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TRUST FUND REFORM TASK FORCE

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

ON

LEGISLATIVE PROPOSAL OF THE DEPARTMENT OF THE INTERIOR/
TRIBAL TRUST FUND REFORM TASK FORCE

JULY 30, 2002
WASHINGTON, DC

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CONTENTS

	Page
Statements:	
Campbell, Hon. Ben Nighthorse, U.S. Senator from Colorado, vice chairman, Committee on Indian Affairs	2
Griles, J. Steven, deputy secretary, Department of the Interior, Washington, DC	3
Hall, Tex, chairman, Three Affiliated Tribes, Fort Peck Reservation, New Town, ND	10
Inouye, Hon. Daniel K., U.S. Senator from Hawaii, chairman, Committee on Indian Affairs	1
Masten, Sue, chairwoman, Yurok Tribe of Indians of California, Eureka, CA	6
McCaleb, Neal, assistant secretary for Indian affairs, Department of the Interior, Washington, DC	5

APPENDIX

Prepared statements:	
Griles, J. Steven	27
Hall, Tex (with attachments)	30
Intertribal Monitoring Association on Indian Trust Funds	45
Masten, Sue (with attachments)	30
McCaleb, Neal	27
Additional material submitted for the record:	
Commission on Indian Trust Funds Concept Paper	52

LEGISLATIVE PROPOSAL OF THE DEPARTMENT OF INTERIOR/TRIBAL TRUST FUND REFORM TASK FORCE

TUESDAY, JULY 30, 2002

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

The committee met, pursuant to notice, at 10 a.m., in Room 106, Dirksen Senate Building, Hon. Daniel K. Inouye (chairman of the committee) presiding.

Present: Senators Inouye, Campbell, Conrad, Johnson, McCain, and Thomas.

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 on the recommendations of the Department of the Interior/Tribal Trust Fund Reform Task Force as they relate to the reorganization of the Department to improve the management of funds held in trust by the United States for the benefit of individual Indians and Indian tribes.

Last week the committee held a hearing on the Department of the Interior's July 2, 2002 Report to the Congress on the Historical Accounting of Individual Indian Money Accounts.

The Department's Report projects that the conduct of a historical accounting of the accounts held in trust for individual Indians will take at least ten years and will cost at least $2.4 billion.

Since the time the Department submitted its report, the House of Representatives overwhelmingly rejected a proposal contained in the Interior appropriations bill for fiscal year 2003 that would have limited the accounting of individual and tribal accounts to a 15-year period.

In addition, the U.S. District Court for the District of Columbia has agreed to consolidate with the class action lawsuit brought on behalf of individual Indian money account holders, the *Cobell* v. *Norton* litigation—the seven actions that have been brought by tribal governments seeking an accounting from the government of their accounts.

The Department's Report and these recent developments serve to provide further context for the recommendations that the committee anticipates receiving this morning.

While we understand that a full consensus has yet to be reached on a number of matters, including the powers and authorities of an independent Commission, and the establishment of statutory standards for the administration of the United States trust responsibility, the committee is encouraged by the progress that has been realized thus far and looks forward to working with the Task Force and the citizens of Indian country as we endeavor to bring long awaited resolutions to these matters.

I will now call on the vice chairman of the committee, Senator Campbell.

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

Senator CAMPBELL. Thank you, Mr. Chairman.

The Department and Tribal Trust Fund Reform Task Force has been meeting for quite a long time. It has reached agreement on a number of issues. There still look to be many areas of disagreement.

Probably more than anything, the parties seem to be quite apart on the powers and authorities of what will be called the Independent Commission or how independent it should be.

Here we are, 1 month later, and much has happened. On July 2, the Department issues its report on Historical Accounting. On July 17 this year, the House defeated a provision to limit the United States accounting responsibility to post-1985, as you mentioned, Mr. Chairman.

On July 21, as you also mentioned, Judge Lamberth assumed responsibility for several of the Tribal Trust Fund claims that have been filed against the United States. On July 25, this committee held a hearing on the Report on Historical Accounting.

So, we are making some progress. At the last hearing, I did remind the parties that we have only about 4 or 5 weeks of actual work. We will be getting out this Friday as most people know, or I assume we may get out this Friday. It is still a little bit up in the air. We won't be back in session for 1 month and I think we only have 4 weeks or a little over of actual work time.

The task force still has three meetings scheduled for this fall. So, as I view it, they will not have finished their work before we get out.

Nonetheless, I believe they are resolving many of the outstanding issues and that people of good faith from both the administration and the tribal groups can work to deliver this committee a proposal that not only has the support of all concerned, but there will be real reform and trust management for Indian people who have waited so long and something we can get signed into law.

Thank you Mr. Chairman.

The CHAIRMAN. The panel consists of the Deputy Secretary, U.S. Department of the Interior, J. Steven Griles; the Assistant Secretary for Indian Affairs, U.S. Department of the Interior, Neal McCaleb; the chairman of the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota, Tex Hall; and the chairperson of the Yurok Tribe of Indians of California, Sue Masten.

Secretary Griles.

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

Mr. GRILES. Good morning, Mr. Chairman, and Senator Campbell, it is a honor to be with you again today to review where we have been since we last met and to report to you the, I think, significant accomplishments that we have made since that meeting.

Last week the Task Force held its 7th meeting in Portland, OR. There were a number of earlier meetings that we discussed with you. As you know, the Task Force has been charged with reviewing options and proposals to provide, hopefully, a consensus approach to how we best deliver trust services to the American Indian and to tribes and individuals.

On June 6, we had met before that, we, the department, had worked with recommendations of the Task Force. Those recommendations were submitted to Indian country for review. We held 11 or 12 consultation meetings throughout Indian country to go and look and listen to what people's concerns were.

Mr. Chairman, if I could summarize what we heard, I would summarize those by saying the Federal Government's commitment to self governance and self-determination must not suffer as a result of Federal trust reform. This is what people were saying to us, tribal leaders.

The trust reform must not result in the diminishment of the Government's trust obligations to Indian people. There is a need for creation of a high level position within the Department of the Interior who will be the primary individual responsible for ensuring that trust asset management responsibilities are carried out in an appropriate manner throughout Interior.

The trust asset management issues must be addressed at the regional and at the agency level of the Bureau of Indian Affairs [BIA]. But that cannot be one-size-fits-all solutions. Trust reform must recognize that there are three models for receiving services, through self governance, compacts, self- determination, contracts, and direct services from the BIA.

But there is no bright line between fiduciary trust asset responsibilities and other trust responsibilities. We must assure more accountability within the current BIA structure. Management of trust services and trust resources must be kept at the local level.

We need a clear definition of the trust duties and responsibilities for management of trust assets. There must be an oversight of BIA by an entity that has authority to compel and enforce corrective action.

As the above illustrates, Senator, reform of that current system is not an easy task.

At the Task Force meeting last week, we did, however, reach agreement as a group to recommend that Congress establish a new position, an Under Secretary for Indian Affairs, who would be appointed by the President, subject to confirmation by the Senate, and would report directly to the Secretary.

The Under Secretary would have direct line responsibility over all aspects of Indian affairs within the Department. This authority would include the coordination of trust reform efforts across relevant agencies and programs within the Department to assure those functions are performed in a manner that is consistent with

trust responsibility, as well as a number of other duties carefully hammered out between the Department and the tribal leaders at the Task Force meeting last week.

It was a very, very important meeting and a very, very successful meeting. We had some very, lengthy discussions, at times we had disagreements. But with disagreement, we put that aside and we reached out to each other, Senator, and I think have been able to reach agreement on the restructuring of the BIA as a work group.

We had a work group that brought to the full Task Force a proposal which the full Task Force reviewed and asked a number of questions on. Some of the tribal leaders asked to have some more time to go back to Indian country and look at that and get some more tribal leadership input. We, of course, want that to happen.

So, it was a really good consensus meeting on a number of issues. I think that though many of us have a different view of what changes were needed, the tribes' express concern that trust officers would become involved in the day-to-day activities at the agency level without being answerable to the Superintendent or Regional Directors.

At times the differences between us seemed so great that we could never resolve it in the few days we had, but once we stopped talking concepts and we really rolled up our sleeves and took the time to put on the table the tribal real concerns and the Government's real concerns we were able to develop an organizational model that I think is to assure that the Federal Government can exercise its fiduciary trust duty and at the same time ensure that the tribal governments can be active managers to the degree desired of their own trust assets.

A copy of the consensus reorganization proposal of the working group is attached to my testimony. The work of the Task Force is not complete, as you mentioned, Senator Campbell. We are exploring possibilities as a creation of a commission with oversight responsibilities of a trust fund and management and asset development.

We have reached agreement on the agreement to have an independent commission, but we have not reached an agreement on how that will be and how and what the authorities and duties of that commission should be. We are working very diligently on that, on the qualifications for membership, on those duties.

We plan on participating on the work group which the Task Force has set up to resolve these questions, hopefully to resolve these questions and continue to reach a consensus on how we move forward. It is our hope to reach that kind of consensus in our August meeting in Anchorage.

We were also asked by the Task Force Members to work with the tribes on drafting statutory trust standards and they gave a draft to us at the meeting last week. These standards that were presented to us will be carefully reviewed within the administration in preparation for our next Task Force meeting. We haven't reached agreement on those trust standards, but we have looked at them and there is a lot of agreement with a lot of the ones that they have prepared. We are going to go forward and have those reviewed by our attorneys and by the Justice Department. That was an agreement we reached with the Task Force members.

In closing, I would just want to say, Mr. Chairman, and Senator Campbell, that from my perspective the leadership that the co-chairmen have shown from Indian country and Sue and Tex have been remarkable. There are a number of Task Force members here today who spent long hours and a lot of time discussing and analyzing and understanding. It is not something that has come without that kind of effort. But we all are committed to that effort and I am just very, proud to say that I am part of that effort.

I have Mr. McCaleb with me, Mr. Chairman, if you would like for him to say anything.

[Prepared statement of Mr. Griles appears in appendix.]

The CHAIRMAN. Secretary Griles, I am certain the committee is most grateful to all of you for your participation. We commend you for your patience.

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

Secretary MCCALEB. Mr. Chairman, Senator Campbell, I am not going to add a lot to the very good report that Secretary Griles provided you, except to make it clear that we did reach a consensus on option 5 that was contained in the June 4 submittal.

We had five organizational models. Pursuant to the review of those organizational models and the consultation process around the country between June 4 and this August meeting, we did reach a firm consensus on option 5 and defined the position to lead Indian affairs as the under secretary position.

I would just say that I am continually impressed at the good work that can be done when the members of the Joint Task Force focus on a particular issue, which we did at this meeting. We were focused on the somewhat contentious issue of how the organization worked below the assistant secretary level at both the regional and the agency level in the delivery of the trust functions.

As Secretary Griles indicated, there was a pretty substantial gap between the tribal Task Force members and the Department of the Interior members. But we work all day and into the evening and about 9 o'clock on Tuesday evening we began to come together. We had to get some traction on the issue and come together on it. The work group did, in fact, agree, both the Interior members and the tribal Task Force members.

It was submitted to the tribal Task Force at home the following morning. Generally, consensus was deferred until there was an opportunity to vet this proposal before a much wider cross-section of tribal membership across the country. I think that is representative of how this deliberative process works, not only with the 24 members of the tribal Task Force, but the way they view their responsibility to gain broad consensus and support of agreements before they are actually reached.

We are making substantial progress at each meeting, and although the differences sometimes seem large, at every instance we have focused on a particular issue, we have been able to reach some kind of an accommodation with each other, which I think speaks to the level of sincerity and commitment of all the members of the tribal Task Force as well as the members of the Department

of Interior to reach—not only just find a solution, but find a solution which we can all embrace and which we so sincerely and prayerfully hope will find its fruition in the better management and the better keeping of the trust.

Thank you.

[Prepared statement of Mr. McCaleb appears in appendix]

The CHAIRMAN. Thank you, Mr. Secretary.

Chairwoman Masten.

STATEMENT OF SUE MASTEN, CHAIRWOMAN, YUROK TRIBE OF INDIANS OF CALIFORNIA, EUREKA, CA

Ms. MASTEN. [Remarks in native tongue]. Good morning, Chairman Inouye and Vice Chairman Campbell. I am honored to appear before you again today to discuss the progress of the Tribal Leader/Department of Interior Trust Reform Task Force.

I would like to take the time to introduce the members of the Task Force. The tribal leader cochair, chairman and president Tex Hall; Alvin Windy Boy, chairman Ed Manuel, president, Jerry Small, Governor, Bill Anoatubby and Tim Martin, chairman Mike Jandreau, chairman Ron Allen.

From the Department of the Interior, cochair, Assistant Secretary Neal McCaleb, cochair, Deputy Secretary Steven Griles, Deputy Assistant Secretary, Aurine Martin, Phil Hogan, Tom Slonaker, Ross Swimmer, and David Bernhardt. These are the members that are with us today as we address you.

I also would like to take the opportunity to introduce to you the Yurok counsel members and staff that are with me this morning, if they could please stand.

I want to begin by thanking Deputy Assistant Secretary Aurine Martin and especially Deputy Secretary Steven Griles and Assistant Secretary Neal McCaleb for the extraordinary effort and commitment that they have made in working with the Task Force on trust reform. We feel that we are beginning to develop a cooperative partnership with the Department of the Interior and without the joint commitment and the dedication of the tribal leaders and the department we would not have made the progress that we have made.

To begin, we would like to point out several significant events that have occurred since the last time we spoke to you. Last week, Congress reached resolution on the Corporate Accounting Reform Bill, H.R. 3763. The President is signing the bill into law today.

Among other things, this legislation creates an independent commission that will establish standards and have the power to enforce those standards to force corporations to report honestly their financial affairs to their shareholders.

The rapid passage of this new law shows that Congress can move quickly to address problems. We believe that Congress should make a similar effort on trust reform. We believe it is just as important to hold the Department of the Interior accountable for the funds and resources that the Department holds in trust for Indian tribes, American Indians and Alaska Natives as it is for corporations to be held accountable to their shareholders.

If an independent commission can be created by Congress to create corporate accountability for the benefit of shareholders, then

Congress can just as well create an independent commission that will hold the Department of the Interior and the Department of Treasury accountable for the trust assets they control.

Tribes have the right to expect no less of our trustee than shareholders expect from corporate executives.

Second, just 2 weeks ago, the House of Representatives voted overwhelmingly against a proposal that would have, among other things, limited the time period for accounting of trust accounts for individuals and tribes to 15 years.

