

July 9, 2007

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
ELOUISE PEPION COBELL, .
ET AL . DOCKET NUMBER: CV 96-1285

.
Plaintiff, .

.
vs. . Washington, D.C.

. July 9, 2007

KEFIN GOVER, .
Assistant Secretary of .
the Interior, et al . 3:00 p.m.

.
Defendant. .

.
TRANSCRIPT OF PREHEARING CONFERENCE
BEFORE THE HONORABLE JAMES ROBERTSON
A UNITED STATES DISTRICT JUDGE

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

2 THE COURTROOM DEPUTY: This is civil action
3 number 96-1285, Elouise Pepion Cobell, et al versus Kevin
4 Gover.

5 Would counsel please identify themselves for the
6 record.

7 MR. WARSHAWSKY: Good afternoon, Your Honor. John
8 Warshawsky for the defendant.

9 MR. SMITH: Your Honor, David Smith for the
10 plaintiff.

11 THE COURT: Good.

12 Let's see, this I think is the third progressive
13 prehearing conference since I announced that we were going
14 to have a trial in October. I must say that the ticket
15 price for a conference to sit around talking about
16 procedural details must be awfully cheap to have this many
17 people come out to listen to this.

18 But just to review the bidding, the last time
19 that we were here we had a discussion of the exclusions from
20 the Department of Interior's 2007 accounting plan, and
21 talked about cadastral surveys, direct pay transactions,
22 compacted contracted tribal agreements, monies that were
23 never collected in escheatment, and accounts of deceased
24 beneficiaries, accounts closed before 1994 and
25 transactions after 2000 and transactions before 1938, and it

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1 wound up, at least in my mind, conceiving of this October 10
2 trial, which is still frankly something of a work in
3 progress.

4 As the trial addressed to these questions, just
5 what is it that the Department of Interior is including in
6 this plan? What would it cost to do what the Department is
7 not doing?

8 Taking costs into consideration as the Court of
9 Appeals has instructed that we must, is what the Department
10 is doing adequate? And what I call the bottom line question
11 about throughput, what can the Department account for versus
12 what is -- what has been -- I don't have a better word for
13 throughput -- revenues, receipts.

14 And so I sent the parties off to talk about who
15 would testify and about what. Parties were to meet and
16 confer. Parties have met and conferred, and I think mostly
17 disagreed.

18 There are some areas of agreement. Let me
19 enumerate them, and then when the lawyers get up to talk
20 they can tell me if I missed anything.

21 They have agreed that the plaintiffs may have
22 until August 6 to identify deficiencies in the
23 administrative record. We are talking, I think, about
24 documentary deficiencies and omissions from the
25 administrative record that the government has filed on, I

1 think, last Friday.

2 Then they could not agree on how long the
3 plaintiffs would have to respond to the objections. The
4 plaintiffs say -- I mean how long the defendants have to
5 respond to the objections.

6 The plaintiffs say give them seven days. The
7 defendant says, we want 14. So I have made my first
8 Solomonic decision that the number is Eleven. Eleven for
9 those of you who know the Federal Rules know that it is a
10 magic number. Eleven means not twelve or thirteen or
11 weekends, it means eleven days.

12 The parties agree that they will give one another
13 three day notices, a kind of rolling notice of witnesses who
14 will be called. The parties agree to file pretrial
15 statements by September 17. Motions in limine by September
16 21, and that there will be another pretrial conference, a
17 final pretrial conference on September 28.

18 The parties agree that as to expert witnesses Rule
19 26(a)(2) will be in effect, and they are to exchange Rule
20 25(a)(2) disclosures for their expert witness together with
21 data, documents or other information considered by the
22 expert now.

23 That last provision is a little unusual. I mean
24 if there are experts who have considered all of the
25 documents in the Commerce Department or all of the

1 accounting treatises on record, they certainly do not have
2 to produce that kind of information. But if there is
3 specific reports or documents that are relevant to their
4 testimony, then they have to be produced along with the
5 26(a)(2) disclosures.

6 Now there are some pretty fundamental
7 disagreements between the parties. The defendant wants the
8 plaintiff to identify what its challenges are to the 2007
9 plan in advance of the trial, and the plaintiffs say, wait a
10 minute, that is what this trial is all about. That is what
11 we are going to find out at the trial.

12 In any event, the plan is too general just to file
13 objections to the 2000 plan in advance. We will talk about
14 that, or I hope that we will talk about that this afternoon,
15 but my instinctive response to it is that the plaintiffs
16 have the better of that argument.

17 I mean I hasten to say that I don't have a
18 perfect image of how this trial is going to go, but I had
19 thought that it would begin with the plaintiffs -- excuse
20 me with the Department laying out what its plan is and
21 putting on the witnesses who will explain it and defend --
22 or at least defend what they know is going to be attacked.
23 Remember I said the last time we were here that if
24 the plaintiffs did not want to -- I keep calling you
25 plaintiffs. If the government did not want to do that, the

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1 alternative way to do it would be just to let the
2 plaintiffs subpoena the witnesses that they want to put on
3 the stand and let the treat them all as adverse witnesses,
4 and I think that the government's response to that was on
5 no, no.

6 We do not want to do that. We will bring the
7 witnesses. We will put them on live. We want to tell our
8 story.

9 Well, that is what I will expect you to do. I
10 mean you can certainly anticipate what some or many of the
11 challenges to this plan will be. But to require the
12 plaintiffs to identify all of their challenges before trial
13 puts the plaintiffs -- would put them, I think, at a
14 particular disadvantage.

15 Everybody should remember that we are talking
16 about a bench trial. This is not a trial in which if a word
17 is spoken amiss that it will go into the jury's mind forever
18 and cannot be forgotten.

19 I mean I don't know why judges are supposed to be
20 able to sort these things out better than juries, but we
21 are. By act of Congress we are better at that than juries,
22 so you can -- and so there is going to be some -- both sides
23 are going to be feeling their way a little bit during this
24 trial.

25 And it is not written in stone that the trial has

1 to begin on October 10 and continue day after day until it
2 is completed. It may very well be that we will try it for a
3 while and come to a point where we decide everybody has got
4 to go back and regroup for a while and come back and try it
5 some more.

6 So at any rate, that is my take on the suggestion
7 that the plaintiffs identify all of their challenges to the
8 plan in advance.

9 Now there are a lot more -- well, I think the
10 other most important dispute that is revealed by the papers
11 that have been filed before me concerns discovery.
12 Plaintiff wants discovery of documents, certain documents on
13 costs on what I have called the throughput question.
14 Plaintiff wants requests for admissions. They want 30(b)(6)
15 deponents.

16 And my response -- my take on that is no. Not
17 because this is an APA case, although that would be reason
18 enough, but because everybody in this courtroom knows more
19 about this case than I do, and you have been at it for
20 years, and years, and years, and the plaintiffs have copious
21 information, and they are going to have witnesses on the
22 stand.

23 They can ask questions, and I could see situations
24 in which a government witness says X, and the lawyer says,
25 we don't have any documents to establish X. Where are they?

1 And someone is sent out to get them.

2 That is one of the advantages of having a bench
3 trial. Everybody is going to be feeling their way a little
4 bit I think.

5 So my reaction to the document discovery, and the
6 request for admissions, and 30(b)(6) depositions is -- I
7 don't think there is enough time for that, and it does not
8 accord with my notion of what this trial is going to be
9 anyway.

10 The plaintiff wanted the administrative record
11 provided in TIF or PDF searchable form. I don't know if
12 that was done or not. That certainly would be useful for
13 everybody if it were possible.

14 I understand that there are technical issues with
15 making documents searchable. Documents that are born
16 electronically can be searchable, those that are not it is
17 much more problematic. I would be interested in hearing
18 about that.

19 The plaintiffs want what we call in this
20 jurisdiction de bene esse depositions, depositions of people
21 who can not come and testify. I am not quite sure who they
22 have in mind, but I think it is also a little late in the
23 day for that.

24 Now as I have done all along, what I have given
25 you are reactions and not necessarily rulings, and I will be

1 happy to hear from counsel either about what I have said or
2 about anything else that is on your mind today.

