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MANAGEMENT OF TRIBAL TRUST FUNDS.

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE STATUS OF THE DIALOG BETWEEN THE DEPARTMENT OF THE INTERIOR AND AMERICAN INDIAN AND ALASKA NATIVE LEADERS ON VARIOUS ALTERNATIVES FOR THE REORGANIZATION OF THE DEPARTMENT OF THE INTERIOR TO IMPROVE THE DEPARTMENT'S MANAGEMENT OF TRIBAL TRUST FUNDS.

JUNE 26, 2002
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MANAGEMENT OF TRIBAL TRUST FUNDS.

WEDNESDAY, JUNE 26, 2002

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m. in room 628, Senate Dirksen Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Campbell, Thomas, and Akaka.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. The committee meets this morning to receive testimony from the four cochairs of the Task Force that has been established to consider proposals for the reorganization of the Department of the Interior to better address the management of funds that are held in trust for Indian tribal governments and individual Indians.

The report issued by the General Accounting Office in 2001 indicates that the Department maintains approximately 1,400 tribal trust accounts for 315 Indian tribes, with assets in excess of $2.6 billion.

The Department is also currently administering 260,000 individual Indian money accounts with a balance of $400 million as of September 30, 2000.

In November of last year, the Secretary of the Interior proposed a plan for the reorganization of the Department and the establishment of a Bureau of Indian Trust Asset Management.

This organizational plan was filed with the District Court in the ongoing class action litigation of individual Indian money account holders who assert that the Government has mismanaged their trust funds.

Reaction to the Secretary's proposal in Indian country was not favorable and, ultimately, it was decided that a Task Force should be established to examine other proposals for the reorganization of the Department.

The committee is advised that there were 28 proposals in all that were considered by the Task Force which is composed of representatives of the Department of the Interior and 24 representatives of Indian country.

Although the committee anticipated that today's hearing would focus on one single proposal that had the support of both the Task

Force members and most of Indian country, we are advised that the process has yet to yield consensus.

Accordingly, the committee has scheduled another hearing on July 30th to receive testimony on what the committee understands will be a forthcoming consensus proposal. On that day, the committee will also receive testimony on S. 2212, a bill introduced by Senators Daschle, McCain, and Johnson which also proposes a reorganization of the Department to achieve a greater measure of accountability in the management of these trust funds.

In addition to the dialog that is taking place on matters related to the organization of the Department and its management of trust funds, there are two cases now before the United States Supreme Court which call upon the Court to decide the nature and extent of the United States' responsibilities and liabilities as they relate to the management and administration of tribal trust resources.

So we have much on our agenda to address as we proceed to consider the range of issues associated with the our Nation's trust responsibility.

Finally, I want to observe that after reading the testimonies last evening, it struck me that the existence of this dialog process and what the Task Force has set out for itself to accomplish is nothing less than historic. Over the years, we have witnessed many solutions directed at these endemic and systematic problems but, as our presence here today acknowledges, none of those solutions has proven to be ultimate or workable solution.

I think that with this Task Force and the ongoing dialog between the Department and the tribal governments, we finally have the potential for developing solutions that will work. This is in no small part because the Indian beneficiaries are thoughtful people who know both how the system works and how it ought to work. And so I wish to commend Secretary Norton and the Department because I surmise that you have come to the same conclusion that I have, that the most effective solutions to the challenges confronting Native Americans can be found in Indian country.

And so, on behalf of this committee, I want to thank all of you, one and all, for the time and the patience and commitment you have made to this process and to these issues. Whether you have had the time to step back and take a long view of what you are engaged in or not, let me assure you that from the vantage point of this committee you are making history. I dare say that the history you are making is not just your work as it affects the management of the trust funds, but as a model and a precedent you are establishing in creating a Federal-tribal partnership approach to the resolution of problems. As difficult and as tortuous as you may sometimes find the pursuit of this journey together, there is great potential for such a partnership to address other challenges.

So if I may speak for the committee, I hope you will keep up the good work and do not allow yourselves to get discouraged. We are counting on you and looking forward to working with you, and I have no doubt that together we will find the solutions that will finally work.

May I call upon the vice chairman of this committee.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator CAMPBELL. Thank you, Mr. Chairman. That was a very, very fine statement.

In the almost 10 years I have been with this committee, I have seen the debate on reforming Indian trust management evolve significantly. When I first came to the Senate in 1992, the focus was on efforts to pass the 1994 American Indian Trust Fund Management Reform Act. In the summer of 1996, attention centered around Judge Lamberth's courtroom when the landmark case of *Cobell* v. *Babbitt* was filed. In 1997, when I became the chairman of this committee, our focus shifted to reviewing a strategic plan filed by Paul Holman, the first special trustee. Since 1997, we have debated and discussed the failed TAAMs computer system, two high-level implementation plans, and millions of dollars spent on ill-fated trust reforms.

I must say now, Mr. Chairman, as the vice chairman of this committee, I am encouraged the joint tribal leaders and the Department of the Interior trust Task Force consultation process has begun to seriously hash out the proposals for reform, with tribal input and tribal consultation.

Though fundamental differences remain between the tribes and the Department, and I think in some cases between one tribe and another tribe, I believe the debate is being held exactly where it should be, between the trustee and the tribes. The tribes and the Department know the most about the problems that continue to stand in the way of real trust reform. I am hopeful the Task Force process is providing an opportunity to negotiate honestly and openly about how we go best about framing a new opportunity in trust reform.

There have been some points of contention but I know that in my case I have had a staff person at every single meeting of the Task Force, I believe that they are making great progress, as you do, and are agreeing much more than they are disagreeing. This is not an easy job, as you alluded to, Mr. Chairman. There were nearly 30 reorganization proposals submitted to the Task Force for its consideration. But I am convinced that people of good will who believe, as I do, that solution is long over-due can find the way through this morass. Past solutions have not worked because, in my view, Indian people were not involved in crafting a bill. That is one of the reasons I asked, by the way, to delay any further action on any bill until we heard from this panel today and until there is an opportunity for other tribes to have their voices heard too. But they are getting closer to a consensus.

As the Task Force does its work, I believe Congress needs to continue focusing on the core problems we can help with, including land fractionation, probating Indian estates, and a host of other matters that will never provide the kind of splash the bigger issues do. Working together, we have already removed the threat of massive tribal law suits against the United States. With this Administration's support, the House and Senate passed S. 1857, which we both worked on, Mr. Chairman, the Act to encourage a negotiated

settlement of tribal claims against the United States, which was signed by the President in March of this year.

I am one who is looking very anxiously to the remaining consultation sessions and hope very much the Task Force will produce a proposal that the tribes and the Administration support. I am not looking forward to another exercise in futility writing a bill that we cannot get signed into law. The only way we are going to start writing checks to tribes, which they have long waited for, is to get a bill signed into law. That means that we have got to have something that both the Administration can support and tribes can support. But I remain hopeful that we can find that solution. I am looking forward to the long over-due resolution of the injustice that Indian people have faced in the past on this issue. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

May I recognize the Senator from Wyoming.

STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Senator THOMAS. Thank you very much, Mr. Chairman. I am sorry I am going to have to go to another committee markup. But I simply want to express my interest and say how important I think this issue is. We have been working at it for a very long time. And I am delighted the Task Force is there.

Sometimes I wonder—I see the title of this hearing is for the reorganization of the Department of the Interior. It seems to me it goes much beyond the reorganization. The reorganization is almost secondary to dealing with the issues that are there. We are going to spend all of our time talking about the reorganization. I think we ought to really focus on solving the problems. Now I understand the reorganization is designed to do that, but I am afraid we have been a little diverted into the structure as opposed to the issues.

It is time. Time has passed for us to deal with these things, and we must do it. I just wanted to make the point that certainly our reservations and our tribes in Wyoming, Eastern Shoshone and Northern Arapaho, have had people involved and want to continue. I understand the Department and the tribal leaders have scheduled some meetings in that part of the country and I certainly hope that can happen.

Mr. Chairman and Mr. Vice Chairman, I appreciate what you do. It is time we get this issue resolved. Thank you.

The CHAIRMAN. I thank you very much.

May I now recognize the Senator from Hawaii.

STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

Senator AKAKA. Thank you very much, Mr. Chairman. I thank you and the vice chairman for holding this important oversight hearing on the status of the dialog between the Department of the Interior and the Tribal Trust Fund Management and Reform Task Force regarding the handling of assets held in trust for Indian tribes and individual Indians by the Department of the Interior. This has become about because of the chairman's and this committee's effort to try to do something about the difficulties experienced

by the Federal Government regarding the management of Indian trust assets.

The complexity surrounding Federal management of assets held in trust for Indians has been an issue before Congress and this committee for a number of years. As a member of the Senate Energy Committee, I participated in hearings a few years ago addressing the computer systems that were going to be utilized to address the challenges associated with the management of Indian trust assets.

Mr. Chairman, I am looking forward to hearing from our witnesses this morning as I am deeply interested in the dialog that has been occurring between the Federal Government and tribal leaders in an attempt to begin to resolve these issues. I believe that it is essential for the Government to consult with Indian country to develop ways to overcome these difficulties experienced by the Federal Government regarding the management of Indian trust assets. I am pleased to know that the concerned parties have an opportunity to participate in this process, and I commend all of you for your efforts. Thank you very much, Mr. Chairman.

The CHAIRMAN. I thank you very much, Senator.

The committee is most pleased to welcome the Deputy Secretary of the Department of the Interior, J. Steven Griles.

Mr. Secretary.

STATEMENT OF J. STEVEN GRILES, DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. GRILES. Good morning, Mr. Chairman and Mr. Vice Chairman, Senators. Let me just say that we appreciate your opening remarks and your understanding of what is an historic, in my opinion, opportunity to deal with these very complex and very difficult issues. I would like to ask that my entire statement be submitted for the record.

The CHAIRMAN. Without objection.

Mr. GRILES. Before I go further, let me just give the committee a little background. For the last few days I have been out in Arizona with the fire and what was going on out there. I did not get back until about 4:30 a.m. this morning because United Airline's flights were 6 hours delayed. But I just wanted to let you know that President Bush was there yesterday. He came up to the fire and declared the area of the fire a disaster area, which includes about one-half of the area that has been burned is part of White Mountain Apache Fort Apache Reservation.

The chairman of the tribe, Dallas Massey, met with President Bush yesterday and discussed the impact of the fire on the reservation, particularly the sawmills, the hunting, and all that the tribe has as their activities. We are working diligently, Mr. Chairman, to see that we get a rehabilitation program immediately implemented as soon as we get this fire under control and out. It is an historic fire in the sense of modern day. We have four teams applied to the fire. Over 300 homes have been burned. We do not have it under control. We do not have it contained. We need help from Mother Nature and God. So, we have got some of our best people in the country fighting this fire right now to try to deal with that.

Let me just say for my testimony, sir, that the relationship that we have established with the Task Force members, with the two cochairmen that are here with me today, that I have learned a great deal from them and the other Task Force members and other tribal leaders who are participating. This has been a great experience and we have a much greater understanding of Indian country's needs and I think they have of what our concerns are.

If it would be appropriate, Mr. Chairman, there are a number of Task Force members who are not testifying today, would it be appropriate to ask them if they could stand and be recognized?

The CHAIRMAN. It would be most appropriate, sir.

Mr. GRILES. Maybe Chairman Hall could introduce you to them because they have come a long way and their participation has been absolute. They have spent a lot of their own personal time and a lot of sacrifice of their time to come to these meetings numerous times, not just Task Force meetings, but subcommittee meetings that go on to try to resolve these complete issues.

[Task force members recognized.]

Mr. GRILES. We really appreciate the opportunity to provide a status update to you on the report the Task Force did and presented to the secretary on June 4.

The Task Force efforts are basically focused on three things: Who, that is, what are the organizational options that were presented. I believe that Tex and Sue will be discussing those. The what, what is the strategic plan, the business operations plan that we are involved in. We are not only looking, as Senator Craig Thomas indicated, at the organization, but what is the business of trust and what is the business that we are engaged in with BIA and with Indian country. We have got a whole subcommittee that is involved in that effort to identify that, the "as is business," what are we doing. And then how should we go forward to do that business better. So we have got a process, we have got involvement and consultation with the tribes involved in that.

This Task Force is ongoing. Last week, at the National NCI midyear meeting in Bismarck, the secretary was there and spent a number of hours in which she listened to Indian country. We have got 12 additional regional consultation meetings that are starting. Some have already occurred and more will occur over the next few weeks, and they are listed in my testimony, the locations and times of those.

We are not unaware of the legislative calendar, Mr. Chairman, and we anticipate further feedback to Congress in the near future. We are pleased to know what date you have set the next hearing and I know the Task Force members will work toward trying to see if we can come to some consensus on that.

I would like to allow, if we could, Mr. Chairman, the remainder of the Department's comments to come from someone who I have come to know and have the highest respect for, the Assistant Secretary of Indian Affairs Neal McCaleb.

The CHAIRMAN. I thank you very much, Mr. Secretary, especially for your status report on the Arizona fires. I wish to assure you that this committee stands ready to do whatever we can to work with you in alleviating the pain and suffering caused by this fire.

Mr. GRILES. thank you, sir.

The CHAIRMAN. Thank you very much, sir.

Now it is our pleasure once again to welcome the Assistant Secretary of the Bureau of Indian Affairs, Neal McCaleb.

Mr. Secretary.

STATEMENT OF NEAL A. MCCALEB, ASSISTANT SECRETARY, BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. MCCALEB. Thank you very much, Mr. Chairman, members of the committee. My remarks will be brief. I want to comment not so much on the substance of what has been accomplished by the Task Force, and it is considerable to this point, but I would remind you in our time before you that just a little over a year ago in my confirmation hearings I made the comment relative to the trust, the noun "Trust," with a capital "T," that there had been a serious erosion of trust on the part of the BIA, the trustee, and on the part of the Indian clients. I also said that there was a critical need for the restoration of the credibility of the trustee with the beneficiaries.

Trust, like respect, and when I say "trust" it is with a small "t," the verb, trust, like respect, is not something that can be demanded by authority but must be given willingly. And trust, I think, has been the major work product of this joint committee which has been fundamentally driven and controlled by the tribal leadership present on the committee. They have been the primary movers and have set the agenda as we go along.

In this process of working together, there has blossomed a true flower of trust from the bud of hope. It is our commitment and my desire to keep that flower of trust nurtured and well, because without that there can be no organizational trust that will be truly functional.

I would just close by reminding myself and all those in this room who have the responsibility of this trust that St. Paul, when he wrote the second letter to the Corinthians, said, "To those who have been given a trust, it is required that they be found faithful." And it is our effort in this committee to be found faithful to our trust. Thank you.

[Prepared joint statement of Messrs. Griles and McCaleb appears in appendix.]