We believe this vote sends a strong signal that Congress supports trust reform and a full accounting for Indian trust funds and trust assets.

The time for moving trust reform legislation is now and we believe that it can be done before Congress adjourns.

Third, and still another important development, just last week the Court, in the *Cobell* litigation, agreed to treat cases filed recently by tribes as related to the trust fund accounting class action that is being pursued on behalf of the individual Indian account holders.

In essence, this means that tribes that filed these cases can rely on the rules made in the *Cobell* case and can expect the Departments of the Interior and Treasury to be held to the same standards of trust funds management for their tribal funds as have been applied to those departments in the *Cobell* case.

This event should also a signal the Department of the Interior that it is in everyone's interest to work with us toward the development of both internal and external mechanisms that will provide for full oversight of the management of trust funds and trust resources.

The Task Force has discussed at length what needs to be done to create true trust reform. Although many details remain to be worked out, candid dialog, perseverance and mutual accommodation have enabled us to develop a comprehensive proposal that holds the promise of vastly improving accountability for management of funds and resources held in trust by the United States.

We are developing a system of internal and independent checks and balances, capacity building, technical support and standards to create a management structure that greatly advances accountability in trust administration, protects the rights and interests of tribes, whether they receive direct services from BIA or contract or compact, and provides the flexibility necessary to respond to the varied tribal needs throughout Indian country.

While much remains to be done, we are optimistic that the thousands of hours of hard work and dedication, which have been invested in the Task Force, will ultimately produce positive results.

At this stage we recommend that legislative efforts focus on the creation of an independent Oversight Commission, establish the position of an Under Secretary for Indian Affairs, and codification of principles to guide the department in its administration of trust funds and resources.

In addition, we would like to discuss the agreement we are working on with the Department regarding the organization of the Bureau of Indian Affairs [BIA].

I will discuss the first two matters and Chairman Hall will discuss the remainder.

No. 1, the creation of an independent commission with oversight of all aspects of trust funds management. As we testified at the last hearing, we have proposed that an independent commission be created. The commission, which in the tribal proposal exists outside the Department of the Interior, would be composed of five members, three of whom would be members of federally-recognized Indian tribes.

All of the commissioners would be full-time and would have experience in administration, regulation, accounting or legal aspects of trust management or have comparable experience in tribal government.

The commission should have the power to, among other things, ensure that regulations are enacted that set minimum requirements which the Department must meet in carrying out its responsibility for all aspects of trust funds, management including the sale and lease of trust assets;

Investigate acts or omissions to act by the Department that are in violation of the minimum trust standards.

Order the Department to take specific actions to correct any acts or omissions to act regarding trust funds management;

Audit any and all trust accounts as managed by the Departments of the Interior and Treasury; and

Review the adequacy of the Department's budgets to carryout its trust funds responsibility.

The Department of the Interior agrees that we need an independent commission, but has questions and concerns about the regulatory and enforcement authorities. Also, at this point, they do not want the commission to be created outside of the Department of the Interior.

The Department does agree that the commission should be able to perform audits and report to Congress about the adequacy of the Department of the Interior budgets. Last week the Department made a new proposal to the Task Force that the tribal members of the Task Force are still reviewing.

The Department has proposed that the office of Comptroller of Currency within the Department of Treasury be given the authority to investigate whether the Department is managing trust funds according to the standards that the OCC generally sets for commercial banks.

The Task Force is considering the proposal made by the Department but we need more information about their ideas. The key to the discussion about an independent commission is adequate authority to enforce trust standards that set forth what must be done by the Department to carryout its responsibilities to trust beneficiaries.

We have also agreed that we do not want the independent commission to interfere with the right of a tribe to manage and govern its own resources, and we want the commission to protect tribal self-determination.

Our discussions lead us to believe that the primary failure of the 1994 Trust Reform Act was that it did not provide the Office of

Special Trustee with sufficient powers to fully carryout trust reform.

This perhaps is the main reason we are still here discussing this issue today. This problem must be corrected once and for all if Congress really wants trust reform to occur.

We have attached a discussion draft of the tribes' legislation for the commission. As we continue our negotiations with the Department, we are requesting your input, as well as the input of tribes on this critically important issue.

No. 2, the creation of the position of Under Secretary for Indian Affairs.

General consensus was reached with the Department about the need to create a new position within the Department of the Interior above the level of the Assistant Secretary for Indian Affairs who would answer to the Secretary on Indian matters.

This represents a part of option 5 proposed by the Joint Task Force in the report provided to the Secretary on June 4, 2002. The Department and tribal leaders have reached consensus that the new position should be created as an under secretary rather than a deputy secretary.

The position of under secretary fulfills the management need of the Department to have a full-time official who is responsible for coordinating trust efforts across all Interior agencies, including the Bureau of Indian Affairs, Minerals Management Service, the Bureau of Land Management, the Office of Special Trustee, the Bureau of Reclamation and the Office of Hearings and Appeals.

We are close to a consensus on a full specification of the duties of the under secretary and they are listed in our testimony. The essence of this position is that it will have the direct line authority over all aspects of Indian affairs within the department, including the responsibility for trust reform across all the relevant agencies and programs to ensure that functions are performed in a manner that is consistent with trust responsibility.

This includes accounting, records management, establishing policies and systems, budgets and strategic planning.

In conclusion, as we turn now to Chairman Hall for his testimony, I would like once again to thank Secretary Norton, Deputy Secretary Griles, and Assistant Secretary McCaleb for all the hard work that they and their staff have put into the trust reform effort of the Task Force.

In addition, I would like to thank the tribal leadership on the Task Force and their tribes for the money, time and energy they have put forth.

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. I would like to also thank the committee as always for your continued interest in the concerns of Indian Country.

Thank you.

The CHAIRMAN. Your statement gives us much hope.

[Prepared statement of Ms. Masten appears in appendix.]

The CHAIRMAN. Chairman Hall.

STATEMENT OF TEX HALL, CHAIRMAN, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, NEW TOWN, ND

Mr. HALL. Senator Dan Inouye, Senator Ben Nighthorse Campbell, and Senator Craig Thomas, thank you for this opportunity to present testimony on behalf of the Tribal Task Force. I am now cochair of the Task Force. I would also like to begin by reiterating the testimony in support for our cochair, Sue Masten, for the creation of an independent commission to oversee trust reform.

I would also like to thank the Department, Deputy Secretary Griles and Assistant Secretary McCaleb, for the work they are doing. It is because of that work that we are making progress and we have them to thank for that as well as Secretary Norton. We are also heartened that this administration understands that there needs to be an independent oversight mechanism for the Indian trust.

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 independent regulation or oversight. We believe that an independent commission must have the authority to set specific standards when the Department's standards are deficient and to enforce the trust standards when needed.

Mr. Chairman, we cannot have a trust system where the duties of the trustee are self-defined by the Department that most often is concerned only about defending against liability. We need an independent commission to perform this task because it is very clear that the Department will not do it on its own.

In regards to trust standards, we, the Task Force also firmly believe that Congress should provide direct guidance to the Department and to the commission about the fundamental trust responsibility to Indian tribes and the specific responsibility for trust funds and trust resource management.

The right way to solve this problem is to first clearly delineate the duties and responsibilities and then to create the systems, the policies, staffing and training that will be necessary to carryout those duties and functions.

Moreover, we are very concerned about the tendency of the Department to constantly await the outcome of some pending litigation before they will begin to address those responsibilities.

In the previous administration, it was the *Cobell* and the Department's response was, We will work with you when *Cobell* is resolved in court. In this administration, it is the White Mountain and the Navajo cases. We will know what our responsibilities are after the Supreme Court decides.

Time and time again in our discussions we have bumped up against this wall where the department waits the outcome of some future litigation that will relieve them of their trust responsibilities.

Mr. Chairman and committee members, there will always be litigation. It is part of the American system. So, we can not wait for the end to all litigation before Congress takes action to fix the Indian trust system. Moreover, we do not want to wait around to find out if the lawyers at the Department of Justice can convince some court to undermine that trust responsibility.

Congress should act now to define the trust responsibilities and legal principles that the Department must follow in carrying out its management of Indian trust funds and Indian trust assets that generate those funds.

Attached to our testimony you will find a discussion draft for legislation that contains general findings on the broad trust responsibility to Indian tribes and also specific language on the duties for trust asset management. The general findings are taken from the case law and are important to show the origin of the trust responsibility.

The specific duties are taken from the trust principles in Secretarial Order 3215, called Principles for the Discharge of the Secretary's trust responsibilities which has been incorporated into the Department's manual. In fairness to the Department, we should note that we have only recently begun given this proposed language and giving it to them.

In addition, the language is still under discussion by the Task Force members and tribal leaders in general. The language comes from an existing source within the department and has already been through the review process at least one time in the past.

Moreover, these principles are not new, but have been applied in the private sector for many years. We expect that this proposal will have to be discussed and refined as part of the ongoing process, but felt it was important to begin discussing this issue today with the committee.

In regards to the oversight of the trust responsibility at the regional local level, another essential component of trust reform is internal oversight of the Department of the Interior as it carries out its trust responsibilities.

We do have charts that are listed there that show that proposed reorganization. This reorganization is at the heart of the discussion about the Department's proposal to create BITAP, the Bureau of Indian Trust Assets Management in November that resulted in the formation of the Joint DOI-Tribal Trust Reform Task Force.

The principal goal of the Task Force is to have a single point of decisionmaking at the level at which the tribe interacts with the BIA. Whether that is at the local level or at the regional level coupled with an adequate internal oversight mechanism which will seek to ensure that trust funds management functions are being carried out appropriately.

To accomplish this, we propose that the organizational realignment will involve all levels of the Department of the Interior. At the highest level, the Task Force proposes to establish a new under secretary for Indian affairs to coordinate and unify policy direction for the BIA and to all other agencies operating programs or providing services to Indians within the Department of the Interior as discussed above.

An Office of Self-Governance and Self-Determination report to the Under Secretary to advance long-standing policies that support greater involvement of Indian tribes and managing programs for the benefit of tribal communities.

A new Office of Trust Accountability would report to the Under Secretary to provide internal control and quality assurance in trust

administration throughout the department as well as ensuring timely resolution of problems.

Within the BIA, a trust services section will provide technical support for field operations, trained services for BIA and tribal staff and controls to ensure that programs are administered in accordance with the defined standards for trust administration, and to help avoid problems before they reach serious proportions.

The trust services section would also be responsible for operating trust fund accounting, cash management, appraisal and accountability functions. The structure will retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelmingly tribal preferences.

However, substantial changes to current operations will have to occur. Adequate staffing and funding levels will have to be sought. Personnel will be well qualified to perform these responsibilities and technical assistance will need to be readily available and performance standards reflecting modern practices of trust administration will need to be established and enforced.

This is the proposal that has been developed by a small working group that was mentioned involving tribal representatives and Department of the Interior representatives. The proposal needs to be fully considered by all the tribal members of the Task Force before a full consensus can be obtained.

However, our differences are now relatively narrow on these issues. As we pointed out at the last hearing, the key to this issue has been the tensions created by a lack of resources in both trust management and in tribal services. While we cannot fix all the resources issues, we do believe the proposal under consideration by the Task Force provides the most economical way to resolve the problem while still providing adequate oversight authority to ensure that trust reform in this area is carried out.

Future efforts: We fully recommend that we cannot resolve all the issues in trust reform in what is left of this legislative year. A future effort, with the assistance of this committee and Congress, will be needed to stem the tide of including fractionalization of ownership that exponentially increases the complexity and cost of Federal administration and deprives Indian beneficiaries of the full potential benefit of those resources and undermines the ability of tribes to protect communal resources like water, fish, wildlife and jeopardizes the security of our reservation homelands by eroding tribal sovereignty.

The Task Force needs to continue its efforts to resolve our differences in the proposed legislation. We will next be meeting in Anchorage in late August, just before the end of the Congressional recess and will seek to exchange or refine our proposals on the independent commission, on our statement of trust responsibilities and legal obligations and make the final adjustments to the duties and responsibilities of the Under Secretary.

In the meantime, we are placing our trust in the expertise and the political acumen of the Senate Committee on Indian Affairs to assist us to move legislation forward this year. We believe it is certainly possible to get this legislation passed by Congress yet this Session. If Congress can pass, in a few short days, a bill creating an independent board providing for financial accountability of cor-

porations, it can certainly help us pass legislation or provide for accountability by the Department of the Interior and the Department of Treasury to American Indians and Alaska Natives.

We look forward to working with you and your staff to move this effort forward as quickly as possible.

Mr. Chairman, the tribal leadership is encouraged by the progress of the Task Force and recognizes that this process is far from complete. As the department and tribes face the challenge of implementation of trust reform, we urge your support to ensure the necessary resources are available to support and complete the work of the Task Force and to continue this throughout the trust reform transition period.

So, in conclusion, we believe we made significant progress toward a legislative package since the last hearing held on this issue and the tribes believe they have most of the legislation ready to go and trust that the committee will use its best judgment to assist us in moving this forward.

We also believe that we have reached consensus or at least close to consensus with the Department on a number of issues. We most respectfully ask that you consider how we can yet resolve these issues in this session of Congress and again we thank you for the opportunity to present this.

Mr. Chairman, in closing, I am just concerned about a lot of the older folks, a lot of the tribal members that are 70, 75, 80 years of age and those that are passing on every months throughout Indian country. This has been over 125 years since this trust has been resolved.

We urge Congress to move with this session to help us create this legislative proposal so that many more elders do not pass on without this trust being fixed for them. And we have the capacity within ourselves.

Thank you.

[Prepared statement of Mr. Hall appears in appendix.]

The CHAIRMAN. As we go on to statutorily establish trust standards, would you recommend that we embrace the standard applicable to private fiduciary. If not, what sort of standard would you suggest?

Mr. GRILES. Mr. Chairman, I think that we would like to work with you and the tribal leaders in taking the draft of trust principles as well as some of the findings that they have prepared and use that to try and articulate what would be those appropriate standards within the context of how you move forward.

We believe, I think the four of us sitting here, believe that we have an opportunity to come back to you with a consensus approach on how to best do that. There are many issues that are raised as we discuss these. We need other parties who are not at this table here, but other tribal leaders as well as others in government to assist us to assist you in defining that.

That is my request. I think we can do that. I really believe we have bridged a lot of water. We bridged a lot of gaps and there is a lot of trust among all of us that we can do that.