3 Mr. Warshawsky.

4 MR. WARSHAWSKY: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. WARSHAWSKY: Your Honor, at the outset I do
7 have to say that I think the areas that you have summarized
8 on agreement I think for the most part we would concur with.
9 There are a number that I would want to clarify. But let me
10 be quite clear at the outset.

11 First of all it is our intention to see this
12 matter proceed on October 10. So there is no desire to
13 forestall that. And we certainly do plan to proceed -- the
14 government to proceed initially presenting its case-in-
15 chief, presenting the plan and describing the elements that
16 you have referred to.

17 So we think that as you have described your vision
18 of the trial, that is consistent with our plan for
19 proceeding with our case-in-chief.

20 I have to say actually having worked on this case
21 for five and a half years that in some respects the parties'
22 reports to the court reflected a lot more agreement than
23 historically I might have anticipated.

24 We did have agreement about the date for filing
25 the administrative record, and indeed that did take place

1 last Friday.

2 There was agreement about Rule 26(a)(2) governing
3 expert reports. There is some disagreement between the
4 parties as to what types of individuals constitute experts
5 under Rule 26(a)(2), and I would like to have the
6 opportunity to address that.

7 The plaintiffs agreed to September 17 for pretrial
8 statements if ordered by the court. Obviously we --

9 THE COURT: If what?

10 MR. WARSHAWSKY: If ordered by the court. And I
11 understand -- and I won't speak for the plaintiff. I'm not
12 sure whether they have relaxed that condition.

13 Obviously we think pretrial statements are
14 necessary for disclosure in advance of the trial, and we
15 would hope that the court would, indeed, order that
16 pretrial statements be filed no later than September 17,
17 which is eleven days prior to the pretrial conference,
18 which the parties again agreed should take place on
19 September 28.

20 The parties did have agreement with respect to the
21 admissibility of previously admitted exhibits and testimony
22 in the phase 1.5 hearing, the one conducted in 2003. The
23 parties do not agree as to the admissibility of testimony
24 and exhibits for matters other than the phase 1.5 hearing,
25 and again I will address that as well.

1 THE COURT: Okay.

2 MR. WARSHAWSKY: In essence, Your Honor -- well,
3 if you wish, Your Honor, I could get to that right now.

4 THE COURT: In any order you choose, Mr.
5 Warshawsky.

6 MR. WARSHAWSKY: We agreed on the rolling three-
7 day notice. The parties also agreed that if the court
8 desires to conduct a visit to Lenexa, Kansas to see the
9 American Indians Records Repository that some procedure
10 needs to be established ahead of time, and that goes without
11 saying.

12 I would like at the outset to address the issue
13 that you raised, Your Honor, about the identification of
14 issues. The defendants have requested that the court order
15 the plaintiffs to identify all challenges to the plan by
16 August 6.

17 We do that principally as a matter enabling the
18 parties to plan, to preserve judicial resources and to avoid
19 surprise.

20 As I think everyone in the courtroom is aware, we
21 are working on a compressed timeframe. It seems to the
22 government that any kind of advance disclosure is good
23 disclosure, and that is why we would request respectfully
24 that the court require the plaintiffs to notify us prior to
25 the hearing as to any other challenges.

1 Obviously we understand what most of the
2 challenges are based on. For example, our discussion with
3 the court last time. But in the event that there are
4 additional challenges it would be, I would submit, helpful
5 for orderly process for the court to require that disclosure
6 in advance.

7 The government -- in our proposed order and
8 report, we recognize that there are going to likely be
9 trial exhibits that have not been in -- that are not part
10 of the administrative record, and we proposed August 31 as
11 the date for the parties to exchange any other trial
12 exhibits.

13 For example, Your Honor referred to the throughput
14 issues. It is very possible that there will be some
15 throughput exhibits that are not within the administrative
16 record.

17 Similarly, to the extent plaintiffs have requested
18 the right to -- as I understand the report -- to effectively
19 supplement the administrative record. That is really not a
20 function of a non-government party to supplement the
21 administrative record, but I understand -- or understood
22 that they did want to provide some kind of supplementation
23 to the documents already in.

24 Again, we would respectfully ask that the court
25 establish August 31 as the date for that.

1 As I indicated, the parties did agree with respect
2 to the phase 1.5 hearing, the phase 1.5 hearing was
3 effectively, among other things, a review of the Interior's
4 2003 plan to perform the historical accounting.

5 In many respects there are analogies that can be
6 drawn between the substance of what was reviewed in 2003 and
7 what will be reviewed this fall. For that reason the
8 parties concurred that the exhibits and testimony from phase
9 1.5 should be allowed in to this hearing as well, the ones
10 that were admitted.

11 As I understand plaintiffs' position, plaintiffs
12 want an exhibit that has been admitted previously, any
13 testimony that has been previously admitted to be admissible
14 for this hearing.

15 As the court is well aware, this litigation has
16 past its eleventh year of being on the court's records --
17 having been filed. And to allow such a wide open
18 admissibility of material that arguably has no relevance to
19 what we are going to do in the fall, that is the principal
20 reason the government would oppose it.

21 If the plaintiffs wish to offer previously
22 admitted testimony or exhibits from other proceedings, Your
23 Honor, we would ask the court to handle that on a case-by-
24 case basis.

25 As I indicated with regard to experts, the parties

1 did agree that Rule 26(a)(2) should govern the disclosure of
2 expert opinions and the reports.

3 There was some significant disagreement between
4 the parties as to how that would be implemented. First of
5 all, in the government's report we recommended -- we asked
6 the court to order simultaneous exchanges of expert reports
7 in mid -- I'm sorry, on August 24. We also asked the court
8 to set a date for filing rebuttal expert reports. We
9 suggested September 14.

10 The plaintiffs' proposal was that the government
11 would disclose their experts on August 15, and that the
12 plaintiffs would respond 30 days later. We believe the
13 submission of their initial experts less than a month before
14 trial is insufficient time and see no justification for a
15 serial exchange. We would ask the court to require that
16 they be simultaneously exchanged.

17 And we requested again August, because once again
18 we are working a lot of information into a compressed
19 timeframe. That kind of disclosure -- the time of that
20 disclosure will, again, allow the parties to more fully
21 understand each other's positions, and we would submit
22 preserve judicial resources.

23 The plaintiffs' proposal also asks that the Rule
24 26(a)(2) requirements be applied beyond the category of
25 witnesses covered by the Rule 26(a)(2).

1 In other words, 26(a)(2) refers to specially
2 maintained -- specially retained contractors and employees
3 whose jobs, duties regularly involve giving testimony. It
4 is not every person who would offer any kind of expert
5 opinion. It is a class of experts.

6 Plaintiffs have asked that the defense be required
7 to provide expert reports for any -- quote:

8 "For employees working on
9 defendants' historical
10 accounting."

11 That is a much broader class, and absent any
12 good justification for requiring the extension of Rule
13 26(a)(2) to a broader class of witness, we have opposed that
14 request.

15 The plaintiffs -- I might add, by the way, with
16 respect to the timing that the plaintiffs proposed, the
17 plaintiffs have opposed any pretrial disclosure of rebuttal
18 experts.

19 Under their schedule the initial experts would be
20 disclosed mid-August for the government, September -- mid-
21 September for the plaintiffs, and then rebuttal experts come
22 out in trial. We submit that that is just too late for
23 efficient use of this court's time and the parties' ability
24 to define issues.

25 THE COURT: Before we get too deeply into the

1 subject of rebuttal experts --

2 MR. WARSHAWSKY: Sure.

3 THE COURT: I think both sides are entitled to
4 know that to me the term rebuttal is a really, really narrow
5 term, and the actual incidence of rebuttal testimony or
6 expert testimony in trials is -- I won't say rare but
7 unusual.

8 So calling someone a rebuttal expert to come back
9 and deny what was said by somebody else, that is not
10 rebuttal. Rebuttal is something different. It is more
11 narrow.

12 It is to respond to something that was new in
13 response that was unanticipated and so forth. So rebuttal
14 -- a rebuttal expert is not a truck that you can drive a lot
15 of stuff through in this trial. There will not be much
16 rebuttal.