The CHAIRMAN. I thank you very much, Mr. Secretary.

Now it is my pleasure to call upon the chairman of the three affiliated tribes of the Fort Berthold Reservation of New Town, ND, Tex Hall.

Mr Chairman.

STATEMENT OF HON. TEX G. HALL, CHAIRMAN, MANDAN, HIDATSA, AND ARIKARA NATION, TRIBAL COCHAIR, TRIBAL LEADER/DEPARTMENT OF THE INTERIOR TRUST REFORM TASK FORCE

Mr. HALL. [Greeting in Native language.] Thank you, Senator Inouye and Senator Campbell, for this hearing and giving us an opportunity as a Trust Reform Task Force and as a cochair for the tribal side, with my colleague, Chairwoman Sue Masten, as well as Assistant Secretary McCaleb and Steven Griles, the other cochairs

on the Federal side. It truly is a joint effort on this very important issue.

If I could, Mr. Chairman, I would like to introduce the subcommittee and I would like to have them please stand after I recognize their names. Cochairs of the Legislative Subcommittee are Governor Bill Anoatubby from the tribal side, and David Bernhardt from the Department side. If they would please stand. Cochairs of the Business Processing and Modeling Work Group are Tim Martin, executive director of USET, from the tribal side, and Ross Swimmer from the Department side. And the other subcommittee is the Proposal Review Subcommittee, and we have Alvin Windyboy, who is not here I understand, and Jim Cason from the Department side. And then we have another Task Force member here, George Arthur from the Navajo Nation. And then, of course, we have Tom Slonaker from the DOI Office of Special Trustees is here. I believe that is all of the Task Force members. I hope I did not miss anybody.

The CHAIRMAN. Before you proceed, Mr. Chairman, I want to thank all of you for the work you have put into this effort. We appreciate it very much.

Mr. HALL. They really have, Mr. Chairman, Senator Campbell, and Senator Akaka, they really have been working very hard. I do not know how many hours I could count up, but it is in the hundreds of hours. All of the Task Force is committed to making this effort a reality.

It really is a matter of trust, as Mr. McCaleb had indicated, the verb "trust." I can remember when we started this Task Force after the Department rolled out BITAM in November 2001 and it was unanimously opposed by the tribes. We were at Spokane at the NCI annual convention where there was over 3,000 participants that were registered, and we all decided we needed to put our heads together as tribal nations and decide how we were going to go about this. Then, of course, the idea of the Task Force was formulated. I am very happy to report that after 7 months we have come a long way.

But let me get into some of my testimony, Mr. Chairman, if I could. Again for the record, my name is Tex Hall, chairman of the Mandan, Hidatsa, and Arikara Nation, and also the NCI president and cochair of this Tribal-Federal Joint Task Force on the Trust Reform. I would like to give you a report on how far we have come in our discussions as tribal leaders and as a Department of the Interior over the past 7 months.

Tribal leaders believe that this matter is every bit as important as the Enron scandal. I remember being here in February, I believe the Senate committee hearing was on February 26, and I believe there was a Senate committee hearing the Enron issue and all the media was over there. That was what was more important. My point is this is just as important to the tribal leadership. This has been an ongoing broken trust for over 100 years and we are now coming together to finally get some resolution to this issue.

The Task Force itself is made up of 24 tribal leaders from throughout the country. They were elected from their 12 BIA regions. So that is two tribal leaders and one alternate, for a total 36 that were elected by their tribes. Of course, we had the national

consultation last Tuesday, as was mentioned previously by Mr. Griles, in Bismarck. A great turnout, and we appreciate the Secretary being there and her commitment in coming to Bismarck, not that it is that hard to find, Bismarck, but there is only a small airport there and there is a lot of scheduling that the staff has to do to get in and out of Bismarck. Also, we appreciate her coming to the United Tribes Technical College and talking about education. So we really appreciate that.

But, again, the Task Force was created as a result of the proposal of reorganization by the Department, filed by the Department in the *Cobell* litigation in early November of last year. The Department's proposal calls for the creation of an entirely new Bureau of Indian Trust Assets Management, or BITAM, which would have given BITAM what the Department called trust functions and left in the BIA all the other services that BIA provides.

Tribes and their leaders were unanimously opposed to this proposal for many reasons. Tribes said, and continue to say, that all services to tribes provided by the DOI need to be provided within a single agency, and that agency is the Bureau of Indian Affairs. Tribes, and especially those in my region, the Great Plains, point out that the services in the treaties did not distinguish between trust services and other services. Everything the United States does for tribes comes from a treaty or a legal obligation. So on that point, tribal delegates are now in general agreement with the Department, and we are thankful that the Secretary has told us that she has withdrawn the BITAM proposal in her June 4 letter to the tribes and also in her opening comments at the national consultation last Tuesday, June 18. Although I am not sure that everything has been filed in the *Cobell* litigation to show that DOI has withdrawn that proposal. So that is a point that I would like to leave for the record.

Reaction to BITAM when it initially came out. At the first meeting with the Secretary at which the BITAM proposal was discussed in Albuquerque in December 2001, tribal leaders, including myself, called for a Task Force to develop an alternative to BITAM. And as the Assistant Secretary and other Department officials continued to tour Indian country and listen to tribal leader after tribal leader complain that BITAM was not the answer to trust reform, the Department and tribal leaders proposed that a joint Task Force should meet to work out an alternative to BITAM that everyone could support. And, again, Sue Masten, chairwoman of the Yurok, and myself have been elected cochairs of this Task Force.

As a little bit of background, during the past 6 months we have met in formal sessions five times, beginning in Shepherdstown, Va, in the early part of February at the invitation of the Secretary, then in Phoenix, San Diego, Minneapolis, and just 2 weeks ago in Bismarck, ND. Our first two or three meetings were intense discussions about just process and protocols, and how do we go about business, and how do we agree on our issues, and if we disagree, how do we come to some resolution on that. So the first part of the meetings were basically just a lot on that and what was the scope of the Task Force. What was the purpose and what was the scope? What were we trying to accomplish? And how would the various tribal leaders be recognized? I mentioned in Shepherdstown it was

almost like talking to the U.N. because we had tribal leaders from many different parts of the country, well, actually, 36, and how would that recognition be because they were all sovereign nations, independent sovereign nations.

Then what were the committees that needed to be established? And what was the process by which we would gain agreement? And I am happy to add, we agreed on consensus, on that consensus process. Again, as I mentioned in the introductory, we basically established three main subcommittees; one dealing with the various alternative proposals to BITAM, one dealing with the legislative needs, and one dealing with the scope of carrying out the contract the Department has with EDS, and that is looking at the "as- is" model, what is happening currently at each of the local levels.

Our committees have met by telephone and in person numerous times. Each Task Force member has spent well over hundreds of hours in meetings alone on this task of trust reform. And now we are getting to the heart of the issue of trust reform in our discussions. I can tell you that our efforts are coming into focus now. We are getting to the very issues in our discussions and I believe we are making headway toward working out a legislative solution as well as an administrative solution. Discussions are vigorous and we are beginning to see that. We have many agreements and some disagreements.

What the Joint Task Force agrees on are as follows:

We agree that trust reform is needed. The status quo is unacceptable.

We agree that the BIA should not be split into two separate bureaus. And we are appreciative again that BITAM is dead and that the Secretary has indicated that in her June 4 letter and in her opening comments on June 18 at the national consultation.

We agree that the Department and the BIA must be held accountable to the tribal and individual Indian beneficiaries.

We agree that those responsible for trust reform must answer to a single person in a chain of command.

We agree that there must be adequate resources to carry out all those trust functions. If we do not have the resources, all of the reorganization won't mean anything if we do not have the resources to do it.

And finally, we agree that there must be some kind of oversight for those carrying out the trust responsibilities by some independent body.

What I want to emphasize on this last issue concerning the development of an independent entity to ensure accountability to the beneficiary, this is most likely an area of disagreement between the tribal members of the Task Force and DOI officials. Last week in Bismarck, tribal officials from around the country had their first chance in several months to speak candidly to the Secretary about what kind of trust reform they wanted. Many tribal leaders in Bismarck on June 18 had expressed their viewpoints of wanting an independent commission that had real teeth, a commission that could take actions to make sure that trust funds management and trust asset management functions would be carried out by the Department. And because tribal leaders believe that the creation of an independent commission is one of the most important things

Congress can do legislatively, if not the most important thing, I would like to spend the remainder of the time talking about that independent commission.

First of all, the commission must be independent of the Department of the Interior. Everyone has seen that the Special Trustee appointed under the 1994 Reform Act is not independent enough to get the job done. Originally, the 1994 Trust Reform Act was written to have the Special Trustee be independent. But it did not happen. And the experts tell me that because it is an executive branch commission, the President probably has to appoint the members to this commission.

Second, the commission must have members who know how the trust should be carried out. These members must be qualified and understand how fiduciary trust should operate and understand the issues and responsibilities related to the United States' trust responsibility to Indian people. The commission needs to have stakeholders on it. It should have Native Americans on it. Quite possibly those members should be full-time. And how many? Enough to get the job done. We have not quite decided on that issue. But the Task Force and the tribal side is working very hard on this issue.

And now comes the hard part. What are the powers of the commission? We all basically agree that the commission should set the trust standards and establish procedures for carrying out the trust funds and trust asset management functions. Where we probably disagree is in determining what the commission should be able to do to ensure that trust funds management and trust asset management functions are being carried out properly.

The next point is on sanction powers. Most tribal leaders believe that in order for trust reform to really work, the independent commission must be able to audit financial accounts, investigate allegations that those managing trust responsibilities at the Department are not doing their job and require compliance. Power to issue sanctions, monitor performance of carrying out the trust responsibilities by DOI, which includes the power to review decisions by DOI on trust management and to enforce its points of view if DOI disagrees. Monitor the DOI budget and report to Congress whether the DOI budget for trust fund management and trust asset management is sufficient.

DOI has raised questions about these powers and have asked what happens if the commission orders the Department to do something if it does not have the funds to do it. And that is a very legitimate question. I think part of the answer is to make sure there are adequate resources. There simply has to be the resources in order for this to actually happen.

This committee's efforts and ability to assist in providing adequate resources are critical to the overall success of trust reform. We are often told that we must live within the resources that are available. But the tribes and the court in *Cobell* are saying that trust functions must continue to be carried out. For example, at the Fort Berthold local agency, approximately eight positions are needed to fully carry out trust asset management and trust funds management requirements imposed by the regulations that were put in place in January last year. We do not have those eight positions

yet, they are not hired. So we cannot carry out the functions if we do not have the people.

DOI also I believe thinks there may be some constitutional questions with an independent commission. We are making efforts to make sure that those questions are answered ahead of time, and we want to work with them, the Administration, and work with Congress on this very issue. But I would note that we feel there is nothing in the Constitution that prevents an Executive Branch department from being reviewed by an independent commission.

Finally, I think it is only fair to point out some other concerns we have as we continue to move forward towards a legislative solution.

We remain concerned that the Department is seeking to remove Mr. Joe Keefer as Court Monitor. We have invited Mr. Keefer to all of our Task Force meetings as we believe his presence alone helps keep us on track and focused on what we need to do. And we have not seen him be biased on any of the issues.

We are also continually concerned about the computer shutdown, that being LRIS, the Land Records Information System. I understand it is partially fixed. But after 7 months, it is still causing problems. People are still suffering, probates are stopped, land transfers are delayed, and this causes harm economically to tribes and their members because land transfers cannot take place. This affects us at the Three Affiliate Tribes because we are right in the middle of a construction season in the norther plains and we all know how short that construction season is.

We are also concerned that the Justice Department has appealed trust related cases to the United States Supreme Court which has accepted the cases for review, that being the *White Mountain Apache* case, and the *Navajo Nation* case. These cases should be settled in a manner that does not diminish the scope of the United States' trust responsibility to tribes. Our treaties and the laws of this country set forth what trust responsibility is. Congress should be the one to decide how the trust responsibility gets carried out, not the U.S. Supreme Court.

We are also concerned about the records destruction. As the case is winding down for Arthur Anderson, we understand that the records are being destroyed. And the fact that Arthur Anderson did the reconciliation reports for tribes and has been convicted now of obstruction of justice makes us all very uncomfortable. This is important to the Task Force because we still have to have a starting point for making the system work. We would request assistance from Congress in making sure these records are safeguarded.

Each account will have to have a beginning balance that we can all agree on, or at least we will need a process by which we can get to that starting point. I know that Senator Campbell has offered legislation to get to that starting point, and we appreciate him for his efforts and look forward to working with him on this very important issue.

Can we bridge these differences? Time will tell. I know that the time clock is ticking. The Task Force will continue to meet over the next several months, but tribal leaders believe we need a legislative solution on some of these issues. We hope to have some kind of draft legislation within a few weeks coming up.

We thank you, Mr. Chairman and Mr. Campbell, for giving us an opportunity to present testimony on this very important issue. I look forward to answering any questions you may have.

The CHAIRMAN. Thank you very much, Mr. Chairman.

And now it is my pleasure to call upon the chairperson of the Yurok Tribe of Indians of Eureka, California, Sue Masten.

STATEMENT OF SUSAN MASTEN, CHAIRWOMAN, YUROK TRIBE, TRIBAL COCHAIR, TRIBAL LEADER/DEPARTMENT OF THE INTERIOR TRUST REFORM TASK FORCE

Ms. MASTEN. [Greeting in Native language.] Good morning, Chairman Inouye, Vice Chairman Campbell. It is an honor to be before you today to discuss the progress of the Trust Reform Task Force.

I would like to begin by reiterating the Task Force's support for the creation of an independent entity to oversee trust reform. The Indian trust within the Department of the Interior is the only trust in the United States that is not subject to any type of external regulation or oversight, and this should not be acceptable to anyone. We believe that this is one of the major reasons that the Department has mismanaged our accounts and gotten away with it for decades. The Department has a track record of refusing to perform audits, or to set specific trust standards which would guide the action of its employees, and has also refused to request adequate budgets to perform the trust duties which it is responsible for. You cannot expect that the fox can oversee the hen house.

I serve on the Advisory Board to the Special Trustee. We know first-hand how important it is to have independent oversight that is not subject to the direction of the Secretary. This committee has heard from each of the Special Trustees about their inability to perform their duties under the 1994 Trust Reform Act because of the lack of independence. You have also heard from members of the Advisory Board on this issue.

Congress should create an external, permanent, independent entity that would have the ability to enforce trust standards making the Department accountable to the beneficiaries.

Mr. Chairman, we cannot have a trust system where the duties of the trustee are defined by the limitations of a broken system. We must develop the standards, define the duties of the trustee, provide the resources needed for the systems and staffing. Once this is completed, we are confident that Congress will provide the necessary funding to accomplish the task.