The CHAIRMAN. Chairwoman Masten, do you think we could resolve this in Anchorage?

Ms. MASTEN. I think that as we presented this for the first time for consideration at our last session that there was general agreement in the principles, in the general principles that was the specifics in having the opportunity to fully look at them from the tribal perspective as well as the department. That was the only issue at hand.

It was the first time we had a place at the table before us. I believe that we will make substantial progress the next session, or at least I am optimistic that we will.

The CHAIRMAN. Mr. Secretary, Secretary Griles, your prepared statement speaks of restructuring the Bureau of Indian Affairs. What is the nature of the restructuring that you speak of?

Mr. GRILES. I am looking to see if that is the right chart that is up there.

The CHAIRMAN. I cannot see it from here. We have been told there is something in here.

Mr. HALL. It should be in the attached testimony as well, Mr. Chairman.

Mr. GRILES. Mr. Chairman, this is an overview chart, if you will. It doesn't have all the complete details, but I think fundamentally what this chart reflects is on the left side, under the Under Secretary, we have the Director of Trust Accountability. This is an office with something that the tribal work group, individual members of the work group came up with and this is their idea.

We have endorsed this kind of approach. Attached to this, I think, are some duties and responsibilities that talk about what each of these members are to represent.

The fundamental thing, I think, below there, if you will, is the Office of Trust Services and the trust evaluation that we put on here. What we are attempting to do is assure that in the IMM account holders and the tribal trust responsibilities that we have qualified individuals as a trustee who, you know, with a high degree of care and skill and loyalty; that they are administering our trust obligations to Indian country.

We think that with this approach and with the consensus we have reached that we can make that responsibility defined in such a manner that the future will be fundamentally different than the past. That is what we set out to accomplish here with the tribal Task Force.

The CHAIRMAN. Am I correct to assume that the Under Secretary is the Under Secretary of Indian Affairs?

Mr. GRILES. That's correct, sir.

The CHAIRMAN. Chairwoman Masten, do you go along with this?

Ms. MASTEN. We have agreed in consensus between the Department of the Interior and the tribal leadership for everything above the Assistant Secretary of Indian Affairs. We have agreed in concept for everything below, but we are still fleshing out the duties and responsibilities, so we are still working on that. It is an ongoing process.

The CHAIRMAN. In your best calculation, how much would this cost?

Mr. GRILES. That is a very good question, Senator. We are evaluating that. If I could answer the question this way: We have two things ongoing that are part of the Task Force effort. We have

maintained and kept the consulting group, EDS on board to help us look at what is the business that we are currently conducting in Indian country today, that is, as is business.

We have set up a task group of tribal leaders and experts within Interior. I call them experts because they are becoming extraordinarily knowledgeable about all of those aspects. Out of that group will come a report to us, the Task Force, and we will hopefully have process changes. Out of those process changes will also come a resource need identified as to what our total resource needs are, but specifically to these offices of trust services and trust evaluation.

I don't have a number, but I don't see it being a huge number in the sense of government. I see it being a number of trust evaluators that could be in the range we have 85 agency offices; I don't think we need a trust evaluator in every office. We have to evaluate each of those and determine if we need one there or can we work with the regional structures and set up some trust centers, maybe three or four trust centers that would be around the country that would provide the resources and activities.

So, we are formulating that as we speak. We are working and we are going to present some plans to the Task Force about how we see this working, duties, responsibilities, and resource needs. I don't see it being a very large number in the traditional sense. I think it is a number that hopefully you and the rest of Congress will believe it is very important to do.

One of the things we have been able to do, Senator, is that Office of Management and Budget has been at each of our Task Force meetings. They have sat there. They listened. They comprehend it. They have made great input. So, we hope that we are making those kinds of steps also as we go forward so the administration in totality is working with the tribal Task Force in identifying these resources and functions and duties.

Ms. MASTEN. And Senator, it is one of the priorities for the Anchorage meeting, to review the budget.

The CHAIRMAN. In your statements this morning, for example, Ms. Masten, you spoke of the importance of the independent commission and felt that the Congress should immediately focus ourselves upon the enactment of such a measure to establish this.

Are you suggesting that we move as you progress or do we wait until the whole package is ready?

Ms. MASTEN. I would ask that you work closely with us because we are adamant that an independent commission is necessary. I don't know that we will make any further progress with Interior on whether that position should be advisory or inside or outside of Interior.

But the tribal leadership believes strongly that this commission needs to be outside of the Department and that it needs to have sanction and enforcement capabilities.

The CHAIRMAN. I realize that position, but do you want the Congress to establish this separately and proceed with other facets of the measure or do you want the whole package?

Ms. MASTEN. We would want you to move as quickly as you can on the issue. If it is before we complete the other items, then we would request that you do that.

The CHAIRMAN. Do you have any thoughts on that, Secretary Griles?

Mr. GRILES. Well, Senator, I think that there are some fundamental questions of both legal, constitutional as well as pragmatically about how sanctions could be issued against a government agency from another government agency. We just have to work our way through this.

We need your help. We need the staff's help in thinking through other ways. We have been trying to be very creative. We haven't even talked to the Department of Treasury about the idea we presented last week to the Task Force and the Task Force has agreed to consider that.

So, one of the things we are going to do between now and Anchorage is come back and say, okay, we spent a little bit of time talking with Treasury about this. Does this have merit? Because that is where the banking industry and all gets its monitoring and standards that are adopted. So, we are trying to be creative. We understand the essence of what the Indian country wants, and that is assurance that the past is not repeated in the future.

Mr. McCaleb and I and the Secretary would not be dedicating this time to this if we thought that was going to happen. So, we, too, are looking for the best means to assure that the future is much different than the past.

The CHAIRMAN. Secretary Griles, two cases were mentioned, the *Navajo* case and the *White Mountain* case, both pending in the Supreme Court. Would the Department of the Interior be willing to stay the case until we resolve this trust matter?

Mr. GRILES. Senator, I don't represent the U.S. Government in its totality. That is a decision that the Justice Department makes on our behalf. I think one of the briefs has been filed already. The other one is scheduled for briefing, I believe, in the next few weeks or maybe the end of the month or early September. I am not sure what the correct answer from the government is on that, Senator, I would be happy to explore it and get back and talk with you about it.

This is not something that I am in a position to respond to today, sir.

The CHAIRMAN. I am certain the committee would like to know. At this point, may I yield to the Vice Chairman?

Senator CAMPBELL. Thank you, Mr. Chairman.

You said right from the beginning of this that we shouldn't move any faster than the Task Force moves. Those things that the Task Force agreed on we have been trying to frame up in some bill. But I have to say that we are going to be out and we are coming back around September 2 and we are out about 4 weeks after that.

You have one more meeting while we are in session and two more after we are out. If you think we can move forward and get a bill signed in that amount of time, you have more confidence in this place than I have. I have been here for a while. But I am looking forward to the results of the Alaska meeting.

I was looking at the organizational proposal. Since we have been talking so much about the commission, if we were going to diagram the commission and put it on there, where would it be, right up here above the secretary?

Mr. HALL. Senator Campbell, she will flip the other chart and it will show.

Senator CAMPBELL. Oh, I see, okay, top right. As I understand the tribal position, this commission would have oversight, so I assume some enforcement authority, subpoena authority, I believe I read that in the notes, be able to promulgate rules and regs and other powers.

I would like to ask Mr. Griles, what specifically is the disagreement with this? Does this detract from the authority of the Secretary?

Mr. GRILES. I think it has that potential to distract from the authority of the Secretary in the sense of within normal course of business, who and what are those standards that one has to respond to? We are talking about sanctions against individual government employees who have multifaceted duties and responsibilities today.

Unlike, say, a banker or an accountant who has a defined duty, it is defined as being what it is, a single duty, when a government agency holds the responsibility, it is accountable to the Congress, we are accountable the courts in some instances.

Senator CAMPBELL. Tell me the difference, in your view, of what other commissions have, like the Federal Home Loan Bank Board or the Comptroller of the Currency. I believe there was something in your testimony that dealt with that, that might be a model.

Mr. GRILES. I think the fundamental difference is they are regulating a private entity whereas here we are trying to regulate a government entity which has responsibilities. But, I think, Senator, we, too, are looking for how to accomplish the objectives that Indian country has told us they would like to see us accomplish and as the Task Force has.

Senator CAMPBELL. The June 4, 2002 report for the Secretary prepared by the Task Force contains some of what were called cross-cutting principles. One of the principles seeks a definition of exactly what the Department's fiduciary responsibility would be.

Is it your view that the tribes and the Congress should await the decisions of the Supreme Court this fall? Senator Inouye, I think, alluded to that, before we take any action?

Mr. GRILES. I think that Congress always has the power to act, to define what our trust obligations and responsibilities are. We are guided by the previous statutes. We are guided by the treaties, the laws, the rules and regulations. We are guided by the departmental handbook that has been put in place that defines trust principles. So, Congress obviously has that authority if it wishes to define that trust relationship differently.

Senator CAMPBELL. Maybe to Chairman Hall and Chairwoman Masten, since November 2001, how would you compare the amount of consultation that has occurred since then? More sparks in the beginning and more cooperation now, I would hope?

Mr. HALL. Sparks in the beginning, cooperation now and a little bit of sparks now.

Senator CAMPBELL. A little bit of sparks now.

Mr. HALL. Yes, Senator Campbell; it is ongoing. It is a relationship. We are not going to agree on everything.

Senator CAMPBELL. Yes; and I guess that is one of my concerns about trying to push a bill too fast before we have most things in agreement because you are going to have to go back and speak to somebody else. I mean let us face it, all tribes are not in agreement with all points the Task Force agrees to.

It is going to be difficult, I think, if we try to move this too fast, and then you go back to the people you have to consult with or be accountable to, individual tribes, are you confident that they are going to support the decisions that you have agreed to as a member of the Task Force.

Mr. HALL. One hundred percent confident, Senator Campbell, that the tribes have agreed because we had consultations and they all wanted an independent oversight commission. The Task Force agreed in consensus, as was mentioned, from the Assistant Secretary forward.

The tribes want legislation and they want to move it in this Session.

Senator CAMPBELL. There is the law of possibility and the law of probability. Anything is possible, but I have to tell you, I think it is improbable that we will be able to get it done.

Ms. MASTEN. Senator, I just wanted to add that there has been more consultation with the tribes since November on trust reform than has occurred in the past. But you are correct, although we heard loud and clear from Indian country on several of the points that we reported to you today, there is still a lot of work that we accomplished in the last session and that we will accomplish in the next session that we also need to go out to Indian country for consultation on.

Senator CAMPBELL. What if you can't reach a resolution on the commission and we put something like that in a bill and we get a veto threat of something? Have we accomplished anything?

Mr. HALL. Senator, the Task Force is committed to working on this. This has got consensus in Indian country. It is a tribal caucus proposal. It has the independent commission. It has been debated with the tribal folks throughout all these months, so we are 100 percent.

Senator CAMPBELL. I understand that, but the Task Force doesn't sign the bill into law. That is why I think if we don't reach some consensus, we are going to run into a brick wall even if we could get it passed through the Senate and the House and get it downtown.

Mr. HALL. The Task Force is committed to working and helping with the political process.

Senator CAMPBELL. I see. Thank you, Mr. Chairman.

Ms. MASTEN. But Senator, I would also hope the President, as he considered the commission for the corporations and being responsible to the shareholders, would also have the same commitment to the tribal leaders and to the individuals on trust assets in accountability.

Senator CAMPBELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Although it might be convenient to equate the commission that we are discussing now with the commission that Congress enacted, in the case of the Congressional enactment of the recent commission, it was in response to an unsta-

ble and volatile market, that if something had not been done immediately, we would have had some real problems on Wall Street.

Second, with the almost never-ending parade of misdeeds, something had to be done immediately. I, for one, on a measure of this magnitude, join my vice chairman in trying to suggest that we be a bit more careful here.

I know that you want legislation before we adjourn, but the time is not on our side. One of the worst things we can do is to have a lame duck session coming back after the elections. Then you will have members who may not be responsible to their constituents participating in policy making and the passage of measures.

So, it might take a little while longer, thus my question: Mr. Secretary, you spoke of the Anchorage meeting. Do you have any timeline as to when this committee or this Congress may be able to study a finished product that the Task Force has come forth with?

Mr. GRILES. Mr. Chairman, I think the Anchorage meeting will give us a real indication of how many daylight there continues to be between us and the tribal representatives. I think on the legislation, if one wanted to enact the under secretary, we would be in a position to provide the drafting services to the committee this week and some of the other things.

As far as the remainder of the organizational change, besides the commission, I don't think you would want to put in legislation below the Assistant Secretary. I would think you would want to keep that out of statute and let that be part of the administration of how it organizes it with the concurrence of Congress that we submit organizational proposals up here and the committees review them, but you don't enact those into statute.

So, we think that the only issue that is probably keeping us from reaching a consensus is the commission, its duties, roles and responsibilities and maybe some of the findings and trust principle issues that we have got to review and look at.

So, it really is dependent upon the committee's desire, as to how much you want to enact. If there are other things we need, the Task Force at the last meeting identified other legislative issues, the fractionalization issue that Chairman Hall spoke to. We really need your assistance and help to get that very complicated issue addressed in the future, because no matter what we do on trust reform, no matter how hard we try to work, if we don't deal with that issue, Senator, this program will never be in a position where it can truly be administered in a manner that is efficient and effective and we have really good accountability.

The CHAIRMAN. I gather from this discussion that a major problem may be the commission. Does the Department of the Interior have an alternative proposal?

Mr. GRILES. Senator, we have suggested to the tribal members some duties and responsibilities that we have agreed on, auditing, reporting to Congress, those kinds of things. So, there are things, we believe, that can pass the necessary standards that we believe within the executive branch——

The CHAIRMAN. Can we study your proposal in writing, say what would constitute the membership, the duties and responsibilities

and powers? We would like to compare that with the one the tribal leaders have come forth with.

Mr. GRILES. I think within a few days we could give you that. It is not quite as clean a presentation as it needs to be. But we will endeavor to do that before you go home, sir.

The CHAIRMAN. Who knows, the cochairman of this committee may look it over and come up with a solution.

Mr. GRILES. We hope you can, sir.

The CHAIRMAN. You can never tell.

Senator CAMPBELL. Mr. Chairman, may I interject one question?

The CHAIRMAN. Please do.

Senator CAMPBELL. Perhaps Mr. Griles does not know, and I certainly don't, perhaps you do. But is there in any other Federal agency in the Federal Government, of all the departments, is there any commission in place now that has this similar authority or latitude?