17 MR. WARSHAWSKY: Well, I certainly appreciate
18 that, Your Honor. I don't -- I'm familiar with the sort of
19 practice that you are referring to. It is certainly not our
20 expectation, our plan to hold experts back for a rebuttal
21 case.

22 But I will say this, not having the benefit of the
23 types of pretrial disclosure that we would like, it is
24 potential -- the potential does exist that a new issue will
25 be a raised during the plaintiffs' case-in-chief.

1 THE COURT: Yes, there is. Particularly in this
2 case where everybody is playing kind of running guns, there
3 might be surprises. I understand that.

4 MR. WARSHAWSKY: In any event --

5 THE COURT: It is remarkable we are still playing
6 running gun after eleven years, but that is what we are
7 doing.

8 MR. WARSHAWSKY: Well, Your Honor, the plaintiffs
9 included in their proposed order a provision that was,
10 frankly, vague and ambiguous we would say. It stated,
11 quote:

12 "It shall not be necessary
13 for a party to designate
14 as an expert witness a past
15 or present employee or
16 consultant of the opposing
17 party from whom an expert
18 opinion may be elicited
19 unless that individual has
20 become that party's retained
21 expert."

22 And this is paragraph seven of the plaintiffs' proposed
23 order.

24 I'm not really sure what that means, but since I
25 don't know what that means I don't believe it appropriately

1 should be part of a scheduling order. I think a scheduling
2 order obviously needs to be clear as to what the party's
3 responsibilities are.

4 And let me see. I believe the court actually has
5 covered quite a few of these remaining items. One thing I
6 need to clarify. Actually the court referred to 30(b)(6)
7 depositions that the plaintiffs had requested.

8 THE COURT: Yes.

9 MR. WARSHAWSKY: I believe, if I understand the
10 plaintiffs' report and proposed order, I believe they are
11 referring to trial witnesses.

12 THE COURT: Oh.

13 MR. WARSHAWSKY: That they wanted to have the
14 government designate witnesses to testify in the
15 plaintiffs' case-in-chief pursuant to a procedure similar to
16 30(b)(6).

17 We oppose that because among other things it is
18 really not the government's job to prepare the plaintiffs'
19 witness list. And undoubtedly if a witness does not
20 provide the testimony that the plaintiffs wish, we are
21 going to hear an attack that we simply provided the wrong
22 witness.

23 I think that the court was quite perceptive in
24 talking about the party's knowledge about the case, and I
25 think the plaintiffs are perfectly capable of assembling a

1 witness list without the government taking on the
2 responsibility of designating witnesses for their case-in-
3 chief.

4 The court covered the request to take de bene esse
5 depositions, and of course we concur that.

6 So with the supplementation as I have set out
7 here, we respectfully request the court to enter the
8 scheduling order that we have proposed with our report.

9 THE COURT: All right. Thank you, Mr. Warshawsky.
10 Mr. Smith.

11 MR. SMITH: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MR. SMITH: If I could take a second and
14 introduced to the court an individual who is a new face at
15 our table. His name is Dan Taylor, and he is one of my law
16 partners in North Carolina and a good friend.

17 Dan is a 1968 graduate of West Point and a 1976
18 graduate of Wake Forest University in North Carolina. He is
19 a member in good standing in the North Carolina Bar, and he
20 will be joining us on the trial team.

21 THE COURT: Mr. Taylor is welcome.

22 MR. SMITH: Thank you.

23 MR. TAYLOR: Thank you, Your Honor.

24 MR. SMITH: Your Honor, in going through your

25 list, I think we agree with everything you outlined as to

1 that which we agree on, and it is interesting we did agree
2 on some material parts.

3 The one area where perhaps I question is where you
4 talked about the designation of experts. They do disagree
5 with the type of experts that have to be included in the
6 designation, whether it has to include consultants or
7 employees who may provide expert testimony.

8 There are really two areas that I thought we had
9 agreement on, and if you compare the two reports they differ
10 in some respects.

11 We thought we had agreement on the ability to use
12 prior exhibits and prior testimony in all the actions. When
13 the reports came out it was limited to trial 1.5.

14 We actually thought we had an agreement on
15 consultants who may provide an expert opinion, and when the
16 reports came out Monday night that had been excluded.

17 Now there are three primary areas --

18 THE COURT: Did you say consultants who may
19 provide an expert opinion? That sounds like a 26(a)(2) kind
20 of experts.

21 MR. SMITH: Your Honor, I think it is. And as I
22 read their report -- and I think that is the nub of the
23 problem.

24 They have five accounting firms working on their
25 accounting plans. They have statisticians. They have

1 historians. My understanding is that those individuals
2 will come and testify not only about what they are doing but
3 to opine about whether it is adequate, whether this
4 statistical accounting or whatever they are doing is
5 meaningful.

6 Those are in the nature of expert opinions, and
7 our feeling is that those people should be designated in the
8 Rule 26(a)(2) report, and they should be required to provide
9 reports just like any other experts. Otherwise you don't
10 really have a level playing field.

11 Their position, as I understand it, is that only
12 retained experts should be disclosed.

13 THE COURT: You mean only people retained as
14 experts and not --

15 MR. SMITH: Right.

16 THE COURT: -- in effect operating room physicians
17 who know something about the case?

18 MR. SMITH: Exactly. And they take the position
19 that their contractors who are working on this plan, even
20 though they may provide expert testimony, they do not have
21 to be disclosed.

22 Your Honor, that raises difficulties. And I think
23 legally they are not correct. I think Rule 26(a)(2)
24 requires disclosure of all experts regardless of whether
25 they are retained experts or not, or whether they are

1 employees who have been specifically hired for this action
2 to testify.

3 THE COURT: Well, instead of focusing on Rule
4 26(a)(2) and exactly what it means, let us focus on what
5 this trial is going to be and who you expect are going to be
6 the witnesses.

7 Would you concede that an employee of the
8 Department of Interior who testifies about the work he has
9 been doing -- or she has been doing and how important it is
10 would not fall under your agreement, whatever it is, about
11 experts?

12 MR. SMITH: Right. I would agree that anyone who
13 is simply providing the factual background about what they
14 are doing, that would not be an expert for disclosure
15 purposes.

16 THE COURT: And what if it is a person who has
17 been working on this same -- doing the same stuff but
18 contracting it out to someone?

19 MR. SMITH: If it is an individual who is simply
20 testifying about this is what we are doing, that's a factual
21 witness.

22 THE COURT: And what kind of testimony would that
23 witness give that you think would put you to a disadvantage
24 if you did not have Rule 26(a)(2) disclosures?

25 MR. SMITH: Your Honor, if they take the next step

1 and start addressing opinions about based on what we have
2 reviewed and what we have done we believe this is an
3 adequate accounting, or based upon our statistical sampling
4 we have reviewed it, and we feel it is a reasonable method
5 to do this particular accounting process, those types of
6 things, when they start expressing opinions about what they
7 have done, expert opinions, then I think that is where they
8 cross the line. Otherwise you really have a one-sided
9 disclosure process.

10 Since all our experts are retained experts we need
11 to produce everything. We need to produce reports and
12 disclose what they can testify to. And as I understand it,
13 most of their experts who will be testifying about the same
14 thing would not be disclosed, and it makes it a very uneven
15 process.

16 I think under the rules this court has the ability
17 to go ahead and require disclosure of all experts. I think
18 if you look at the advisory opinions -- excuse me the
19 advisory notes to Rule 26 it says specifically that. Under
20 Rule 26 this court can order disclosures that go beyond what
21 the rules specifically require.

22 THE COURT: It is not clear to me. Are you-all
23 contemplating lining up each other's experts and taking
24 their depositions before this trial takes place? Or are you
25 basically going to depose them here in the courtroom?

1 MR. SMITH: Your Honor, it differs in that
2 respect, and our position is that if the expert witnesses
3 provide reports, I don't think there is time for
4 depositions. I think that we look at the reports, we base
5 our opinions on that, and then we go ahead and learn what we
6 can through the trial process.