We need an independent commission to monitor trust management to ensure that standards are met, because history has shown us that the Department of Interior is incapable of doing it on its own. Other responsibilities of the independent commission would include auditing financial accounts, investigations and compliance, and monitoring corrective actions.

In addition to an independent oversight commission, we also believe that Congress needs to create a position within the Department that will have high-level authority over all Indian trust matters.

The Task Force has reached consensus that it is necessary to create a position of Deputy Secretary or Under Secretary of Interior

for Indian Affairs that would have direct line authority over all aspects of Indian affairs within the Department. The creation of this position will address the major issue raised by both the EDS Report and the court: That the Department of the Interior lacks clear lines of authority and responsibility to ensure accountability for trust reform.

The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility, and communication between these two entities has been uncertain and at times has come into direct conflict.

In addition, the Minerals Management Service, the Bureau of Land Management, the Office of Hearings and Appeals, the Office of American Indian Trust, and the newly created Office of Trust Transition and Office of Historical Accounting all have key responsibilities for trust transactions. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts and trust management across all of the relevant agencies.

This absence has hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems. We believe that Congress should create the new position of Deputy Secretary or Under Secretary for Indian Affairs, and look forward to discussing this with you in greater detail.

The Task Force is still discussing the issue of reorganization of the Bureau of Indian Affairs to ensure accountability for trust management throughout all operational levels. At the sametime working to ensure that resources and decisionmaking are placed at the local level wherever possible.

The most difficult discussions that we are currently engaged in are about the reorganization at the regional and agency level. The Department has insisted that there must be strict separation of trust resource management in a completely separate organization from the management of services such as housing and roads. However, tribal leaders have insisted just as strongly that there must be a single point of decision- making authority at the local level to deal with issues that cut across both trust resource management and other trust services.

At the local level, nearly all activities on Indian reservations take place on trust property—tribal self-government, tribal services, and trust fund and resources management are all interrelated.

Successful project management requires coordination and timely decisionmaking at the local level. Tribes have a great concern that a "stove piped" organization would put an unbearable level of bureaucracy into the system. Imagine having to get central office approval every time that there is a disagreement over construction of a road or an irrigation ditch. This is something tribes do not want and we do not think the Department wants it either.

We believe that trust reform reorganization can be effective to meet its goals and still allow for a single point of decisionmaking on trust resource management and trust services. We generally agree with the Department that it would be valuable to group the

trust funds management and the trust resource management activities that would have clear lines of responsibility and staffing.

However, accountability is not going to be assured through separate organizational structures alone. It can be assured through: Identification of duties; adequate funding; qualified staffing and training; policies, procedures, and standards; internal controls; external audits; transparency; and a focus on responsiveness to the beneficiaries.

I would like to briefly mention a few more items currently under discussion by the Task Force for the committee's consideration.

Adequate funding and staffing for trust management. The Task Force agrees that a primary issue is getting adequate resources to perform the trust duties. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect has contributed to the dysfunctional management and financial systems at all levels of the BIA.

One of the primary concerns of the tribal Task Force members is that the trust reform effort not result in a mere shifting of resources to trust management, away from the critical tribal services such as law enforcement, education, alcohol and substance abuse prevention. Tribes should not be penalized for the Government's mismanagement of trust assets. The cost of trust reform should not be borne by existing tribal programs and services. There must be new appropriations for trust management if trust reform is going to be effective.

Under self-determination programs and beneficiary co-management, it is critically important that trust reform not hinder the progress of the self-determination and tribal co-management of natural resources. It is clear that tribes do a better job of managing our own resources than the Department does, and we must keep the long-term vision in mind. The provisions in S. 2212, the Indian Trust Asset and Trust Fund Management and Reform Act of 2202, are a good starting point for this discussion.

Ongoing consultation process with beneficiaries for trust reform. This Task Force was created for a specific purpose—to define reorganizational options to implement trust reform. However, the Task Force is also serving as a forum for discussion on other related trust reform issues that the Department is facing, such as the computer shutdown, data cleanup, historical accounting, TAMS, et cetera. The Task Force has discussed the development of a long-term strategy for ensuring continued communications and consultation between tribal leaders and the Department as trust reform moves forward.

Process for settling historic account balances. The Task Force has had discussions about the need to set up a forum for the resolution of current and subsequent litigation. Trust reform cannot be complete until there is resolution to these historical disputes.

Land consolidation programs. Finally, in order to address the escalating magnitude and complexities of land ownership patterns and trust fund accounts, Congress must invest in Indian land consolidation programs. According to the BIA, the 56 million acres of trust and restricted lands under its supervision are divided into over 2 million different ownership interests. Fractionation of own-

ership interests through inheritance has created an accounting nightmare for the Federal Government, and must be addressed if trust reform is to occur.

In conclusion, we find ourselves at a unique opportunity that has put high-level Department of the Interior representatives at the table with tribal leaders for the first time. Although the problem of trust management has existed through numerous administrations, never before have we had all three branches of Government, Judicial, Congress, and the Administration, focused on trust reform.

We are appreciative of the commitment that Secretary Norton, Deputy Secretary Griles, and Assistant Secretary McCaleb have demonstrated and for the hard work that they and their staff have contributed to the Task Force. And of course I would also like to acknowledge the hard work and contributions of my esteemed colleagues who have also donated staff resources to this effort.

This has not been an easy task for the Department of the Interior or for the tribal leaders. However, we have all been committed to stay at the table to work on this most important issue. If we continue to maintain this serious level of effort, we firmly believe that we can reach some policy decisions that will put trust reform effort on track to a successful conclusion, and we are looking forward to working closely with you on any legislation necessary to implement trust reform.

We also would like to thank the Committee, as always, for your continued interest on this issue and all issues of importance to Indian country. Thank you.

[Prepared joint statement of Mr. Hall and Ms. Masten appear in appendix.]

The CHAIRMAN. I thank you very much, Chair Masten.

Listening to the testimony, it is apparent much has been accomplished towards meeting the mission of this Task Force. But it also seems apparent that there are a few more steps to be taken.

My first question is, can this be legislatively handled by separate bills, or should it be addressed in one bill? Are the issues inseparable or can they be separated?

Mr. Secretary? And I will ask the whole panel here.

Mr. GRILES. I think, Mr. Chairman, it is the right question. I think if we are looking simply at an organizational structure, that potentially could be one bill. But as Chairman Masten so appropriately laid out, there are lots of issues that the Task Force is working on, some like the fractionation issue and things of that nature will require additional legislative support.

So as the Task Force has evolved, as we have developed more issues and have broadened our breadth and length and scope, I think that we are finding that there will be other legislative issues that we need to bring back to you and we would like to invite your advice on how best to try to address those.

So the immediate issue is the organization, which we do think would probably need some legislative support. But there are other issues truly that we are going to need more legislative support on also.

The CHAIRMAN. Chairman Hall.

Mr. HALL. Thank you for the question, Mr. Chairman. I really think that the hearing that you have laid out I believe you said July 30 is a real opportune time for the tribes to present their number one priority in this legislative solution is the independent commission. And so I think that window is open here for the 107th Congress and the tribes are wanting to get some sort of legislation during this session on that issue. So that way everything can continue to move. But that is the first priority right now. And as Mr. Griles had indicated, there may be some need later on, but right now that appears to be the priority that the tribes are focused on. We are hoping we can get something done during this session.

The CHAIRMAN. Are you confident that by July 30 this committee can study a proposal by the Task Force on this issue?

Mr. HALL. Yes; actually, we are working on it with Governor Anoatubby and David Bernhardt in the Legislative Subcommittee. I am confident that the Task Force and that subcommittee will have a draft for review, I do not know what timeframe before the 30th that would entail. But we would have something.

The CHAIRMAN. In your testimony, Chairman Hall, you noted I believe about ten areas of agreement.

Mr. HALL. Yes.

The CHAIRMAN. Can they be handled separately or must they await one bill?

Mr. HALL. I think that those could be handled in one bill, Mr. Chairman.

The CHAIRMAN. At this time, or until the mission is accomplished?

Mr. HALL. We talked about the BIA should not be split into two separate bureaus. That is an agreement that is right now. We agree on that right now. The accountability is another point that we all agree on. But it is just an accountability thing. A single sponsor, that can be done, the single person in the chain of command. Adequate resources, I think that as we are looking for the 2004 budget, I think that that is something that can be done there. Then, of course, the independent commission. So I think the single sponsor and the independent commission are two I think that could be handled as of July 30, and the rest of them could be brought forward in the final bill.

The CHAIRMAN. Well, obviously, we have many questions and some of the questions have been submitted by other members of the committee. And because of the apparent love-fest that we have here. [Laughter.]

I am reluctant to ask questions that may break up this love affair. But there are a few I think I should ask.

Mr. GRILES. Do we get time to consult before we respond? [Laughter.]

The CHAIRMAN. Secretary Griles, in the Department's view, what is the legal standard that the United States must meet in its management of tribal lands and resources that are now held in trust? Is it the standard applicable to a common law private fiduciary, or some higher standard, or some lower standard? What standard are we addressing here?

Mr. GRILES. That is a fundamental question that you are asking for which we have had a number of statutes, rules, regulations that

we have adopted to try to define this trust responsibility. At this point, I think there are two cases that are before the Supreme Court. The Supreme Court is going to be addressing the very question you have just asked and will address that in the very near term. I think, as a non-lawyer, I am best to tell you that we are looking for those decisions to give us some further guidance.

But we have two Supreme Court decisions already, *Mitchell I* and *Mitchell II,* which give us guidance as to what our trust responsibilities are. And in our principles, and policies, and procedures that we are evolving with the Task Force, we are looking to the private trust guidance and principles that they have to see how better we can adopt things that have been successful in the private sector to apply to our trust obligations. And we are working with the tribes as well as the Tribal Task Force to put those into place because they are proven and we can use those to better administer the trust responsibilities.

The CHAIRMAN. Would it be correct to state that the Task Force is awaiting the decision of the Supreme Court in the cases before it, especially the Navajo case, before we can discuss the legal standard of management? Chairman Hall?

Mr. HALL. Personally, I do not think so, Mr. Chairman. I think that Congress is the ultimate trustee and sets that standard. We have heard it over and over that it is the highest fiduciary responsibility that Congress has. So these are very important trust cases and, as I mentioned in my testimony, I think Congress has that obligation to define that trust responsibility and not have the Supreme Court do that. So we are very concerned about that. I think that it should be done before it goes to the Supreme Court.

The CHAIRMAN. So your position is that this Congress should act upon this issue before the court rules?

Mr. HALL. Yes; I believe it should. I believe it should review these cases before it goes to the Supreme Court because that would affect everything else. Every other tribe in the country would be affected by this. And so this is a real critical juncture of where we are at and where we are going in the future in regards to the Congress and carrying out its trust responsibilities to Indian country.

The CHAIRMAN. What is your view, Mr. Secretary, on this independent commission?

Mr. GRILES. First, Mr. Chairman, we support an oversight of independent-type commission review. What we are trying work with the tribal leaders on is the definitions that Chairman Hall was speaking to, setting trust standards, the authority and power to issue sanctions, that kind of question. How does that interrelate with the overall authority of the Secretary of the Interior, and separation of powers, and all of those kinds of legal questions. As Chairman Hall indicated, we are working together. The Task Force has asked for some legal briefs analysis to be performed.

So we, too, want to support an independent commission or a commission, and the term "independent" carries different meaning to all of us. We are trying to define that in a consensus mode that we could bring back to you, hopefully by the 30th of July, and could indicate to you where we think that works. There will be give and take. We will have our view and others will have their view and

we will try to find a consensus that we can bring back to you, Mr. Chairman.

The CHAIRMAN. Because you are still in the negotiating stage, I am reluctant to ask questions. But I have one more. Chairman Hall mentioned that this commission should have the authority to impose sanctions. Does the Interior Department have any thoughts on that?

Mr. GRILES. I am not sure, Mr. Chairman, what the word "sanctions" implies at this point.

The CHAIRMAN. I realize that is rather vague because I do not think you mentioned what sort of sanctions you have in mind.

Mr. GRILES. So I think it is an area which we really need to work with the Task Force on and say what do we need? Chairman Hall and Chairwoman Masten both, all of us want to find the best solution so the tribal beneficiaries and the individual beneficiaries have an assurance that the trust obligations are being honored and being delivered in an efficient, effective, and in the correct manner. How do we take that goal and iterate that into a commission and to the Bureau of Indian Affairs. If we set up, say, and Under Secretary and then the Secretary, how does all that fit together.

The one thing you do not want is two people responsible and nobody held accountable. And so, as we look at this, we have got to assure accountability and responsibility, and assure that somebody can be held accountable and should be held responsible for trust beneficiaries service delivery. And whatever we do here, we have got to end up with that type of approach. I think that we all want that to happen, but how do we take the independent oversight body or a commission with sanctions or whatever and put that to play so it meets both the constitutional concerns but, more importantly, the delivery of services and accountability and responsibility.

The CHAIRMAN. So the Department is open as to what steps must be taken to bring about accountability? If it calls for sanctions, so be it.

Mr. GRILES. We just need to work together to figure that out, Mr. Chairman. This Task Force works long hours and many days, and over the next three or four weeks, or whatever the time is, we are going to continue to do that. In fact, we are going to meet after this hearing to pursue some of these thoughts.

The CHAIRMAN. You know, when this is accomplished we will have a big celebration I think.

Mr. GRILES. I will buy the champagne, Mr. Chairman. [Laughter.]

The CHAIRMAN. Mr. Vice Chairman.

Senator CAMPBELL. Thank you, Mr. Chairman. I have got about 40 questions. Unfortunately, wouldn't you know it, the conference committee between the House and Senate on the energy bill is taking place in just a short while, so I only have about another one-half hour I can be here.

As you know, some of us, me, you, and several others, worked very hard to get an Indian section in that energy bill. It is not in the House bill, as you probably know, Tex. Even what we could get in the Senate side was only really dealing with conservation and renewables and so on, not with any opportunities for tribes to develop their non-renewable resources. So we are working very hard

trying to make sure our colleagues on the other side of the Hill recognize the importance of getting us less dependent on foreign energy by giving some opportunities to Indian tribes which have roughly a third of all the low-sulphur coal in America under their reservations, as you know, and oil, and gas, and other resources.

So it is a real important conference and I simply cannot miss that. So when I skip out a little early, I did not want you to think I am not concerned about this issue. That one is also really important to Indian country.

You mentioned the date of July 30 of having something maybe concrete for a draft. I have to remind you that we are supposed to get out about July 30 or so for a 30-day recess. Since it is election year, that gives us about 30 days after that. There is some talk about coming back for a session after the election. But it looks to me like we only have about a month or a little more to be able to work on this to try to get it through this year and there is an awful lot of unresolved things. I would just point out to you so you know that we are up against a time constraint that we may or may not be able to reach some consensus to get a bill passed.