Mr. GRILES. Senator, I am not aware of one that has that kind of latitude and authority over another Federal agency as this is envisioned. We have searched, along with the tribal reps and the tribal reps have attorneys who have been looking.

So, we have looked for models throughout the Government to see. Some of the things we have fashioned come from some that we have found. So, the things we will be presenting to you will be based on some of the previous successes that have been adopted.

Senator CAMPBELL. So, the committee, I guess, can assume that your opposition really isn't to a commission; it is the authority of the commission. You seem to be of the mind that a commission that has an advisory capacity is not bad, but one that has the authority to oversee, direct and so on is much worse. Is that correct?

Mr. GRILES. That's correct, Senator. I think an advisory commission, that is not an issue. We could do that and concur in that easily. It is the expanded role of sanctions and the ability to take enforcement actions against employees that concerns us. How do you do that as an independent body within an executive branch?

We are trying to figure that out.

The CHAIRMAN. Mr. Secretary, do we need legislative authority to establish the office of under secretary and the office of self-governance and self-determination or can the Secretary, Ms. Norton, do that right now?

Mr. GRILES. We need the authority for the under secretary, Senator. We have, and I am going to use a number, six or seven assistant secretaries that are established by statute and one or two which are named specifically to that title, but we do not have the authority, as we have been told by a legal review of this, to establish the under secretary position without statutory inclusion.

The CHAIRMAN. Should the life of this Task Force be extended?

Mr. GRILES. Mr. McCaleb and I have found this to be a useful dialog and I think I can speak for him on this and it has been a very, very worthwhile effort. There is so much more work to be done. I mean we have only scheduled three more consultation meetings, but there are about three or five, maybe more than that, subcommittees that are working as we speak today throughout Indian country.

So, this new Task Force can and should probably have a longer life than this review of the organization. Once we get an organization agreed to, it is the whole level of how you manage it, what are the principles, what is the staffing? We have the fractionation.

We have a new group. A new subcommittee of the Task Force that has been set up on fractionalization. They are going to meet next week, I believe it is, or the week after next. There is just a lot of work that the tribal leaders have dedicated. I mean they are not leaving home and spending a huge amount of time to do this for us and with us. We have a lot of employees who are away from home also.

The long answer to your short question is, yes, I think we do.

The CHAIRMAN. Chairwoman Masten, do you agree or disagree?

Ms. MASTEN. We agree. It was a principle that the Department and the Task Force agreed to a couple of months ago that it is important as we move forward with the implementation of trust reform that tribal leadership be actively engaged and we insure that consultation occurs in Indian country.

The CHAIRMAN. Senator Conrad, do you have any questions?

Senator CONRAD. I do, Mr. Chairman. First of all, I thank you and our cochairman for holding this hearing. I thank the witnesses, and a special welcome to Chairman Tex Hall of my home State, somebody that we have high regard for and we are very pleased is actively involved in the search for a solution.

I would like to turn the attention of the witnesses' to the question of the individual Indian money accounts. Perhaps, you could give us, Mr. McCaleb, if that is appropriate, an update on where we are.

I would like to preface your response by talking about the events that occurred at Standing Rock where they had been doing the inputting of the documentation for those accounts with respect to that tribe and then were told that was all going to be centralized and taken away from them, leading to a loss of jobs and a very strong negative reaction from the tribal leadership there as well as, I think, the tribal membership.

I think it was not well received. My understanding is all of that has been put on hold by the lawsuit. But perhaps there is more to know than that. Could you give us an update on where things are with the individual accounts?

Mr. MCCALEB. Yes, Senator; one of the things that the Task Force has done is create a special subcommittee on as-is business processes. It is done in cooperation with Electronic Data Services to determine exactly how we are doing business at the agency level right now and the regional level in the delivery of these services.

We are translating that into areas that we see that need to be improved or enhanced. The report of this committee will be very influential of any changes that are done at the agency level.

We have agreed in the tribal Task Force on two guiding principles. One is that our organization within the BIA needs to be such that trust review and trust services are delivered at the level where they originate. That is largely at the agency, as you have indicated about Standing Rock.

Second, that there must be full and timely accountability. Those are two broad principles. We are trying to incorporate that. There

is a management organization chart over there that represents some tentative agreements that have been reached by the tribal Task Force and the department participants in this joint committee.

We came to that agreement in a work group last week, very late in the evening. It has been submitted to the tribal Task Force at large for approval. They wanted to vet that before a wider cross-section of leadership.

I guess the shorter answer is, I think that is what this Task Force is about, trying to determine the most effective way to deliver these services at the agency level where the work originates.

Senator CONRAD. Has there been any further update of the funds that could not be identified? That is, with the individual money accounts there were funds that could not be accounted for. Is there an update with respect to those funds that could not be specifically accounted for?

Mr. MCCALEB. The special trustee has been working with the BIA and the Office of Trust Funds Management to define the extent of that. I am not aware of the outcome of that at this point, but that is an ongoing effort on the part of the special trustee.

Senator CONRAD. Mr. Chairman, if I could ask one other question on a subject that is related, I held a hearing on what happened to the J Tech funds of the Standing Rock Tribe. During the course of that hearing, we were advised that money had been drawn down for the purpose of building schools, $12 million for the stated purpose of building schools. We found out in fact that none of the money had been used for building schools, but instead was being used to backstop accounts that were individual loans that were made, unsecured loans in that amount.

In fact, we are now being told it may be much more than that. It went out by the way of individual loans, unsecured.

In that circumstance, we learned that Cora Jones, who was the representative of the BIA that had the authority to release those funds, had released them without any evidence that they were going to be used for the purposes indicated. That is, there was absolutely nothing that demonstrated the money was going to be used for the purposes intended by the legislation that passed here.

Mr. McCaleb, can you assure us today that Ms. Jones is not in a position of authority over any of those funds going forward?

Mr. MCCALEB. The answer to your question is yes.

Senator CONRAD. There is an ongoing investigation by the Department, is that correct?

Mr. MCCALEB. Yes; by the Office of Inspector General of the Department of the Interior.

Senator CONRAD. By the Office of Inspector General? Can you give us any update with respect to that investigation?

Mr. MCCALEB. No; not really while the investigation is still in progress. I received a preliminary report at the launching of the investigation which basically supports everything that you determined in your hearings; that these funds which were dedicated for other purposes were utilized to collateralize or secure individual loans, which was completely beyond the investment plan on which the funds were released.

Senator CONRAD. Well, I would just say that was a hearing by this committee in which we discovered this. I would hope that follow-up would be provided to this committee. This committee played a central role in securing those funds. Those funds were secured for very clear purposes.

I think it is essential to the working of the committee that they be advised upon the outcome of that investigation.

Can you assure us today that will be done?

Mr. MCCALEB. Yes, sir; as soon as I have a substantive report from the Office of Inspector General, I will share that with this committee.

Senator CONRAD. Well, I thank you. I would just say to the chairman, Mr. Chairman, this is a matter of significant concern to me, to, I think, to this committee. It is of grave concern to the members of the Standing Rock Sioux Tribe, because we provided, you will recall, $90 million in compensation for land that was taken and never appropriately compensated for. But we provided the compensation pursuant to the recommendation of a commission during the Reagan Administration.

Now we find out that some of that money has been used for purposes other than those intended, and perhaps a very substantial part of the money. This is something that we simply must pursue.

I want to thank the chairman and I want to thank Mr. McCaleb for those answers. We will be looking forward to your additional report.

The CHAIRMAN. Thank you very much.

Chairman MCCAIN.

Senator MCCAIN. Thank you very much, Mr. Chairman. Thank you for holding this hearing.

Mr. McCaleb, Mr. Griles, are you aware that Judge Lambeth has said that he will take on the various suits by the individual tribes? Are you aware of that?

Mr. GRILES. Yes, Senator McCain.

Senator MCCAIN. Does that lend any urgency to you and the tribes coming to some kind of agreement?

Mr. MCCALEB. Senator, in addition to the Task Force meeting that we held in Portland last week, we also held a meeting with the Inter–Tribal Monitoring Association, which is a group of 50 tribes, most of whom are litigants in these lawsuits.

We are trying to educate both ourselves and the tribes relative to this.

Senator MCCAIN. What education is necessary?

Mr. MCCALEB. Well, it has to do with most of the suits, of the 20 suits that have been filed, all but 3 are asking for an accounting, which they are absolutely due.

We are going to involve the Office of Historical Accounting in a seminar with these tribes so that we can go forward on the same fact basis. They had agreed to do that in early October.

Senator MCCAIN. You have been having discussions for 6 months with the tribal leaders?

Mr. MCCALEB. With the tribal Task Force. We had our first meeting with the ITMA in May.

Senator MCCAIN. Well, I have to tell you that a lot of us have sat here with various witnesses over many years and we have gone

around and around on this issue, previous administrations, previous witnesses, previous Task Forces, previous BIA officials, and as far as I can tell, we are no different than what we were 10 years ago.

That is incredibly frustrating. I have often said that if this were being done to any other Group of Americans outrage would prevail throughout this country.

Yet, we now seem to be unable, again, to come to an agreement. We are hung up on a chart of who is responsible for what. I think that some of us may feel unless there is some agreement that Judge Lambeth and other judges throughout the Nation will be making decisions which will probably, in the end, cost the taxpayers one heck of a lot more, just in legal fees, than it would be if there was some kind of orderly way of adjudicating these claims.

It seems to me that would lend some urgency to you all coming to some agreement. I am not against reorganizing the BIA. I think the first hearing I ever appeared in was the reorganization of the BIA in 1987. That is fine. I mean after a while it gets a little boring, but it is fun to move different boxes around and call people deputy secretary or under secretary and have little lines going out in different directions.

But tell me what in the world that has to do with settling these pressing claims that have been around for 100 years.

So, my admonition to you is that I hope that you could agree with the tribal Task Force, you could agree with any other tribal organization there is, come to some agreement, come to the Congress and say, We need this statutory authority, or don't waste time away from home for some of your employees, and just say, Let us let the courts decide it.

I think I have a reasonable legislative proposal. I would like you to examine it. I would like for the tribes to examine it. If you want to change it, change it. If you want to reject it out of hand, reject it out of hand.

But let's not fool around with reorganizing the BIA. And by the way, the previous administration is more culpable than you are. You have only been in office for 1 year or perhaps less in your appointed positions. The other administration had 8 years.

But the way I see the progress going, 8 years from now we will be having another hearing, perhaps not with the same Senators, but certainly the same subject.

So, all I can say is please don't come to us with another reorganization of the BIA. Come to us whenever you want with a reorganization of the BIA. As I say, it is a fun academic exercise. But please come to us with a proposal to settle the issue where Native Americans are deprived of billion of dollars that is rightfully theirs.

If we can't do that, if we can't get action through the Congress, then I wish Judge Lambeth and all of the other Federal judges across America a great deal of success because maybe they will be able to do something that we in the administration have been unable to do over 100 years, roughly.

I would be glad to hear any response that Mr. McCaleb and Mr. Griles have or Ms. Masten or Mr. Hall.

Thank you, Mr. Chairman.

Would you like to make any comments? Please go ahead.

Mr. MCCALEB. Mr. Chairman, if I may, I would like to point out that our meeting with the ITMA has been for the purpose of seeing if we can develop a model for alternative dispute resolution as an alternative to mass litigation on the issue of historical accounting on the tribal accounts.

The individual Indian money accounts are already at issue in a class action suit, as you indicated, before Judge Lambeth in his court.

That is the historic aspect of this equation, looking back. Another equally important aspect is looking forward and asking what do we do in the future, so that the mistakes and the mismanagement of 115 years is not repeated.

The cooperation between the tribal Task Force and the Department of the Interior, which we have been discussing, is substantial. This organizational chart is one aspect of that. But there are fundamental concepts upon which we have agreed that will profoundly affect the administration of the trust in the future.

There are aspects we have not yet agreed upon that we have discussed here today. But that is precisely, Senator, what our goal and ambitious objective is, that is, to prevent the reoccurrence or the continuation of the mismanagement and the concerns of the Indian people that you have expressed.

Senator MCCAIN. Mr. Griles.

Mr. GRILES. I think Secretary McCaleb has responded. I want you to know as Deputy Secretary, he and I have spent thousands of hours and many, many days working to find solutions to the very problems you speak to.

We are not reorganizing for the sake of reorganizing. We are meeting with the tribal leaders hopefully to define the future so that the future is fundamentally different than the past. The past is unacceptable. The future has to be different.

So, within the context of that, as Mr. McCaleb says, the Indian tribal leaders, on the tribal lawsuits, have agreed to a process and we are making progress to try to find a better solution than having a number of suits around the country. We owe them an accounting. We are not arguing that. That has been argued by the previous administration. We are not arguing that.

We came to this committee and to this Congress and suggested legislation in the spring that was enacted by Congress to extend the opportunity for us to enter into these discussions and negotiations in order to try to resolve an historical problem that we inherited. I appreciate your recognition of that.

So, we are going to continue to work with the tribal leaders, the tribes, and this committee to look for other solutions to these problems. We need your help. We are going to need your advice and your help in how to resolve some of these questions as we develop what the real problems are with the individual tribal accounting.

We are going to, hopefully, Senator, come forward with a process that will allow the tribal governments to understand what has been done, why it was done, what is wrong with it and give them an accurate accounting of those accounts.

Senator MCCAIN. I think we know all of everything but the last. We know how it was done. We know why it was done. We know what happened.

Please go ahead, Mr. Hall.

Mr. HALL. Thank you for the question and for the comments, Senator McCain. We are fundamentally working together on a number of issues, the tribes and the Task Force, but we fundamentally have a difference on the legislation.

The tribes do want to put forward legislation. I am concerned that with the remaining time, that we are short on time, but you know, Senator, on trust standards and trust responsibilities there are two cases pending before the Supreme Court, the *White Mountain Apache* case and the *Navajo Nation* case.

The tribe Task Force doesn't want the Supreme Court to make those determinations on that trust responsibility. We would like to include that in this legislation, as well as an independent oversight commission and the authorization of those new positions that you see from the Assistant Secretary up, which includes the Under Secretary and the Director of Trust Accountability, which really is the internal mechanism to oversight on trust. The independent commission is the external.

So, the tribes are looking to the Senate Committee on Indian Affairs to proceed with this type of legislation in the remaining days of the 107th Congress.

Senator MCCAIN. Don't bite off more than you can chew, Mr. Hall.