7 You mentioned at one of the very first status
8 conferences, a lot of our discovery is going to be what we
9 hear in this courtroom beginning October 10. I don't think
10 we need depositions of expert witnesses if adequate reports
11 are filed by all of them.

12 On the other hand, if they aren't going to require
13 reports of their consulting witnesses who will testify as
14 experts, then I do think we need depositions to know what
15 they're going to say.

16 There is no way that our experts can respond to
17 theirs unless we have some way of knowing what they are
18 going to say before October 10th, unless we threw it all
19 into the trial, you know, and don't have any disclosures and
20 just see how it goes.

21 THE COURT: Do it the old fashioned way.

22 MR. SMITH: Yes.

23 THE COURT: Bring your witnesses down and see who
24 wins.

25 MR. SMITH: That is actually much preferable --

1 much more preferable to the one-sided disclosure that they
2 have asked for. I think that is the alternative. Either we
3 disclose all of the witnesses who are going to be testifying
4 as experts, provide expert opinions and disclose that, or we
5 just throw it all out at trial and see how it goes, in which
6 case we don't need disclosures at all.

7 I think that those are the two reasonable
8 alternatives.

9 THE COURT: All right.

10 MR. SMITH: Your Honor, the other area regarding
11 experts we disagree are timing. They contend there should
12 be simultaneous disclosure if there is a disclosure of
13 experts.

14 Our problem with that is that the issue in this
15 case is what are they doing? What are they not doing?
16 How much is it going to cost to do what they are not doing?
17 They need to tell us what that is. They need to
18 disclose that so our experts can review that and consider
19 that. That is why we have suggested basically a two-tiered
20 process, that they disclose their experts by mid-August, and
21 we will disclose ours 30 days later.

22 Presumably their experts should be already. They
23 have prepared this plan, and I think we can even move that
24 up. Have it by August 1 and September 1 if they feel
25 disclosure of our experts by September 14 is insufficient.

1 But we need to know what they are going to say
2 and what their experts are going to say. As we noted
3 earlier their, plan is very general in nature. They have
4 to provide the details on how they are doing it and what
5 they are doing. Our experts cannot speculate as to that,
6 and that is why we need them to make their initial
7 disclosures.

8 Your Honor, as far as the next area of rebuttal
9 experts, I mean frankly as you noted rebuttal experts are
10 typically quite narrow.

11 Our position is, let's hear what happens at the
12 trial, and if something new comes up during the trial, the
13 experts will be prepared and can review that transcript, and
14 they can provide that rebuttal expert testimony during the
15 trial. I don't think we be disclosures for that, and
16 certainly not taking depositions of that. We only have
17 about three months until the trial starts. That is not much
18 time.

19 Your Honor, the last area I think you mentioned
20 was depositions. I don't again think we need depositions
21 unless there is inadequate disclosure by the government as
22 to what their expert testimony is going to be.

23 The second area I particularly wanted to address
24 was the use of prior exhibits in testimony. You know in
25 some respects it is a question of the rules of evidence. I

1 mean if all of the parties were represented during that
2 testimony and if it is relevant, certainly it should be
3 admissible, and you are the gatekeeper for that.
4 But on the other hand, this is not just one --
5 these are not separate trials. These are separate phases
6 reaching up to a final resolution. In many respects this is
7 different phases of the same trial.
8 We have had a lot of testimony in this case. We
9 have had literally hundreds of days of testimony. We have
10 had hundreds of exhibits that have been entered in this
11 case. They all build on one another.
12 They want to limit it to trial 1.5, and in trial
13 1.5 a lot of reliance was placed on testimony in trial one
14 and exhibits used in trial one. They are all interrelated,
15 and that's why Judge Lamberth's procedure was, if I admitted
16 it before, I don't have to go through the process and you
17 don't have to go through the process of trying to readmit
18 what I have already agreed should be in.
19 Certainly we don't expect the court to read
20 hundreds of pages -- or hundreds of days of transcripts, and
21 I think in the pretrial statement we can designate those
22 portions of the transcript -- of the prior transcripts that
23 we think are key and that are relevant to this particular
24 proceeding.
25 But as far as exhibits, it seems to me if it has

1 been used before, it should be admissible. In fact we
2 researched that issue looking at other cases where there
3 were phases of one proceeding, and we could not find a
4 single case that said that the exhibits from the prior case
5 would not be admissible, and certainly there are a number of
6 cases that say where they would be admissible.

7 The leading case is out of the Ninth Circuit, Fed.

8 2nd, 1352. It basically said, we are not going to put the
9 parties and the court to the burden of trying to prove
10 something that has already been admitted in an earlier
11 phase.

12 Your Honor, as far as documents and discovery, we
13 have been provided the administrative record. We got it
14 Friday afternoon. It was provided intentionally in a PDF
15 format. I understand sometime later we got some documents
16 in a TIF format.

17 So we're working on those trying to see if we can
18 convert them into a usable system. We have some problems
19 with that, and I cannot say I have looked through all of the
20 documents by today.

21 The index does not correspond to the documents.

22 You cannot look at the number on the index and find the
23 document itself, so there are some logistics we need to work
24 out.

25 But we have noted some glaring omissions, some

1 documents that would be in the administrative record that
2 are not, documents that referred to other documents, and I
3 think Your Honor has set October -- August 6 for the day for
4 identifying other documents that we feel should be in that
5 record.

6 Your Honor, our request, as you noted, was to go
7 somewhat broader than that. We feel there are documents
8 that relate to this proceeding that are not contained in the
9 strict administrative record, documents such as the
10 throughput analysis that they are doing.

11 I understand that they have those documents, but
12 they do not want to produce them until they are designated
13 as exhibits, documents such as how much it is going to cost
14 to do these exclusions.

15 Those are items that we have never been provided
16 documentation before, and I think it is important for our
17 experts to be able to see those before they provide opinions
18 and before they are required to formalize their opinions and
19 testify.

20 So what we have requested, Your Honor, is by
21 August 6 that we identify specifically other documents that
22 we feel we need for this particular proceeding, and I
23 anticipate it will include the throughput analysis. I
24 anticipate it will include the cost information, with the
25 same proceeding as you noted following objections eleven

1 days later.

2 There are other items that were specifically
3 mentioned, objections to the plan.

4 THE COURT: Let me stop you where you are, Mr.

5 Smith, because I hear what you're saying about the omission
6 of what I have called the throughput numbers and the cost
7 numbers from the administrative record.

8 The government's position I'm sure is, well, the
9 administrative record is a record of our plan. These are
10 other questions that you have thrown into the soup, Judge.
11 They are not part of our administrative record, and we don't
12 have an administrative record of those things. What we are
13 going to do is develop information about those matters and
14 present them for trial.

15 So the August 7 -- August 6 deadline for
16 identifying deficiencies in the administrative record does
17 not really read on this problem.

18 MR. SMITH: That is exactly right, and that is
19 exactly the position they take. This administrative record
20 relates solely to our May 31, 2007 accounting plan, and it
21 does not relate to the additional issues that you have
22 raised.

23 That is why we suggested that by August 6 we
24 identify any other documents we feel we need to address
25 those issues that you have raised that are not in the

1 administrative record.

2 THE COURT: All right, go ahead.

3 MR. SMITH: Your Honor, with respect to the
4 objections to the plan, in many respects we have already
5 done that. We have identified areas where they have
6 excluded beneficiaries or transactions. We have had that
7 dialog.

8 But you know this trial is not really about just
9 their plan. It is more than that. It is what they are
10 doing, and what they are not doing, and how they are doing
11 it.

12 You can look at their plan and you can try to
13 guess what they are saying in that plan, but it is really
14 premature for us at this stage to make formal objections to
15 the plan. I think as you noted, that was the argument.
16 That is again a part of this trial process. We're going to
17 learn about this plan. We're going to get discovery
18 regarding what they're doing.

19 Your Honor, the problem with these plans is you
20 can have a trial regarding a plan, you know, and six months
21 later they can create another plane. This is their ninth
22 plan in nine years.