My view has been that the Task Force has to help write this thing. If it is going to be satisfactory to the tribes and to the Administration, they have got to help write it.

I might also, before I ask a couple of questions, tell you, Deputy Secretary Griles, I am glad you mentioned the fires in Arizona. What a lot of people do not know is that a lot of good Indian kids are out there on those fire lines.

Mr. GRILES. Very much sir.

Senator CAMPBELL. I just bumped into one group in Colorado the other day, a group of Navajo Hotshots, as they are called. We have about 270,000 or 280,000 acres on fire in Colorado. Not as big as Arizona, but hugely big. Those kids are all over the country, Indian youngsters, now fighting those fires, trying to protect lives and property of all Americans. This Arizona fire, about half of it being on the White Mountain Apache Reservation, I know that we are going to make sure that we do our best to return the favor of all these Indian kids that have tried to protect our lives and property.

Let me get to a couple of questions now, Mr. Chairman. One to perhaps Neal or Deputy Secretary Griles. Your written statement says that the Task Force report recommended that the BITAM proposal be replaced by one of the options advanced, which the Secretary has agreed to do. So when we look at the three options that have been put forward by the Task Force so far, is it fair to say that one of those is going to be forwarded to the committee that Congress could act on?

Mr. MCCALEB. Yes; that is our objective and I think it will be done. We thought it was premature to recommend a specific one of the three options until after there was an opportunity for national consultation and a full airing of this in Indian country to see what their response was to the three options that were presented.

Senator CAMPBELL. I see. Okay. When Chairman Hall mentioned that one of the bills, if we did several bills, one could deal with the issue of not splitting the Bureau. I do not think we have to do that anyway because it can only be split with legislative action. If we

do nothing, it does not get split. Simple as that. So that is probably not necessary to be on the table.

The phase-out of the Special Trustee, I might also ask Neal or Deputy Secretary Griles, the phase-out of the Special Trustee, given the lack of success we have had really since 1994 and the huge amount of money we have spent, I can see why the tribes want it phased-out and replaced with an independent entity with oversight regulatory authority. I think you spoke a little bit to that. Then your view is that it might be an independent entity with some oversight and advisory capacity but not with regulatory capacity?

Mr. GRILES. Senator, I think that is really the fundamental question is the duties, responsibilities, and authority of a commission. I think we feel that until the trust reform is actually pretty much sufficiently completed, we need to have an Office of Special Trustee still maintain its role and advise the Secretary on what ought to happen. How those two interrelate, the Office of Special Trustee and another commission or advisory board and what its authority and responsibilities are is what we hopefully will be able to come back to you with some thoughts on in the next thirty days. We need a lot of work to be done on that.

Senator Campbell, could I just respond to something you said also.

Senator CAMPBELL. Please.

Mr. GRILES. I just want to tell you that when I was out there on the fire line there were a lot of Native Americans there. I want to say that I also had a meeting with the tribal council of the White Mountain Apaches. They are very concerned about this fire and the tribal council wants to do everything it can to assure the communities there that they are partners in those communities and they are just as affected by this fire as Show Low and the other communities there. We are working as a partner with BIA, and the White Mountain Apache has an individual on every one of these teams to work together.

So this is a huge community, if you will, out there and they are working together to bring back resolution and a community spirit of solving this problem. I just wanted to make sure you understood that the Chairman wanted me to convey that to you and to the Committee here.

Senator CAMPBELL. I appreciate that. We all know that homeland security and fighting terrorism are one of, if not, our biggest prioritys right now as a Nation. One thing the tribes fear is that the reforms we are discussing may take place without the resources to implement them. We can pass any kind of a bill, but if we do not come up with the money it does not get done. It is as simple as that.

Is it your position that there will be new resources available to fund the reform? Or is that going to be covered out of existing Indian programs or taken from other Indian programs? Maybe Neal might be best to answer that.

Mr. GRILES. Mr. Vice Chairman, Mr. McCaleb can respond, but I will also respond for you. We recognize that this President has put over $80 million of additional funds this year alone into trust reform. At each of these meetings we have had, we have had OMB

presence there. They are in the audience, they are a part of the consultation process. The "as-is business" as well as the "business to be" planning that we are doing with EDS and with the Tribal Task Force is intended to—if we are going to do this job properly, how much resource do we need? What are the types of people we need? How do we structure it so these services are delivered?

We cannot continue to not provide adequate resources. The President and the Secretary have shown that effort already with this recent 2003 budget that has been submitted. And we are in that process of evaluating the 2004 budget. But as we go through this, as the new business processes go forward and we identify these new resources and what is going to be required, we are going to be working with the President, OMB, and with you to see how we can best do that.

Senator CAMPBELL. Well, when we see the President's 2004 budget, we may be reminding you of that if the resources are not able to get the job done.

Mr. MCCALEB. Mr. Vice Chairman, I would respond to that. It is my personal commitment to the Indian Task Force members, and I am optimistic that this will be supported by the Administration and the Congress, that we will not cannibalize the already underfunded programs in order to finance the necessary improvements and resources required for trust reform.

Senator CAMPBELL. Thank you. I am sure the tribes will appreciate that position.

To Chairman Hall and Chairwoman Masten, I understand there are 29 proposals submitted to the Task Force for its review, many of them have common themes. Has the Task Force Legislative Committee, did I understand that Chairman Anoatubby is the Chairman of that, have they begun the process of framing up anything yet that we can look at?

Mr. HALL. Yes; they have, Mr. Chairman. They have been in existence since March, it was formed in March, so they have begun the process.

Senator CAMPBELL. With the chairman's permission, could Chairman Anoatubby maybe elaborate for 1 minute or 2 on what you have done so far or what we can expect?

The CHAIRMAN. Please.

Senator CAMPBELL. I realize that there are a lot of particulars you probably have not got ironed out yet.

Mr. ANOATUBBY. Mr. Vice Chairman and Mr. Chairman, thank you for inviting me to the table. I apologize, I am not fully prepared; however, I do have some comments that I could make in this regard. We have been working with your staff to keep your staff informed and they have also been coming to the Task Force meetings. We have what we call a memorandum but it one that we continue to update that gives the various options that have been decided by the Task Force and the various initiatives I guess we will have to take in order to seek a legislative solution.

I think the cochairs of this Task Force have very well outlined what we have devised. We have not attempted to actually create or develop the legislation itself. What we have is a set of principles and guidelines that we would follow in asking that this Congress would in fact pass legislation to address these issues. So as far as

the actual development of legislation, no, we do not have that. But we do have the guidelines.

The Legislative Committee is working closely with the Proposal Review Committee. We attend their meetings, we keep abreast of what is happening there, and then we do our best, and this also involves the cochair of this committee, David Bernhardt of the Secretary's Office, where we consult and we develop strategies. One of the strategies that we have is that after this meeting the co-chairs will meet with Interior, we will discuss those pending issues, and as those issues become non-issues and there is some consensus, then we will forward to you a report which will give you the information that you need to develop legislation.

Senator CAMPBELL. Okay. I thank you. I mentioned a while ago that time has become important because we have not very much left in this year. But we want to get it right. Frankly, after all the broken promises, we want to try to get it right when we write the thing.

Mr. ANOATUBBY. Mr. Vice Chairman, we feel very committed to dealing with this. We understand the legislative calendar. We had hoped by this hearing that we would have one option at least for the organizational structure available to you. Because the consultation process must be completed before we can actually present that option, we felt it would be just a little premature for us to forward one. However, I believe, at least it is my opinion, that the Task Force has in fact come to agreement on the creation of this one line, one single individual concept, and the two options, the Deputy Secretary or Under Secretary, will be a decision that will be more easily made than what it would have been several months ago.

This can be forwarded to you I believe after the Task Force meeting. There is no way to predict, obviously, that this can be done because there are a lot of dynamics within the Task Force. But I have great hope that by the Task Force meeting in July there can be forwarded to you a single option as far as the organizational structure is concerned. Again, that is my hope. I cannot speak for the entire Task Force, but I am committed to it and I believe that the co-chairs are committed to it. And as long as the debate does not move in a direction that will take us away from it, I surely believe that can be accomplished.

Senator CAMPBELL. Good. Thank you. I know the Task Force is working as hard as it can on this. I guess my concern is I want to see this come to a resolution, but by the same token, I do not think anybody on the committee wants to do something that is premature without the Task Force's complete involvement in writing some kind of draft proposal we can introduce.

Sue, did you have something to add?

Ms. MASTEN. If I could just add that our focus has mainly been on the Under Secretary and/or Deputy Secretary level for discussions of legislative matter and also on the independent commission. So we still are flushing out other details. So it is important that the legislation be able to consider and include those things as we develop them. We may not have everything by the 30th, but we will certainly have some items for consideration. And as we move forward, we will articulate in more detail what the remainder items would be.

Senator CAMPBELL. That will be good in the sense that you will have the microphone there. Years ago, President Nixon, who inaugrated the best Indian policys, Indian Self-Determination, that we deal with now started during the Nixon years, had the idea of creating a "Trust Counsel Authority" which would have avoided the conflicts the United States has when it comes to litigating cases dealing with Indian assets and Indian rights. Has the Task Force considered that idea or looked up the original Nixon proposal?

Ms. MASTEN. I appreciate your bringing that to our attention because we have not specifically looked at this piece. But we have had those concerns and discussions regarding the matter and about the conflict in being able to have a separate council that would take a look at the effort. So those discussions have happened but we have not reached any consensus on it. And so I appreciate your bringing that to our attention because I personally had forgotten this piece of it and it could help us in our discussions at the table.

Senator CAMPBELL. If you do reach a consensus, will you share that with the Committee too, please?

Ms. MASTEN. We certainly will.

Senator CAMPBELL. Mr. Chairman, I do not want to hog all the time. I think Senator Akaka has been waiting patiently, so I will be happy to yield to him for his questions.

The CHAIRMAN. Thank you very much.

The Senator from Hawaii.

Senator AKAKA. Thank you very much, Mr. Chairman.

Senator CAMPBELL. Senator Akaka, if you would yield just a moment. Since I have to leave in 1 minute or two, I do have some questions that I am going to submit in writing and ask the Task Force members if they could get those answers back to us in writing. Thank you. Thank you, Senator.

Senator AKAKA. Mr. Chairman, without question, this is a moment in history when a great challenge and a great opportunity exists for the indigenous peoples of the United States. After all of these years, we are coming to a point where we are putting the best minds together at all levels, beginning even from the Executive Branch, here in Congress, as well as the Judicial Branch, to try to bring together a system or a structure that will help the indigenous peoples of the United States. For me, this is the moment we are at. That is why it is so important that we take time to really scrutinize what we are doing and to be certain that what we are doing is in the best interest of the indigenous peoples of the United States and the United States as well. I am so glad that the executive branch is part of this, the tribes are part of this, and together we are dialoguing.

The hearing today is to find out what the dialogue has been and how far you have come and whether we are at a moment where we can draft and craft legislation that will help bring this about. It appears it is close. And when you give a timeframe to it, I hope something happens in July. It is not impossible, but it means that lots of work has to be done, a lot of dialoguing has to be done, decisions will have to be made. So it can be a difficult time for all in this effort. And I want to thank the Chairman, Senator Inouye, for bringing this about on our side to try to bring this to a head.

It was mentioned about the Under Secretary and the Deputy Secretary and that you are thinking of establishing the position of Secretary of Indian Affairs in option 2, and in option 5 to establish a position for an Under Secretary of Indian Affairs. These will be appointed by the President. My question is, will there be a process to ensure that the tribes have a role in advising the President and Secretary of the Interior as to which candidates might be appropriate for these positions? That is open to any witness, anybody at the table.

Ms. MASTEN. Speaking from the tribal leadership side, we certainly would hope that provision would be provided for. Because of the magnitude of importance to Indian country, it is most appropriate that the tribal leadership would have input.

Senator AKAKA. Any other comments?

Mr. MCCALEB. Senator, that is a delicate issue because, clearly, we would like to see tribal involvement and assessment of the candidates for that position. At the same time, there is I think a need and a precedent to preserve the power of the Executive to make that appointment. I think that is something that we need to work out. We thank you for raising that issue because I think it is something that we need to discuss very fully in our conversations.

Senator AKAKA. The whole dialog is, if there was one word, I guess the word is reform. When you think of reform you think of a difficult process at all levels, particularly when you are charged with the responsibility of finding solutions that may not or will not please everyone but which are realistic, efficient, and workable. I think this is where the dialog is going and you are quickly coming to focus on this. I commend you for your efforts that you have made up to now.

As I read the report and read the Federal Register, I come to a question that I would like to ask all of you because this intrigued me about the cross-cutting principles and the use of the cross-cutting principles. So my question is, do the options recommended by the Task Force embody the seven cross-cutting principles set forth by the Task Force?

Ms. MASTEN. What we are saying is that we will need to flush that out because they are not complete. We specifically did not complete the work there to allow for Indian country to have meaningful and timely input into just a framework. So that as we develop that, those are the cutting principles that we will ensure are addressed in any structure that we recommend.

Mr. HALL. Senator Akaka, those cross-cutting principles really were developed way back in December in response to BITAM. They started out as seven principles that we all agreed had to be incorporated and became our cross- cutting principles. So this has really got the support of Indian country to make sure it is incorporated.

Mr. MCCALEB. I think it is the understanding of all the participants that these cross-cutting principles will be embodied in the final proposal.

Senator AKAKA. Thank you very much for your responses. Mr. Chairman, thank you.

The CHAIRMAN. I thank you very much.

Like the vice chairman, I will be submitting several questions here and I look forward to your responses. May I ask one question.

No one has discussed the matter of pending lawsuits or possible lawsuits that may come about because of alleged past mismanagement of tribal or personal accounts. Is the Task Force going to set forth any sort of procedure to resolve these, or are you going to let the courts proceed with the cases?

Mr. MCCALEB. If I may, Mr. Chairman. In the area of the tribal lawsuits, and there are about 20 that have already been filed and the potential for 300 to be filed, through the auspices of this Task Force, we have established a subcommittee that involves the Intertribal Monitoring Association, which consists of tribes with large trust assets, and we are working with them to review and to try to develop some alternative dispute resolution mechanisms that would obviate the need for litigation to solve these suits and potential suits in an effort to truncate the extended time period that would be required by litigation and the expense of litigation. That effort is in the beginning stages.

We are trying to address that on the tribal basis. On the individual Indian money accounts, that issue is very much at issue and is in the courts now and very far along. We have really tried not to cross the lines into that and to keep our effort and our eyes forward on the future and what we can do to eliminate some of these kinds of problems from developing in the future. We have not really dealt so much with the current litigation, the Cobell suit.