Go ahead, Ms. Masten.

Ms. MASTEN. Senator, I personally have been involved in trust reform for the past 12 years and have seen no progress to date. At least today we are sitting down at the same table with the Department of the Interior and we are consulting with tribal governments across Indian country.

I do expect, though, if Congress and the administration can act quickly to address the corporate shareholders needs, then they ought to be able to act quickly to be accountable to Indian country.

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

The CHAIRMAN. I thank you very much. With that, I would like to thank the panel for helping us. We look forward to your report of the Anchorage meeting.

[The July 24, 2002 Commission on Indian Trust Funds Concept Paper appears in appendix.]

[Whereupon, at 11:34 a.m., the committee proceeded to other business.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED JOINT STATEMENT OF J. STEVEN GRILES, DEPUTY SECRETARY OF THE DEPARTMENT OF THE INTERIOR, WASHINGTON, DC AND NEAL MCCALEB, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. Chairman and members of the committee, it is a pleasure for the two of us to appear before you again on a panel with the two cochairs of the Joint Department of the Interior/Tribal Leaders Task Force on Trust Reform, Sue Masten, chairwoman of the Yurok Tribe of Northern California, and Tex Hall, chairman of the Three Affiliated Tribes of North Dakota. We are here today to brief the committee on the status of the work of the Task Force.

Last week, the Task Force held its seventh meeting in Portland, OR. Earlier meetings were held around the country in Shepherdstown, WV, Phoenix, AZ, San Diego, CA, Minneapolis, MN, and Bismarck, ND. The Task Force was formed last December in response to the Department's proposal to create a new organizational unit called the Bureau of Indian Trust Asset Management, which envisioned the consolidation of most trust reform and trust asset management functions located throughout the Department into a new bureau. This proposal was subsequently strongly opposed by the tribes.

The Task Force is charged with providing proposals to the Secretary on organizational alternatives for the management of trust services within the Department. The Task Force's purpose is to evaluate organizational options and to submit to the Department one or more alternatives to reorganize the trust asset management system. 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 myself and Assistant Secretary McCaleb.

The members of the Task Force have all come a long way personally and professionally as participants in this group. The two of us have attended every one of these meetings, as have our cochairs here with us today. As we talk about the future of the Bureau of Indian Affairs and work together to resolve issues related to how the Federal Government carries out its trust responsibility to Indian people, we are building another kind of trust among ourselves.

While we have reached agreements on many key issues related to the organization of the Department of the Interior and management of our trust functions, our work is not done. We will be meeting in August in Anchorage, AK, and have other meetings scheduled.

On June 6, at a meeting of the National Congress of American Indians, the Department at the recommendation of the Task Force solicited comments on various options proposed by the Task Force for restructuring of the Department with respect to trust. We received back from the Tribes detailed and thoughtful comments. We heard the following themes:

The Federal Government's commitment to self-governance and self-determination must not suffer as a result of Federal trust reform.

Trust reform must not result in diminishment of the government's trust obligation to Indian people.

There is a need for creation of a high level position within the Department who will be the primary individual within the Department responsible for ensuring that the trust asset management responsibility is carried out appropriately throughout the Department.

Trust asset management issues must be addressed at the regional and agency level of the Bureau of Indian Affairs [BIA].

There can be no one-size-fits-all solution. Trust reform must recognize that there are three models for receiving services: Through self-governance compacts, self-determination contracts, and direct services from the BIA.

There is no bright line between fiduciary trust asset responsibilities and other trust responsibilities.

We must ensure more accountability within the current BIA structure.

Management of trust services and trust resources must be kept at the local level. We need a clear definition of the trust duty and responsibility for management of trust assets.

There must be oversight of the BIA by an entity that has the authority to compel and enforce corrective action.

As the above illustrates, reform of our current system is not an easy task. At the Task Force meeting last week, we reached agreement as a group to recommend that Congress establish a new position, an Under Secretary for Indian Affairs, who would be appointed by the President, subject to confirmation by the Senate, and would report directly to the Secretary. The Under Secretary would have direct line authority over all aspects of Indian affairs within the Department. This authority would include the coordination of trust reform efforts across the relevant agencies and programs within the Department to ensure these functions are performed in a manner that is consistent with our trust responsibility, as well as a number of other duties carefully hammered out between the Department and the Tribal Leaders on the Task Force. We believe reaching consensus on the creation of this position and the duties of this new senior official was a major accomplishment of the Task Force.

We have also reached agreement on creation of an Office of Self-Governance and Self-Determination within the Office of the Secretary, reporting directly to the new Under Secretary for Indian Affairs. This will enhance the abilities of the tribes that are interested in moving toward more compacting and contracting to carry out the services due to Indian tribes. Similarly, we have agreed that any legislation should also include the creation of a Director of Trust Accountability reporting directly to the Under Secretary who will have the day-to-day responsibility for overseeing the trust programs of the Department.

Perhaps most importantly, last week in the working group we reached agreement on a restructuring of the Bureau of Indian Affairs. The Department and the Tribes agree that our trust duty requires a better way of managing than has been done in the past. The Department's longstanding approach to trust management needed to change, and this change must be reflected in a system that is accountable at every level with people trained in the principles of trust management. When the we arrived in Portland last week, the Department brought a proposal to create Trust Centers at the regional level within the Bureau and trust officers at the agency level. It was the best way we could see to ensure that decisions made at the regional and local level were reviewed to ensure that we were meeting our fiduciary trust responsibility to both tribes and individual allottees.

4 Our tribal counterparts on the Task Force had a very different view of what changes needed to be made within the Bureau. The tribes expressed concern that these trust officers would involve themselves in most of the day-to-day activities at the agency level without being answerable to the Superintendent or the Regional Directors. The differences between us seemed too great to resolve in just a few days. However, once we stopped talking in concepts, rolled up our sleeves, and took the time to put on the table our real concerns, we were able to develop an organizational model that does its best to ensure that the Federal Government can exercise its fiduciary trust duty, and, at the same time, ensure that tribal governments can be active managers, to the degree desired, of their own trust assets. A copy of the working group consensus reorganization proposal is attached to this testimony for your information. This reorganization can be done administratively and does not require additional legislative authority. We believe that it is likely to have the greatest positive impact on the future management of trust assets.

As we mentioned above, the work of the Task Force is not complete. We are exploring the possibility of creating a commission with oversight responsibilities for

trust funds management. We have reached agreement within the Task Force to recommend creation of an independent commission on Indian trust funds within the executive branch. While we have mutual agreement on many of the functions this commission should have, we have mutual disagreements as well. We are not in agreement on the Commission's duties and we have not discussed the Commission member qualifications or term of service. We have presented a number of commission ideas that we plan to discuss with the Task Force at the upcoming meeting in August. We plan to participate with a working group set up by the Task Force whose charge it is to try to resolve these differences and reach consensus on the details of this commission's duties and responsibilities. Our goal is to have an agreement on this issue at our August meeting in Anchorage.

5 Finally, we were also asked by the tribal members of the Task Force to work with the tribes on draft statutory trust standards presented at our meeting last week. These standards will be carefully reviewed within the Administration in preparation for our next Task Force meeting. We have not reached any agreement on the trust standards. However, we will be having both our attorneys and attorneys at the Department of Justice look at them.

This concludes our statement. We would be happy to answer any questions the committee might have at this time.

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

JULY 30, 2002

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

The corporate accounting reform bill. First, we want to point out several significant events that have occurred since we last spoke to you. This past week, Congress reached resolution on a corporate accounting reform bill, H.R. 3763, and the President has indicated that he will sign it into law. Among other things, this legislation creates an independent commission that will establish standards and have the power to enforce those standards to force corporations to report honestly their financial affairs to their shareholders.

We believe it is just as important to hold the Department of Interior accountable for the funds and resources that the Department holds in trust for Indian Tribes, American Indians and Alaska Natives as it is for corporations to be held accountable to their shareholders. American Indians, Alaska Natives and Indian tribes are just as deserving as corporate shareholders; in fact, they are in much the same position. Just as a shareholder's interest in a corporation is entrusted to corporate officials, in the case of tribes and their members, trust funds and trust resources are held for them by the Department of Interior and the Department of the Treasury. If an independent commission can be created by Congress to create corporate accountability for the benefit of shareholders, then Congress can just as well create an independent commission that will hold the Department of Interior and the Department of Treasury accountable for the trust assets those Departments control. Tribes have the right to expect no less of their trustee than shareholders expect of corporate executives.

The Department of Interior has generally said in our discussions since we last testified that they agree that we need an independent commission. As we will discuss further in this testimony,

where we may differ is in the powers and functions of that Commission.

The vote in the House rejecting a limitation on the period of accounting for trust funds. Another significant event occurred less than two weeks ago. The House of Representatives voted overwhelmingly against a proposal that would have, among other things, limited the time period of the accounting of trust accounts for individuals and tribes to 15 years between 1985 and 2000. The House took this action despite the fact that the Department of Interior had just released a report stating that it would cost $2.4 billion to provide a full accounting of the funds held in trust for individual tribal members. We believe this vote should send the Department of Interior a signal that the time is right to provide Indian tribes and their members a full accounting for their funds and the assets that generate those funds. As noted in our testimony presented in June, without a valid accounting determining what should be in our accounts as of a specific date we will not have a starting point for the appropriate management of trust funds.

Just as important, a number of Congressmen and women said in debate that they wanted to hear from Indian tribes and their members on this issue. This testimony is our effort to tell you what we believe is essential to include in trust reform legislation, which should go forward this year if at all possible.

Tribal Cases treated as related to *Cobell*. In still another important development just last week, the court in the ***Cobell*** litigation agreed to treat as cases related to ***Cobell*** seven trust fund accounting cases filed recently by various Indian tribes in the United States District Court for the District of Columbia. In essence, this means that the tribes that filed these cases can rely on the rulings made in the ***Cobell*** case and can expect the Departments of Interior and Treasury to be held to the same standards of trust funds management for their Tribal funds and the assets that generate those funds as have been applied to those Departments in the ***Cobell*** case. This event should also send a signal to the Department of Interior that it should be in everyone's interest to work with us towards development of both internal and external mechanisms that will provide full oversight of the management of trust funds and the assets that generate those funds.

Essential elements of trust reform, including reorganization of the Department of Interior

The Task Force has discussed at length what needs to be done to create true trust reform. Although many details remain to be worked out, candid dialogue, perseverance, and mutual accommodation have enabled us to develop a comprehensive approach involving many components, which taken together, holds the promise of vastly improving accountability for management of the funds and resources held in trust by the United States for Indian beneficiaries.

What we are developing is a system of internal and independent checks and balances, capacity building, technical support, and standards to create a management structure that: (a) greatly advances accountability in trust administration; (b) protects the rights and interests of tribes whether they receive direct services from the BIA or contract/compact; and (c) provide the flexibility necessary to respond to varied tribal needs throughout Indian country. While much remains to be done, we are genuinely optimistic that the thousands of hours of hard work and

dedication which have been invested in the Task Force efforts by tribal leaders and high level officials within the Department of Interior over the course of the past seven months will ultimately come to fruition.

Essential elements of trust reform legislation

While we may be requesting further legislative action from Congress in the future, at this stage, we recommend that legislative efforts focus on the creation of an Independent Oversight Commission, the establishment of the position of Undersecretary for Indian Affairs, and codification of principles to guide the Department in its administration of trust funds and resources. These issues are separate and apart from the historical accounting issue, which will likely need additional legislation as well, but which is not being discussed by the Task Force at this time.

We will discuss the three principal elements in turn, and indicate where there is agreement with the Department, where there appears to be a good opportunity for consensus, and where there currently is no agreement yet in sight.

1. **Creation of an independent Commission with oversight of all aspects of trust funds management.** As we testified at the last hearing, we have proposed that an independent Commission be created. The Commission, which in our proposal exists outside the Department of Interior, would be composed of five members, three of whom would be members of federally recognized Indian tribes. All of the Commissioners would be full time and would have experience in administration, regulation, accounting or legal aspects of trust management, or have comparable experience in tribal government.

   The Commission should have the power to, among other things:

   a) ensure that regulations are enacted (whether first proposed by the Department of Interior or by the Commission) through negotiated rulemaking that set minimum standards, or minimum requirements which the Department must meet in carrying out the Department's responsibility for all aspects of trust funds management, including the sale and lease of trust assets;

   b) investigate acts or omissions to act by the Department that are in violation of the minimum trust standards;

   c) order the Department to take specific actions to correct any acts or omissions to act regarding trust funds management;

   d) audit any and all trust accounts as managed by the Departments of Interior and Treasury; and

   e) review the adequacy of the Department's budgets regarding carrying its trust funds

responsibility.

In carrying these duties and functions, the Commission's actions, and in fact, any authority provided in the entire act will not interfere with Tribal law, reduce Tribal sovereignty or change the rights of allottees; or prevent a tribe from managing its own resources.

The Department of Interior has said they agree that we need an independent commission. However, they have a considerably different view of what the powers of that commission should be. – At this point, they do not want to the Commission to have regulatory, investigative or enforcement power; but they have asked us what the scope of the regulatory authority would be and what kinds of sanctions would we want the independent commission to impose. Further, they do not want the commission to be created outside of the Department of Interior. The Department does agree that the Commission should be able to perform audits and report to Congress about the adequacy of the DOI budget. As always, the new Commission must be provided adequate resources to perform its duties.

Thus, there is a considerable gap concerning the idea of an independent commission. Tribes believe that a Commission must have adequate enforcement and regulatory powers to ensure that trust funds management is carried out by the Department at least consistent with minimum standards, provided that this enforcement and regulatory power is used in a manner that will protect the right of tribes to manage their own resources and protect and enhance the ability of tribes to contract and compact with the Department under the Indian Self-Determination and Education Assistance Act, as amended.

Last week the Department made a new proposal to the Task Force that the Tribal members of the Task Force are still reviewing. The Department has proposed that the Office of Comptroller of Currency (OCC) within the Department of Treasury be given the authority to investigate whether the Department is managing trust funds according to the standards the OCC sets generally for commercial banks. Under the Department's proposal, exactly what sanctions the OCC would be able to impose was not yet made clear; nor has it been made clear how the standards imposed by the OCC would apply to the Department of Interior or the Department of Treasury, in which the OCC is located.

The Task Force is seriously considering the proposal made by the Department. Just as they want more information from us about our proposal, we need more information from them about their ideas.