23 So at least we don't foresee the trial just being
24 about this particular plan. It's more about what they have
25 excluded from the plan and every plan prior to that. We

1 have covered those areas of exclusion.
2 As far of days for identification of exhibits, I
3 think that is covered by Rule 16.5 where people have to --
4 the parties have to designate experts -- excuse me,
5 exhibits, and that would be under the plan we have by, I
6 believe, September 17.
7 Your Honor, the designation of subjects under
8 which witnesses can testify, I think Mr. Warshawsky
9 correctly stated that what we were requesting was not
10 30(b)(6) depositions, but that in our pretrial statement we
11 be allowed to designate areas on which we want people to
12 testify.
13 For example, the area of compacting and
14 contracting tribes. Ask them to produce the person who is
15 most knowledgeable on that issue to come and testify for us.
16 So we don't have to search through their witnesses to try to
17 find the correct person.
18 Testify regarding direct pay. Who is the person
19 at the defendants who has that specific knowledge regarding
20 oil and gas? Bring that person to testify so that person
21 can inform the court what they are doing. It seems a much
22 more efficient process if they can provide these people
23 without us having to search through individual experts -- or
24 witnesses trying to find the best person to testify as to
25 that.

1 Mr. Warshawsky had a question about a provision in
2 our order regarding expert witnesses of other parties. Your
3 Honor, what we are suggesting by that was if an adverse
4 witnesses is called, a witness for the defendant, and they
5 are knowledgeable in a particular area, that we can obtain
6 an adverse opinion from them without having to formally
7 designate them. Perhaps that is a given, but we wanted to
8 be sure it was clarified in the order.

9 Your Honor, the final area is the witnesses who
10 may be unavailable in the de bene esse depositions. What we
11 particularly had in mind, Your Honor, are some of our
12 clients who may be because of health reasons or because of
13 specific economic circumstances unable to come to trial.

14 There are witnesses out in Indian country who
15 have information regarding the issues that you have raised
16 about the problems with the estates, about the problems of
17 not being an account holder yet having -- being a
18 beneficiary.

19 I think that it is important for those individuals
20 to come and testify, but some of them may not be able to do
21 it. And those are the limited circumstances we had in mind
22 when we drafted that part of the order.

23 I think it is important for their voice to be
24 heard, because the case is really about them, and in those
25 circumstances we would like the opportunity to take their

1 depositions if they cannot be here.

2 Thank you, Your Honor.

3 THE COURT: All right. Anything further Mr. Mr.
4 Warshawsky?

5 MR. WARSHAWSKY: Briefly, Your Honor.

6 THE COURT: Tell me -- respond to a couple of
7 points.

8 Respond to Mr. Smith's point about the documents
9 that support your costs and throughput numbers. I
10 understand your position, and I agree with your position
11 that those are not part of your APA response, because they
12 are not part of your record. But it is part of what I want
13 tried in this case.

14 So you are not thinking about bringing those
15 exhibits down on the day of trial, are you?

16 MR. WARSHAWSKY: We proposed August 31 as the date
17 for disclosing that, Your Honor. Those would be other trial
18 exhibits, and that is the sort of thing we believe the
19 parties should simultaneously be exchanging at that time.
20 So of course we certainly did not propose bringing that down
21 at the last minute.

22 THE COURT: Okay. Now for tribal members who have
23 something to say and who do not want to come here, or who
24 cannot come here to testify and who have information that is
25 relevant to the issues that will be tried in this case, what

1 about starting with affidavits?

2 MR. WARSHAWSKY: Your Honor, I would -- if
3 somebody's going to testify, I would want to have the
4 opportunity to cross, and you cannot do that obviously with
5 affidavits.

6 THE COURT: I understand that. I want to keep
7 reminding everybody this is a bench trial, and it is
8 possible that we can stop, and it's possible if an affidavit
9 comes in that you want to challenge, it is possible that we
10 can stop and you can fly out to Oklahoma and take a
11 deposition.

12 MR. WARSHAWSKY: Your Honor, I think if the
13 plaintiffs -- the problem with the plaintiffs' proposed
14 order is that they have asked for blanket authority to take
15 an unspecified group of depositions.

16 The way normally one proceeds is if the parties do
17 not agree on taking the deposition of an otherwise
18 unavailable witness, an application has to be made to the
19 court and good cause shown.

20 Frankly, at this point we don't see the relevance
21 of -- we don't see the relevance of the types of witnesses
22 that Mr. Smith spoke of for purposes of reviewing the
23 historical accounting plain.

24 THE COURT: Well, I'm not sure that I do, either,
25 and that is why I am suggesting that we start with the

1 affidavit, and then I may look at an affidavit and say yes,
2 that is relevant. And you may say, well, we cannot accept
3 that. We want to going take this guy's deposition. Then we
4 can do it.

5 Or I can look at the affidavit and say, this has
6 nothing to do with the case. Thank you very much, send it
7 back, and we have not taken a deposition we don't need to
8 take.

9 MR. WARSHAWSKY: Your Honor, I would not feel -- I
10 don't feel that I'm in a position to agree to the
11 admissibility of an affidavit in the record. It is very
12 possible -- I mean we are all going to be racing around
13 doing a lot of work getting ready --

14 THE COURT: I'm not asking you to agree to
15 anything in advance. I'm suggesting a way of proceeding
16 that would preserve your right to object -- preserve your
17 right to take the objection and save everybody a lot of
18 time, and trouble, and travel, and money in between.

19 MR. WARSHAWSKY: Perhaps the plaintiffs could
20 submit the affidavit as an element of a proffer to show why
21 they want to be able to use someone's testimony at the
22 hearing.

23 THE COURT: Okay.

24 MR. WARSHAWSKY: That would certainly be
25 acceptable.

1 THE COURT: Testimony other than testimony
2 received in the 1.5 hearing. Here's my take on that one.
3 Any evidence that has been -- anything that has
4 been received in evidence by my predecessor judge in this
5 case will be presumed admissible, but it won't automatically
6 be admitted, because the government will obtain an objection
7 as to relevance. Relevance is the issue.

8 If it has been previously received -- if it has
9 been previously received, we don't have to go through the
10 drill of identifying, and authenticating, and worrying
11 about all of the other objections that could be made to
12 evidence.

13 But it may be that it was admitted for some other
14 purpose and that this purpose is not relevant to the
15 proceeding before us. In that case, your relevance
16 objection will be preserved, and you can make it.

17 MR. WARSHAWSKY: Thank you, Your Honor. I believe
18 that addresses our principal concern.

19 THE COURT: Okay.

20 MR. WARSHAWSKY: As the court I am sure is aware,
21 in the course of the eleven plus years we've had two
22 contempt trials.

23 THE COURT: That's kind of what I'm thinking of,
24 too.

25 MR. WARSHAWSKY: Exactly.

1 THE COURT: All right.

2 MR. WARSHAWSKY: So it did strike us that
3 relevance would be the principal concern, and as you
4 described it, that makes sense, Your Honor.

5 If the court --

6 THE COURT: Let's talk about this -- about the
7 issues Mr. Smith raised concerning who is an expert and who
8 was a 26(a)(2) expert.

9 The only thing that concerns me about that issue
10 is the question of imbalance that Mr. Smith suggests, that
11 is all the plaintiffs' experts almost by definition are
12 retained as experts, and on the other hand the government
13 has a lot of people that have been retained as consultants
14 or that have good working for the government on other
15 aspects of this thing, and you don't want to have them
16 designated as experts even if they have opinions.

17 There is some imbalance there if they are going to
18 have to give you statements, and CVs, and reports and so
19 forth from all of their experts and you don't have to give
20 any for yours.

21 MR. WARSHAWSKY: It is possible, Your Honor, we
22 may have read -- we may have read -- I am not sure if we
23 read too much into the wording of the plaintiffs' report.
24 Plaintiffs spoke -- the report included statements -- this
25 is on page five, paragraph sub-A, that the reports be

1 required from employees who may be working on defendant's
2 historical accounting.

3 We have employees working. They do not fall
4 within the scope of Rule 26(a)(2). They are not specially
5 retained experts. They do not regularly provide expert
6 testimony.

