; *see supra* Part II.I.

625. Regarding per capita and judgment accounts, Interior defendants failed to verify the accuracy and completeness of per capita payments. *See* "Memorandum from Tom Slonaker, Special Trustee, to Bert Edwards, re Historical Accounting for 1,903 IIM Judgment Accounts"

(July 26, 2002), AR-224 at 10-11-01. Interior defendants could neither verify the accuracy and completeness of the roll of recipients entitled to per capita payments, nor verify that judgment funds distributed per capita were distributed to the beneficiaries in the correct amount. *Id.* at 10-11-01 to 10-11-02. Further, per capita payments were made in differing amounts to various members of the tribes, but the Interior defendants have provided no explanation for these variances. Finally, Interior defendants were unable to verify that each beneficiary who should have been paid, in fact, had been paid. *Id.*; *see also* "Data Completeness Validation – Interim Status Report" (June 12, 2007), AR-342 at 34-01-24 (noting that specific check numbers for per capita disbursements to Arapahoe and Shoshone beneficiaries are missing).

626. Instead of producing source documents that directly support a disbursement transaction, under the 2007 Plan, defendants assume that a debit transaction that corresponds to a valid check number is a proper disbursement. *See* "Drawing the Debit Sample for Alaska" (December 10, 2003), AR-385 at 46-03-25. Defendants assume that an invalid check number is an electronic payment. *Id.* In addition, the data completeness validation/account reconciliation project is not designed to verify the accuracy of disbursements - *i.e.,* that disbursements were made to the correct beneficiary or that they were made in the correct amount. 10/15/07 PM Tr. at 673:3-19 (Herman).

627. Moreover, the CP&R database that the Interior defendants say confirms the accuracy of Interior data regarding the negotiation of Treasury checks, in fact, is the same data that Interior has provided to Treasury. Treasury does not verify the accuracy of Interior's information before the information is input into the CP&R database. Treasury simply reports to Interior the same information that Interior provided to it in a new format - the CP&R database. 10/11/07 PM Tr. at 418:21-420:25 (Ramirez). Indeed, when NORC sampled debits from the

Alaska region, only 8 out of 45 checks with CP&R data appeared to have been negotiated. AR-387 at 47-01-04. In comparing the CP&R to actual checks, no comparison could be done prior to 1991 as these checks were destroyed by the government. AR-382 at 45-02-02. Therefore, CP&R data do not validate the accuracy of the disbursements.

628. Interior defendants may not assume that disbursements were made to the correct beneficiaries in the correct amount for several reasons: all checks issued prior to 1990 and their copies have been destroyed; critical disbursement documents are missing and contain errors; documentation regarding automatic disbursements from IIM accounts is missing, making it impossible to verify the validity of such disbursement transactions; and reference codes are erroneous. *See* Motions Hearing, 11/24/98 Tr. at 171:14-172:4 (Locks); "NORC Sample Design Planning Series – Part IV: Alaska Region Disbursement Prototype Sample – Design and Findings" (September 2003), AR-387 at 47-01-04; "Audit Report – Independent Auditors Report on the Financial Statements for Fiscal Years 1998 and 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (May 2000), AR-376 at 60-35-34 (critical disbursement documents are missing and contain errors); "Audit Report –Financial Statements for Fiscal Year 1997 for the Office of the Special Trustee for American Indians Tribal and Other Special Trust Funds and Individual Indian Monies Trust Funds Managed by the Office of Trust Funds Management" (March 1999), *see* AR-377 at 60-36-83 (documentation regarding automatic disbursements from IIM accounts is missing, making it impossible to verify the validity of such disbursement transactions). Indeed, defendants admit a significant risk of error exists in assuming that disbursements were made properly. "Managing Historical Accounting Records," AR-168 at 57-30-06, n.3.

629. Generally, auto-disbursements cannot be verified because check numbers for "auto-disbursement checks" are not recorded in the TFAS and are missing entirely if the disbursement results in a zero balance in the account. AR-342 at 34-01-24.

630. IIM Trust funds were not allocated and disbursed because documentation did not exist to identify the correct beneficiaries. *See* AR-377 at 60-36-76.

631. In accordance with stipulations filed by defendants on the eve of Trial 1.0, the Treasury defendant prepared a "Study of Check Negotiation Practices for the Office of Trust Funds Management-Issued Chec*ks*. *See Cobell V*, 91 F. Supp. 2d at 23. These stipulations were filed with the Court on June 1, 2000 [Dkt. No. 510] and were entered into the trial record of these proceedings as DX-242. This study reports that $177,481,567.93 was distributed to IIM beneficiaries by way of Treasury checks between September 1, 1998 and August 31, 1999. DX-242 at 3, 16; *see also* 10/16/07 PM Tr. at 884:5-885:6 (Winter). For the period October 1, 1998 through September 30, 1999, defendants report that $175,544,960.19 was disbursed via Treasury check. DX-238 at 1. The disbursement totals, confirmed by an independent auditor ($177,481,567.93), are substantially less than the total disbursements endorsed by defendants ($336,637,000.00). AR-375 at 60-34-40; *see also* 10/16/07 PM Tr. at 886:9-14 (Winter). Nonetheless, defendants disregarded the audited disbursement totals and, instead, used the $336.6 million disbursement amount for fiscal year 1999 in its throughput estimate. AR-171 at 56-02-04. Now, for the first time, defendants assert that the audited disbursement totals are "erroneous." 10/16/07 PM Tr. at 902:13-16 (Winter).