The key to the discussion about an independent commission, or providing those powers to some other agency, is recognizing that whoever does the enforcement must have adequate authority to enforce minimum standards that set forth what must be done by the Department to carry out its responsibilities to trust beneficiaries in all aspects of trust funds management and management of the assets that produce those trust funds. We

have also agreed that we do not want the independent Commission to interfere with the right of a tribe to manage its own resources, and we want the Commission to "enhance and protect" the right of a tribe to contract or compact with the government under the Indian Self-Determination and Education Assistance Act, as amended.

Finally, our discussions lead us to believe that the primary failure of the 1994 Trust Reform Act was that it did not provide the Office of Special Trustee with sufficient powers to fully carry out trust reform. This remains the biggest reason we are still here discussing this issue today. This problem must be corrected once and for all if Congress really wants trust reform to occur.

The Department's most recent proposal is as close to a recognition of the need for adequate authority as we have seen, and we are encouraged by this development. However, we are not yet in a position to see consensus occurring on this issue. We have provided you with a copy of the draft of our version of an independent trust oversight commission.

2. **Creation of the position of Undersecretary for Indian Affairs.** General consensus was reached with the Department about the need to create a new position within the Department of Interior above the level of the Assistant Secretary for Indian Affairs who would answer to the Secretary on Indian matters. This represented a part of the Alternative 5 proposed by the joint Task Force in the report provided to the Secretary on June 4, 2002. The Department and Tribal leaders have reached consensus that the new position should be created as an Undersecretary, rather than a Deputy Secretary. The Undersecretary designation fulfills particular organizational needs regarding executive branch management within the Department, as we discussed in our previous testimony. This position would be created through legislation. While we do not have the legislation in final draft form, we are close to a consensus on a full specification of the duties of that position.

   These duties and responsibilities include the following:

   1) 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 trust responsibility.

   2) Responsible for ensuring and advocating that the policies and law of tribal self-determination and self-governance are maximized and implemented throughout DOI.

   3) Responsible for all trust reform/administration efforts in DOI.

   4) Responsible for ensuring that the BIA establishes practices to maintain accurate

data regarding ownership and lease of Indian lands.

5) Responsible for monitoring and maintaining the reconciliation of tribal and Individual Money trust accounts to ensure a fair and accurate accounting to all trust accounts.

6) Responsible for establishing and implementing policies and systems that allow for proper accounting and investing of trust funds monies and the preparation of timely reports to account holders.

7) Responsible for ensuring that BLM establishes adequate practices, policies and procedures to enforce compliance with Federal requirements relating to the lease of Indian lands.

8) Responsible for ensuring that the MMS establishes practices to enforce compliance by lessees of Indian lands with reporting of production and payment of lease revenues, including the auditing of leases.

9) Responsible for coordinating policies within the Department to ensure that the policies, procedures, practices and systems related to trust within the Department of the Interior are coordinated, consistent, and integrated, and that the Department prepares comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle.

10) Responsible for ensuring that the trust fund investment, general ledger, and subsidiary accounting systems are integrated and adequate to support the trust fund investment needs of BIA.

11) Responsible for ensuring the integration of land records, trust fund accounting, and asset management systems among agencies.

12) Responsible for developing a coordinated Trust Management Program budget throughout the Department of Interior.

13) Responsible for providing guidance for Trust Administration, developing a strategic plan on trust reform, in consultation with the Indian Tribes, and reporting to the Secretary and Congress on the progress made.

14) Required to work with affected American Indian and Alaska Native tribes to resolve conflicts which may arise between tribal laws, policies, and cultural and traditional practices and Departmental actions, functions, regulations, and procedures and applicable federal law.

15) Act as the principal liaison for the Department with the Trust Oversight Commission, and be responsible for acting upon the recommendations/directions of the Commission.

16) Responsible for ensuring that Departmental actions and functions concerning tribal trust management are developed in consultation with American Indian and Alaska Native tribes.

We believe that we are close to complete consensus on these duties and responsibilities. We have not discussed in any great detail the appointment process for this position, nor have we discussed whether the person appointed to this position would serve a term of years.

3. Trust responsibilities and legal obligations of the Department. Tribes also believe that the legislation should generally define the trust responsibilities and legal principles that the Department must follow in carrying out its management of trust funds and the assets that generate those funds. These principles have not yet been agreed to by the Department of Interior, but they are taken directly from Secretarial Order 3215, *Principles for the Discharge of the Secretary's Trust Responsibility*, which has been accepted by the current Administration. The Secretarial order was derived from the case law, the 1994 Indian Trust Fund Management Reform Act. A copy of proposed Findings and a statement of the trust principles are attached to this testimony.

We invite your careful review of this document, because it goes considerably beyond a simple statement of what the components of trust management ought to be. The trust principles state specific actions that must be taken and legal requirements that must be followed in order for the trust responsibility regarding trust funds management to be properly carried out by the United States. These principles do not tell the Department of Interior or the Department of Treasury how to do these things, but rather they set forth the things that must be done in order to carry out trust funds management functions.

These principles are not new, but have been applied in the private sector for many years. We believe these principles must be placed into positive law, enacted by Congress, to ensure that there will be no future challenge by the government to its trust obligations in this area.

4. Oversight of the trust responsibility at the regional and local level. Another essential component of trust reform is internal oversight of the Department of Interior as it carries out its trust responsibilities. This reorganization is at the heart of the discussion about the Department's proposal to create a "Bureau of Indian Trust Assets Management" (BITAM) in November that resulted in the formation of the joint DOI/Tribal Trust Reform Task Force.

The principal goal of the Tribal Task Force members is to have a single point of decision making at the level at which a tribe interacts with the Bureau of Indian Affairs, whether that is the local agency level or at the regional level, coupled with an adequate internal oversight mechanism which will seek to ensure that trust funds management functions are being carried out appropriately.

To accomplish this, we propose that the organizational realignment will involve all levels of the Department of Interior.

- At the highest level, the Task Force proposes to establish a new Undersecretary for Indian Affairs to coordinate and unify policy direction for the Bureau of Indian Affairs and all other agencies operating programs or providing services to Indians within the Department of Interior, as discussed above.

- An office of Self-Determination/Self-Governance will report to the Undersecretary to advance long-standing policies that support greater involvement of Indian tribes in managing programs for the benefit of their communities.

- A new office of Trust Accountability would report to the Undersecretary to provide internal control and quality assurance in trust administration throughout the Department as well as ensuring timely resolution of problems.

- Within the Bureau of Indian Affairs, a trust services section will provide technical support for field operations, train services for BIA and tribal staff, and controls to ensure that programs are administered in accordance with defined standards for trust administration, and help avoid problems before they reach serious proportions. The trust services section would also be responsible for operating trust fund accounting, cash management, and appraisal accountability functions.

- The structure will retain a single line of authority for delivering programs and services to tribal communities in accordance with overwhelming tribal preferences. However, substantial changes to current operations will occur. Adequate staffing and funding levels would be sought, personnel would be well qualified to perform their responsibilities, technical assistance will need to be readily available, and performance standards reflecting modern practices of trust administration will need to be established and enforced.

This is the proposal that has been developed by a small sub-workgroup involving Tribal representatives and Departmental representatives, and in schematic form is attached to this testimony. Consensus on this proposal has not yet been fully achieved, in part, because from the beginning of our discussions, Tribes have made it clear that they do not want to increase the bureaucracy with which they have to deal on a day-to-day basis. To do that would delay things like economic development decisions, land transfers, land

leases, probates, and many other points of interaction between the Tribes, their members, and the Bureau of Indian Affairs. Thus, the proposal outlined above needs to be fully considered by all of the Tribal members of the Task Force before full consensus can be obtained.

However, our differences are now relatively narrow on these issues. As we pointed out at the last hearing, the key to this issue has been the tension between the need of the BIA to provide critical resources to Tribes in areas they manage, such as law enforcement, education and other needs, and the need for the BIA to be responsible trustees of trust funds and assets. This tension is created by a lack of resources at both levels. While we cannot necessary fix all of the resource issues, we do believe the proposal under close consideration by the Task Force as presented in the attached schematic provides the most economical way to resolve the problem while still providing adequate oversight authority to ensure that trust reform in this area is carried out.

5. **Fractionation of interests in land.** In addition, the assistance of Congress will be needed to stem the tide of increasing fractionation of ownership that exponentially increases the complexity and cost of federal administration, deprives Indian beneficiaries of the full potential benefit of their resources, undermines the ability of tribes to protect communal resources like water, fish, and wildlife, and jeopardizes the security of our reservation homelands by eroding tribal sovereignty. While this may not be part of the legislative package regarding trust reform that needs to be passed this year, the fractionation of ownership must be dealt with soon.

   As part of the task force efforts, a special committee has been formed to begin looking at creative ways to solve this century old problem. It is in part because of the number of fractionated ownership interests that the cost of administering trust funds is so expensive.

Further Task Force efforts.

Completion of Legislation. The Task Force needs to continue its efforts to resolve our differences in the proposed legislation. We will next be meeting in Anchorage in late August, just before the end of the Congressional recess, and will seek to exchange and refine our proposals on the independent commission, on our statement of trust responsibilities and legal obligations, and make the final adjustments to the duties and responsibilities of the undersecretary.

In the meantime, we are placing our trust in the expertise and political acumen of the Senate Committee on Indian Affairs, to assist us to move legislation forward this year. We believe it is certainly possible to get this legislation passed by Congress yet this session. If Congress can pass in a few short days a bill creating an independent board providing for financial accountability of corporations, it can certainly pass legislation that will provide for accountability by the Department of Interior and the Department of Treasury to Indians and Alaska Natives. We look forward to working with you and your staffs to move this effort forward as quickly as possible.

Continued Existence of the Task Force. We believe that the Task Force will need to continue for some time to complete its work. Aside from determining the final legislation that will be needed, the Task Force must further refine the local and regional structures needed to ensure that trust reform is carried out. In addition, the Task Force will want to examine the "as is" model of the Department, pursuant to the Department's contract with EDS, and propose the necessary changes in that system, where it doesn't work, and learn from those places where the trust responsibility is being handled well.

We will also need to assist the Department in choosing effective systems for managing its trust responsibility that provide all the information that a beneficiary would want to know about his or her account with the Department (accountability), and that would allow the beneficiary to understand how his or her accounts are being managed (transparency). This will be a great deal of work, but Tribes are prepared to continue this effort to ensure that this trust reform effort will not turn into a dream.

Resources Needed. In order to carry out all these functions, we need to have continued resources appropriated by Congress. We are asking that Congress supply us, through its appropriation to the Department of Interior, with the tools we need to ensure that trust reform does finally happen. We will be glad to work with Committee staff and the Department to work out an appropriate budget.

Conclusion

We believe that we have made significant progress towards a legislative package since the last hearing held on this issue. The Tribes believe they have most of the legislation ready to go, and trust that the Committee will use its best judgment to assist them to go forward with this effort. We also believe that we have reached consensus, or are close to consensus with the Department of Interior on a number of issues. While we know that there are only a few legislative days left in the 107th Congress, we also know how important this issue is to Tribes and their members.

We most respectfully ask you to consider how we can yet resolve these issues in this Congress, and we again thank you for the opportunity to present our views.

DRAFT TRUST RESPONSIBILITIES AND LEGAL OBLIGATIONS FOR LEGISLATION

FINDINGS; PURPOSES.

(a) FINDINGS- Congress finds that--

(1) The United States has historical and unique legal and political relationships with the American Indian people, as reflected in the Constitution, treaties, Federal laws, treaties, numerous court decisions, federal statutes, executive orders, and the course of dealings of the United States with Indian Tribes which result in trust responsibility and obligations;

(2) The United States has a government to government political relationship with the sovereign Indian Tribes contained within its boundaries which has been long and mutually beneficial relationship since the beginning of the Republic;

(3) The United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes;

(4) The United States Constitution recognizes the special relationship between the United States and Indian tribes

a. Clause 3 of Section 8 of Article I vests Congress with the authority to address the conditions of the indigenous, native people of the United States;

b. Under Article VI, treaties between the United States and Indian Tribes are the supreme law of the land.

(5) Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws, including laws that provide for the exercise of administrative authorities;

(6) The United States Supreme Court has repeatedly affirmed the trust responsibility of the United States towards Indians – finding, for example, that there is an "undisputed existence of a general trust relationship between the United States and the Indian People," *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*") and that the United States "has charged itself with moral obligations of the highest responsibility and trust" and "should therefore be judged by the most exacting fiduciary standards" *Seminole Nation v. United States*, 316 U.S. 286 (1942).

(7) Congress has enacted laws in an attempt to address deficiencies in policies, practices, and systems that are involved in the administration of trust funds and resources held in trust by the United States for the benefit of Indian Tribes and individual Indians – duties of the Secretary of Interior for trust fund management, for example, were

described in the American Indian Trust Fund Management Reform Act of 1994 (Reform Act), Pub. L. 103-412, Oct. 25, 1994, 108 Stat. 4239.

(9) Congressional definition as to the scope of responsibility for trust fund administration, however, has not provided sufficient guidance to protect the interests of trust beneficiaries;

(10) It is necessary for Congress to establish principles for the administration of trust funds and resources generating income deposited into those funds. The Secretary of the Interior issued Order 3215 on April 28, 2000 setting forth certain principles for the discharge of the Secretary's trust responsibility, but those departmental principles lack the force of law.

Definition

"Indian trust assets" means lands, natural resources, money, or other assets held by the federal government in trust or that are restricted against alienation for Indian tribes and individual Indians.