7 Now -- and that was one of our principal
8 concerns, Your Honor, that basically we were concerned that
9 every employee who is working on the historical accounting
10 plan, or even yes, consultants who are working on the
11 historical accounting plan, who were brought in to provide
12 fact testimony, that the plaintiffs wanted expert report
13 from us.

14 I believe that Mr. Smith may have clarified this
15 for us. Certainly if a consultant -- one of the accounting
16 firm people, for example, one of the statisticians, if those
17 people are brought in to offer expert testimony, we would
18 consider them to be people, at least to the extent they are
19 providing the expert testimony, they are specially retained
20 people who are providing expert testimony. They would fall
21 under Rule 26(a)(2).

22 Now if a consultant is brought in -- an accountant
23 who is there to testify about the process that he or she
24 goes through in reviewing a transaction, I'm not sure first
25 of all what the expert opinions are there, and that is a

1 concern.

2 It should not apply to everybody employed -- or

3 I should say everybody who is a consultant to the

4 government. It should only apply where expert opinions are

5 involved.

6 As far as the notion -- I think one of the other

7 concerns that we had was the notion that the plaintiffs

8 would be allowed an additional month before providing us

9 with their expert reports.

10 Your Honor, again, I think in a case where the

11 plaintiffs -- I think we all understand that most of the

12 challenges, hopefully all of the challenges, are well known

13 in advanced, and certainly the challenges to the plan --

14 this is an area within the plaintiffs' province to

15 determine.

16 There is no justification for having -- you know,

17 asking the government to wait an additional month to see

18 those reports.

19 We are trying to avoid surprise. We are trying to

20 preserve judicial resources and having as an efficient a

21 hearing as possible. The way to do that is by the provision

22 of the expert reports from the plaintiffs.

23 THE COURT: Okay.

24 MR. WARSHAWSKY: Your Honor I believe -- let me

25 just double check here.

1 I will say, Your Honor, we are -- you know, the
2 request -- I should say just a moment about the TIF/PDF
3 issue that Mr. Smith spoke about.

4 The request for searchable TIF files is something
5 that came up during the course of our meet and confer
6 sessions. We are working on that trying -- and obviously we
7 will try to satisfy the plaintiffs.

8 I believe there are some technical limitations,
9 because as I understand it, and I am not a technical person
10 in this area, but in order to make these files searchable, I
11 believe in essence an optical character recognition, an OCR
12 application is run.

13 Some types of documents and some print is more
14 susceptible to accurate -- an accurate OCR scan than other
15 types. And that may be part of the problem. But, you know,
16 we will certainly work with the plaintiffs to resolve that
17 as best we can.

18 THE COURT: Thank you, Mr. Warshawsky.

19 MR. WARSHAWSKY: Thank you, Your Honor.

20 MR. SMITH: Your Honor, if I might be heard.

21 THE COURT: Yes, Mr. Smith.

22 MR. SMITH: Your Honor, as far as the experts,
23 what I understand from what Mr. Warshawsky said, which
24 differs slightly from what is in their proposed order, is if
25 anybody is going to provide an expert opinion, they will

1 disclose them and provide a report, and that is what we have
2 asked for.

3 And if a witness does not provide a report, they
4 should not be allowed to -- or permitted to testify or
5 provide an expert opinion during the trial.

6 As far as the August 31 date for providing the
7 throughput and other information, we need enough time for
8 our experts to look at that and rebut that, if necessary.
9 August 31 is a little late for that. I think they have the
10 information available now. Our experts need to look at that
11 before they are designated.

12 As far as your suggestion about affidavits from
13 beneficiaries, I think that that is fine with us. If we
14 provide the affidavit and you determine that it is not
15 relevant or it is and they can go ahead and depose them if
16 they feel that is necessary. I think that is satisfactory
17 to us.

18 Regarding the past testimony and exhibits, we
19 agree with your suggestion. If it is relevant for any
20 purpose, whether it be substantive, or on credibility
21 issues, or whatever, it should be admissible. Otherwise
22 Your Honor will take care of that and exclude it.

23 As far as the format, this has been a long-
24 standing issue. During the 2005 trial we sat there with 2
25 million documents in unsearchable format where we had to

1 print them off every night they came.

2 Certainly the government has this capability, has
3 the OCR capabilities, and we would request these documents
4 be produced in some sort of workable format other than what
5 we have had in the past, and we will continue to talk to Mr.
6 Warshawsky about that.

7 There is one other area that we feel needs some
8 documentation of, and we in the past have requested
9 electronic records regarding certain beneficiaries, and it
10 should be easy to produce if they are on their electronic
11 systems, so that we can review their documentation regarding
12 certain beneficiaries.

13 That was one of the items that Mr. Harper reminded
14 me that we would request -- probably request on August 6 if
15 Your Honor allows us. We feel that it's important for us to
16 do a complete review.

17 THE COURT: What is it that you want by August 6?

18 MR. SMITH: Your Honor, there are certain
19 beneficiaries where we would like their records so we could
20 look at the accounting that has been done as to them, and we
21 are just asking them for the electronic, period.
22 So if we provide a name, they should be able to
23 pull up the electronic records of those particular
24 beneficiaries, and we could provide a list next week of
25 those beneficiaries that we want.

1 We are not asking them to go and research back to
2 the 1800s, simply provide the electronic records they have
3 for certain beneficiaries

4 THE COURT: How many?

5 MR HARPER: Can we consult for a moment, Your
6 Honor?

7 THE COURT: Yes.

8 (Whereupon, counsel conferred.)

9 MR. SMITH: Your Honor, 100, no more than 100.

10 THE COURT: Is there a problem with that, Mr.
11 Warshawsky?

12 MR. WARSHAWSKY: Yes we do, Your Honor.

13 This has already been proposed and briefed, and
14 again, this is an attempt to essentially conduct discovery
15 with respect to individuals in what is a class action to
16 review the adequacy of the accounting plan. It moves to a
17 different phase of the trial or the proceedings.

18 THE COURT: Yes, but I thought you were the great
19 proponents of sampling for testing?

20 MR. WARSHAWSKY: We are the great proponents of
21 sampling --

22 THE COURT: Sampling for proving the adequacy of
23 an accounting. What are they asking for except a hundred
24 names? It is a sample.

25 MR. WARSHAWSKY: I am not sure precisely what

1 they are asking for, but what I suspect they are asking
2 for is every document that we have related to 100
3 individuals.

4 THE COURT: Well, so far all they have asked for
5 is for you to push an electronic button and give you a
6 printout of what you have got for 100 people. That's not a
7 problem, is it?

8 MR. WARSHAWSKY: I think that the court has hit
9 on a very important distinction in talking about a sampling.
10 Sampling -- what the government has done -- what
11 we are proposed -- what we are the great proponents of is
12 sampling transactions to assess the reliability of business
13 records.

14 What the plaintiffs are talking about are
15 sampling accounts, and I am not sure what they are going to
16 do with it. But it very well may be that in the course of
17 picking an employee that there will be a tremendous effort
18 and cost involved in finding records related to that
19 individual.

20 THE COURT: They did not ask for records. They
21 asked for the printout. Whatever you have gotten
22 electronically.

23 MR. WARSHAWSKY: Well, again, we need to see
24 specifically what the requests are. We have had this
25 request once before, and that was part of the discovery that

1 was before the court and which the court has already ruled
2 on.

3 And when this was submitted as a previous
4 discovery request, we set forth for the court the nature of
5 the burden that would be involved in responding to it.

6 THE COURT: Well, I mean -- Mr. Smith, get back up
7 here and tell me what burdensome thing you are asking for
8 here.

9 MR. SMITH: Your Honor, we are asking exactly for
10 what you said. For them to provide -- for us to provide
11 them with a list of a hundred beneficiaries, for them to
12 punch the button and produce the printout for those
13 beneficiaries that they have on their electronic records.
14 We are not asking them to go beyond the electronic era.
15 That is all we want

16 THE COURT: Tell us again why you want this?

17 MR. SMITH: Your Honor, I think it is important
18 for reviewing their process of statistical sampling to see
19 how this all plays out.