Mr. HALL. Mr. Chairman, just a couple of points. One is the Task Force itself really needs further consultation from tribes to make sure that is part of our scope. As I mentioned in my testimony, the scope began with alternatives to BITAM and now we are talking about tribes that are in litigation in terms of finding some sort of alternative dispute resolution.

Second, I am hopeful that some sort of alternative dispute resolution can be obtained. But I guess I am concerned that we are not really moving like I would like to see. We are not moving to get those tribes who are involved in litigation at the table yet. So as Mr. McCaleb mentioned, there is an attempt to work on that. But we are getting calls from tribes that are wanting to know is the Department serious about this alternative dispute resolution, and what mechanism will be set forth to get their involvement and get their input to see if some sort of an alternative dispute resolution could be obtained. And if we are serious, when is it going to happen. So we are still waiting on that issue.

Ms. MASTEN. Mr. Chairman, just to add. In my comments under the process for settling historic account balances, I did mention the Task Force has had the discussions about the need to set up a forum for the resolution of current and subsequent litigation and that we feel it is important for trust reform to be complete that there has to be resolution of these historical disputes. However, we really felt that this was an area where the tribes who are actively involved need to be a participant and we need to hear from them as to what they think that structure or forum should look like. So we are in the process of identifying that.

The CHAIRMAN. I thank all of you again. And if I may repeat what the vice chairman stated. It is true that after the July 4 recess we have 4 weeks of session remaining and then we go into the August recess and we will be back on September 4. I think we will

be concentrating on limited issues. Thirteen appropriations accounts, that will take up much time. Then you have certain politically hot items such as medicare, medicaid, pharmaceutical needs, energy, et cetera, et cetera. And so we do not anticipate that this matter will be resolved in this session of the Congress. I do not think any of you are anticipating that.

We do not wish to in any way suggest that we are pressuring you by the July 30 date. We set that July 30th date because if we do not have it by then, we may not have a hearing in September. But we want at least a status report on that day and look forward to your meeting again on July 30.

Yes, Mr. Secretary?

Mr. MCCALEB. Mr. Chairman, with your permission, I made an oversight and did not identify two of the Department of the Interior people that were really essential in making all of this happen and doing the heavy lifting, if you would, and that is Aurene Martin, who is my deputy, and Phil Hogan, who is the Associate Solicitor for Indian Affairs. They have been critical and essential in the success that we have enjoyed.

The CHAIRMAN. Thank you very much.

Once again I thank you all and I hope that the love affair continues. Thank you.

[Whereupon, at 11:40 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. TIM JOHNSON, U.S. SENATOR FROM SOUTH DAKOTA

Mr. Chairman, thank you for holding this important hearing today to hear from the Department of the Interior's Tribal Trust Fund Task Force. I appreciate your leadership on this important issue, Mr. Chairman, and look forward to hearing from the Task Force today, as well as future hearings on the management of the Trust Funds next month, including a hearing on S. 2212, legislation I introduced with Senators Daschle and McCain.

We have already benefited from the input of many tribal officials in the context of Department consultation meetings, as well as the Department's Task Force on Trust Reform. I have had numerous discussions and meetings with South Dakota tribal leaders, and I greatly appreciate their insights and leadership. I would also like to take this opportunity to thank Mr. Mike Jandreau, Chairman of the Lower Brule Sioux Tribe, a member of the Interior Department's Task Force on Trust Reform, and Tom Ranfranz, President of the Flandreau Santee and Chairman of the Great Plans Tribal Chairman's Association for their sound advice and counsel as we proceed with trust reform efforts.

While I am pleased the Task Force is giving tribal leaders across the country a voice in the process of reforming the management of the trust funds, it is unfortunate this consultation and input did not occur before the Secretary of the Interior announced her plan last November.

I will keep my comments brief, but I want to again thank the Tribal leaders who are part of the task force and remind them that I look forward to their thoughts and recommendations on legislation to address this problem, and specifically their recommendations on how to improve on S. 2212. I would hope we can find consensus within the Task Force, tribal leaders and Congress to enact legislation this year to finally put us on a path to correct this inexcusable Trust Fund problem.

Thanks again, Mr. Chairman, for all of your leadership in addressing so many issues important to Indian country all across America.

PREPARED STATEMENT OF CLIFFORD MARSHALL, CHAIRMAN, HOOPA VALLEY TRIBE

I am Clifford Marshall, chairman of the Hoopa Valley Tribe. I appreciate the opportunity to submit my testimony for the Senate Committee on Indian Affairs hearing record regarding the trust reform and related matters. Because trust reform will effect the ability of tribes to develop stable governments for the next several decades, I urge the Committee to take the necessary time to assess the impacts on Indian Country before moving forward with proposals that are based on vague short term concepts rather than addressing longstanding problems.

There have been two forms of trust reform that have been underway for the past several years, one initiated by tribes and the other by the Federal Government. These are two very different approaches. The tribal approach focuses on Indian Country, while the Federal approach has been one focused on inside the Beltway

using consulting firms that have little experience in Federal Indian trust and tribal government matters.

Regarding tribal efforts, tribes have been involved in various forms of trust reform activities since the first treaty was entered into and the trust relationship was established. At least part of the tribal trust reform efforts have been designed to address problems associated with the underfunded BIA, Indian programs. For example, comparisons between the budgets of Indian programs to those for federally owned lands and resources demonstrate that Indian forest programs receive only 35 percent of the funds appropriated for management of the United States' own lands and that Indian roads maintenance programs only receive 30 percent of Indian road maintenance needs. It was this type of underfunding, coupled with the lack of local tribal control over management of reservation affairs, that led to the development of such laws as the Indian Self-Determination and Tribal Self-Governance Acts.

Information that was submitted to the Task Force by the Tribe demonstrates that tribal and individual Indian beneficiaries, as well as the United States, receive a benefit of $3 of non-BIA funds for every $1 of BIA compacted/contracted funds as a direct result of the Tribal efforts in furthering tribal trust reform activities. Clearly, this information indicates that the Tribal Self-Determination and Self-Governance initiatives are very beneficial to the goals of reforming Indian trust programs.

Regarding Federal trust reform efforts, it has been both frustrating and costly for tribal governments over the past few years to chase around Indian Country the most recent recommendation is of consulting firms who have been awarded multi-million dollar contracts by DOI. It certainly is very revealing of the Federal efforts to have spent over $760 million dollars thus far, but we have yet to find meaningful solutions and many of the consultant proposals have been universally rejected by the tribes. Unfortunately, the most recent Federal trust reform efforts have focused almost entirely on restructuring or eliminating the BIA's trust management functions without spending any time to analyze whether the new organization will simply fall into the same old problems that brought us to where we are today.

DOI officials say that status quo of the BIA is unacceptable, and restructuring is necessary if trust reform is to be successful, including "realignment" of the lower levels of the BIA. (Task Force Report, p. 27). This proposed realignment initiative includes the probability of segregating trust asset management functions and budgets from the BIA Regional, Agency and Sub-agency offices for transfer to a trust service centers. While there has been discussion about the local BIA Regional and Agency offices "contracting" with the trust service center to maintain local trust asset management functions, it is more likely that these functions will be permanently removed from the local offices since the budgets will no longer be available to support them.

The American Indian Trust Funds Management Reform Act of 1994 (Reform Act) established the Special Trustee for American Indians and gave that position a significant amount of control over trust reform efforts. Despite the fact that Office of Special Trustee (OST) was supposed to only provide an oversight function—not a program implementation function, Congress began appropriating substantial amounts of funds for the OST budget. OST then assumed control over the BIA Office of Trust Funds Management, then assumed control of the historic accounting functions, most recently appraisals, and probates are expected to follow. Today, OST has stopped being the oversight function as originally contemplated in the Reform Act and has now become part of the problem. In effect, OST is now what the BIA was 12 years ago—and the problems continue to escalate and few are being resolved. For example, it was the failures of the OST's Office of Trust Funds Management system that resulted in the complete shut-down of the DOI computer systems that were connected to the OTFM systems. In effect, the DOI computer systems had to be disconnected because proper safeguards were not incorporated in the OTFM systems that would prevent outsiders from improperly accessing trust information. Clearly, OST has now become a major part of the problem that must be fixed if trust reform is ever to be successfully implemented.

Congress mandated in the Reform Act that a comprehensive plan be developed, in consultation with tribes, and submitted to the House Resources and Senate Indian Committees for review. To complete the framework for trust reform, the Reform Act also contains a mandate that the Special Trustee certify in writing the adequacy of the trust reform budgets of the BIA, BLM and MMS. Unfortunately, neither of these statutory requirements has been complied with. I believe that the present state of the Federal trust reform is in the state of chaos that we see today largely because of these critical failures by OST in complying with these legal mandates.

To address trust asset management, DOI has proposed to fragment Indian services into two or more agencies. If one fully implemented these proposals, Indian

Country would become the only place in the Nation where a tribe or individual Indian will be required to go to multiple agencies just to get permission to start businesses, create employment, implement welfare reform programs, build roads, have adequate housing, fight fires, use resources and lands, and so on. Despite the fact that Indian people today are more regulated than any other group around the Nation, separating BIA functions into multiple organizations will require a substantial amount of new funds just to maintain the same level of services that are being provided today. Indian services will be reduced in favor of paying for more Federal bureaucracy. Unfortunately for tribes, none of the proposals analyzes what impacts will occur to the regional and agency offices where 95 percent of the services in Indian Country are provided.

Based on an analysis of BITAM submitted earlier by the Tribe, any option that separates the BIA functions into multiple organizations will cost at least $10 million of new or reprogrammed funds just to hire additional supervisors, assuming that the same level of BIA employees will be maintained. Additional funds will likely be necessary once the new organization determines what service it, will provide to tribes and individual Indians. With respect to contracting and compacting with tribes, there will likely need to be amendments to various Federal statutes, including the Indian Self-Determination and Self-Governance Act, to provide for mandatory contracting/compacting requirements for any new non-BIA organization.

Restructuring of any Federal agency must be done in accordance with pre-determined plans, with identified and measurable goals and specific timeframes, none of which presently exist for restructuring Indian affairs today. Restructuring for the sake of restructuring is typically not the best use of limited resources, funds or time. Quite simply, changing employee name tags and agency addresses will not fix trust problems. Over three-quarters of a billion dollars have been spent by Federal officials and numerous consultants in the name of trust reform and little benefits have been demonstrated from the results. Yet tribes continue to struggle with underfunded programs, largely because of the unwillingness of Federal officials to provide funding and resources at the local tribal government levels, where clear progress is being made as tribes have consistently corrected problems and brought stability to local trust services under the Self-Determination and Self-Governance Acts. It seems clear that the Federal Government has simply been investing in the wrong solutions.

With respect to the DOI consultation process for the Task Force report, we are concerned that the process is not proceeding in a manner that will provide meaningful input from tribes and individual Indians regarding trust reform activities. Quite simply, DOI cannot expect that having just over 30 days for review and comment on such a major effort provides any level of reasonable consultation with tribes across the Nation, even if the Task Force Report were to be expanded to include sufficient information with which to make an independent assessment of the Task Force's recommendations. It has also been explained that the EDS contract is supposed to provide additional substantive information regarding how the options will impact the local levels of the BIA. Further, no explanation has been provided to reconcile the fact that the Task Force's report to the Secretary will be submitted in July while the EDS analysis won't be completed until December.

Trust Reform Budget Requests. The Tribe does not believe that DOI has given fair consideration of budget needs to implement trust reform measures. Past needs-based budgets submitted to tribes during national budget meetings indicate that there is a need of approximately $7.0 billion to adequately fulfill the trust obligations to tribes and individual Indians, as compared to the existing BIA budget of approximately $2.2 billion. Instead of dedicating more limited funds and resources toward reorganization of the BIA, the Hoopa Valley Tribe believes that DOI must aggressively work toward securing adequate funds and resources to implement the Federal trust obligations to tribes and individual Indians. Without both adequate funds and a commitment to engage tribes into every phase of the trust reform efforts, no trust reform plan can be successfully implemented.

With respect to S. 2212, the Tribe strongly believes that there must be a legislative solution to trust reform problems if they are ever going to be resolved. Quite simply, there is presently insufficient legal guidance and authority to address the trust management issues that we are confronted with today. S. 2212 provides a sound beginning point for the legislative package.

Our comments on S. 2212 are as follows:

No. 1. We agree with S. 2212 that the BIA structure must be kept in tact. Besides not having the time or funds to construct a new Indian agency, the exercise of separating trust functions between resource management and other trust services will undoubtedly become an insurmountable task. The Hoopa Valley Tribe opposes DOI proposals that fragment the BIA into two or more agencies because we believe that

it will ultimately lead to the destruction of Indian services and diminishment of trust responsibilities owed to tribes and individual Indians by the United States.

No. 2. We disagree with section 307 of the bill that there is a need for a new Deputy Secretary for Trust Management and Reform. We believe that the bill correctly defines the trust duties for trust asset management and that the existing Assistant Secretary for Indian Affairs can appropriately address trust reform issues provided that the necessary funding and resources are made available to the BIA.

No. 3. We wholeheartedly agree with the provision contained in the bill that provides for the development of resource management plans. We believe that this is one of the key cornerstones to ultimately resolving the differences between tribes, individual Indians and the United States with respect to management of trust lands and resources. Again, adequate funding must be made available to accomplish this goal and adequate flexibility must be provided to tribes and individual Indians to contract for the development of the plans.

No. 4. We recommend that a provision be added to the bill that will facilitate the development and submission of adequate budgets necessary to properly manage trust assets and to fulfill the trust responsibilities of the United States to tribes and individual Indians. We suggest that language be included that mandates that the annual BIA Unmet Needs budget be reviewed so that annual budgets provide a reasonable method of increasing the funding levels of the BIA on a regular basis to meet the unmet needs.

No. 5. We recommend that a section be added that would establish a new Division of Indian Claims within the DOI Office of Hearings and Appeals. Throughout the years of tribal deliberations regarding trust reform, tribes have expressed frustration from not having access to information that is controlled by the United States that would help to facilitate the development of claims, in order to resolve these claims through mediation, negotiation, litigation or legislation.

No. 6. We recommend that provisions be added to the bill that would facilitate resolution of the breaches of trust that have been identified by the *Cobell* Court.

Testimony of
J. Steven Griles
Deputy Secretary of the Interior
and
Neal A. McCaleb
Assistant Secretary for Indian Affairs
before the Committee on Indian Affairs
United States Senate
June 26, 2002

Thank you, Mr. Chairman and Members of the Committee, for inviting the Department to testify today on the progress we have made in our consultation with Indian tribes on organizational issues related to the management of individual and tribal trust assets. It has been six months since we last appeared before the Committee on this important matter. Over that time, we have spent many hours working with Tribal Leaders on critical issues and have made progress in coming to an understanding of their needs and concerns.