Trust Principles. The proper discharge of the trust responsibility of the United States requires, without limitation, that the Trustee, with the highest degree of care, skill, and loyalty:

a. Establish and enforce exacting fiduciary standards to protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion;

b. Assure that any management of Indian trust assets promotes the interest of the beneficial owner and supports, to the extent it is consistent with the trust responsibility, the beneficial owner's intended use of the assets;

c. Enforce the terms of all leases or other agreements that provide for the use, transfer, or disposition of trust assets, and take appropriate steps to remedy trespass on trust or restricted lands;

d. Promote tribal control and self-determination over tribal trust lands and resources;

e. Select and oversee persons who manage Indian trust assets;

f. Confirm that tribes that manage Indian trust assets pursuant to contracts and compacts authorized by the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450, et seq., protect and prudently manage Indian trust assets;

g. Provide oversight and review of the performance and administration of the trust responsibility, including Indian trust asset and investment management programs, operational systems, and information systems to ensure that the interests of trust beneficiaries are protected;

h. Account for and timely identify, collect, deposit, invest, and distribute income due or held on behalf of tribal and individual Indian account holders;

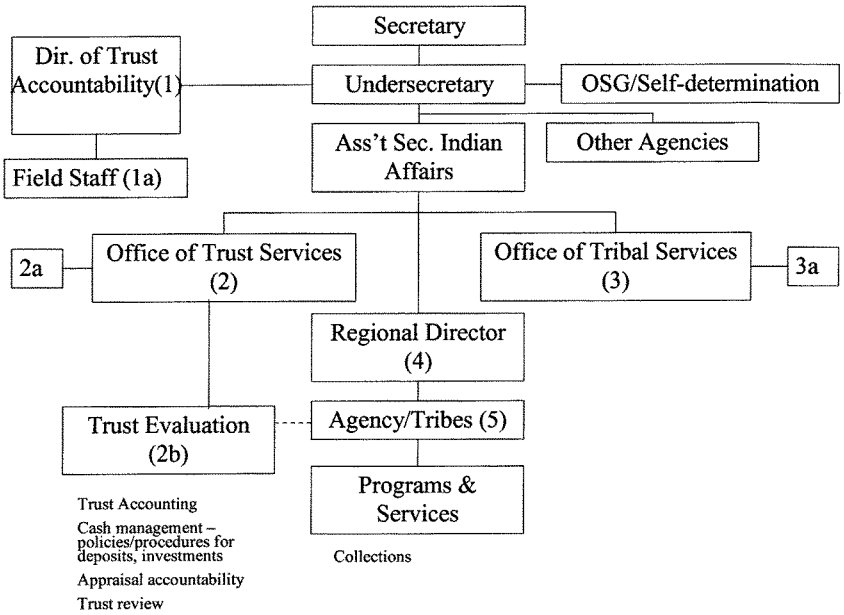
i. Maintain a verifiable system of records that is capable, at a minimum, of identifying: (1) the location, the beneficial owners, any legal encumbrances (i.e., leases, permits, etc.), the user of the resource, the rents and monies paid, if any, and the value of trust or restricted lands and resources; (2) dates of collections, deposits, transfers, disbursements, third party obligations (i.e., court ordered child support, judgements, etc.), amount of earnings, investment instruments and closing of all trust fund accounts; (3) documents pertaining to actions taken to prevent or compensate for any diminishment of the Indian trust assets; and (4) documents that evidence actions regarding the management and disposition of Indian trust assets;

j. Establish and maintain a system of records that permits beneficial owners to obtain information regarding their Indian trust assets in a timely manner and protect the privacy of such information in accordance with applicable statutes;

k. Invest tribal and individual Indian trust funds to make the trust account reasonably productive for the beneficial owner consistent with market conditions existing at the time the investment is made;

l. Communicate with beneficial owners regarding the management and administration of Indian trust assets; and

m. Protect treaty-based fishing, hunting, gathering, and similar rights of access and resource use on traditional tribal lands.


Secretary
Dir. of Trust Accountability(1)
Undersecretary
OSG/Self-determination
Field Staff (1a)
Ass't Sec. Indian Affairs
Other Agencies
2a
Office of Trust Services (2)
Office of Tribal Services (3)
3a
Regional Director (4)
Trust Evaluation (2b)
Agency/Tribes (5)
Programs & Services
Trust Accounting
Cash management – policies/procedures for deposits, investments
Appraisal accountability
Trust review
Collections

Functions

1) Writes Regulations to implement laws and requirements relating to Trust Administration, has responsibility of reporting serious problems in need of attention to the Undersecretary; reports directly to the Undersecretary

1a) Serves as field representatives of Director of Trust Accountability at Regional/Agency levels

Reviews operations for consistency with regulations, manuals, agreements

Reports discrepancies to Director of Trust Accountability and other appropriate offices with a record necessary to support due process

IIM ombudsman

2) Responsible for developing procedures, manuals, agreements to implement regulations; provide training services; qualifications, standards. Functions are trust accounting, cash management (policies/procedures for deposits, investments) appraisal accountability and trust review.

2a) Staff experts available to provide assistance to Regional and Agency Offices, Tribes and Trust Evaluation Office

2b) Requirement for that office to approve Trust transactions (ex. approval of leases, timber sales, farm management plan…) that exceed a threshold level. Trust review for fiduciary responsibilities within a defined schedule (time frame) Once approved, has the responsibility to monitor implementation. For tribes contracting/compacting to perform functions from (2), responsibility to ensure that programs are operated in accordance with contract/compact requirements regulations and statutes

- Responsible for developing procedures, manuals, agreements to implement regulations; provide training services; qualifications standards

3a) Staff experts available to provide assistance to Regional and Agency Offices

4) Regional Director (no significant change)

5) Sign off authority for leases, trust transactions, deeds, contracts, permits, plans, that have undergone trust evaluation and are in accordance with pre-approved management plans

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STATEMENT
of the
INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

ON THE DELIBERATIONS OF THE
JOINT TRIBAL/DEPARTMENT OF INTERIOR TASK FORCE
ON INDIAN TRUST REFORM
before the
SENATE COMMITTEE ON INDIAN AFFAIRS

July 30, 2002

I. Introduction

The Intertribal Monitoring Association on Indian Trust Funds (ITMA) is a representative organization of the following 54 federally recognized tribes: **Central Council of Tlingit & Haida Indian Tribes, Kenaitze Indian Tribe, Metlakatla Indian Tribe, Hopi Nation, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Tribe, Hoopa Valley Tribe, Yurok Tribe, Soboba Band of Luiseno Indians, Southern Ute Tribe, Nez Perce Tribe, Passamaquoddy-Pleasant Point Tribe, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa Indians, Grand Portage Tribe, Leech Lake Band of Ojibwe, Red Lake Band of Chippewa Indians, Blackfeet Tribe, Chippewa Cree Tribe of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Belknap Tribes, Fort Peck Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Fallon Paiute-Shoshone Tribe, Walker River Paiute Tribal Council, Jicarilla Apache Nation, Mescalero Apache Tribe, Pueblo of Cochiti, Pueblo of Laguna, Pueblo of Sandia, Three Affiliated Tribes of Fort Berthold, Turtle Mountain Band of Chippewa, Absentee Shawnee Tribe, Alabama Quassarte, Cherokee Nation, Kaw Nation, Kiowa Tribe of Oklahoma, Muscogee Creek Nation, Osage Tribe, Quapaw Tribe, Thlopthlocco Tribal Town, Confederated Tribes of Umatilla, Confederated Tribes of Warm Springs, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Confederated Tribes of Colville, Forest County Potawatomi Tribe, Oneida Tribe of Wisconsin, Eastern Shoshone Tribe, and the Northern Arapaho Tribe.**

Twelve years ago, the Intertribal Monitoring Association on Indian Trust Funds was organized by tribes to actively monitor and have a voice in the activities of the federal government to ensure fair compensation tribes for the historical trust funds mismanagement. More than a decade later, ITMA continues its mission to serve our membership by not only monitoring the federal government's activities, but also participating in the Task Force's activities, evaluating various legislative proposals, and working with the Department of the Interior and Congress on resolving the tribal trust fund mismanagement issues. The latter activity has been a core piece of ITMA's mission and is an issue in which ITMA has valuable historical knowledge and expertise.

ITMA has been monitoring and participating in the deliberations of the joint Tribal/Department Of the Interior Task Force (Task Force) on Trust Reform, and is pleased to provide the following observations from our perspective. Before providing the substance of our statement, ITMA would first like to respond to questions raised at the hearing on June 26, 2002 involving the settlement of the tribal trust fund claims, and to provide the Committee with an update of these discussions with the Department of the Interior.

II. Issues Raised at June 26, 2002 Hearing

Question: Chairman Inouye asked the panel of witnesses whether this matter was begin addressed by the efforts of the Task Force.

Assistant Secretary Neal McCaleb responded that a committee had been established under the auspices of the Task Force to work on setting up a framework for settlement discussions to occur between the Department of the Interior and the tribes who have filed or are planning on filing trust fund mismanagement lawsuits against the Federal Government. Assistant Secretary McCaleb further explained that ITMA was involved in the development of this process. Task Force Co-Chairman Tex Hall also responded stating due to the discreet purpose of the Task Force, namely, devising and evaluating alternatives to the BITAM proposal, the Task Force would have to re-consult the tribes nationwide on whether the Task Force should handle the issue of resolving tribal trust fund claims, and also stated that various tribes are wondering whether the Department is "serious" in addressing this issue. Co-Chair Chairwoman Sue Masten responded that any trust reform effort would not be complete without addressing this very important issue and that those tribes with claims must be involved in this process.

ITMA's Response: Based on ITMA's longstanding experience and work in this area, the Task Force agreed by official action that ITMA should take the lead in working with the Department on establishing a process to address the tribal trust fund mismanagement claims, and that ITMA would continue to report the progress of its activities to the Task Force. Moreover, the tribal members of the Task Force felt strongly that this issue fell outside of the original scope of the Task Force and that it would be improper for the Task Force to expand its work in this regard without first consulting the tribes. ITMA believes that the process must address the tribal claims and resources and that all affected tribes must be involved in the process and continues to working on outreach

to the affected tribes. ITMA intends to fulfill its commitment to keep the Task Force apprised of these efforts.

III. ITMA-DOI Efforts at Determining Tribal Trust Fund Account Balances

A few months ago, the Department requested ITMA to spearhead the effort and participate in talks designed to reach agreement on a process for achieving agreed-upon accurate account balances. ITMA set up the initial meeting with the Department of the Interior officials in conjunction with the Task Force's meetings in Minneapolis in mid-May. In conjunction with last week's Task Force's meetings in Portland, Oregon, ITMA and the Department met in an effort to discuss the issue of resolving historic tribal trust account balances. These initial discussions have revolved around establishing a framework for this effort. ITMA circulated to our membership and the Department a draft set of principles to guide participants in these deliberations. ITMA and the Department jointly reviewed the principles during the Portland meeting, and both committed to continue working on the document. Attached to this testimony is the latest draft document. Some tribes are reluctant to participate in this effort because of the good faith effort and concerns that this process is set up only to deflect contempt charges. The Department expressed concerns that tribes with claims be present at the discussions and that tribal leaders, not just attorneys, be involved in the process.

The Department admits that it is motivated in this effort by eighteen lawsuits that have been recently filed by tribes which, in turn, were motivated by concerns that the statute of limitations would otherwise run on their claims. ITMA will make every effort to ensure that the Department addresses this issue as an honorable resolution of tribal claims. Dealing with this issue, however, will ultimately be the province of Congress. ITMA hopes to bring back to this Committee an agreed upon approach to resolving this matter in a manner that both tribes and the Administration can recommend jointly.

Certainly, this will be a difficult enterprise, but ITMA is encouraged by the Department's initial overture and subsequent participation. ITMA has long advanced the position that he Department will never be in compliance with the Indian Trust Funds Management Reform Act of 1994 until it has accurate account balances on its books. ITMA looks forward to continuing this work toward achieving procedures for resolving long-standing claims of tribes and will keep this Committee advised of progress in this arena.

IV. Views of the DOI-Tribal Task Force Reform Efforts

The deliberations to date have been arduous. While ITMA member tribes occupy more than eight of the 24 seats on the Task Force, ITMA member tribes have expressed their concerns that the closed nature of participation in the Task Force's deliberations may affect the ultimate acceptance of its work through out Indian country. As a result, ITMA has continued to monitor those deliberations, just as it continues to monitor the Department's operations, and to report regularly to this Committee and the rest of Indian country. The following comments relate to area where ITMA believes progress has

occurred as well as a discussion of other areas that require attention or action from the Task Force.

Identifying trust duties: Until the June meeting in Bismarck, the Department had successfully resisted any suggestion that an inventory or identification of its trust duties should be undertaken. ITMA has long advocated that any trust administration system adopted should be marked by an identification of the duties to be discharged. Only then can appropriate policies and procedures be designed to guide execution of those duties. Recognizing that any system will experience failures, ITMA has argued that any trust system must include internal controls to detect those failures, and a method of enforcement or compliance to permit those internal controls to function effectively. ITMA believes the parties to the Task Force have now adopted these principles by consensus to guide their future deliberations.

Transparency: For years, ITMA has urged in statements to this Committee and the Department that any meaningful trust reform must incorporate the concept of transparency into the federal government's Indian trust administration. This concept of "transparency" is the need for openness, honesty and dialogue as it relates to the subject at hand, is the clear accountability to the tribes and individual trust beneficiaries in an open, clearly defined process that provides for prior consultation. (This concept has been a part public discourse in recent months and now has been incorporated into the Task Force's deliberations: the Attorney General and the President joined by Senator McCain of this Committee, have called for more transparency in financial dealings, generally.) At the Bismarck meeting of the Task Force, the importance of incorporating this concept into Indian trust reform was adopted by consensus. ITMA suggests the recent bill entitled "The Public Company Accounting Reform and Investor Protection Act of 2002" (S. 2673/H.R. 5070) can provide guidance to the Committee and the Task Force in this matter.

Oversight or regulatory authority: A third concept long advocated by ITMA has also been accepted by the Task Force, namely, the need to for some form of oversight of the Department's trust administration. ITMA has pointed out for years that Indian trust may be unique among trusts in America because it is subject to no regulatory authority whatsoever beyond those administering the trust. The Congress, Inspectors General, the General Accounting Office, and independent auditors engaged by the Department itself have issued reports or management letters pointing out failures or losses in the administration of the trust. It is the Secretary's responsibility to direct or ensure that failures are corrected or that losses are made whole, but no one acknowledges this. In fact, not only can these discoveries be withheld from the trust beneficiaries, but disclosing such failures to the beneficiaries can subject the person to punishment.

Under this unregulated structure, the principal checks on the Department's breaches of trust have been the beneficiaries themselves detecting mistakes or failures and then suing for redress. When that happens, the entire might of the government is marshaled to protect and defend the trustee, not to vindicate the rights of beneficiaries. The current *Cobell* litigation demonstrates vividly why depending on the capabilities of the

beneficiaries to police their trust administration has not resulted in meaningful reform. Reports from the plaintiffs in that case indicate that they have expended at least $10 million to date to prosecute their claims. Very likely, no individual beneficiary alone has the capability to maintain such an expensive and protracted action to protect his or her individual interest and only some tribes have that capability in the face of such overwhelming resources arrayed against them. Tribes have the determination but only a few have the resources to reconstruct the records of the government, who continues to resist requests to prepare the required accounting.