20 We ought to be able to look at a specific
21 beneficiary and compare it to what they are doing and see if
22 it makes any sense, unless they absolutely cannot do it, and
23 that would be shocking if they cannot do it. It is
24 certainly not very burdensome. It should not take more than
25 a couple of hours to print those off.

1 MR. WARSHAWSKY: Your Honor, if I may?

2 THE COURT: Yes.

3 MR. WARSHAWSKY: We have moved into an area where,
4 frankly, Mr. Quinn is much more knowledgeable about the
5 burden that would be involved in this request, and I would
6 ask the court to hear Mr. Quinn on this.

7 THE COURT: Mr. Quinn.

8 MR. QUINN: Good afternoon, Your Honor.

9 With respect to the request that has just been
10 placed before the court, in the May 18 document request Your
11 Honor will recall that the plaintiffs have put forth before
12 the court I believe it was 38 names of individuals asking
13 for the individuals and their predecessor in interest and
14 all related transaction records concerning those
15 individuals.

16 In the second request asking for a similar type of
17 information for I think it was 50 named individuals who
18 presumably at least by the nature of the wording in the
19 request, were judgment account -- IM account holders or per
20 capita account beneficiaries.

21 In the course of responding to that request I had
22 occasion to talk to the special trustee for the American
23 Indians and representatives from the Treasury Department,
24 all of whom had prepared descriptions of what would be
25 necessary to go through and look up those records.

1 Even with respect to -- you have to be careful
2 when there is a request with respect to pressing a button.
3 It is not like pressing one computer and getting -- you may
4 get a series of some account numbers, but those may be
5 married to account numbers that are in another office in
6 another location, and that is part of the accounting process
7 that is being undertaken.

8 In the electronic era the experience here is that
9 each reconciliation has caused several thousand hours to
10 pull the substantially documents, marry them up to the
11 electronic ledger. So it is not just a pressing button and
12 having those pop out.

13 And I would want to be very clear on specifically
14 the information the plaintiffs are expecting to get here
15 before we say where this could be accomplished in time for
16 October 10.

17 Because if you go back to the record of the
18 request that they filed on May 15 and look at the
19 government's response to those requests, you will see that
20 there is a very elaborate, detailed effort to specify the
21 identification of records.

22 And this is not to be unexpected. The records in
23 the occasion when they were creating the transactions
24 originally, it was not -- the record keeping was not
25 structured in the fashion to pull all of these individual

1 pieces of paper together.

2 That has been the reason for the creation of the
3 American Indian Records Repository. It is part of the
4 effort to index those documents, but it is a very time-
5 consuming and laborious task, which is one of the reasons
6 why the department has established transaction sampling,
7 because of the costs versus the accuracy in terms of
8 rendering the accounting for everyone who has had an account
9 in the class.

10 So I would just caution the court that it is not
11 just like pushing a button on your home computer and
12 printing out a particular document. It is a very involved
13 labor-intensive effort that relies on a number of people in
14 a number of offices across the department, particularly
15 within the Office of Special Trustee.

16 THE COURT: Mr. Smith, do you know -- I'm sitting
17 here trying to find this May 15 --

18 MR. HARPER: Your Honor, may I speak to this
19 issue?

20 THE COURT: Sure, Mr. Harper.

21 MR. HARPER: Good afternoon, Your Honor.
22 I think the question is in the first instance,
23 what are we asking for now as to what we asked for before?
24 What we wanted before was all the information that the
25 defendants had, weather in electronic format or in paper

1 format.

2 What they responded to in that was how laborious

3 of a task it was going to be to do what Mr. Quinn just

4 stated, that is match up each and every transaction with

5 each and every documentation going back for however many

6 years.

7 They said that that would be too difficult and

8 cost millions of dollars, and not withstanding how that may

9 be highly important as an inferential matter to the state of

10 their records, the court made its ruling in that regard.

11 What we are asking for here is far narrower. It

12 is merely those electronic records on their system. For

13 example, they have three systems that are possibly

14 implicated, maybe a couple of more.

15 The integrated resource management system called

16 IRMS for short. The land records information system, also

17 referred to as LRIS, and the various forms of TAAMS, which

18 is a system that they are moving some of the documents to.

19 This information may be on one or more of these

20 systems for each of these beneficiaries. What we are saying

21 is that that electronic information contained on those

22 databases, we are just asking for them to just download

23 those and to provide those -- provide that information which

24 is on their systems.

25 We are not asking them go back and trace the

1 leases and get us the background lease documents. That may
2 be something for another juncture or for another trial.
3 We understand what the court has stated for this
4 trial is that that would not be the assessment for this
5 trial. So we understand that, Your Honor. But we, at a
6 bare minimum, have the capability to look at their
7 exclusions and determine whether or not those exclusions are
8 reasonable.

9 The way to do that is to look, among other things,
10 at the information on the database to figure out what is
11 there and what is not there, and then compare that to other
12 information to the extent that we can find it.

13 That goes directly to the scope of their
14 accounting. That goes directly to the issues identified by
15 this court that will be tried, and it is not burdensome at
16 all, because it is merely electronic information, not the
17 underlying transactional documents, not the underlying lease
18 documents and things of that nature.

19 So we believe, Your Honor, because the burden is
20 slight and the information is relevant, at a bare minimum
21 the plaintiffs should have the right to such information.

22 MR. QUINN: Your Honor, if I may?

23 THE COURT: Sure.

24 MR. HARPER: Thank you, Your Honor.

25 MR. QUINN: We are somewhat taken by surprise.

1 This is not an issue that was at all raised in our
2 conference prior to -- in preparation of coming together on
3 agreement of the schedule for the October 10 hearing. So
4 we are kind of having to react to this request on the fly
5 here.

6 I guess if the court is at all inclined to
7 entertain this as a possible project that the plaintiffs be
8 required to specify exactly what it is that they are looking
9 for.

10 One question that comes off at the very beginning
11 is not just identifying individuals. When they identified
12 individuals in their May 18 request, they named names. No
13 addresses. No account information. And in going to those
14 records, you could have three people with the same name.
15 Abbreviated names. Change of names. Spousal names.

16 All of this without the account information, the
17 account numbers, it does create a very difficult task just
18 as far as identifying the correct information.

19 But plaintiffs are referring here to a sample of
20 their own choosing. The sample, I would submit to the
21 court, Your Honor, has been chosen. At the time plaintiffs
22 filed this complaint, they had named representative
23 plaintiffs chosen.

24 They put those names before the court. Judge
25 Lamberth and the court reviewed those plaintiffs for their

1 adequacy, for the typicality of their situation, and the
2 terms of the representative nature of their class.
3 There has also been extensive discovery in the
4 production of documents and the availability of records made
5 for the named plaintiffs as well as their predecessors in
6 interest.

7 This is a wholly new group. We don't even know
8 the name at this point of who would be in this sample. But
9 they are not -- have not gone through that process, Your
10 Honor, of being tested for their representative status,
11 whether their circumstances are representative of the class
12 as a whole.

13 I would submit that there is nothing that the
14 plaintiffs have put forth here at this point at least to
15 demonstrate that the circumstances of any of these
16 individuals would represent the larger class as a whole.
17 And to the extent we need a sample I would say to Your Honor
18 that there is a sample already selected, and those are the
19 named certified class representatives.

20 THE COURT: All right. First of all, I will
21 permit the plaintiffs to file a discovery request for either
22 the downloaded or printed out electronic information that
23 may exist in IRMS, LRIS or TAMS for not more than 100 names
24 of the plaintiffs' choosing.

25 I want to reassure the government here that I

1 think I am capable of -- I mean if and to the extent these
2 are the hundred people selected for their obscurity to prove
3 that you have not been doing your job, I can sniff that out
4 pretty well.

5 But the plaintiffs are certainly entitled in their
6 way in this proceeding to essentially test what you have
7 got, and I think that is the way they are choosing to do it,
8 and this is not going to go beyond that to background
9 records, and archives, and documents, and running these down
10 any further, but I will take the request as made in good
11 faith on its face for electronic data, and that is what they
12 are going to ask for, and that is what they are going to
13 get.