Background

The Federal government has held funds in trust for American Indian tribes since 1820. In 1887, the General Allotment Act extended the Federal government's fiduciary duties to individual Indians. The Allotment Act allocated parcels of reservation lands to Indian heads of households and opened "surplus" lands to non-Indian settlement. The allotted lands were to be held in trust by the United States for a designated period. Individual trust accounts were to be set up for each Indian with a stake in those lands. The Indian Reorganization Act of 1934 ("IRA") ended the allotment of tribal lands and extended indefinitely the period for holding allotted lands in trust.

Trust fund accounts consist generally of money received through the commercial use of trust lands, including timber sales, agricultural fees, and oil and gas leases and of funds received from congressional judgment or legal settlement awards. Today, trust lands produce income from more than 100,000 active leases for 350,000 individual owners and 315 tribal owners. Leasing and sales revenues of about $300 million per year are distributed to more than 225,000 open Individual Indian Money (IIM) accounts and approximately $800 million per year is distributed to 1,400 tribal accounts.
Numerous reports filed by the General Accounting Office and Congressional committees have

pointed out serious and long-standing problems with the government's management of funds and resources entrusted to its care.

Secretary Norton is committed to reforming trust management and to reaching solutions that will help Indian Country. Secretary Norton initiated a number of actions to address the difficult challenges of trust reform during her first year. These include formulating a proposal to reorganize trust management; creating a new Office of Historical Trust Accounting (OHTA); and initiating development of a new strategic plan for improved trust management. In August 2001, during our formulation of the FY 2003 budget, various issues were identified concerning the trust asset management roles of the BIA, the Office of Special Trustee for American Indians (OST), and other Departmental entities carrying out trust functions. In response, an internal working group was created. The internal working group developed a number of organizational options ranging from maintaining the status quo to privatizing functions to realigning all trust and associated personnel into a separate organization under a new Assistant Secretary within the Department.

While this internal review was underway, Electronic Data Systems (EDS) was undertaking an independent, expert evaluation of the Department's trust reform efforts. On November 12, 2001, EDS presented its report "DOI Trust Reform Interim Report and Roadmap for TAAMS and BIA Data Cleanup: Highlights and Concerns" in which it called for a "single, accountable, trust reform executive sponsor."

The Department decided to propose the formation of an organizational unit called the Bureau of Indian Trust Asset Management (BITAM), which envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau. The Secretary believed this new Assistant Secretary position would have the needed authority and responsibility for trust reform and Indian trust asset management. Seven regional meetings on the proposed organizational change with tribal officials and account holders were held between December 13, 2001 and February 1, 2002.

- December 13, 2001, Albuquerque, New Mexico
- December 20, 2001, Minneapolis, Minnesota
- January 3, 2002, Oklahoma City, Oklahoma
- January 10, 2002, Rapid City, South Dakota
- January 17, 2002, San Diego, CA

- January 23, 2002, Anchorage, AK
- February 1, 2002, Arlington, VA

It became clear during this process that the Tribal Leaders were opposed to BITAM.

Creation of the Joint DOI/Tribal Leaders Task Force on Trust Reform

At a meeting held on December 13, 2001, in Albuquerque, New Mexico, the National Congress of American Indians (NCAI) proposed the formation of a Task Force charged with providing alternative proposals to the Department on organizational alternatives to reorganize the management of trust services. The Task Force's purpose would be to evaluate organizational options and to submit to the Department one or more alternatives to reorganize the trust management system.

To further develop an improved reorganization plan and achieve broader consensus, Secretary Norton agreed to create a joint DOI/Tribal Leaders Task Force on Trust Reform. The Trust Reform Task Force is to:

> "develop and evaluate organizational options to improve the integrity, efficiency, and effectiveness of the Departmental Indian Trust Operations consistent with Indian treaty rights, Indian trust law, and the government-to-government relationship."

In developing options for an organizational structure, the Task Force has engaged in discussions addressing the underlying problems that the reorganization must address. The purpose of trust reform reorganization is to improve various aspects of carrying out our trust responsibilities, including trust accounting and trust resources management, while complementing and protecting tribal self-government and other, non-fiduciary trust services.

To date, the Task Force has held several multi-day meetings that included weekend meetings as follows:

- February 1 - 4, 2002, in Shepherdstown, WV
- March 8 - 9, 2002, in Phoenix, AZ
- April 25 - 26, in San Diego, CA

- May 19 - 21, 2002, in Minneapolis, MN
- June 13 - 15, 2002, in Bismarck, ND

Task Force Members

The composition of the Tribal Membership of the Task Force was determined by all the tribes and represents a broad cross-section of tribal interests on a regional basis. The Task Force consists of two tribal leaders from each region, with a third tribal leader, from each region, acting as an alternate. Members of the Federal team consist of senior Department officials, including Deputy Secretary Steve Griles and Assistant Secretary for Indian Affairs Neal McCaleb.

Members of the Task Force have spent an extensive amount of time on this effort. From the very first joint meeting, the Task Force has earnestly attempted to achieve progress on trust reform. The Task Force established special subcommittees to facilitate and coordinate its activities. These panels have met in person or on conference calls numerous times since February. The members of the Task Force have invested an immense amount of their professional and personal time to develop a meaningful approach to trust reform. We are thankful to them for all of their hard work and sacrifices.

Task Force Report and Findings

On June 4, 2002, the Task Force presented to Secretary Norton its initial report containing its findings and recommendations on the DOI trust organization. The Report recommended that the BITAM proposal be replaced by one of the options advanced, which the Secretary has agreed to do. The report also recommends raising Indian policy and program interests to the highest level ever within the Department of the Interior by proposing, as a possible option, the appointment of an Under Secretary to oversee Indian Affairs. In its report, the Task Force states that there is a real need for reform and that the status quo is not acceptable. We could not agree more. We believe the current system must be improved.

The Task Force received a total of 29 separate alternative organizational proposals (or submissions with observations). These alternative proposals provide a wide variety of options for consideration; the options ranged from the status quo to a new Department of Indian Affairs. Some proposals state a preference to place the Department's trust responsibilities outside of DOI.

The Task Force members analyzed the 29 proposals and created several generic composite options reflecting the best features and major elements presented by the entire body of the alternative proposals. At the May 2002 meeting in Minneapolis, Minnesota, the Task Force agreed to initiate consultations on its recommendations. The Department published the Task Force report in the Federal Register in early June, and scheduled regional consultation meetings throughout June and early July.

On June 18, Secretary Norton met with Tribal leaders in Bismark, North Dakota as part of these ongoing consultations. The meeting was extremely positive and reflected the efforts of both the Tribal members of the Task Force and the Federal members.

Options Recommended by the Task Force

The Task Force presented to Secretary Norton five options for improving the Department's management of Indian trust assets. They are:

- **OPTION 1(a): Create A New Department of Indian Affairs** This alternative envisioned a new Cabinet position and organization. All of the American Indian and Alaska Natives related functions within the Department would be moved to this new organization.

- **OPTION 1(b): Create A New Independent Agency Within The Executive Branch Of Government** This alternative envisioned a new independent agency, possibly temporary, outside of the Department, that would be dedicated to managing all of the American Indian and Alaska Native-related trust functions within the Department.

- **OPTION 2: Create A New Deputy Secretary for Indian Affairs**. This alternative envisioned the creation of a new top-level Interior official who would be responsible for all of the Indian-related functions within the Department.

- **OPTION 3: Create An Organizational Structure With Two Assistant Secretaries** This alternative envisioned the creation of a new Assistant Secretarys position to manage portions of the Department's Indian trust responsibilities

- **OPTION 4: Create An Organizational Subdivision At the Bureau Level** This

alternative envisioned the subdivision of the BIA into two or more subordinate organizations. The Subcommittee identified three logical groupings of current BIA functions - Education, Trust Funds and Trust Resources, and Trust Services. The functional grouping facilitates reasonable considerations and permits the agency to increase management attention to key trust responsibilities.

- **OPTION 5: Create A New Leadership Position of Under Secretary and Group BIA Functions** This option envisions the creation of an Under Secretary of Indian Affairs and the grouping of BIA functions into logical units. In large part, it is a composite option reflecting the key features of Option 2 and Option 4.

The Task Force recommended option 2, which would create a New Deputy Secretary for Indian Affairs, option 4, which would create an organizational subdivision at the Bureau Level, and option 5, which would create a new leadership position of Under Secretary and group BIA functions, for consultation, consideration and input from Tribal Leaders. The Task Force report stated that the principal focus of further consultation involves the configuration of line management officials, from top to bottom, in each alternative as well as the grouping of staff support functions.

The Task Force's Evaluation Criteria

The Task Force report points out the following set of criteria used to evaluate the various organizational options that have been put forward. This list is not all-inclusive.

- Does the option ensure that the United States faithfully discharges its trust duties to tribal governments as set forth in treaties, statutes, Executive Orders and case law?
- Does the option support tribal self-determination and self-government?
- Does the option ensure full and continuing accountability for management of Indian trust assets?
- Does the option address the various costs of implementation?
- Does the option ensure that individuals responsible for Indian trust asset management are adequately trained?
- Does the option deal with potential conflicts of interest?
- Does the option address the key issues identified in the Cobell litigation?

- Does the option allow for sufficient flexibility to accommodate tribal needs, special laws or treaties?

Conclusion

The effort that we have put into this consultation process is an indicator of its importance to the Department. The Department is firmly committed to, in consultation with Tribal leaders, finding an appropriate, equitable solution for improving management of Indian trust assets, both tribal and individual. Indian Country deserves real reform, and the Task Force and the Secretary are committed to this goal. The product we ultimately come up with will not have 100 percent support, but we are dedicated to improving the system, to fairness, and to ensuring that future generations of American Indians will inherit a trust management system that provides accountability to individuals and tribes. We appreciate the effectiveness and timeliness of the Task Force's work. We have accomplished a tremendous amount in our five meetings thus far. We are at a *critical stage* now; deciding how to deliver services, how trust functions will be maintained, and how we will have clear and immediate accountability for our services and the individual and tribal accounts. This concludes our statement. We will be happy to answer any questions the Committee may have.

TESTIMONY OF CHAIRMAN TEX G. HALL
OF THE MANDAN, HIDATSA AND ARIKARA NATION
AND
CHAIRWOMAN SUSAN MASTEN OF THE YUROK TRIBE

TRIBAL CO-CHAIRS OF THE TRIBAL LEADER / DEPARTMENT OF INTERIOR TRUST REFORM TASK FORCE

BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

JUNE 26, 2002

Chairman Inouye, Vice Chairman Campbell and Members of the Committee, we are honored to appear before you today to discuss the progress of the Tribal Leader / Department of Interior Trust Reform Task Force. As you know, we are the two tribal leaders who serve as co-chairs of the Task Force and we are here to represent the consensus views of the 24 tribal leaders who serve on the Task Force. We greatly appreciate the opportunity to participate in the legislative process of the United States Congress and to provide this Committee with our views.

Summary: The Tribal Leader / DOI Trust Reform Task Force (Task Force) has developed a set of options for tribal leaders to consider for a reorganization of the Department of Interior's offices for administration of trust reform. In sum, these include the creation of an independent oversight body, the creation of a Deputy or Under Secretary for Indian Affairs, and a possible reorganization of Bureau of Indian Affairs activities. The Trust Reform Task Force and the Department are beginning an intensive consultation process with the anticipation that this effort could lead to new legislation this year to amend the Trust Funds Management Reform Act of 1994 and implement other aspects of organizational realignment for trust reform.

Background on Trust Reform and the Creation of the Task Force: The United States Government has committed to a broad trust relationship with Indian tribes that requires the federal government to protect tribal self-government, to provide services to Indian communities, and to exercise the highest degree of care with tribal and Indian lands and resources. In order to gain the advantage of Indian land and resources, the federal government also imposed reservation allotment programs in the period from 1887 to 1934, which spawned the proliferation of hundreds of thousands of trust fund accounts and land records for individuals. It is well documented that the Department of Interior has mismanaged billions of dollars worth of trust funds derived from Indian land, timber, oil & gas, and hard rock minerals.[1]

The Trust Funds Management Reform Act of 1994 mandated specific responsibilities for the

[1] See Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund, H.R. Rep. No. 499, 102ND Cong., 2ND Sess. 1992, 1992 WL 83494 (Leg.Hist.), and, Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results (Letter Report, 05/03/96, GAO/AIMD-96-63).

Department in accounting and management of Indian trust funds. Among other things, the Department is under a requirement to render an accurate accounting for all funds held in trust, develop integrated and consistent trust policies and procedures, and ensure that the trust fund accounting system is integrated with the land and asset management systems of the Bureau of Indian Affairs, the Bureau of Land Management and the Minerals Management Service. To date, the Department has achieved none of these objectives under the 1994 Act.

In November 2001, Interior Secretary Gale Norton announced her intention to establish a new agency, a Bureau of Indian Trust Asset Management (BITAM), to administer responsibilities for trust funds and resources and separate trust assets management from the Bureau of Indian Affairs. Tribal leaders throughout Indian country overwhelming rejected this idea and demanded that they be consulted on matters that would so profoundly affect the rights and interests of their tribes as well as their constituencies. Following the consultation sessions convened in Albuquerque and Minneapolis during the first part of December, agreement was reached to create and fund a Trust Reform Task Force comprised of Tribal Leaders and representatives of the Department of Interior. The Task Force was formally established in January 2002 and has held six meetings: an initial tribal caucus was held in San Diego, CA in January 2002; and full Task Force meetings have been held in Shepherdstown, WV - February 2002; Phoenix, AZ - March 2002; San Diego, CA - April 2002; Minneapolis, MN - May 2002; and, Bismarck, ND - June 2002.

The Task Force Membership includes:

- 24 Tribal representatives (2 each from 12 BIA regions)
- 12 alternates (1 from each BIA region)
- Technical Advisors
- Federal government representatives (12)
- 4 Co-chairs (2 tribal members, 2 federal members)

Co-chairs Tex Hall – Chairman of the Mandan, Arikara & Hidatsa Nation
Susan Masten – Chairwoman of the Yurok Tribe
Steven Griles – Deputy Secretary of Interior
Neil McCaleb – Assistant Secretary of Interior for Indian Affairs

Purpose and Scope of Task Force: The Task Force has established a protocol that defines its purpose: "to develop and evaluate organizational options to improve the integrity, efficiency and effectiveness of the Departmental…Indian Trust Operations consistent with Indian treaty rights, Indian trust law and the government-to-government relationship." While the purpose of the Task Force is defined narrowly as the development of options for an organizational structure, the scope of the Task Force's inquiry has included a broader look at the nature of the problems that trust reform must also address.