632. The difference between the two disbursement totals for FY 1999 is $161,092,039.81 [$336,637,000.00 less $175,544,960.19]. Defendants claim, with no support, that almost 50 percent [$161,092,039.81 divided by $336,637,000.00] of the disbursements in

FY 1999 were *not* via Treasury check. 10/16/07 PM Tr. at 887:14-889:19 (Winter); *see also* DX-238 at 1. Of that total, defendants admit almost $135 million of funds that had been designated as IIM funds were transferred to other accounts that hold funds of the Government, not accounts that were established to hold the funds of IIM trust beneficiaries. *Id.*:

IPAC	$897,841.96
BB Transfers	$73,493,269.88
Debit Memos	$619,189.22
Cancel Checks	($364,462.89)
Transfer Adjustment	$5,526,382.12
Intrafund Transfers	$54,475,369.00
	$134,647,589.29

See also 10/16/07 PM Tr. at 887:14-889:19 (Winter) (explaining various transfers). Defendants have not performed a similar analysis for any period prior to 1999 because prior period transfers can not be substantiated:

> Winter. I can't substantiate with firm numbers.
> Kresse. You can't quantify it, right?
> Winter. Right.

10/16/07 PM Tr. at 895:14-16 (Winter). *See also id.* at 895:5-8.

633. Defendants have failed to explain adequately the $161 million difference in FY 1999 in funds stated by the independent auditors and funds disbursed by checks issued to beneficiaries. The disbursement reconciliation process between Interior and Treasury did not control and account for the disbursement of trust funds for periods prior to and including FY 1999.

634. Throughput estimates that exclude trust funds collected and deposited in the Treasury and agent banks are inadequate inasmuch as they materially understate the throughput of the IIM Trust.

635. Interior defendants have prepared several charts that illustrate their throughput estimates. *See, e.g.,* DX-365; AR-171 at 56-02-04. However, their estimates are inconsistent. In DX-365, defendants estimate that $5.525 billion has been credited to IIM accounts for the period 1909 to 1984, inclusive. DX-365 at 1. In AR-171, however, defendants estimate the posted credits for that same period as $6.597 billion, $1.072 billion higher than the aggregate estimate reflected in DX-365. *See* AR-171 at 56-02-04 (total of "Other Receipts" for the period 1909 to 1984, inclusive). Similarly, defendants' aggregate estimates for the period 1985 to 2000 are inconsistent. *Compare* DX-365 at 1 ($3.434 billion) *with* AR-171 ($3.617 billion). Accordingly, defendants' throughput estimates are inconsistent and unreliable.

636. Further, defendants' use of estimated balances as a proxy for receipts or collections is unsound and that it materially understates the throughput of the IIM Trust.

637. Further, defendants' throughput estimates are speculative because they are incomplete and unsupported.

638. Further, at least $4 billion in trust revenue has been collected, but not disbursed to the plaintiff class or transferred to an IIM account.

639. Further, that defendants systemically have destroyed the negotiated checks that are necessary to verify the accuracy of disbursements to the plaintiff class.

640. Further, defendants have proffered no evidence that funds were disbursed to beneficiaries via electronic funds transfer.

641. Further, defendants' failure to verify the accuracy of account balances for each beneficiary is so defective that the accounting has been unduly delayed.

642. Further, defendants' failure to verify the accuracy of collections for each beneficiary is so defective that the accounting has been unduly delayed.

643. Further, defendants' failure to verify the accuracy of posted receipts for each beneficiary is so defective that the accounting has been unduly delayed.

644. Further, defendants' failure to verify the accuracy of disbursements to each beneficiary is so defective that the accounting has been unduly delayed.

645. Further, defendants' failure to validate the propriety of funds transferred from the IIM Trust to accounts that hold government funds is so defective that the accounting has been unduly delayed.

646. Further, more than $13 billion in nominal dollars has been posted to the IIM Trust from 1909 to 2002 and that the parties concur in that amount for the stated period.

647. Further, throughput estimates that exclude collections prior to 1909 are incomplete and inadequate.

648. Further, throughput estimates that exclude funds held in SDAs are incomplete and inadequate.

649. Further, throughput estimates that exclude funds collected and disbursed by tribes pursuant to contract, compact and cooperative agreement are incomplete and inadequate.

650. Further, throughput estimates that exclude trust funds paid to beneficiaries pursuant to direct pay contracts negotiated by the government and lessees are incomplete and inadequate.

Respectfully submitted this 30th day of November, 2007.

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November 30, 2007

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Findings of Fact and Conclusions of Law was served on the following via facsimile, pursuant to agreement, on this day, November 30, 2007.

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