ITMA has long urged that if the Secretary refuses to fulfill her responsibility to trust reform then there should be established an oversight entity of the Department's trust administration by a unit with authority to order and enforce corrective action. The Task Force recently agreed to the establishment of such a Commission outside the Department with authority. This matter is one that ITMA believes is a critical piece of the overall reform efforts. ITMA will continue to advocate for it in the Task Force discussions and that ITMA be a part of that process.

Remaining Areas of Concern

Government Attorneys: ITMA continues to believe that so long as the government attorneys involved with Indian trust administration are allowed to view their duties as running only to the government itself and its officers, no meaningful trust reform will be achieved. Currently, it is the duty of no legal officer of the government to advise the Department to make whole promptly even known losses to Indian trust beneficiaries. Here we note, too, that the Public Accounting Reform Act of 2002 deals with the role attorneys play and visits certain statutory requirements on those who become aware of failures in discharging the public trust. ITMA suggests a similar approach to visiting statutory duties upon government attorneys with responsibilities attendant to the Indian trust.

Trustee or defendant?: As previously stated, ITMA continues to be concerned that the government's position in the Task Force discussions continues to be driven in large part by the its posture before the courts in litigation, and by concerns regarding possible liability of the government. ITMA believes that legislation may be required to make it a duty of government officials to disclose losses and mistakes in administering the Indian trust before Indians will ever be able to have any confidence that those who would be forthcoming are not cowed by the fear of retaliation. In the Portland Task Force discussions, the tribal representatives unveiled a statutory approach, albeit in draft form, for discussion purposes as a starting point to tackle this central issue. We will be discussing these draft principles in further detail with our membership and other tribes, and will provide our input on this subject.

Piecemeal Restructuring of the Department: Part of ITMA's concerns regarding the on-going Departmental restructuring discussion of the Task Force arise from the Department's continuing desire to form a separate organization for administering Indian monies and the management of revenue generating natural resources. Some tribal

participants continue to voice the concern that permitting the Department alone to determine what these fiduciary trust responsibilities are violates the basic principle that an agent cannot determine the scope of his or her agency. This approach would leave for later determination where such functions as protecting treaty rights, water rights, and the tax status of surface and subsurface estates, as well as of monies in trust, would be placed. A second related concern is the Task Force's on-going work which focuses primarily on reorganizes current functions within the BIA, while putting aside for later discussion current functions administered by other agencies in the Department, such as the Minerals Management Service, Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, etc. Certainly, a thorough review of these agencies and the adequacy of their performance of their trust duties and functions followed by implementation of needed improvements will be central to a successful Department-wide reorganization effort.

Need to Understand Scope of Fiduciary Duties: ITMA believes the crux of the complications in current task force discussions on organization is that the Departmental representatives do not yet have a clear understanding of the scope of their fiduciary duties. It is clear from the Administration's first BITAM proposal that they did not know that many human service and governance programs of the BIA have been declared by Congress to be discharges of the trust responsibility as well. ITMA believes these Task Force discussions would profit immensely by continued discussions of the nature and scope of the trust responsibility. Such an understanding will permit the Task Force to approach its deliberations with a deeper understanding of some of the reasons for recent failures in trust reform efforts.

TAAMS, for instance, was a commercial lease distribution system that was tasked with providing land titles and records services, even though commercial land title software was already widely used in jurisdictions throughout the country. Ironically, after massive efforts to customize the system to address another of the unique features of the Indian trust, today the TAAMS system is utilized only to provide current title information. The inadequate lease distribution "legacy" systems are still used to distribute lease income. TAAMS was procured without adequate consideration of just what it was expected to do. Similarly, the Secretary's BITAM proposal was put forth without adequate consideration of just what it was intended to do. That was considered a level of detail that could be taken up later. In both instances, determining the duties to be performed were proposed to be put at the end of the process. In both instances, ITMA believes the decision was driven by the perceived exigencies of litigation, rather than by a carefully considered appreciation of the real trust reform to be achieved. In both instances, the perceived exigencies of litigation were to avoid liability or official sanction, and improvements to trust administration were blithely assumed, or hoped, to follow.

V. Conclusion

ITMA believes the Departmental representatives to this Task force have informed themselves more assiduously and more rapidly than any Administration in recent history. ITMA remains concerned that the schedule is propelling the Task Force to

make decisions of the most profound consequence at a pace that outstrips their understanding of the nature and scope of their duties. ITMA believes that the more the Task Force grapples with these issues, the more it finds itself returning to consideration first of the duties to be performed, rather than the systems or the organization to be adopted. The Comptroller of the Currency's Handbook on Fiduciary Activities and almost any basic text on trust administration counsel that there are principles that should guide trust administration. Undivided loyalty to beneficiaries, compliance with the terms of the trust, and faithful discharge of the duties assumed by the trustee are uniformly cited as paramount among those principles. These same texts advise that almost any organization or system that permits adherence to those principles and that is conducive to efficient discharge of those duties is acceptable.

ITMA, on behalf of its tribal membership, appreciates this opportunity to comment and stands ready to assist the Congress by answering any questions and providing information obtained during our 12-year direct involvement in the area of trust funds and trust assets management and trust reform efforts.

Commission on Indian Trust Funds Concept Paper

July 24, 2002

Title on Commission on Indian Trust Funds

[Words that need to be defined and placed in the definitions section of the Act are put in {brackets} and put in bold the first time they appear.]

[A purpose section will be placed at the beginning of the entire bill when it has been completed.]

SECTION 1. ESTABLISHMENT OF NATIONAL COMMISSION ON INDIAN TRUST FUNDS.

There is hereby established the National Commission on Indian Trust Funds (referred to in this Act as the 'Commission ').

SECTION 2. MEMBERSHIP.

(a) The Commission shall be composed of five full-time members, composed of a Chairman and four associate members, to be appointed by the President with the advice and consent of the Senate.

(1) Not more than three members of the Commission shall be of the same political party. At least 3 members of the Commission shall be **{enrolled members of any {Indian tribe}}**.

(2) Tribal members of the Commission shall be selected from a list of nominees submitted by the Indian tribes and all members of the Commission shall be selected in **{consultation}** with Indian tribes.

(3) In making appointments to the Commission, due consideration shall be given to otherwise qualified persons who are enrolled members of Indian tribes who have **{resources held in trust}** for their benefit by the United States.

(b) The Commission shall also include, as an ex-officio member, the undersecretary for Indian affairs of the Department of Interior.

(c) Each person chosen as a member shall have significant legal, accounting, regulatory, or administrative experience with respect to trust assets and accounts, or comparable experience in tribal government.

(d) Each member of the Commission shall serve on a full-time basis, and may not, concurrent with service on the Board, be employed by any other person or engage in any other professional or business activity.

(e) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who has been convicted of a felony.

(f) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President for neglect of duty, or malfeasance in office, or for other good cause shown.

(g) A vacancy in the Commission in the membership of the Commission shall be filled in the manner in which the original appointment was made.

SECTION 3. TERMS.

(a) Except as provided in subparagraph (b), members of the Commission shall serve for six year terms, beginning on the date of their confirmation by the Senate.

(b) Of the initial members of the Commission—

(1) two members, including the Chairman, shall have a term of office of six years;

(2) two members shall have a term of office of four years; and

(3) one member shall have a term of office of two years.

SECTION 4. DUTIES AND POWERS.

The Commission shall carry out the following duties and functions:

(a) SCOPE OF AUTHORITY.--- The Commission shall ensure that the **{Secretary}** is properly carrying out the **{trust responsibility}** to Indians and Alaska Natives and Indian tribes regarding *all aspects of* **{trust funds management}**, including the accounting, distribution, collection and investment of trust funds and the valuation and sale *or lease* of **{trust resources}** related to **{trust funds}**. ***In carrying out this duty, the Commission shall not interfere with the right of an Indian tribe to provide for the regulation and enforcement of land use activities. (put this section also in the General provisions of the bill)***

(b) The Commission shall have the power, consistent with this Act, to promulgate regulations establishing minimum standards that the Secretary

must follow in carrying out its trust responsibility as stated in subsection (a). The regulations shall:

(1) be promulgated using negotiated rulemaking with Indian tribes as provided in title 5 of the United States Code.

(2) protect and enhance the right of an Indian tribe to contract or compact with the United States to carry out responsibilities under the Indian Self Determination and Education Assistance Act, as amended, 25 U.S.C. Section 450a et seq. (ISDEAA);

(3) notwithstanding any provision of this Act or of any other law, not affect or be deemed to have any affect on the right of any Indian tribe to establish standards for carrying out the trust responsibility pursuant to any contract or compact between an Indian tribe and the United States under the ISDEAA; and

(4) comply with tribal law unless inconsistent with Federal law.

(c) Except as provided by Federal law, using **{generally accepted auditing standards}**, the Commission shall have the power to audit any and all **{monetary accounts}** kept by the United States in trust for the benefit of Indians and Indian Tribes.

(d) The Commission shall have the power to investigate any act or failure to act of the Secretary which is alleged to be inconsistent with its trust responsibility as stated in subsection (a).

(e) Pursuant to any investigation carried out by the Commission under subsection (d), the Commission may:

(1) Issue findings concerning the adequacy of funding and resources to meet minimum standards for trust funds management;

(2) Upon notice and hearing, order that specific actions be taken by the Secretary to correct any deficiencies in trust funds management, and

(3) Monitor whether any order issued by the Commission is being carried out by the appropriate **{Department}** and take such additional actions as may be necessary to enforce any order issued.

(f) In carrying out the above duties the Commission shall have the power to subpoena and examine witnesses, to gather evidence and otherwise conduct hearings pursuant to the Federal Rules of Civil Procedure.

(g) In consultation with Indian tribes, report to Congress no less than annually about the adequacy of resources that are available to the appropriate Departments to carry out the trust responsibilities as are stated in subsection (a).

(h) Report to the Secretary and to affected Indian tribes any deficiencies in trust administration as determined by the Commission.

(i) Request audits to be performed by the General Accounting Office.

(j) Request investigations to be conducted by the Office of Inspector General for the Department.

(k) The Commission shall have the power, consistent with this Act, to promulgate regulations to carry out its duties under this Act other than as provided in this Section. The regulations shall be promulgated using negotiated rulemaking with Indian tribes as provided in title 5 of the United States Code.

SECTION 5. APPEAL. An appeal to any final decision of the Commission may be taken by any aggrieved party in accordance with title 5 of the United States Code.

SECTION 6. ADMINISTRATIVE PROVISIONS

(a) COMPENSATION AND EXPENSES.—

(1) The Chairman and each associate member of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5 of ~~the~~ United States Code.

(2) All members of the Commission shall be reimbursed in accordance with title 5 of the United States Code for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

(b) MEETINGS AND QUORUM—

(1) MEETINGS.—The Commission shall meet at the call of the chairperson and shall meet not less than 6 times each calendar year. Official meetings of the Commission shall be open to the public *unless a closed meeting is requested by at least three members of the Commission. [criteria for closed meetings need to be established- not yet discussed by Task Force]*

(2) QUORUM.—A quorum of the Commission shall consist of not less than 3 *[some have suggested 4 members being required and also that all matters be determined by an affirmative vote of not less than 4 members-not yet discussed by Task Force].*

(c) DIRECTOR AND STAFF.—

(1) EXECUTIVE DIRECTOR.—The members of the Commission shall appoint an executive director of the Commission. The staff director shall be paid the rate of basic pay equal to that for level V of the Executive Schedule.

(2) STAFF.—With the approval of the Commission, the executive director may appoint such additional personnel as the Commission deems appropriate.

(d) APPLICABILITY OF CIVIL SERVICE LAWS.—The staff of the Commission shall be appointed without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates).

(e) EXPERTS AND CONSULTANTS.—With the approval of the Commission, and without regard to any limitation concerning the rate of pay for services, provided that the rate of pay is comparable to what is paid for similar services in the private sector, the executive director may procure temporary and intermittent services under section 3109(b)of title 5, United States Code.

(f) INDEPENDENT LEGAL COUNSEL. — The Commission shall have the authority to hire independent legal counsel to act as General Counsel to the Commission and to represent the Commission in any proceeding to which it is a party.

(g) FACILITIES.—The Administrator of the General Services Administration shall locate suitable office space for the operation of the Commission, including any field offices established as provided in this subsection. The facilities shall serve as the headquarters of the Commission and shall include all necessary equipment and incidentals carrying out the purposes of the Commission. The Commission may locate field offices in such other locations as it may, in consultation with Indian tribes, deem appropriate.

(h) DETAIL OF FEDERAL EMPLOYEES.—Upon the request of the Commission, the head of any federal Agency is authorized to detail, without reimbursement, any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties. Any such detail shall not

interrupt or otherwise affect the civil service status or privileges of the federal employee.

(i) TECHNICAL ASSISTANCE.—Upon the request of the Commission, the head of a Federal Agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

(j) USE OF MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as Federal Agencies and shall, for purposes of the frank, be considered a commission of Congress as described in section
3215 of title 39,United States Code.

(k) OBTAINING INFORMATION.—The Commission may secure directly from the any Federal Agency information necessary to enable it to carry out its duties, if the information may be disclosed under section 552 of title 5,United States Code. Upon request of the chairperson of the Commission, the head of such agency shall furnish such information to the Commission.

(l) EXEMPTION FROM FOIA.— Information gathered by the Commission in the performance of its duties about specific individuals and specific accounts shall be exempt from the Freedom of Information Act, title 5, section 552.

(m) SUPPORT SERVICES.—Upon the request of the Commission, the Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

(n) PRINTING.—For purposes of costs relating to printing and binding, including the cost of personnel detailed from the Government Printing Office, the Commission shall be deemed to be a committee of the Congress.

(o) EXEMPTION FROM LIABILITY. — Commission members shall be immune from lawsuits relating to the performance of their duties under this Act.

SECTION 7. AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated such sums as are necessary to carry out this section. The amount appropriated under this subsection shall not be deducted from or affect any other appropriation made for the benefit of Indian persons.

SECTION 8. GENERAL PROVISIONS. (for entire Act; as they affect the Commission)

(a) Nothing in this Act shall be construed to preclude any Indian tribe from enacting and implementing its own laws and regulations.

(b) Nothing in this Act shall be construed to infringe upon the sovereignty of any Indian tribe.

(c) Nothing in this Act shall affect or change the rights or status of any **{allottee}.**

(d) Nothing in this Act shall be construed to preclude an Indian Tribe from managing its trust resources.

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