The events that led to the formation of the Task Force stem directly from the Department's inability to provide an accurate accounting for tribal and individual trust funds. These matters are specifically addressed in the Trust Fund Management Reform Act of 1994, and the breaches

in trust fund management found by the federal district court judge in the *Cobell v. Norton* litigation. It is clear that the primary goal of the reorganization effort is to address trust funds management, as opposed to general matters of trust resource management or the broader trust responsibility to protect treaty rights or tribal self-government. Please see the attached "Indian Trust Cycle Chart w/ Reform Areas Noted" for an overview of the scope of trust fund management reform.

However, tribal leaders are greatly concerned that the DOI's focus on just one aspect of the trust relationship -- trust funds -- will lead to solutions that harm other areas of the trust relationship. This was one of the primary concerns about the Secretary's BITAM proposal to separate all trust asset management into a separate Bureau. Ultimately, the various aspects of the trust relationship -- tribal self-determination, tribal self-government, tribal services, and tribal land and resources -- are interrelated at the local level. Since time immemorial, our strong tie to the land and resources is an integral part of who we are, spiritually, culturally and traditionally. Indian people live on trust land and every day we are going to school, building houses and roads, and making a living on trust land. Tribal leaders do not want a "stove piped" bureaucracy that separates trust lands from all of the activities that we do on our lands. So the reorganization must not have a negative effect on other aspects of the trust responsibility, and should seek to integrate and improve the general provision of all Indian services and programs.

Finally, trust funds accounting has a direct relationship to the management of tribal and individual land and natural resources. For example, a collections system must have accurate reporting of production and payment of lease rents and royalties. However, tribes are often very protective of their right to manage their own lands and natural resources. Statutes such as the Indian Reorganization Act, the Self-Determination Act, and the Indian Forest Resources Management Act confirm the tribes' rights to be primary manager of tribal lands and natural resources. Therefore, the Task Force has also insisted that the reorganization not overreach into areas that are committed to tribal control.

Summary of Work Products and Process: The Task Force has created three sub-committees to carry out specific projects: 1) the Alternative Proposal Review Sub-Committee, 2) the Legislative Options Sub-Committee, and 3) the As-Is Business Processes Study Sub-Committee.

Alternative Proposal Review Sub-Committee - This Sub-Committee is charged with the task of reviewing alternative proposals for the organizational structure, and is chaired by Chairman Alvin Windyboy of the Chippewa Cree Tribe and Jim Cason, Assistant Deputy Secretary of Interior. Beginning in February 2002, the Committee collected all of the alternative proposals that had already been put forward. In March, the Sub-Committee developed a list of the "Preliminary Criteria for Analysis and Evaluation of Organizational Proposals for Trust Asset Management Reform" (attached). The Task Force will utilize these criteria for further evaluation of the organizational options. Additionally, the Sub-Committee put out a request to all tribes requesting that they submit any additional alternative proposals by a deadline of April 12. Twenty-nine proposals were received, reviewed, summarized by the Sub-Committee. The preliminary results of this review were put into a June 4, 2002 Task Force Report that has been sent out to all tribes in order to have meaningful consultation with

tribal leaders as a part of the evaluation process. Tribal comments are due by July 12. A summary of this is included below, the "Elements of An Organizational Structure for Trust Fund Management Reform."

Legislative Options Committee - This Sub-Committee is charged with working collectively with the Task Force to develop any needed legislation to implement the organizational proposal, and communicating with Congress on the progress of the Task Force. The Task Force is anticipating a significant likelihood that the reorganization will require legislation, most likely as amendments to the Trust Fund Management Reform Act of 1994, and is aiming to develop that legislation within the time frame of this legislative year. Governor Bill Anoatubby of the Chickasaw Nation and David Bernhardt, Director of Legislative and Congressional Affairs and Counselor to the Secretary, chair the Sub-Committee, and they have set a goal of developing a legislative package by July 6.

As-Is Business Processes Sub-Committee - Interior is contracting for a study of the "As-Is" business processes to determine how trust fund management processes are currently being performed, to draw comparisons with private trust systems, and eventually to make suggestions for reforms. This Sub-Committee is working with DOI and EDS on this study and is chaired by Tim Martin, Executive Director of the United Southern and Eastern Tribes and Ross Swimmer, Director of the Office of Trust Transition. It is expected that this study will be completed by December 2002.

Elements of An Organizational Structure for Trust Fund Management Reform:
The Proposal Review Subcommittee found a number of major themes and commonalities among the 29 proposals for an organizational structure. The Task Force then selected a number of concepts for consultation with tribal leadership. They are explained in greater detail in the June 4, 2002 Task Force Report to the Secretary of Interior which we attach. This report to the Secretary does not contain any final recommendations, but is intended as an interim step to communicate the progress of the Task Force and create a basis for ongoing consultation with tribal leaders.

Summarized below are three of the major organizational options for trust reform that are contained in the June 4 report. The tribal leaders on the Task Force would like to begin working with Congress to develop potential legislation in these areas as we collectively discuss these options with Indian country.

1) **Creation of an Independent Entity with Oversight Responsibility for Trust Reform.**

The Indian trust within the Department of Interior is the only trust in the United States that is not subject to any type of external regulation or oversight. We believe that this is one of the major reasons that the Department has consistently, and for so many decades, refused to reform itself, refused to perform audits, refused to set any kind of specific trust standards which would guide the action of its employees, and refused to request adequate budgets to

perform the trust duties for which it is responsible. We would note that the Office of Special Trustee, which was created under the 1994 Act, was originally envisioned as an independent office, but was placed in a position subordinate to the Secretary of Interior at the Administration's insistence. Each of the Special Trustees has testified to this Committee that their ability to perform their duties has been impaired by the lack of independence.

The tribal leadership on the Task Force and the DOI are in agreement that some sort of independent entity is needed. The Department of Interior would prefer that it be advisory in nature rather than regulatory or prescriptive. The tribal leadership on the Task Force believes that Congress should create an independent entity that is capable of exercising regulatory and oversight authority over the Indian trust within the Department of Interior. We do not want the trust responsibility removed from the Department of Interior; we simply want the trust funds accounting system fixed, and true trust reform to be implemented.

In our preliminary discussions among the tribal leaders on the Task Force, we believe that the independent entity should include the following features:

- Responsibilities would include:
  - i. Auditing financial accounts
  - ii. Investigations and compliance
  - iii. Sanctions for nonfeasance and malfeasance
  - iv. Monitoring of corrective actions
  - v. Establishment of standards and regulations for trust fund management (consistent with tribal self-determination)
  - vi. Monitoring DOI budget to ensure adequate resources with reports to Congress

- Commissioners who are American Indians or Alaska Natives who are experts in the Trust Industry, Indian Trust, and Indian Law, and include stakeholders from tribal governments and Indian account holders should direct the independent entity.

- The entity should be independently funded as a permanent agency, and should have the ability to hire experts exempt from the civil service pay scale.

- The oversight and regulatory responsibilities of the Office of Special Trustee should be phased out over an identifiable timeframe.

2) <u>High-Level Responsibility for Indian Affairs</u>.

The Department has agreed with tribal leadership that it is necessary to create a position of Deputy Secretary or Under Secretary of Interior for Indian Affairs would have direct line authority over all aspects of Indian affairs within the Department, including the coordination of trust reform efforts across all of the relevant agencies and programs to ensure that functions are performed in a manner that is consistent with the trust responsibility and to elevate visibility of the trust responsibility in Indian affairs within the Department. This

concept is also included in S. 2212, the Indian Trust Asset and Trust Fund Management and Reform Act of 2002.

The creation of this position will address the major issue that was raised in the EDS Report and by the Cobell court: the lack of clear lines of authority and responsibility within the Department of Interior to ensure accountability for trust reform efforts by the various divisions of the Department of Interior. The two major entities responsible for trust assets and accounting are the Bureau of Indian Affairs and the Office of Special Trustee. The lines of authority, responsibility and communication between these two entities has been uncertain and at times has come into direct conflict. In addition, the Minerals Management Service, the Bureau of Land Management, and the U.S. Geological Service all play important roles in trust management, and various responsibilities are spread throughout the Office of Hearings and Appeals, the Office of American Indian Trust, and the newly created Office of Trust Transition and Office of Historical Accounting. Finally, nearly every agency in the Department of Interior has some significant trust responsibilities. At this time, there is no single executive within the Secretary's office who is permanently responsible for coordinating trust reform efforts across all of the relevant agencies. This absence has particularly hurt the progress of those issues that cut across agencies, such as the development of a system architecture that integrates trust funds accounting with the land and asset management systems of the BIA, BLM and MMS (as required by the 1994 Act).

Although the Secretary of Interior has broad authority to reorganize, transfer authority, and delegate power over any matter within the Department according to her desires,[2] for several reasons we believe that it would be wise for Congress to create the new position of Deputy Secretary or Under Secretary for Indian Affairs.

First, the Special Trustee was created by Congressional act in 1994, and Congress invested a number of significant responsibilities for trust reform in this office. At the same time, the authority of this office was left somewhat unclear by the 1994 Act. Any efforts to clarify the responsibilities of the Special Trustee should probably be done in a joint effort with Congress in order to ensure continued Congressional support.

Second, Congressional authorization may be helpful in ensuring that an integrated decision making structure for trust management in the Department of Interior remains in place over an extended time period and through successive administrations. Perhaps it is useful to note that one of the most fundamental Congressional acts in Indian affairs was to establish the office of the Commissioner of Indian Affairs under the Secretary of Interior as a centralized structure for "the purpose of facilitating and simplifying the administration of the laws governing Indian affairs" and "management of all Indian affairs and all matters arising out of Indian relations."[3]

Since the 1950 reorganization plan, there has arisen a pattern where the authorities of the Commissioner of Indian Affairs have been delegated to separate offices, most often in a well-

[2] See Reorg. Plan No. 3 of 1950, Sec. 1,2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to 5 U.S.C., Government Organization and Employees.
[3] See 25 U.S.C. 1a,, 2.

intentioned effort to focus resources and attention on a particular issue. This started with the delegation of health care to the Department of Health and Human Services in 1954, and subsequently the creation of Assistant Secretary for Indian Affairs, the Office of American Indian Trust, the separation of minerals, oil & gas to MMS and BLM, the Office of the Special Trustee, the Office of Trust Transition, and a number of other transitions. These evolutions in the DOI structure have moved far away from the expressed Congressional intent to integrate authority over Indian affairs in a single structure. There would perhaps be a value in having Congress take a look at the issue of fragmented decision-making authority in Indian affairs within DOI and how it relates to the current problems in implementation of trust reform.

Finally, one of the chief advantages of working with Congress to create this new position is that it would ensure that tribal governments have an opportunity to be involved in the process. The management of Indian affairs within the Department of Interior is an incredibly important issue to tribes, and most often the internal reorganizations within DOI have been done with little, if any, tribal consultation and involvement. Working with Congress would ensure tribal input.

One item that requires further discussion between the DOI and the tribal leaders on the Task Force is the question of conflicts of interest. A good example of this conflict is where the Department is required to protect the treaty water rights of Indian tribes, and also required to provide water to irrigators through the Bureau of Reclamation. Tribal Task Force members have suggested that the Deputy or Under Secretary for Indian Affairs should have independent legal counsel on matters that involve a conflict between the DOI's trust responsibility and other responsibilities.

3) Reorganization of the Bureau of Indian Affairs.

One of the major items for continuing discussion between DOI and the tribal leaders on the Task Force is the issue of reorganizing the Bureau of Indian Affairs to ensure accountability for trust management throughout all operational levels, and at the same time to ensure that resources and decision-making are placed at the local level wherever possible.

In broad terms, we have been discussing the idea of creating a structure would have three major operational divisions under the Assistant Secretary for Indian Affairs: 1) Trust Funds and Trust Resources Management; 2) Trust Services (such as law enforcement, social services, roads, etc.); and 3) Indian Education. An administrative services section to handle such functions as budget, personnel and information systems would support these three divisions. Central office functions within these divisions could include: (1) the establishment of standards, procedures, protocols, internal controls for accountability, and program priorities; (2) delegations of authority to regional offices; (3) technical assistance; (4) reporting and troubleshooting; and (5) development of budgetary needs. The Task Force suggested that the Office of Trust Funds Management and other offices, which are currently or prospectively under the administrative control of the Office of Special Trustee, would be phased back into the BIA in order to have integrated beneficiary services. This is essential to maintain accountability; by having these offices report to the Special Trustee, the Special

Trustee is placed in the tenuous position of overseeing itself.

The most difficult discussions have been about the reorganization at the Regional and Agency Office level. The Department has insisted that there must be strict separation of trust resource management in a completely separate organization from the management of services such as housing and roads. However, the tribes have insisted just as strongly that there must be a single point of decision making authority at the local level to deal with issues that cut across both trust resource management and other trust services. At the local level, nearly all activities on Indian reservations take place on trust property – tribal self-government, tribal services, and trust fund and resources management – and the functions are interrelated. Reservations are active, developing communities that are completely dependent on trust property, and need decisions made on routine matters at the local level in a reasonable time frame. For example, all of the major infrastructure activities like housing, roads, irrigation, drinking water, telephone service, etc. take place on trust land. Approving a lease or an easement often requires balancing the specific trust responsibility to the trust land with the broader trust responsibility to promote tribal services and tribal self-determination.

There are also quite a number of important daily relationships at the local level regarding the provision of social services to elders and minors, and the management of their IIM accounts. Social workers, medical professionals and Superintendents work together to set up restricted accounts and approved spending plans for the protection of their trust funds. BIA and tribal law enforcement also must regularly deal with activities that take place on trust lands, deal with trust resources, or relate specifically to leasing activities. For example, trespassing cattle and the remedies under a grazing lease for impoundment or fees, timber theft and timber leases, violations of irrigation and water rights, ejectment of a tenant on nonpayment on a lease, etc.

Tribes are the primary actors in purchasing and consolidating fractionated interests in Indian land into useable parcels. This is an activity that is of great benefit to DOI. But tribes do so for specific development reasons – that is where the money comes from – so when a tribe wants to develop a refinery or a golf course or needs to build a school or a clinic, they often need to purchase the land and they do so with the direct involvement of the Superintendent in finding the fractionated interest owners, making purchase offers, partitioning unwilling sellers, acquiring interests that have gone out of trust – etc.

All of these types of decisions require strong coordination and decision making at the local level on matters that affect both a trust resource interest and the broader trust responsibility to provide services. These make up the routine kinds of decisions of local BIA officials that often never reach the central office level. Tribes have a great concern that a "stove piped" reorganization that sharply separates the ability to make decisions on trust resource management and trust services at the local level would put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. Imagine having to get central office approval every time there is a disagreement over a housing lease approval or construction of an irrigation ditch – this is something tribes don't want and we don't think the DOI wants either. Central office decisions take a long time – and this means

more business deals go stale, more financing dries up, projects don't move forward and the cycle of missed opportunities for Indian country would be exacerbated.