14 But they have to ask for it formally and precisely
15 enough. And if all you get are names and you say, we cannot
16 respond to that, then that is what your response would be.
17 We cannot respond to that, it is just names.

18 MR. WARSHAWSKY: Your Honor, for clarification.

19 Again, as Mr. Quinn indicated, this is a new issue. It has
20 just come up today. We have not had a chance, obviously, to
21 assess the burden that will be associated with retrieving
22 this information, and we would like to have an opportunity
23 to respond to the discovery request and to present any
24 appropriate objections.

25 THE COURT: Well, that is why it will be a

1 discovery request, Mr. Warshawsky.

2 MR. WARSHAWSKY: Thank you, Your Honor.

3 THE COURT: Now trying to put together the
4 schedule that falls out of this proceeding this afternoon,
5 it seems to me that the following dates make sense.

6 By August 6 the plaintiffs will identify what
7 they see as deficiencies in the government's 2007 plan.
8 Eleven days later -- and I don't know when the seventeenth
9 falls, but eleven days later the government will respond.

10 MR. WARSHAWSKY: I am sorry, Your Honor. You are
11 referring to deficiencies in the administrative record?

12 THE COURT: Yes. I'm talking about the
13 deficiencies in the administrative record.

14 This business of whose experts go first, I think
15 we are going to resolve this way. There are going to be two
16 rounds of expert disclosures, both simultaneous.

17 The parties will designate experts initially on
18 August 17, and 30 days later they can designate responsive
19 experts to what have been designated by the other time, also
20 simultaneously.

21 By August 31 the parties are going to exchange
22 trial exhibits, and in the government's case that will
23 include exhibits that will support their positions on what
24 we have been calling the cost and throughput issues.

25 Will I order pretrial statements? Yes. There is

1 a form for it in the local rules. I am not a slave to that
2 form. It can get pretty detailed, but I want to know
3 basically by that time what you all think are the issues,
4 what witnesses you think you are going to call, what
5 witnesses you think -- well you have already exchanged your
6 trial exhibits.

7 Motions in limine by September 21. Final pretrial
8 conference on September 28.

9 What is left to be put off to another day, the
10 discussion of it that is -- what have I left out?

11 MR. WARSHAWSKY: Your Honor, I don't think you
12 have left anything out, but the one thing I wanted to
13 clarify, I understood -- or I wanted to make sure there is
14 clarity on this, but the government -- I think Mr. Smith
15 indicated that the government had agreed that all experts
16 would be subject to Rule 26(a)(2).

17 The government's position remains that
18 26(a)(2) applies to a special category of experts. It is
19 especially retained or specially employed experts and
20 employees whose job is regularly providing testimony.

21 It is possible that there will be individuals who
22 do not fall within that category who will give testimony
23 that ends up having an opinion nature to it, but that does
24 not mean that those people should be subject to the rigorous
25 requirements of 26(a)(2).

1 THE COURT: You are backtracking on what you said
2 here 10 minutes ago about how all of your experts -- if you
3 are going to call them as experts, you will provide the
4 statements on them.

5 I take you at your word and think that you will do
6 that.

7 MR. WARSHAWSKY: We will.

8 THE COURT: If what you're doing is leaving
9 yourself a trapdoor for something that might turn out to be
10 a piece of opinion testimony, duly noted. There will be an
11 objection, and I will rule on the objection at trial. I
12 cannot do all of that in advance

13 MR. WARSHAWSKY: Well, I am not trying to leave a
14 trapdoor, Your Honor, but I did want to make clear. We
15 understand the types of witnesses that Mr. Smith spoke about
16 when he spoke, for example, about accountants offering
17 opinions and statisticians.

18 Yes, we expect to offer them as experts, and we
19 expect to have them providing -- at least where they are
20 providing opinions, they will provide reports.

21 THE COURT: All right. Well, I think you are
22 making -- I think you are taking kind of a hypothetical
23 save, and that that is what lawyers do, in particular what
24 good lawyers do, and I hear you and we will deal with that
25 at trial.

1 MR. WARSHAWSKY: Thank you, Your Honor.

2 THE COURT: Are we done here?

3 MR. SMITH: Your Honor, if I may?

4 THE COURT: I should never ask that question. Not
5 where David Smith is concerned

6 MR. SMITH: Your Honor, just a point of
7 clarification.

8 We have August 31 for disclosure of pretrial
9 exhibits, but it is -- I think it is September 16 for
10 disclosure of any response of experts, for want of a better
11 word.

12 THE COURT: Yes.

13 MR. SMITH: Yet under our stipulation at that time
14 under Rule 26 those experts should be identifying experts --
15 identifying exhibits upon which they are relying for their
16 opinion.

17 THE COURT: Yes.

18 MR. SMITH: So would that be a supplementation?

19 THE COURT: The experts -- I mean exhibits on
20 which experts are relying are not necessarily trial
21 exhibits.

22 MR. SMITH: Right. I think under Rule 26 they are
23 supposed to -- at the time of designation they are supposed
24 to identify the documents they will use as exhibits.

25 THE COURT: You may have until the later date to

1 identify documents that are specific to an expert if that
2 expert is identified as a responsive expert.

3 MR. SMITH: Okay, I understand.

4 Also, as far as the throughput information, we
5 will see that for the first time at the time exhibits are
6 proffered.

7 THE COURT: That is right.

8 MR. SMITH: Can we have time to prepare exhibits
9 in response to that, say 10 days later?

10 THE COURT: Sure.

11 MR. SMITH: Okay. I take it under your rule there
12 is no provision for depositions of experts? Is that
13 correct?

14 THE COURT: I did not say anything about
15 depositions of experts. I have a feeling that that has sort
16 of fallen out of the equation.

17 MR. WARSHAWSKY: Your Honor, if I may, I think Mr.
18 Smith said it well. The advisory committee notes to
19 26(a)(2) I believe indicates that expert reports should be
20 complete enough -- or someone's advisory committee notes I
21 recall say this, that reports should be complete enough that
22 a deposition really is not necessary and provided they are,
23 done, we can let it go.

24 THE COURT: Good.

25 MR. SMITH: I think that is correct, Your Honor.

1 THE COURT: And the affidavit point, I think the
2 affidavit idea is a good idea. You can proffer affidavits.
3 The question is when you proffer the affidavits.
4 I don't know how many affidavits you are talking
5 about. Can you manage that at the same time as you get the
6 trial exhibits in, Mr. Smith?

7 MR. SMITH: We can do that.

8 THE COURT: Fine. Then that gives everyone time.

9 MR. SMITH: Your Honor, there was an issue raised
10 in the party's responses regarding problems with expert fees
11 as a past issue. That is not going to be raised this time
12 since there is not going to be depositions of experts, but
13 perhaps at some point in the future we may need to raise
14 that with the court. I think it is an outstanding issue

15 THE COURT: Okay. Thank you counsel.

16 MR. WARSHAWSKY: Your Honor, one last question.

17 I'm not trying to be a typical lawyer.

18 With response to time frame for responding to the
19 de bene esse notices. Can we request ten days? Or we would
20 request ten days.

21 THE COURT: I am sorry, say that again?

22 MR. SMITH: When we received the list of de bene
23 esse witnesses, the proffers --

24 THE COURT: Yes.

25 MR. WARSHAWSKY: The government would request ten

1 days to respond.

2 THE COURT: That is fine.

3 MR. SMITH: Could we have eleven, Your Honor?

4 THE COURT: Eleven. Eleven it is.

5 MR. WARSHAWSKY: Eleven. Thank you.

6 THE COURT: I want you all to know that although I
7 am -- I like to make myself generally available for
8 discovery disputes, we are not having discovery or any other
9 kinds of disputes. There is a significant period of time
10 here between this weekend and early August when I am not
11 going to be around. So you are just going to have to get
12 along and play pretty between now and about the eighth or
13 tenth or twelfth of August.

14 All right, thank you.

15 (Whereupon, the proceedings were adjourned.)

16 - - - - -

17 CERTIFICATE OF COURT REPORTER

18 I certify that the foregoing is a correct transcript of
19 the proceedings in the above-captioned case.

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SUSAN PAGE TYNER, CVR-CM

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