We believe that a trust reform reorganization can be effective to meet its goals and still allow for local decision making on routine matters that cut across trust resource management and trust services. We generally agree with the Department that it would be valuable to group the trust funds management and the trust resource management activities at the local level, with clear lines of responsibility and staffing. However, we do not believe that the individuals responsible for these functions should be under a separate administrative authority from the staff responsible for performing other trust services. Rather, the BIA Regional and Agency office authorities should remain as the primary focal point of contact with individual tribes, preserving local control of functions and programs to support tribal self-determination. Accountability is not going to be assured through any organizational structure, it can be assured through:

- Identification of Duties
- Adequate Funding, Staffing and Training to Perform Those Duties
- Policies, Procedures, Standards
- Internal Controls
- External Audits (performance and financial)
- Transparency (basis for decisions is clearly stated and evident)
- Adequate staffing training with performance standards
- Focus on Responsiveness to Beneficiaries
- DOI/BIA staff committed to change and improvement of trust activities

Other Items for Congressional Consideration:

1) Adequate Funding and Staffing for Trust Management - The DOI and tribal leaders on the Task Force have agreed that one of the primary issues in trust reform is getting adequate resources to perform the trust duties. The BIA has never been provided with an adequate level of financial and human resources to fulfill its trust responsibilities to Indian country. This chronic neglect of trust duties has contributed to dysfunctional management and financial systems at all levels of the BIA.

   However it is the reservation level agency offices that have been most adversely impacted. Dedicated personnel have been forced to work in substandard facilities, with inadequate support. The cumulative effects of this longstanding neglect are major deficiencies in the management of individual Indian trust assets that produce much needed revenues from mining, grazing, logging and other royalties. Unfortunately, Interior's reliance on outside private contractors to bring computer-based technology to bear on management deficiencies has failed and even resulted in further misuse of

appropriations.

For example, appropriations in tribal forestry are far short of need:

	Proportion of Amount Required to Provide Adequate Forestry Services to Tribes	
	STAFFING	FUNDING
Management Programs	63%	29% a/
Fire Programs	73%	89%

a/ BIA Recurring & Special Recurring appropriations only. In 2001, tribes contributed additional funds for forest management which amounted 64% of the Congressional Appropriations for BIA Recurring and Special Recurring forestry programs. When tribal contributions are considered, funding is adequate to meet 49% of needs.

Source: "Draft Funding & Position Analysis for Fiscal Year 2001, Summary of Findings." USDoI, BIA< Office of Trust Responsibilities, Division of Forestry, June 2002.

As another example, one member of our Task Force, former Chief Charles O. Tillman of the Osage Tribe, described the situation on the Osage Reservation. The Osage Tribe has over 12,000 oil wells that are managed by the Bureau of Indian Affairs. Individuals from the private oil industry have advised the Chairman that they would have at least 16 inspectors for an oil field of this size, however the BIA provides the Osage oil field with only 4 inspectors.

One of the primary concerns of Tribal Task Force members is that the trust reform effort not result in a mere shifting of resources to trust management away from critical tribal services such as law enforcement, education, alcohol & substance abuse prevention. There must be new appropriations for trust management if trust reform is going to be effective. We will be preparing a budget analysis that will incorporate the BIA tribal unmet needs data, and will be sharing that analysis with Congress as a part of the appropriations process.

2) Clear Definition of the Department's Fiduciary Responsibility to Manage Indian Trust Assets - The Task Force identified this issue as one that should be included as a part of any trust reform effort. The lack of a clear understanding about the nature of the DOI's trust responsibilities has continually clouded the ability of the DOI and tribal leaders to communicate clearly and come to agreement on the specific issues that must be addressed in trust reform.

The trust relationship between Indian tribes and the federal government is a structure with many different aspects; some highly specific; others more general. In broad terms, the various aspects of the trust relationship include:

a) The responsibility of the federal government to protect tribal self-government and treaty rights from the incursions of state government and from federal overreaching into internal tribal matters -- found in treaties and defined in the Cherokee Nation cases in the 1830's.

b) The federal departments have numerous responsibilities under treaties, statutes, and Executive Orders, to act as trustees in education, health, housing, child welfare, substance abuse, natural resources management, litigation, etc.

c) The responsibility to protect the tribal land base. Tribal lands and natural resources, such as fish, wildlife and water, are held in trust. This trust relationship includes a broad range of duties, including protection from illegal transfers, protection from impacts of other federal programs, and the duty to make the trust productive consistent with the desires of the beneficiary.

d) Individual Indian allotments are held in trust, and there are many specific statutory, regulatory and judicially imposed requirements that attend to allotted land.

e) Tribal and individual funds derived from trust assets and held in trust, and the management of Indian trust money is also subject to specific statutory, regulatory and judicially imposed requirements.

The current crisis that led to the formation of the Task Force is directly related to this last aspect of the trust relationship – the Department's inability to provide an accurate accounting for tribal and individual trust funds. However, tribal leaders have been very interested in having the DOI understand this aspect of the trust responsibility in the context of its broader trust responsibilities. Certainly this would be a very large and difficult legal task to specifically define the nature of the federal trust responsibility to Indian tribes, but it one that the Task Force is interested in discussing.

3) Self-Determination Programs and Beneficiary Co-Management - The tribal leadership on the Task Force also believes that it would be useful for Congress to consider further refining the relationship between trust funds management reform and the laws and policies that underpin Tribal Self-Determination. Trust fund accounting has a direct relationship to the management of tribal and individual land and natural resources. For example, a collections system must have accurate reporting of production and payment of lease rents and royalties. However, tribes are very opposed to any reforms that would limit tribes' right to manage their own natural resources. Most tribal lands and natural resources were reserved to the tribes under treaties or executive orders that committed the land to the "exclusive use and occupancy" of the tribe. Subsequent statutes such as the Indian Reorganization Act, the Self-Determination statutes, and the specific resource management statutes such as the Indian Forest Resources Management Act, the American Indian Agricultural Resource Management Act and the Indian Mineral Development Act also confirm the tribes' rights to be primary manager of tribal lands and natural resources, with a limited approval role for the DOI. So it is important that the scope of "trust reform" not overreach into areas that are committed to tribal control, and not serve to hinder the progress of the self-determination policy. We believe that it would be useful for the Committee to look at the provisions in S. 2212, the Indian Trust Asset and Trust Fund Management and Reform Act of 2002.

4) Ongoing Consultation Process With Beneficiaries for Trust Reform - This Task Force was created for a specific purpose; to define organizational options to implement trust reform. However, the Task Force is also serving as a forum for discussion of urgent trust reform issues that the Department is facing, such as the computer shutdown, data cleanup, historical accounting, TAAMS, etc. While this has been a useful function, there are concerns that the Task Force may go beyond the scope of its original purpose. This has led to a decision by the Task Force to go back and consult with tribal leaders about the need for an ongoing consultation process for trust reform.

   The Task Force is also looking at the long-term strategy for beefing up the communications and consultations between tribal leaders and the Department as trust reform moves forward. Trust fund management reform will be a complex, multiyear effort to design and implement a strategic plan, a system architecture and policies and procedures as well as to make improvements or corrections in a broad range of areas, such as records management, probate, appraisals, accounting, computer systems, etc. This process will require a great deal of ongoing consultation and dialogue with the tribes and individual beneficiaries for a sustained period of time, and there would be a significant value in maintaining a Task Force or similar body of beneficiaries to engage in that discussion. This is an important question for Congress to consider for the future of the trust reform effort.

5) Process for Settling Historic Account Balances - The Cobell litigation and the subsequent filing of litigation on tribal trust cases has increased interest in the development of a forum or resources for resolution of tribal and/or individual trust disputes. The settlement of current account balances is necessary in order to resolve accounting issues going forward. The DOI requested that the Task Force consider creating a committee that would hold discussions to determine if an acceptable dispute resolution process can be developed to settle tribal trust fund claims. The tribal leaders declined as this was beyond the scope of the Task Force's mission. Instead, the Inter-Tribal Monitoring Association on Indian Trust Funds (ITMA) is coordinating some meetings on ITMA's legislative proposal.

6) Land Consolidation Programs - In order to address the escalating magnitude and complexity of land ownership patterns and trust fund accounts, Congress must invest in Indian land consolidation programs. According to the BIA, the 56 million acres of trust and restricted land under its supervision are divided into 170,000 tracts of land with 350,000 Indian owners and, most important, 2 million different owner interests. Fractionation of ownership interests through inheritance has created an accounting nightmare for the federal government, and must be addressed if trust reform is to occur.

Alternatives Considered, but not Pursued:

There were also a number of suggestions among the 29 proposals that merited significant

discussion by the Task Force but that they ultimately decided not to pursue:

1) The BITAM Proposal – Tribal leaders have clearly rejected the approach of separating trust asset management from other trust responsibilities. Separation would cause a myriad of practical problems in providing services and management of trust assets as the local level. In addition separation would also weaken the overall federal trust responsibility and threaten tribal self-determination. The tribal leaders on the Task Force believe that accountability for trust funds management can be achieved through standards, reporting and both internal and external controls, without the need for dividing the federal trust obligation.

2) Separate Department of Indian Affairs. This proposal would elevate the status of Indian affairs and address problems with conflicts of interest. However, the Task Force felt that during the consultation sessions on BITAM, a large majority of tribal leaders made it clear that they did not want trust responsibilities taken out of the Department of Interior, and also felt that the creation of a new cabinet level Secretary would be an extremely difficult political hurdle.

3) Separate Management of Individual Indian Trust and Tribal Trust. Tribal leaders also rejected the idea of separating out the management of Individual Indian Money (IIM) accounts from the management of tribal trust funds and resources. From a practical standpoint, such separation would be very difficult because of the complexity of resource ownership patterns and the intermingling of administrative and management systems. In addition, tribal leaders felt that it was essential to maintain the relationship between tribal governments and their members since the welfare of the tribal community is affected by the administration of individual allotments.

Conclusion:

On behalf of the Tribal Leaders who serve on the Trust Reform Task Force, we would like to thank Secretary Norton, Deputy Secretary Griles, and Assistant Secretary McCaleb for all of the hard work that they and their staff have put into the trust reform effort. If we maintain this serious level of effort, we firmly believe that we can reach some policy decisions that will put the reform effort on track to a successful conclusion. We would also like to thank the Committee, as always, for their continued interest and concern for Indian issues.

Attachment
PRELIMINARY CRITERIA FOR ANALYSIS AND EVALUATION OF ORGANIZATIONAL PROPOSALS FOR TRUST ASSET MANAGEMENT REFORM

(adopted by the TRTF in March 2002)

CRITERIA

1. How does the proposal ensure that the policies, procedures, and systems necessary for the United States to faithfully discharge the entirety of its trust duties to tribal governments as set forth in treaties, statutes, Executive Orders and case law are in place?

2. How does the proposal support tribal self-determination and self-government? How does the proposal address the potential for increased tribal involvement over time in the operation of programs for Indian trust asset management for the benefit of their own communities through contracting and compacting?

3. How does the proposal ensure that the trustee standards of care, policies, procedures, and systems necessary for the United States to faithfully discharge its fiduciary duties and responsibilities towards beneficial owners of Indian trust funds and Indian trust resources are in place? How does the proposal attempt to ensure full and continuing accountability for management of Indian trust assets (e.g., identify mechanisms, such as internal controls, independent audits, disclosure and correction of deficiencies)?

4. To what extent does the proposal clearly define organizational responsibilities and authorities, including a coherent trust orientation, a strategic plan, appropriate business models, measurable performance standards, and accurate reporting/information systems, for implementation?

5. How does the proposal address the organizational responsibility for development of the systems required to manage Indian trust assets?

6. How does the proposal attempt to ensure accountability for both BIA and tribal programs involved in the operation of programs responsible for management of Indian trust assets? How does the proposal provide for involvement of the beneficial owners?

7. What changes within the existing BIA organizational structure would be required at the Central Office? Regional/Agency Offices? Technical Service Centers? Are these changes permanent or temporary? How does the proposal ensure that accurate reports on progress of implementation are provided? What type and extent of interference or disruption of existing BIA and tribal programs for management of Indian trust assets would be anticipated if the proposal were to be implemented? How will dislocation costs and continuity be assured during transition?

8. How does the proposal address costs of implementation? To what extent does it attempt to

minimize transaction costs incurred by tribes in their relations with the United States in fulfilling its obligations to Indian tribes and individual Indians? To what extent does it attempt to identify, quantify, and minimize costs incurred for additional bureaucracy and administration? Does it identify the source of funds to be used to defray these costs? How does it attempt to minimize costs of administration (records and information systems, standardized practices, trust transactions, etc.) to provide efficient, effective services to Indian beneficiaries?

10. How does the proposal ensure that individuals responsible for Indian trust asset management are adequately trained and qualified to discharge the duties to which they are assigned? How does the proposal ensure that individuals responsible for administration of the trust are rewarded for outstanding performance, and sanctioned for acts of malfeasance or nonfeasance?

11. How does the proposal deal with conflict of interest?

12. Can the proposal be implemented within existing authorities? If legislation will be required, what will the legislation need to address?

13. How does the proposal address the issues involved in the Cobell contempt proceeding?

14. What issues are likely to be raised with respect to acceptability of the proposal to the Congress? The Administration? The Court? Tribal Governments? Individual Indian beneficiaries?

15. Is the organizational structure capable of serving/exercising the best interest/fiduciary duty for individual Indian trust beneficiaries?

16. To what extent does the proposal allow for sufficient flexibility in trust asset management in order to accommodate regional and/or tribal variations in the mix of trust resources and/or special laws or treaties applicable from region or tribe to another?

17. To what extent does the proposal address process problems that are identified in trust asset management by the TRTF or EDS?

Attachment

Draft - Simple Indian Trust Cycle Chart w/ Reform Areas Noted (3/19/02)

"What are we trying to fix?"

Indian Trust Property
(land, oil & gas, minerals, timber, grazing, etc.)

Tribal Owners

Individual Owners

Trust Duties:
Ownership Records
Probate

Transactions
Inspections

Money

Surveys & Quantification
Protection & Maintenance
Fractionation
Land Use Planning

Trust Duties:

Accounting

Distribution

Trust

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Lease

Invest ment

Reporting
Accounts

Receivable

Trust Duties:
Make Productive (consistent with beneficiary)
Lease Approval
Sales Procedures
Appraisals
Collections
Enforcement
Procedures for Accounting Quantity & Value

Crosscutting Duties:

Tribal Self-Determination	Strategic Planning
Treaties, Laws, Cases	Policies and Procedures
Funding	Establishing Account Balances
Training	Security & Privacy of Information
Internal Controls	Systems Architecture
External Audits and Monitoring	Beneficiary Focus
Errors and Omissions	Performance Measures

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